

10-2014

Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force

William Park

Boston University School of Law

Catherine A. Rogers

Pennsylvania State University, Penn State Law, CCLS, Queen Mary University of London

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

 Part of the [International Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, No. 42-2014
Penn State Law Legal Studies Research Paper Series (2014).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/16

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



PENN STATE LAW

THE PENNSYLVANIA STATE UNIVERSITY
THE DICKINSON SCHOOL OF LAW

Legal Studies Research Paper No. 42-2014

TITLE

Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force

AUTHOR(S)

William W. Park
Boston University – School of Law

Catherine A. Rogers
The Pennsylvania State University Dickinson School of Law

This paper can be downloaded without charge from The Social Science Research
Network Electronic Paper Collection: <http://ssrn.com/abstract=2507461>

PENNSTATE



The Dickinson
School of Law

law.psu.edu

Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force

By William W. Park[†] & Catherine A. Rogers[‡]

I. Introduction

Third-party funding raises a host of ethical and procedural issues for international arbitration, perhaps most notably in connection with arbitrator comportment. It would be a brave arbitrator indeed who ignored the potential conflicts raised by his service as consultant to an institution bankrolling a claimant in a case *sub judice* before the arbitrator. Given the funder's stake in the award, and possible involvement in selection of the arbitral tribunal, similar concerns arise when colleagues in the arbitrator's law firm serve as counsel or adviser to a funder, or when an arbitrator is called to rule on cost allocation or security in a context where the funder's participation becomes relevant.

As third-party funding has become an increasingly global phenomenon in national courts,¹ the institutions which provide such financial backing to litigation include not only specialized firms, but also insurance companies, investment banks, and hedge funds, collectively capitalized well into the billions. In recent years, funders have taken a particularized interest in international arbitration. Funders report that upwards of ten percent of their investments are in international arbitration disputes,² both commercial and investor-state arbitration.³

The need for sustained study of these concerns prompted establishment of a Task Force on Third-Party Funding in International Arbitration, convened by the International Council for Commercial Arbitration (ICCA) along with Queen Mary College at the University of London. As discussed below, the Task Force will assess both real and perceived concerns that the relatively new practice raises, as well as what might be done, and why.

[†] Member of the Governing Board of ICCA, President of the London Court of International Arbitration, General Editor of *Arbitration International* and Professor at Boston University.

[‡] Professor and Paul and Marjorie Price Faculty Scholar at Penn State Law, and Professor of Ethics, Regulation, and the Rule of Law at Queen Mary, University of London, where she is also Co-Director of the Institute on Ethics and Regulation.

¹ For a survey of this growth and the reasons why, see Chapter 5 in CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* (Oxford University Press 2014).

² Kantor, *supra* note 5, at 69 (reporting Credit Suisse describes 10% of its portfolio in international arbitration, and similar investments by Juridica and Burford Capital Limited).

³ Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration*, GROTIUS CENTRE WORKING PAPER NO. 2012/1 (June 5, 2012) at 6, available at <http://ssrn.com/abstract=2078358> (documenting rapid increase of third-party funding in international arbitration in the last decade). See also Mark Kantor, *Third-Party Funding in International Arbitration: An Essay About New Developments*, in 24(1) ICSID REV. 65, 66, (2009) (third-party funding is "becoming a feature of international arbitration").

International arbitration attracts funders in part because such cases typically involve high-value claims,⁴ proceedings with no substantive appeal,⁵ potential for streamlined procedures, the ability to control litigation variables such as the arbitrator's expertise, and the enforcement mechanisms of international conventions.⁶

Funders generally treat their investment portfolios as proprietary information.⁷ Moreover, most funding agreements are confidential, and the funders' presence in disputes is often undisclosed.⁸ In a few international arbitration cases, the presence of third-party funding has become public. In some cases disclosure may be by design,⁹ while in others disclosure has been the result of disputes between the funder and the funded party and/or its counsel.¹⁰ As a relatively new practice that operates mostly behind the scenes, the basic mechanics of third-party funding are not always well-understood.

Funder participation raises a host of vital issues, such as the funders' relationship with parties and counsel in managing the dispute, allocation of costs and security for costs, transparency and disclosure, confidentiality, attorney ethics, arbitrator conflicts of interest, tribunal powers, and potential relations with institutions.

