ARBITRATION IMMUNITY
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THE Resolver

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Summer 2024 ciarb.org

Countering corruption

THE ADR COMMUNITY'S EFFORTS TO PREVENT CORRUPTION

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Curse of corruption

In her excellent piece on the international arbitration community's efforts to prevent corruption (see page 13), our head of policy, Cristen Bauer, points out that it is a problem that exists at a local and national level in every country in the world.

How true. There is nothing new about corruption, just endless new opportunities to practise it. When I was a criminal defence lawyer, I dealt with trials involving police officers and civil servants, among other trusted members of society. Not even the highest members of judicial systems are immune. It is alleged, for example, that according to a recent British Institute of International and Comparative Law report, commissioned by the UK Ministry of Justice, the President of the Supreme Court of Ukraine has been detained on corruption charges linked to a bribe worth nearly US$3 million. In 2019, the High Anti-Corruption Court was established to implement a transparent appointment mechanism. Mr Justice Robin Knowles, Lord Neuberger, Dame Elizabeth Gloster and I met with a delegation from Ukraine to discuss the report and look at ways of improving dispute resolution for the future.

I also dealt with a case involving an underwriter who was bribed to pay claims involving huge sums of money in relation to racehorses. I won't quite say everyone has their price, but I will say that dishonesty, which goes hand in hand with corruption, is insidious in public life.

It is difficult to know how endemic corruption is in arbitration because much of it goes unseen. But I will say with confidence that the *Nigeria v P&ID* case (see page 23) is the tip of the iceberg. False arbitrations where both sides join forces to get a tribunal to pay out huge awards that they then share happen more often than we would like to think.

Only two things bring arbitration fraud out into the sunlight: accidents (crooks make mistakes) and vigilance. No amount of guidelines and legislation will stop corruption, but being hyper alert will help curb it. When I worked for the British Government's export credit agency, we used to say that if an insurance claim was too well documented, it would immediately arouse suspicion. As I have said before: our biggest problem is being asleep at the wheel.

Dishonesty, which goes hand in hand with corruption, is insidious in public life

Jonathan Wood FCIArb, President, Ciarb

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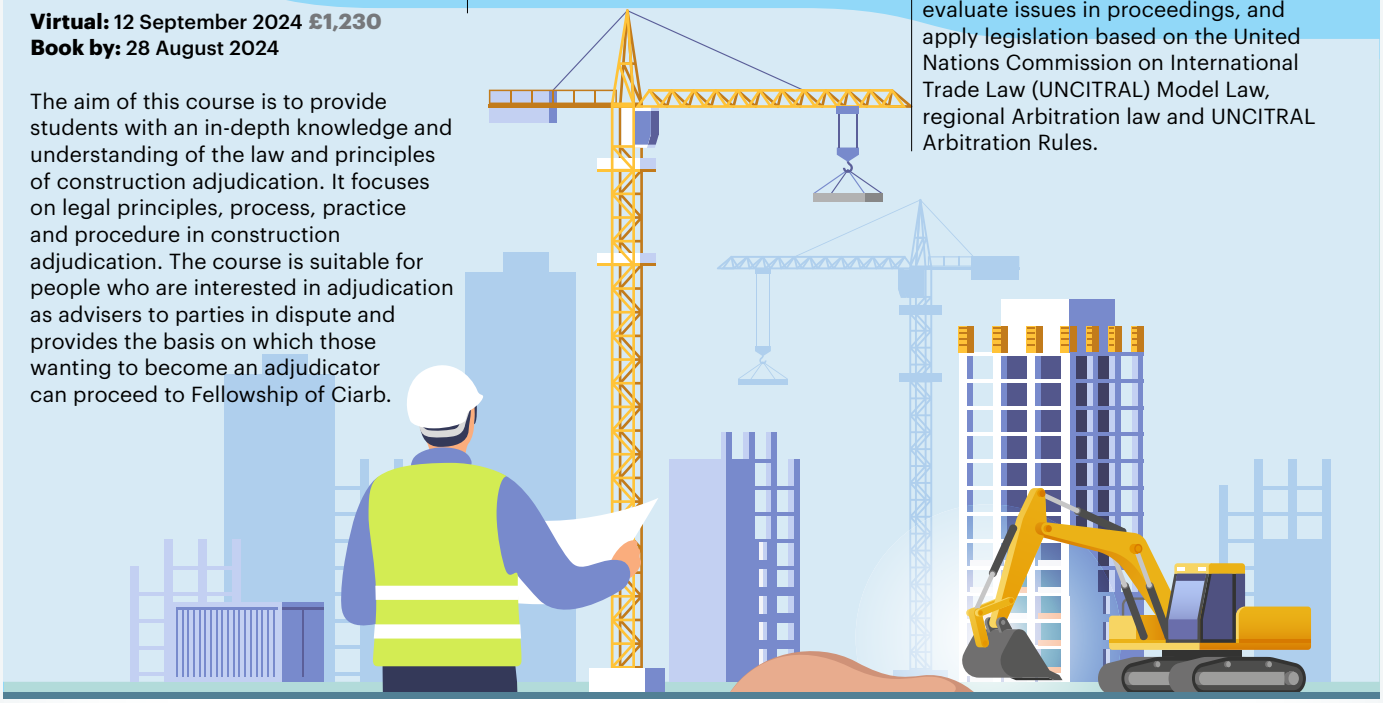
Virtual Module 1 Law Practice and Procedure of International Arbitration

