Arbitration in Europe: new rules on third-party litigation funding

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On September 13, 2022, the European Parliament passed a resolution to propose a directive (the "**Directive**") on the regulation of third-party litigation funding. Although not obvious at first sight, the Directive would also apply to arbitration procedures or other alternative dispute resolution mechanisms.[1]

The European Parliament recognizes that, although third-party litigation funding is "virtually non-existent in Europe, it is a booming phenomenon in investment arbitration that multiplies the number and the volume of claims of private investors against States"[2]. As it expects the practice of third-party litigation funding to expand in Europe—considering how it is already prevalent in the United States and many Commonwealth countries—the European Parliament is concerned about the potential for abuse by litigation funders, should the status quo of a regulatory vacuum be maintained. Indeed, litigation funders may be tempted to put their own economic interest over the interest of claimants and thus assume undue control over the funded proceedings.

Notwithstanding those concerns, the European Parliament notes that third-party litigation funding, if properly regulated, could enhance access to justice for claimants. Hence, the proposed Directive establishes common minimum standards on third-party litigation funding for Member States that wish to permit the practice within their territory.

The Directive mandates the creation of an independent public supervisory authority responsible for overseeing the authorisation of litigation funders and monitoring of their activities. Litigation funders would thus have to demonstrate annually that they possess adequate financial resources to pursue their activities and to observe a fiduciary duty of care[3] towards the claimants they are funding. The supervisory authority of a Member State would also be empowered to investigate complaints regarding litigation funders and to share information with the supervisory authorities of other Member States.

The Directive also sets minimum requirements with regards to third-party funding agreements. For instance, such agreements would have to be written in one of the official languages of the Member State in which the claimant and intended beneficiaries are resident.[4] Also, any agreement that would entitle the litigation funder to a share of over 40% of the total award would, absent exceptional circumstances, be deemed to null and void. Finally, unilateral termination of funding agreements by the litigation funder would also be prohibited.

The Directive further seeks to give courts and arbitral bodies more power by requiring claimants to inform the adjudicational authority of the existence of a third-party funding agreement. Such transparency would allow a tribunal to ensure that litigation funders do not get an unreasonable share of an award, to impose penalties for not respecting the Directive and to hold litigation funders responsible for adverse costs arising from unsuccessful litigation.

It is to be noted that the Directive is still in the proposal stage, and the rules relayed above must go through the European parliamentary process and implementation at the national level by each Member State before becoming law. Nonetheless, such rules go hand in hand with arbitration rules that are already in place on a global scale. Indeed, the International Chamber of Commerce’s Arbitration Rules, the

International Centre for Dispute Resolution's International Arbitration Rules, and most recently the International Centre for Settlement of Investment Disputes' Arbitration Rules, already provide for the obligation to disclose to the tribunal any funding arrangement involving a non-party to a proceeding.[5]

Given the *Comprehensive Economic and Trade Agreement* (CETA) in place between Canada and the European Union, and considering how CETA potentially allows for a degree of investor-state dispute settlement through arbitration, the Directive's solidification into law would provide for an interesting playing field where Canadian and European investors would have an enhanced financial ability to seek compensation.[6]

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[1] In the Directive, "proceedings" is described as including "any voluntary arbitration procedure or alternative dispute resolution mechanism, through which redress before a court or administrative authority in the Union is sought concerning a dispute" and "court or administrative authority" is described as "a competent court, administrative authority, arbitral body or other body tasked with adjudicating on proceedings, in accordance with national law"

[2] Paragraph F of the recitals of the European Parliament resolution of 13 September 2022.

[3] Although the Directive specifically provides for a "fiduciary duty of care", it is interesting to note that the French text of the Directive uses the term *devoir de loyauté* (duty of loyalty). The ambit of the former is of course much wider than that of the latter.

[4] "intended beneficiary" here means a person who is entitled to receive a share of an award in proceedings and whose

interests in the proceedings are represented by the funded claimant or a qualified entity (meaning an organisation representing consumers' interests (and designated as such under Directive (EU) 2020/1828)) bringing the action as a claimant party on that person's behalf.

[5] See article 11(7) of the ICC Arbitration Rules 2021 and article 14(7) of the ICDR International Arbitration Rules (2021 edition) and Rule 14 of the ICSID Arbitration Rules (July 2022 edition).

[6] CETA entered into force provisionally on September 21, 2017, but its provisions on investor-state dispute settlement only come into force when all EU Member States have completed their ratification process. To date, CETA remains to be ratified by 11 Member States (Belgium, Bulgaria, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, Poland and Slovenia).

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