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Ms Meg Kinnear
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By email to icsidideas@worldbank.org

Dear Ms Kinnear

Comments on ICSID Rules amendments: Proposed AR 21 - Disclosure of Third-party Funding

The ICSID Secretariat is to be congratulated on its proposals for modernisation and enhancement of its rules.

My comments in this letter are restricted to proposed AR 21, which contemplates the mandatory disclosure of third-party funding (TPF) in every arbitration. Although such disclosure is unjustified and there is no consensus for it, funders may have been expecting ICSID's proposal. However, it will surprise insurers. The word 'insurance' does not appear in the Rules but proposed AR 21(1) includes 'premium', which suggests that it is intended to bring insurance within its scope. If that is right, I would respectfully suggest that:

- you publish an explanation as to why ICSID seeks to treat insurance as a form of TPF;
- you reach out to insurers and their users during the consultation period; and
- if the inclusion of insurance is to proceed, you amend the wording of AR 21 to state clearly the types of insurance which it covers, using plain language by which insurers could recognise themselves.

Credentials
I am an arbitrator in independent practice and I also work part-time for LexisNexis UK on its Lexis®PSL Arbitration module, writing practical guidance content for lawyers. (This letter is written in my personal capacity and the views expressed are my own.) Other relevant background includes:

- Member of the ICCA-Queen Mary Task Force on TPF in International Arbitration, 2016-2018
- Senior Legal Advisor, Thomas Miller Legal (assessment and management of cases for TPF and for ATE insurance, including ICSID arbitrations), 2012-2014
- Registrar and Deputy Director General, London Court of International Arbitration (LCIA), 2008-2012
- Solicitor, England and Wales, since 1990; Avocat, Paris Bar, 1994 – 2008

My website has an 'Arbitration insurance and funding' page, which contains more details of my experience in these fields as well as links to various articles, lectures and blog posts which I have written about them.

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TPF will benefit ICSID arbitration

I am confident that TPF will benefit investor-state arbitration in the same way as insurance has benefited commercial arbitration for the last hundred years and more.

When I was Registrar of the LCIA, I was always pleased to administer cases involving parties whose costs were being supported by insurers, e.g. 'before the event' (BTE) legal expenses insurers. I could have confidence that such cases would be handled professionally and efficiently. Insurers, with their commercial imperatives, would not tolerate time, money and effort being wasted on unmeritorious challenges to arbitrators and other interlocutory skirmishes designed to cause delay or to satisfy personal animosities. In contrast, an uninsured, unfunded and improvident claimant, left to its own devices after its lawyers resigned for non-payment of fees, could behave extraordinarily badly, demanding adjournments and lashing out at the tribunal and the secretariat.

Having no interest in the outcome of an arbitration, its remuneration coming instead by way of a pool of annual premiums from numerous customers, but having committed funds to a case, a BTE insurer will naturally be keen to monitor its progress and to keep a close eye on expenditure, thereby contributing to the smooth and efficient running of proceedings.

Funders do not have the same commercial imperative to keep a watchful eye on a case. Their expenditure is not a mere cost to them but can be more than compensated by a share of proceeds. Nevertheless, those who fund claims in ICSID arbitrations generally do monitor them carefully. Regrettably, the ICCA-Queen Mary Task Force has not included, in its best practice guidance, a duty on funders to take 'rigorous steps short of champerty', as the English courts put it in the notorious *Excalibur* litigation (*Excalibur Ventures LLC v Texas Keystone Inc and other companies* [2014] EWHC 3436 (Comm) and [2016] EWCA Civ 1144). The Task Force would leave parties and funders to make whatever agreement they like about monitoring; it could even be nil. The ICSID secretariat will have to be vigilant to ensure that new funders do behave as professionally as I know our funder colleagues on the Task Force, and others such as Burford, Woodsford and Vannin, do.

At Thomas Miller Legal, I assessed a number of potential ICSID claims, which we did not recommended for funding or ATE insurance. I have noted that none of these claims was filed with you, even though requests for arbitration had been prepared. None of them was hopeless or frivolous; they were simply uneconomic or too hazardous, rendering the proposed arbitration an enterprise from which nobody would emerge content. I think your Working Paper (WP) ought to recognise funders' gatekeeping function, which is another benefit for ICSID arbitration.

No call for disclosure of insurance and no requirement for it in investment treaties

There is a long-established tradition in international commercial arbitration that insurance is a private matter and should not have to be disclosed in every case. Thousands of arbitrations have proceeded on this basis since the 19th century with parties being supported by all sorts of insurers, e.g. freight, demurrage & defence (FD&D), trade credit, contract protection, general risks, manufacturers' and professional liability.