⁴ Since 2001, ten arbitrations have yielded awards over USD 1bn (one investor-state arbitration and nine commercial awards), and another 20 arbitrations have resulted in awards of USD 500m or more (three investor-state and 17 commercial arbitrations). Michael Goldhaber, *Arbitration Scorecard 2013*, AM. LAW., June 24, 2013, http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202608198051&Arbitration_Scorecard_2013&slreturn=20130714160934.

⁵ Although international arbitration is often critiqued as less speedy and cost-effective than corporate parties desire, the question is always "less" in comparison to what? In national legal systems, even those regarded as highly effective, the average length of a case, which usually includes appeal as of right, can be both long and unpredictable. In addition, complex commercial claims worth hundreds of millions, sometimes billions, of dollars undoubtedly require time to adjudicate and are often extremely expensive in any forum. That said, there is clearly room for improvement and several important reforms by various arbitral institutions are working toward that end.

⁶ THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 11 (Lisa Bench Nieuwveld & Victoria Shannon eds., Kluwer Law Int'l. 2012).

⁷ See Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 463 (2012).

⁸ See Maxi Scherer, Aren Goldsmith & Camille Fléchet, *Third Party Funding in International Arbitration in Europe: Part I—Funders' Perspectives*, 2 INT'L BUS. L. J. 207, 217-18 (2012) ("As a general matter, funders require that their involvement not be revealed, unless the client is compelled to do so.").

⁹ See Jean E. Kalicki, *Third-Party Funding in Arbitration: Innovations and Limits in Self-Regulation (Part 2 of 2)*, KLUWER ARB. BLOG (Mar. 14, 2012), <http://kluwarbitrationblog.com/blog/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/> (mentioning *Oxus Gold PLC v. Republic of Uzbekistan et al.*, an investment arbitration case conducted under the UNCITRAL Rules); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (unpublished) (identity of plaintiff funder, Calunias Capital, willingly disclosed). See also Sebastian Perry, *Bolivia claim attracts third party funder*, GLOBAL ARB. REV. (July 5, 2012), <http://globalarbitrationreview.com> (discussing third-party funding of claimant in *Guaracachi Am., Inc. v. Bolivia*, UNCITRAL, PCA Case No. 2011-17, but not disclosing identity of funder).

¹⁰ See *S&T Oil Equip. v. Juridica Invs. Ltd.*, 456 Fed.Appx. 481 (5th Cir. 2012) (where the identity of Juridica, a company funding an ICSID arbitration between S & T Oil and the Romanian government, became public when S & T Oil sued Juridica in U.S. federal court and appended a copy of the funding agreement).

The arrival of third-party funders will likely affect a broad range of participants in the arbitral process in addition to arbitrators, for reasons mentioned above, and the parties which receive funding. Counsel for litigants who which not coordinate with funders will at some point stand across from opposing counsel who do. And all law firms compete in a marketplace in which millions of dollars in legal fees come from funders.

Savvy business manager may incorporate confidentiality provisions into their arbitration agreements which either facilitate or preclude disclosure to third-party funders. Or the agreement may address costs in the event of funder participation. Issues in the arbitration agreement may require assessment not only arbitrators but even as a preliminary matter by institutions.

Investor-state arbitration has attracted particular attention by both funders and their critics. The cases interest funders because of the potential for sizeable recoveries. According to some anecdotal reports, at least two-thirds of ICSID cases filed in 2013 implicated claimants which had sought resources from a major funder.¹¹

In theory, funders can provide support for either claimants or respondents.¹² The funding of claims, however, provides the greater upside potential, and therefore attracts more attention. Some critics thus express concern that significant new funding in investment arbitration cases will expand investor-state arbitration, creating a disproportionate burden on States.¹³ Others laud the development as bolstering increased access to justice, as investors whose claims were once considered too costly are now able to obtain financing.

Some critics express concerns that less-scrupulous funders may be willing to fund weak claims, willing to take high risks in exchange for potentially significant rewards, with a consequential increase in dubious cases. For some, this critique overlaps with concern about perceived disparities in investment arbitration that favor investors over States.¹⁴ Analogies to questions about class arbitration will not escape the thoughtful observer.¹⁵

¹¹ This estimate was from only one (albeit major) funder on the Task Force. No reliable statistics exist about whether these parties actually obtained funding.

