Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings

While the great third-party funding debate appears to centre on the issues of disclosure, arbitrator bias, security for costs, and regulation, the potential conflicts between third-party funding and confidentiality in arbitration proceedings have so far received comparatively little attention. Perhaps not rightly so, as the following example shall illustrate:

> *The claimant in a commercial arbitration has agreed to arbitrate in confidence a dispute resulting from a major M&A-transaction, with the applicable arbitration rules providing for confidentiality as regards both the arbitration's existence and the documents submitted in the course of the arbitral proceedings. Nevertheless, the claimant submits the case to a litigation funder for initial review. A litigation funding agreement is concluded and, as the case progresses, counsel for the claimant discusses the memorials and evidence submitted by the opponent with the funder's team. Has the claimant violated its confidentiality obligations?*

The term 'litigation funding' shall be used here to describe the provision of capital for dispute resolution – including international arbitration – by commercial funding institutions disposing of funds dedicated for investing in claims and defences ('litigation funders'), pursuant to an agreement

between funder and funded party ('litigation funding agreement'). The term 'third-party funding' shall be used as an umbrella term for all options available to a party involved in legal disputes to obtain financing by non-parties to this dispute ('third-party funders'), pursuant to an agreement between funder and funded party ('third-party funding agreement') or otherwise. Litigation funding will therefore be understood as a subset of third-party funding.

If we assume that the parties are bound by wide-reaching confidentiality obligations, discussing the details of the case with a litigation funder at first glance appears to be outright incompatible with these very obligations, as the funder will virtually always be a non-party to the arbitration agreement. And while the typical interests associated with confidentiality (such as preventing "trial by press release" and aggravation of the dispute) do not seem to raise specific concerns in litigation funding scenarios, there is a very real concern that the litigation funder might use information about the opponent obtained during case assessment and case monitoring for the purposes of financing subsequent disputes involving or affecting the opponent, or otherwise profit from this information to the detriment of the latter.

Conversely, funded parties likewise have legitimate interests in disclosing information relating to the arbitration to litigation funders and other third-party funders in order to obtain (or facilitate) access to justice. These conflicting interests are difficult to weigh and reconcile, as the funded party's conflicting duties to preserve confidentiality of information relating to the arbitration and to disclose this very information to its litigation funder both are *contractual* in nature, flowing from the arbitration agreement and the litigation funding agreement, respectively.

It is submitted that, as a general rule, disclosures to a litigation funder should be possible without entailing a violation of applicable confidentiality obligations. This

position finds support in the exceptions to confidentiality contained in virtually all arbitral laws and rules that provide for corresponding confidentiality obligations [See, e.g., LCIA Rules, Art. 30(1); Swiss Rules of International Arbitration, Art. 44(1); Hong Kong Arbitration Ordinance 2011, s. 18(2)(a)(i); Scottish Arbitration Act 2010, Rule 26(1)(d). Compare International Law Association, *Confidentiality in International Commercial Arbitration*, p. 21, model arbitration confidentiality clause, sections [C](1) and [C](4).]. The rationale behind these exceptions is that disclosure ought to be possible to the extent necessary to prosecute or defend the arbitration, to protect party's lawful interests, or to persons exercising monitoring and advisory functions with regard to the arbitration. For this reason, it is widely accepted that exceptions from otherwise applicable confidentiality obligations apply on disclosures to lawyers, shareholders, debenture holders, insurers, potential buyers of a company in arbitration, investors, lenders, P&I Clubs, guarantors, beneficiaries, licensers and licensees, tax advisers, etc [See the references in von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Kluwer Law International 2016), p. 303-306.]. Litigation funders and the information they require for assessing and monitoring the case should fall within this non-exhaustive list and mandate an exception to confidentiality. In the absence of any international convention, soft law, principle, practice, case law, or authority finding litigation funding in arbitration to be objectionable, it should be accepted that litigation funders are entitled to information when ascertaining whether to provide capital for arbitration, and that funded parties have legitimate business interests in making use of this capital in order to prosecute or defend against arbitration claims.

To be sure, an interpretation of the parties' agreement as to the scope of and exceptions to confidentiality will always be determinative. The (often unwanted) consequences of wide

confidentiality clauses combined with a few or no exceptions are, however, not specific to cases involving litigation funding.

The most promising way to permit disclosures to litigation funders while at the same time respecting the confidentiality interests of the opposing party would be to ensure that litigation funders preserve the confidentiality of the information provided to them. Where a high level of confidentiality is desired and commercially sensitive information is involved, a party may wish to initiate a discussion at the outset of the arbitration on how to ensure that third parties on each side preserve confidentiality, and these discussions may then include third-party funders in general, and litigation funders in particular. The parties could then establish a mutually agreed list of persons allowed to access (specified) information relating to the arbitration, which the arbitral tribunal then endorses by way of a confidentiality order. To be included on this list, the litigation funder would typically need to sign a written undertaking to preserve confidentiality. On a more general (and perhaps practical) level, the arbitral tribunal could make both parties sign an undertaking to take reasonable steps to ensure that any third parties they bring into the proceedings comply with their confidentiality obligations.

This post can of course only begin to scratch the surface of the manifold confidentiality issues [See in more detail in von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Kluwer Law International 2016), p. 293-330.]. Should funded parties be allowed to disclose confidential information only to disclosed funders? What if listed litigation funders must disclose information about the funded case to the investor public by virtue of statutory disclosure rules? What if a funder tries to attend an important evidentiary hearing in order to better assess the viability of the case? On a more general level: is it

acceptable that confidentiality provides another layer of secrecy for litigation funders in that transparency as to the capital structure of a party in arbitration is not only restricted by the funded party's confidentiality obligations towards the funder, but also by the obligations between the parties to not disclose information obtained in the course of the arbitration to non-parties? The great third-party funding debate has only begun.

The author welcomes any anecdotal evidence of when and how conflicts between funding and confidentiality did materialize.

The views expressed in this post reflect the author's personal opinion and are not attributable to the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.