A Preview of the Forthcoming ICCA-Queen Mary Report on Third-Party Funding

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As the three co-chairs of the **ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration**, we are pleased to announce that the final Report will be launched at the ICCA Congress in Sydney with an extraordinary group of experts, including Donald Donovan, Ania Farren, Jean-Christophe Honlet, Gabrielle Kaufmann-Kohler, Julian Lew, Audley Sheppard, and Lawrence Teh. We provide below a brief overview of the Report.

The Task Force was a joint effort established in 2013 between ICCA and the Institute for Regulation and Ethics, School of International Arbitration, Queen Mary University of London. With over 50 members representing over 20 jurisdictions from around the world, the Task Force includes arbitrators, in-house and external counsel, individuals who work for various governments, academics, and third-party funders. Since its inception, the Task Force undertaken sustained study and discussion of the key issues arising from third-party funding of arbitration.

The work of the Task Force and its Report also benefitted from extensive consultations, individual comments, and numerous roundtable discussions and public symposia. During a public comment period that extended from 1 September through 31 October 2017, the Task Force received over sixty written submissions from individuals, law firms, and organizations. It also benefitted from many additional comments both at the roundtables and symposia organized by the Task Force co-chairs, and several other events at which the draft was discussed.

It is important to note at the outside that, in light of how rapidly international arbitration practice and funding models are evolving, the ICCA-Queen Mary Report does not aim to be either definitive or permanent. Changes in the field and considerations that arise within in particular regulatory contexts may require reconsideration of its contents and analysis. While this Report will not be the last word on issues relating to third-party funding, we believe it develops an important set of conceptual frameworks and analysis that are much needed. It also articulates clear Principles that the Task Force hopes will provide concrete guidance now and a foundation for future work in the area.

In terms of substance and organization, the Report has 8 chapters. The first three chapters provide introductory and background material. The Introductory Chapter 1 explains the background on the Task Force and its work. Chapter 2 provides an overview of the market and mechanics of third-party funding. It examines the reasons parties seek funding, and the process third-party funders use to evaluate whether to fund a dispute. It then provides a descriptive overview of the range of means for

financing disputes, including both modern case-specific non-recourse funding and a range of other sources that serve similar functions.

Building on Chapter 2's overview of the forms of funding, Chapter 3 examines the definition of third-party funders and third-party funding, and issues relating to definitions. Specifically, Chapter 3 provides broad Working Definitions of "third-party funding" and "third-party funders" that underlie the Task Force's deliberations. The chapter also examines the reasons for particular language in different possible definitions, surveys the range of definitions that have been adopted by various other sources, and analyses the functional features of different means of dispute financing that relate to how they are definitionally categorized.

Despite adopting a broad Working Definition for the purposes of its overall analysis, the Task Force recognized that addressing particular sub-issues required more narrow definitions that focus attention on the target of specific inquiries. For example, not all types of funding that are relevant to an assessment of potential conflicts of interest may be relevant for an assessment of a request for security for costs, and vice versa. For this reason, Chapter 3 concludes by examining how different definitions affect analysis of particular issues addressed in subsequent chapters.

After the chapter on definitions, the Report turns to three substantive chapters on each of the following topics: Disclosure and Conflicts of Interest (Chapter 4), Privilege (Chapter 5), and Costs and Security for Costs (Chapter 6). Debate existed on the Task Force about what form any work product should take. On the one hand, there was a desire to avoid contributing to what some regard as an overcrowding of rules and guidelines. Ultimately, it was decided that the essential conclusions of each chapter, particularly given the length of the overall long report, should be easy to reference. For that reason, each of these chapters begins with a distilled set of Principles, which serve to summarize the essential conclusions of the relevant chapter.

The body of each of these substantive chapters both identifies relevant sources and articulates competing viewpoints the Task Force considered in reaching these Principles. They also explain the reasons why particular viewpoints were eventually incorporated into the Principles instead of others.

Chapter 4 addresses the issue of disclosure and potential arbitrator conflicts of interest. Consistent with other recent sources, the principle it articulates requires disclosure of the existence and identity of third-party funders to facilitate analysis of potential conflicts, but not (for the purposes of conflicts analysis) any other provisions of the funding agreement. It both proposes systemic disclosure by parties and counsel to arbitrators to facilitate assessment of potential conflicts, and confirms that arbitrators have the power to request disclosure of the presence and identity of any funder. The chapter does not, however, provide any new standards for assessing conflicts, but instead refers such issues to existing law, rules, and guidelines. In its analysis the chapter provides a detailed survey and analysis of other disclosure obligations.

Chapter 5 addresses confidentiality and privilege. It examines international standards for evaluating privilege, and provides a survey of national differences regarding privilege, particularly the contrasting treatment by common law and civil law jurisdictions of information and communications provided to third-party funders for the purpose of obtaining funding or performing under a funding agreement. The analysis in the chapter is supported by an online Appendix, which collects national reports indicating how different jurisdictions treat issues of privilege with respect to third-party funding. Specifically, the chapter recommends that, despite national variances, tribunals generally treat information shared with a third-party funder as protected against disclosure.

Chapter 6 takes up the issue of costs and security for costs. It analyses existing standards for allocating costs and for granting security for costs, based largely on investment arbitration case law.

It concludes that the existence of funding is not generally relevant to such determinations, but examines exceptions that may exist.

Chapter 7 collects the Principles articulated in other chapters, and provides a summary of best practices in funding arrangements. Task Force members generally agreed that most aspects of funding arrangements were dealt with in the private agreements between funders and a funded party. Consequently, it was decided that a statement of existing best practices would be the most useful means of providing guidance to new parties seeking funding, new third-party funders entering the market, and the increasing number of arbitrators and counsel that are encountering funding for the first time. The chapter concludes with a checklist of considerations that provide additional guidance for the due diligence process.

Finally, Chapter 8 examines third-party funding in investment arbitration. The analysis in each of the foregoing chapters also addresses issues and sources regarding third-party funding in investment arbitration, but those chapters focus on analysis of the current state of the law. Chapter 8, instead, seeks to examine some of the broader policy issues that may affect how the Principles of this Report are applied in investment arbitration, and a limited range of specialized issues that have arisen with respect to funding in investment arbitration.

This Chapter does not seek to offer concrete answers on these policy questions, but instead proposes areas for future research and consideration. Even with more modest goals, the process of drafting this Chapter presented many unique challenges. One of the primary challenges was linguistic. The language used by different stakeholders in debates about investment arbitration can be particularly stark. Terminology that is part of the basic lexicon of one group of stakeholders is often regarded by those with competing views as inherently biased or unduly inflammatory. Despite these challenges, this Chapter aims to provide a fair-minded and full-throated presentation of competing viewpoints in a manner that respects particular stakeholders' frame of reference, but also facilitates meaningful discussion. Importantly, this final Chapter was produced in consultation with several individuals that work with or represent States, as well as numerous representatives from civil society and other interest groups.

As co-chairs of the Task Force, beyond the initial launch, it is our hope that parties, counsel and arbitrators will find the Principles and analysis in the Report helpful in addressing issues that arise in the course of an arbitration, in entering into a funding agreement, and in continued discussions and debates regarding third-party funding.