Virtual: 12 September 2024 **£1,230**
Book by: 28 August 2024

Strengthen your knowledge and understanding of international arbitration through this highly popular course. It focuses on the legal principles, process, practice and procedure in international arbitration. By taking this course, you will acquire the knowledge needed to evaluate issues in proceedings, and apply legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, regional Arbitration law and UNCITRAL Arbitration Rules.



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The opener

Ciarb opens a new Branch in Saudi Arabia

LOGEN WANG/SHUTTERSTOCK

Ciarb recently opened its 44th Branch in the Kingdom of Saudi Arabia.

"We are delighted to open a new Branch in Saudi Arabia and continue to build private dispute resolution capacity in the country and the wider Middle East and North Africa region," said Ciarb CEO Catherine Dixon.

"The interest and enthusiasm shown during Riyadh International Disputes Week 2024 in March demonstrates a real appetite to embed private dispute resolution as an integral part of an effective judicial system," she added.

Ciarb now has 270 members in the Kingdom, many of them women, and over the past five years has, in conjunction with the Saudi Center for Commercial Arbitration, delivered more than 50 courses in the country, training over 1,500 people. This year, the two organisations are set to deliver 15 courses.

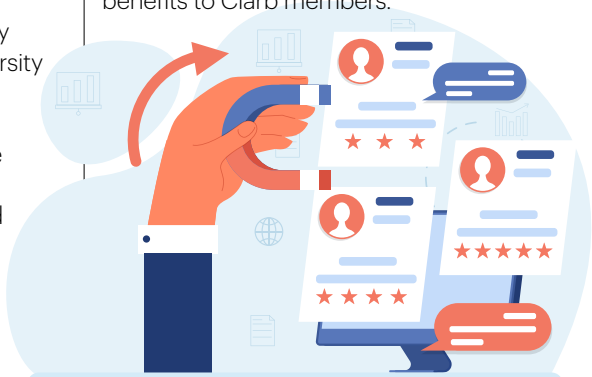
Chair of the Saudi Arabia Branch Dr Hamed Merah MCIArb described the new Branch as a "positive step forward as we continue to cultivate private dispute resolution in the Kingdom".

Ciarb and Jus Mundi partner to boost Ciarb members' profiles

Ciarb and Jus Mundi are delighted to announce their partnership, which aims to increase opportunities for dispute resolution practitioners worldwide at all levels of experience by raising the profile of Ciarb members through the interconnection of their Jus Connect platform with the Ciarb Member Directory. We will be working closely together to boost equality and diversity in arbitration.

Through the partnership, Ciarb members who have a profile on the Jus Connect platform will be able to have their Ciarb qualification and postnominals recognised on their Jus Connect profile, and update their profile with relevant expertise and publicly available data.

Ciarb's recently revised Member Directory will soon be interconnected with the Jus Connect platform, boosting benefits to Ciarb members.



60-SECOND INTERVIEW

Sophie Nappert

Sophie Nappert is the co-chair of the International Chamber of Commerce (ICC) International Task Force Addressing Issues of Corruption in International Arbitration.

