

From: [Yihua Chen](#)
To: [ICSID Ideas](#)
Subject: Comments on ICSID Rules Amendments
Date: Wednesday, November 21, 2018 10:13:02 AM
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Dear Mr. /Mrs.,

I am a PhD candidate of the Erasmus School of Law at Erasmus University Rotterdam, and my PhD research topic is about 'third-party funding in international arbitration'. Herewith this letter, I would like to draw following comments on the ICSID proposed amendments to rules.

1. Disclosure for third-party funding (AR 21)

It is happy to see that a clause concerning third-party funding is introduced in the proposed Arbitration Rules (Conciliation Rules as well). In fact, either scholars or practitioners are looking forward to seeing the legislative standpoint of ICSID towards third-party funding, thus the proposed amendments to the ICSID rules are of great significance and importance. With regard to the benefits and risks of third-party funding in the investment arbitration context, there have been a great number of discussions in the current study, and I do not want to discuss it here. Since the definition of third-party funding concerns the application of specific rules that are intended to apply to third-party funders, the question thus goes to whether insurance should be included into the scope of third-party funding, and which definition of third-party funding, narrow one or broad one, should be introduced? As to my research experience, I would like to suggest the ICSID Secretariat keep a narrow definition of third-party funding and list insurance separately in AR 21. The reasons are listed as follow:

- 1) The third-party funder and insurer are two different entities, working in different industries and being regulated by different administrations as well as under different rules. They two share some similar features which may raise arbitrator conflicts of interest and thus are introduced to the IBA Guidelines. It is understandable that the ICSID Secretariat intends to accept the legislative model of the IBA Guidelines, viewing both the third-party funder and insurer as the circumstances required to be disclosed to the arbitration institution and other parties, but the IBA Guidelines do not regard the third-party funder and insurer are identical. Specifically, the third-party funder and insurer are just two representatives of the circumstance requiring disclosure, and two shared with two common features. The first one is contributing funds or other material support, no matter how the funds are going to be paid. The second one is having a relationship with the award, either a direct economic interest in or a duty to indemnify for the award. Apart from these two representatives, the non-disputing party who has a controlling influence on the disputing party also needs to be disclosed. Therefore, the IBA Guidelines concern more about the relationship between the third party to a dispute and the arbitrator, which may cause potential conflicts of interest, instead of accurately defining the third-party funder and insurer, who are just two examples used to interpret the General Standard 6(b) and provided in the Explanation to General Standard 6 . It is worth noting that the ICC Guidance Note for the disclosure of conflicts by arbitrators takes the same approach by not directly referring third-party funding or insurance in the Note.
- 2) The proposed definition of third-party funding may cause inconsistency in the level of

the national and international legislation. To date, Hong Kong and Singapore have provided the definition of 'third-party funding' in their Arbitration Ordinance and Civil Law Act respectively. The key elements of these two definitions are 1) a qualified commercial person carry on the business of funding; 2) provision of arbitration funding; and 3) remuneration is a share or other interest in the proceeds of the proceedings on a non-recourse basis. In this case, insurance is excluded from the definition. At the level of international treaties, all the EU Investment Treaties, including the EU-Vietnam FTA, TTIP and CETA, do not include insurance into the category of third-party funding. At the level of investment arbitration rules, the Brazilian CAM-CCBC, the CIETAC Investment Arbitration rules do not include insurance either. In addition, the Code of Conduct of the UK Litigation Funding Association is not applicable to the insurance as well. Therefore, using a 'one-size-fits-all' definition of third-party funding may influence the national market of insurance and third-party funding. If the ICSID AR are going to take insurance into the definition of third-party funding, it is with no doubt that the inconsistency of the legislation will be aroused - the insurance industry might be forced to be under the regulation of the third-party funding regime and it is the same in the other way around. It would be also quite weird that insurance companies call their products as third-party funding agreements in the future.

- 3) Indeed, the legislative aim of the Arbitration Rules is to maintain the justice and fairness of the proceedings and to decrease the risk of awards being challenged to the minimum. If the insurer may exert a control over the party to a dispute or have an interest in the award, insurance needs to be taken into account when determining the independence and impartiality of arbitrators. We do not need to focus too much on whether the insurer contributes funds or other material support, the questions should be if the controlling power will be imposed upon the party to a dispute by the insurer, and if the insurer has a relationship with arbitrators which may raise conflicts of interest.
- 4) Insurance is a quite mature and long -existed industry, being normally regulated by a national financial administration and financial regulations. Due to the various needs of the policyholder, insurance can be in different forms, such as the 'before the event' insurance, 'after the event' insurance, legal liability insurance, political risk insurance etc. Compared with the 'widely-understood' third-party funder, the remuneration of whom is normally part of the proceeds, the remuneration of the insurer is in the form of the 'premium'. I'm not going to discuss whether and how the insurer exerts control upon the party to a dispute, since I am also looking forward to hearing the thoughts from the insurer's perspective concerning the question whether and how the insurer exerts a controlling power upon the party. Therefore, I will hold the view of the IBA Guidelines for the present that the insurance is a circumstance which needs to be disclosed to relevant parties, including the BTE insurance, the ATE insurance and liability insurance. Thus, concerning the wording of the AR 21, I suggest:

Arbitration Rule 21 (1) Disclosure of third-party funding and insurance

- (1) *'Third-party funding' is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (third-party funder), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:*

- (a) *Through a donation or grant; or*
 - (b) *In return for a remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.*
- (2) *'Insurance' is the provision for reimbursement, coverage, indemnification of legal expenses, adverse costs or liability incurred in the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (insurer), to a party to the proceeding, an affiliate of that party, or a law firm representing that party, in return for a premium. Such premium may be provided dependent on the outcome of the proceeding.*

2. Additional Facility Mediation Rules (Annex E) – Independence and Impartiality of the Mediator

With regard to the independence and impartiality of the mediator, it is necessary to add the same rule concerning the disclosure of third-party funding (and insurance) into the AFMR. The reasons are listed as follow:

- 1) Third-party funding is also relevant to the independence and impartiality of the mediator. Although the ICSID Mediation Rules grant parties great powers to control the process and outcome of the mediation, the independence and impartiality of mediators still affect the justice and fairness of the final outcome of the proceeding. Given that the mediator is required to sign the declaration and under a continuing obligation to disclose any change of circumstances related to the declaration in accordance with AFMR 8, the question, then goes to how the independence and impartiality of mediators could be guaranteed without the disclosure of third-party funding by parties?
- 2) The Completeness of the ICSID investment dispute resolution system. Both AF Arbitration Rules and AF Conciliation Rules have been proposed to add the rule with respect to the disclosure of third-party funding. The requirement of the impartiality and independence of a decision-maker should not vary among the arbitrator, conciliator and mediator.
- 3) The pre-existing practice of introducing third-party funding into the Mediation Rules. On 4 June 2017, the Legislative Council of Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill, legalizing third-party funding of arbitration and mediation in Hong Kong. According to the new Section 7A to the Mediation Ordinance (MO), the financial and ethical safeguards proposed for third-party funding of arbitration and associated proceedings under the Arbitration Ordinance (AO) will be also applicable to the MO and funding of HK services. The Section 98U and 98V of AO, taking into effect in 2019, provide that:

98U Disclosure about third party funding of arbitration

- (1) *If a funding agreement is made, the funded party must give written notice of—*
 - (a) *the fact that a funding agreement has been made; and*
 - (b) *the name of the third party funder.*
- (2) *The notice must be given—*
 - (a) *for a funding agreement made on or before the commencement of the arbitration—on the commencement of the arbitration; or*
 - (b) *for a funding agreement made after the commencement of the arbitration*

—within 15 days after the funding agreement is made.

- (3) The notice must be given to—
 - (a) each other party to the arbitration; and
 - (b) the arbitration body.
- (4) For subsection (3)(b), if there is no arbitration body for the arbitration at the time, or at the end of the period, specified in subsection (2) for giving the notice, the notice must instead be given to the arbitration body immediately after there is an arbitration body for the arbitration.

98V. Disclosure about end of third party funding of arbitration

- (1) If a funding agreement ends (other than because of the end of the arbitration), the funded party must give written notice of—
 - (a) the fact that the funding agreement has ended; and
 - (b) the date the funding agreement ended.
- (2) The notice must be given within 15 days after the funding agreement ends.
- (3) The notice must be given to—
 - (a) each other party to the arbitration; and
 - (b) the arbitration body (if any).

- 4) Therefore, I recommend that the same rule of AR 21 be introduced into the AF mediation Rules with regard to the disclosure of third-party funding (and Insurance). Given that ICSID has recognized the status and importance of third-party funding in the ICSID investment dispute resolution system, there is no reason why third-party funding should be missed in the ICSID mediation rules. It is not only about the due process of the proceedings but also the completeness of the whole ICSID dispute resolution system.

Thank you. Should you have any questions, please do not hesitate to contract me.

Kind regards,
Yihua Chen

Yihua Chen (Howard), LLM

PhD Candidate
Arbitration & Dispute Resolution

Visiting address Burgemeester Oudlaan 50
Sanders Building (L-Building) / Room 6-04 / Rotterdam

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E [REDACTED]

Erasmus School of Law