¹² Defense-side funding may occur, for instance, when the defendant wishes to bring costly counterclaims or cross-claims (e.g., a claim for summary judgment), or, by sophisticated defendants willing to pay funders a portion of pre-calculated loss mitigated through a successful defense. See Scherer et al., *supra* note 8, at 211; Goffrey McGovern et al., *Third-Party Litigation Funding and Claim Transfer* (RAND 2010), at 22, available at http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf (last accessed Oct. 6, 2014). In practice, it rarely happens and, to date, no respondent-side funding has been reported in an investment arbitration case by a commercial third-party funder.

¹³ See De Brabandere & Lepeltak, *supra* note 5, at 8; Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 384-85 (2011).

¹⁴ See Munir Maniruzzaman, *Third-Party Funding in International Arbitration – A Menace or Panacea?*, KLUWER ARB. BLOG (Dec. 29, 2012), <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>; De Brabandere & Lepeltak, *supra* note 5, at 8.

¹⁵ See William W. Park, *La jurisprudence américaine en matière de class arbitration: entre débat politique et technique juridique*, 2012 Revue de l'arbitrage 507

II. Salient Task Force Activities

The Task Force was launched in mid-2013.¹⁶ The authors serve as co-chairs, with Professor Stavros Brekoulakis as Rapporteur.¹⁷ A full list of Task Force members can be found on the ICCA website.¹⁸ The Task Force was composed to ensure representation of a full range of stakeholders from geographically and industry distinct perspectives, including arbitrators, in-house counsel and parties, external counsel, representatives with administrative functions in arbitral institutions, academics, and a range of funders.

The first meeting of the Task Force was a roundtable discussion held in London in February 2014. It focused on presentations and policy discussions among participants organized around a series of the most salient issues arising from the participation of third-party funders, with action items proposed for each topic. These topical discussions, which were each led by individual members, included the potential for conflicts of interest among funders and arbitrators, confidentiality and attorney privilege issues, allocation of costs and security for costs, internal and industry-based self-regulatory models for funders, and the implications of third-party funding in investment arbitration. These topics and the proposed action items are discussed in turn below.

A. Defining Third-Party Funders

Although not initially a distinct topic for discussion by the Task Force, the need for a working definition of Third-Party Funding quickly became clear. The significant disagreement about the exact nature of third-party funding is part of what contributes to open questions about whether, how, or to what extent it could or should be regulated. Although often described as a monolithic group, there is significant variety among funders. Funders have different types of cases as targets for investment, operate and fund in different jurisdictions and practice areas, and have widely variant internal practice guidelines.

One reason why third-party funding is difficult to define is that economic interests in a party or a dispute can come in many shapes and sizes.¹⁹ Arrangements may be structured as debt instruments, equity instruments, risk-avoidance instruments, or as full transfers of the underlying claims. Some agreements permit or require active participation of the third-party funder in key strategic decisions in the case, while other agreements are limited to periodic updates.

Conventional definitions are limited to agreements entered into after a dispute has arisen, but they can be entered into either before or after the case is filed. Moreover, many funding arrangements are not necessarily entered into between the principal funder and the party. Funders often create “special purpose vehicles” that are separate corporate structures from the funders themselves to facilitate the funding arrangement.²⁰ In some

¹⁶ See Leo Szolnoki, *ICCA and Queen Mary examine third-party funding*, GLOBAL ARB. REV. (Oct. 11, 2013), <http://globalarbitrationreview.com/news/article/31962/>.

¹⁷ Professor of Commercial Law and International Arbitration at Queen Mary

¹⁸ ICCA Projects, *Third-Party Funding*, http://www.arbitration-icca.org/projects/Third_Party_Funding.html (last accessed Oct. 6, 2014).

¹⁹ Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 63-67 (2011).

²⁰ See Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 J.L. ECON. & POL’Y 405, 430 (“[Third-party litigation funding investors] rely on Special Purpose Vehicles, which . . . are legal

situations, funders may provide financing directly to law firms. In addition to variations in structure, the conditions for funding and for recovery by a third-party funder also vary significantly. A typical agreement provides for funders to receive a percentage of recovery, and the percentage increases with the passage of time since the initial investment.