Before the fuss about TPF began five or six years ago, there had been no call for the regulation of the (far older and more extensive) participation of insurers in international arbitration. On the contrary, it is well recognised that an obligation to disclose insurance could force breaches of confidentiality undertakings in a policy, expose coverage issues and commercial vulnerabilities, and give an unfair advantage to a powerful

self-insured opponent, such as a state. An institution which imposed such an obligation in its rules could jeopardise the level playing field, which it is one of its duties to secure.

TPF has arrived in sectors not already well served by insurance. Lawyers and academics who focus on these sectors, notably in investor-state arbitration, have called for TPF to be regulated. The various treaties and arbitration rules, which have sought to deal with TPF, have mainly used a definition which targets the modern phenomenon of non-recourse funding provided in return for a share of proceeds.

The definitions of TPF in CETA, the EU-Vietnam FTA, and the EU-Singapore Investment Protection Agreement, which are cited at paragraph 252 of the WP, are all of this type and do not extend to insurance. According to paragraph 253, the WP proposes to define TPF 'in a manner similar to the definitions in the above texts'. However, the ICSID Secretariat apparently decided to depart from the wording in the texts cited in the immediately preceding paragraph 252 and to favour instead some wording proposed by the ICCA-Queen Mary Task Force, cited at paragraph 246, which purports to bring insurance within a definition of TPF.

I note, in this regard, that the ICCA-Queen Mary Task Force's Investment Arbitration Sub-Committee did not use the Task Force's 'working definition' for its own deliberations. The sub-committee assumed that the TPF which it was looking at was the modern form of non-recourse funding. It discussed political risk insurance but as a 'point of comparison' (p210) and as an alternative to investment treaty arbitration (p211), not as an alternative form, or sub-category, of TPF.

I would respectfully invite you to consider whether it is appropriate for the ICSID Secretariat to go beyond the provisions in recent investment treaties, and beyond the type of TPF discussed by the ICCA-Queen Mary Task Force investment arbitration sub-committee, and whether the proposed extension of the definition in AR 21 to insurance, implicit in 'premium', might be *ultra petita*.

No consensus or mandate for systematic disclosure of TPF in every arbitration

There is no doubt that ICSID arbitration faces public scrutiny and has certain characteristics which, in an encounter with the modern form of TPF, could give rise to problems in particular circumstances, such as those mentioned at paragraph 255 of the WP. Double hatting, for example, is a concern and it is not unknown for ICSID arbitrators to sit on the boards of new TPF providers. However, the risk of these combinations arising in a small number of cases is not sufficient reason to impose mandatory disclosure of TPF in all ICSID arbitrations. After all, the potential conflicts identified at paragraph 255 are created by arbitrators who choose to conduct their professional affairs in ways which most arbitrators would eschew; they are not created by TPF.

According to the ICCA-Queen Mary Task Force report (p87), 'Today the prevailing consensus in the international arbitration community is that that (*sic*) the existence of third-party funding can raise potential conflicts of interest for arbitrators, and therefore the identity of funders should be disclosed.' The Task Force does not state who it understands the international arbitration community to comprise, how a consensus was established and whether the community's notion of TPF also extends to certain types of insurance.

In a Kluwer Arbitration Blog post on 23 December 2017, the Brazilian lawyer, Napoleão Casado Filho, expressed his own caution about 'consensus and unanimities'. He made a series of important points about

the dangers of imposing a duty of disclosure of TPF in all arbitrations and criticised what he saw as a 'regulatory appetite' from members of the ICCA-Queen Mary Task Force. He proposed an alternative approach, encapsulated in the CAM-CCBC recommendation on disclosure of TPF, 'a mere recommendation that is not encompassed by the institution's Procedural Rules'.

The ICC Note, which is quoted at paragraph 251 of the WP, is likewise outside the ICC rules. It asks arbitrators to consider disclosing in the circumstances of each case (no more than that) 'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award'.

This language, which is crucially different from the wording in proposed AR 21, comes from the 2014 revisions to the IBA Guidelines on Conflicts of Interest. Those revisions, on a plain reading, do not require disclosure of TPF at the outset of every arbitration. General Standard 7(a) requires a party to disclose a *relationship* between an arbitrator and its funder.

However, according to its report, a majority on the ICCA-Queen Mary Task Force interpreted this IBA wording as contemplating 'systematic disclosure' of TPF (p115), an approach which it endorsed in its Principles (pp81 and 112). With its own international obligations under the ICSID Convention, the ICSID Secretariat may wish to be circumspect and to consider, for example, whether it is satisfied that the ICCA-Queen Mary Task Force was adequately representative, inclusive and transparent. You may agree that it would be appropriate for you to look at this issue of systematic disclosure afresh and from the perspective of ICSID's particular duties to its worldwide membership and to its diverse users.