Even when funding agreements are entered into directly between a client and the funder, it is not simply a bilateral relationship. The funding arrangement often involves a symbiotic relationship with the party's law firm. Law firms may encourage, facilitate, and (according to anecdotal evidence from funders) even initiate parties' application for third-party funding. Outside funding can cover firms' fees and reduce their own risk if, for instance, the case were instead to be structured around a contingency fee arrangement. Informal agreements, with various degrees of specificity, often exist between funders and law firms. These agreements, as well as the primary funding agreements with parties, may involve specified reductions in a law firm's contingency fee or hourly rates; they may establish flat fee billing or some hybrid fee structure.

Although most third-party funding arrangements are generally entered into for profit, that is not always the case. For example, in the investment arbitration case brought by Philip Morris against Uruguay, The Bloomberg Foundation and its "Campaign for Tobacco-Free Kids" provided outside financial support for the Uruguayan government.²¹ This arrangement seems to have much more in common with pro-bono support for legal causes than more conventional definitions "third-party funding," but arguably raises some similar issues.

In its initial discussions, the Task Force quickly decided that a working definition of third-party funding would be useful, both for discussion purposes and as a starting point for several of the practical projects that the Task Force will be taking up. Consensus on the Task Force was that a definition of third-party funding or third-party funders might vary depending on the purpose for which the definitions are used. As the Task Force first considered the potential for conflicts of interest as between funders and arbitrators, it developed a working definition for that context.

Although potentially subject to revision, that working definition developed by the Task Force is:

The terms 'third-party funder' and 'after-the-event-insurer' refer to any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.

entities created for . . . the acquisition, financing, or both, of a project or the set up of an investment. They are usually used because they are free from preexisting obligations and debts, and are separate from the parties that set them up for tax and insolvency purposes.")

²¹ See Press Release by Uruguay's Counsel, Foley Hoag LLP, *Government of Uruguay Taps Foley Hoag for Representation in International Arbitration Brought by Philip Morris to Overturn Country's Tobacco Regulations*, Oct. 8, 2010, <http://www.foleyhoag.com/news-and-events/news/2010/october/uruguay-taps-foley-hoag-for-representation> (last accessed Oct. 6, 2014).

This definition of third-party funders attempts to capture a more full range of funding relationships that currently exist, without being so overly broad as to require disclosure of entities such as minor equity investors or creditors. While there was significant consensus about this definition, there was also considerable debate and disagreement on the Task Force about whether this definition should include ordinary insurers.

On the one hand, traditional insurers have interests in and may also exercise control over key aspects of a party's case strategy, such as control over settlement. As a practical matter, such control may, particularly in individual cases, be functionally similar to more conventional third-party funders and after-the-event insurers. For some members of the Task Force, these similarities raised questions of fairness in treating similarly situated entities in similar manner for the purposes of disclosure.

On the other hand, there were concerns that ordinary insurers are ubiquitous and have not historically been considered as subject to assessment with respect to potential arbitrator conflicts. Some members of the Task Force believed that this approach was a historical anomaly that should be corrected in conjunction with taking up the issue of third-party funding, while others suggested that exclusion of traditional insurers was a structural feature of dispute settlement that should not be tampered with and could be maintained as separate from the issue of third-party funding. One reason for this latter perspective is that before-the-event insurers generally do not specifically and intentionally identify an existing case as a specific target of their investment. As a result, before-the-event insurers may be presumed to be less directly involved in the specifics of case management than third-party funders are. This is undoubtedly a definitional issue that the Task Force will continue to explore in its future work.

B. Potential Conflicts of Interest with Arbitrators

Although some commentators have argued against the possibility of conflicts of interest as between funders and arbitrators, the Task Force quickly arrived at consensus that there are real and important concerns about potential conflicts. Several factors contribute to this perception, including the increase in the number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, and, relatedly, the often close relations among elite law firms and leading arbitrators.²² Against this backdrop, after developing a definition, the first action item taken up by the Task Force was to consider disclosure obligations and potential for conflicts of interest with arbitrators.

At the time of its first meeting, these issues were already under consideration by the IBA Sub-Committee on the IBA Guidelines on Conflicts of Interest in International Arbitration, which was undertaking to amend the IBA Guidelines to address potential

²² See Mark J. Goldstein, *Should the Real Parties in Interest Have to Stand Up?—Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration*, TRANSNAT'L DISP. MGMT. (2011), <http://www.transnational-dispute-management.com>, at 7. See also Maxi Scherer, Aren Goldsmith, & Camille Fréchet, *Third Party Funding of International Arbitration Proceedings—A View From Europe: Part II: The Legal Debate*, 6 INT'L BUS. L. J. 649, 651-53 (2012) (discussing third-party funder disclosure obligations in the context of potential arbitrator impartiality issues).

conflicts of interest that may arise when third-party funders participate in arbitral disputes. The discussion below provides some background analysis of why amendments were needed to the IBA Guidelines to address issues relating to disclosure and potential conflicts of interest.

Even if funders are not formally parties, they do participate with varying degrees in various stages of an arbitration. Thus, one of the most obvious potential sources of conflict is if an individual arbitrator were repeatedly appointed in cases involving the same third-party funder. With law firms and parties, when the frequency of repeat appointments reaches a certain threshold, that history is generally regarded as raising possible concerns about influence or inter-dependency. For this reason, the 2004 IBA Guidelines required that when an arbitrator has had more than two appointments in the last three years by the same party²³ and three or more appointments in the last three years by the same law firm,²⁴ the repeat appointments must be disclosed. It is worth emphasizing that these past appointments are not necessarily a basis for disqualification, but they raise sufficient concern to warrant disclosure and to raise the possibility of disqualification.

Third-party funders also raise some unique concerns that are distinct from those that arise with either law firms or parties. For example, take the case of one party that is funded by a funder, which involves a particular individual as the presiding arbitrator in one arbitral dispute, but that same presiding arbitrator also serves as counsel to the claimant in another unrelated second arbitration, which is funded by the same funder who participated in selecting the participating arbitrator. The presiding arbitrator acting as counsel in the second arbitration has fees paid by the funder, and likely has significant contacts with the funder for the purposes of representation. The financial arrangement and ongoing contacts arguably raise questions about the presiding arbitrator's impartiality and independence in the first arbitration.²⁵

The resolution of the problem illustrated above may seem self-evident, but only if the arbitrators are aware of the existence of the relevant funding agreements. Currently, parties have no obligation to reveal the participation of third-party funders in a dispute. The simple presence of a funder in an international arbitration case is therefore most often unknown or unknowable. More importantly, the nature of funders' relationships with attorneys and funded parties is generally unknown, as are funders' levels of involvement in case management and strategy, including the selection of arbitrators or expert witnesses.

Particularly given the very real possibility that the existence of the funding agreement may be later discovered (and has in fact caused problems in certain cases), one starting proposition for the IBA Sub-Committee and the Task Force was that some form of disclosure would be necessary, at least to arbitrators directly. Moreover, clearer

²³ IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, § 3.3.2 (2004) [IBA GUIDELINES].

²⁴ *Id.* at § 3.3.7.

²⁵ This hypothetical was developed by Maxi Scherer in *Out in the open? Third-party funding in arbitration*, CDR NEWS, July 26, 2012, available at <http://www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration> (last accessed Oct. 6, 2014).

guidance was needed about when such participation may raise questions about potential conflicts for arbitrators, warranting disclosure or even recusal or disqualification.

The Task Force was invited to provide comments on the proposed draft Guidelines and passed along its assessments on these issues. The Task Force looks forward to publication of the amendments to the IBA Guidelines, which will occur just as this article is going to press.

C. Ongoing Work

Currently the Task Force has formed several Working Groups to address other issues, such as allocation of costs and security for costs, confidentiality and attorney-client privilege, guidelines for best practices among funders in international arbitration, and funding in investment arbitration. These topics are commented on in general terms below. It is important to note, however, that while the discussion below frames the relevant issues, work on these topics is ongoing and the final output of various Working Groups may vary as they consider more deeply even how to define the range and importance of various issues.

1. Allocation of Costs and Security for Costs

The presence of third-party funding is increasingly being raised as an issue in applications for security for costs, as well as in final applications regarding allocations of costs. There have been anecdotal reports of funded claimants who ultimately do not prevail being unable to pay costs. Because funding is relatively new, and understanding of the nature of funding and the reasons for it are not always very well understood among arbitrators, counsel, and parties, concerns have been raised about relying on assumptions and intuition instead of careful analysis in working through these issues in individual cases. Moreover, both of these issues are seminal important for funders as they affect the case profile and fundamental considerations in determining whether to fund it. The starting premise for the Task Force and this Working Group is that more guidance is needed regarding the various factors that might be relevant in addressing applications for costs and security for costs, and that a sensible approach can be developed that takes into account the various concerns and substantive issues.