BTE insurance: excluded by IBA and ICCA

The IBA revisions draw a distinction between (i) a direct economic interest in, and (ii) a duty to indemnify a party for, an award (General Standard 6(b)). The first is the defining characteristic of the modern form of TPF and the second is a characteristic of insurance, such as liability insurance, and ATE insurance (which indemnifies a party for a costs award). The IBA Guidelines thus deal with both TPF and insurance but, as the Explanation to General Standard 6(b) confirms, they treat them as separate and distinct; they do not seek to bring insurance within a definition of TPF, as proposed AR 21 does.

However, BTE legal expenses insurance, which is functionally close to the modern form of TPF, does not have either of the characteristics set out in General Standard 6(b). It follows that, whether by accident or design, BTE insurance is excluded from the disclosure obligations introduced in the 2014 revisions. This paradox was pointed out by Trinidad Alonso in an incisive Kluwer Arbitration Blog post, entitled 'Third-Party Funding's Older Sibling: Legal Costs Insurance and the Issue of Regulation' on 31 August 2017. Alonso also drew attention to inconsistencies in the treatment of insurance and TPF in articles in *Arbitraje*, vol. X, no.3, 2017 and in the IBA's *Arbitration News* vol 23, no.1, February 2018. Her LLM thesis on this topic, which I co-supervised with Prof. Dr Stefan Kröll in 2017, has been published online by Bucerius Law School.

The ICCA-Queen Mary Task Force chose not to use the IBA's notions of 'direct economic interest' or 'duty to indemnify' in its working definition. To cater for BTE insurance, it had 'material support' or 'financing' provided in exchange for 'reimbursement that is wholly or partially dependent on the outcome of the dispute' (p50). This would be a bizarre and doomed business model, the insurer having no prospect of making a return from the risks which it covered. Recognising the 'view' that contingent reimbursement was not a form of remuneration and that BTE insurers made their profits instead through premiums paid in advance by numerous customers, the Task Force added 'or in return for a premium payment' (p53).

The Task Force need not have made these efforts with its definition, though, because it decided that it wasn't concerned with BTE insurance after all. It excluded maritime arbitration, in which legal costs insurance (FD&D) is ubiquitous, on the basis that 'funding in the maritime context exists within a historical tradition and subject to a set of existing practices and internal norms that were beyond the scope of the Task Force's work' (p11). It then went on to exclude BTE insurance, in its entirety, from its recommendations for disclosure on the basis that it is 'rarely if ever involved in large commercial arbitrations (apart from maritime arbitrations, which are expressly excluded from recommendations of this Report)' (pp94 – 95). The Task Force does not explain why it regards tradition and paucity as reliable guardians of ethics. However, the result is right: there is no good reason for the mandatory disclosure of BTE legal expenses insurance and there has never been any demand for it.

The definition of TPF cited at paragraph 246 of the WP is not, as the WP states, the Task Force's definition for the purposes of disclosure. This is an error in the WP. The definition for disclosure appears at p81 of the Task Force's report. It omits 'premium' (but curiously retains contingent reimbursement). I would respectfully invite the ICSID Secretariat to revisit its proposed definition in AR 21 and to consider whether it intended to include BTE insurance and, if so, why.

ATE insurance does not provide financing or material support

Unlike a BTE insurer, an ATE insurer has an interest in the outcome of an arbitration. In principle, it would therefore be caught by General Standard 6(b) of the IBA Guidelines. However, again possibly by accident, the Explanation to Standard 6(b) confuses the issue: it adds a requirement that an insurer contribute funds or 'other material support' to the prosecution of the claim. Contrary to the suggestion in paragraph 239 of the WP, ATE insurers do not contribute funds; they have a duty to indemnify their insured in the event of an unfavourable costs award at the end of the arbitration (see, for example, *Eskosol v Italy*, ICSID Case No. ARB/15/50, P.O. No.3, 12 April 2017). 'Material support' is not defined. It appears in the US Patriot Act in connection with aiding terrorism but it is not current in insurance circles. It must refer to legal or other services provided for free pending the outcome of the case, which, again, is not something that ATE insurers do. ATE insurers may therefore be excluded from the disclosure obligations in the IBA Guidelines too, despite having both of the characteristics identified in General Standard 6(b).

The ICCA-Queen Mary Task Force had no insurers in its membership and it did not consult with insurers (see fns 83 and 197). Having adopted wording from the Task Force's Principles, which purport to target insurers, the ICSID Secretariat should consider engaging with insurers and their users during the consultation period.

In any event, I would respectfully suggest that the wording of AR 21 should be revised so that it is easily comprehensible. If insurers are to be included, they should be identified with plain language in the rule and in its heading, as well as in the synopsis and press releases. Insurers would also be entitled to know ICSID's reasons for their inclusion.

Yours sincerely

James Clanchy, FCIArb