2. Confidentiality and Attorney-Client Privilege

While some funders seek to avoid obtaining privileged information and written legal analysis from the claimant's counsel, other funders habitually seek access to confidential information in order to assess and monitor the progress of cases in which they invest. After all, how does a third-party funder properly evaluate the causes of action without obtaining confidential or privileged information at the heart of a case?

This practice raises a host of difficult issues. Does providing such confidential or privileged information to third-party funders constitute a waiver? The answer to this question may in turn depend on whether the jurisdiction whose privilege rules apply recognize a privilege for third-party funders or a so-called common interest exception. Even a seemingly straightforward determination of which privilege rules apply may be difficult, and, once determined, considerable variation exists from country to country. Meanwhile, even in those countries with relatively well-developed third-party funder

regimes, answers to these questions are not always clear and it is a distinct possibility that different rules could apply to different parties and funders in the same proceeding. For these reasons, this Working Group is investigating whether it would be possible and productive to develop international standardized evidentiary privilege standards that relate to third-party funding.

3. Best Practices

One of the most striking features of third-party funding concerns how it is virtually immune to regulation in international arbitration. While some national systems have limited rules that apply to funders and their participation in national litigation, those rules end up having little or no effect on funding of international arbitration claims. One reason is that funding agreements generally select applicable law and forums for enforcement that avoid jurisdictions that prohibit or significantly limit funding arrangements.

This is one area where there was considerable disagreement among Task Force Members. Some believed that individual funders could and should develop internal rules to govern their conduct. The concern was that external guidelines, particularly imposed without any enforcement mechanism, would operate effectively as a burden on upstanding funders, while doing little or nothing to curb potential abuses by less-scrupulous funders.

Despite the potential for disagreement, there was general consensus that a Working Group be created to consider the potential for developing such best practice guidelines, and the viability of an enforcement mechanism, such as membership or certification of compliance.

4. Investor-State Arbitration

For all the questions and issues raised by third-party funding in international arbitration generally, there remain additional issues specific to investment arbitration. As already noted, third-party funding is almost exclusively available for claimants, which in investment arbitration necessarily means investors. Anecdotal evidence also indicates that investment arbitration cases may be more expensive to bring and sustain than the typical commercial case, but also have more potentially higher value outcomes. All this suggests that third-party funding may (and perhaps already has begun to) increase the total number of investment claims brought against States.

Other related issues raised during initial Task Force discussions on this topic involve the relationship between third-party funding and political risk insurance, issues regarding the status of funders (can they qualify as an “investor” under BITs), and related questions about whether and to what extent States can be deemed to have consented to arbitrate with funders. Finally, the often undisclosed presence of third-party funders has also drawn criticism as inconsistent with current efforts to make investor-state arbitration more transparent.

Given the complexity and implication of these issues, the Task Force formed a special Investment Arbitration Working Group to consider them in depth. This Working Group has expanded beyond the initial Task Force membership in order to bring in specialized expertise and perspectives that are unique to investment arbitration. In

addition to the range of funders, arbitrators, and law firms drawn from the Task Force directly, the Investment Arbitration Working Group also includes (either in their official or in some instances in their personal capacity): the Secretary General of ICSID; representatives from various States, including the Dominican Republic, Egypt, Germany, Singapore, Slovakia Spain, the United States, and others; and representatives from international organizations such as the International Court of Justice, UNCTAD, and the OECD.

The Working Group has also tapped in-house counsel from major corporations who are active in investment arbitration, leading arbitrators who specialize in investment disputes, and academics doing specific research in the area of third-party funding of investment arbitration claims. A final list of the membership of the Investment Arbitration Working Group will be published soon.

The Investor-State Working Group is currently scheduled to meet in January 2015. While the Working Group will ultimately determine its own mission and activities at that meeting, its overall function will be to analyze relevant issues and make policy and practical recommendations. It may also build on the work of the larger Task Force regarding, for example, issues such as security for costs and proposed best practices for third-party funders—as those topics raise unique issues in investment arbitration.