It is uncommon for English courts to set aside arbitration awards. Has the *Nigeria v P&ID* case caused reflection within the international legal community about the integrity of the arbitral process?

The courts in this jurisdiction are very respectful of the arbitral process. There are limited grounds on which an award can be challenged, and section 68 of the Arbitration Act 1996 allows the award to be set aside on the grounds of serious irregularity that caused a substantial injustice.

In practice, this only affects a very small percentage of cases. In the *Nigeria v P&ID* case, the judge was aghast at a number of issues, which caused him to adopt quite a strong tone in his judgment. He wasn't asked to opine on arbitration as a process, but he considered it necessary to do so as a matter of public order. Then again, a judge's strong reaction in cases like *P&ID* will act as a welcome call to arms for the arbitration community.

Are English courts looking for tribunals to be more proactive?

English courts recognise the difficulty of that proposition. As a tribunal, if you start saying to counsel: "Are you sure that you're putting in all the questions that you should? Have you investigated this? Why aren't you asking that?", you open yourself up to accusations of partiality and trying to help one side. However, if you don't do anything, then you are accused of wilfully closing your eyes. It's a very tight line to walk.

What steps are being taken at the international level to mitigate corruption in arbitration?

I co-chair the ICC's International Task Force Addressing Issues of Corruption in International Arbitration. We are aiming to propose a roadmap for arbitrators on the basis of accepted international practice. There is no question that the days of tribunals saying "this is not my problem" are gone.

The ICC Anti-Corruption Commission, which has a wealth of experience on these issues, has issued a proposed model clause for contracts, where parties say: "We agree to abide by the international treaties on anti-corruption". If parties agree to put a clause like this in their contracts, it will be a tremendous help down the line for arbitration tribunals to open up these issues if they have suspicions.

Having a clause in the contract that spells out a stance against corruption is going to be, to my mind, a great deal of help for arbitration tribunals in the event of a dispute. The International Bar Association (IBA) has a very active anti-corruption side and is an observer to the ICC work in the task force. My daughters will say that I hail from the last century, but when I started practising law, corruption was seen as one of the costs of doing business, especially in certain industries. Everyone knew it was going on. You hired facilitators to obtain contracts and concession agreements – and you had to pay them. That's how it worked. The shift to today's approach has been immense – it is a welcome development and we are catching up.

■ **To read our Case Note on *Nigeria v P&ID*, see page 23**

Lagos Island central business district, Nigeria

TAYVAY/SHUTTERSTOCK

Having a clause in the contract that spells out a stance against corruption is going to be, to my mind, a great deal of help for arbitration tribunals

What ADR can learn from the Post Office Horizon scandal

Mediation has resolved the largest and most complex of disputes, but when it came to the nation's subpostmasters it failed miserably. Catherine Dixon asks what went wrong

WILLIAM BARTON/SHUTTERSTOCK

In recent years, the Post Office Horizon scandal in the UK has shaken the legal world and brought to light the importance of ethics and the behaviour of lawyers and others involved in the justice system in ensuring justice and fairness. The scandal, which involved the wrongful conviction of hundreds of subpostmasters and mistreatment of individuals by the Post Office, has sparked widespread outrage and calls for accountability.

At the heart of the scandal were allegations that the Post Office used flawed accounting software, known as Horizon, the Post Office knew Horizon was flawed and could be accessed by third parties, (other than the subpostmasters), and in light of this knowledge continued to accuse subpostmasters of financial discrepancies, leading to false accusations, prosecutions and even imprisonment. Many of these individuals were left bankrupt, emotionally traumatised and their lives irreparably damaged.

ABOUT THE AUTHOR

Catherine Dixon MCIArb is Chief Executive Officer of Ciarb. She is a Solicitor and an Accredited Mediator.

In the aftermath of the scandal, questions are being raised about the role of lawyers in representing the Post Office and their ethical obligations to ensure justice. Lawyers have a duty to act in the best interests of their clients, but they also have a responsibility to uphold the rule of law, fairness and ethical standards.

In the case of the Post Office Horizon scandal, it appears that lawyers representing the Post Office may have failed to uphold ethical standards. Subpostmasters continued to be prosecuted despite mounting evidence of the software's unreliability. This raises serious concerns about ethical conduct and the need for greater accountability.

BARRIER TO MEDIATION

Mediation is often successful in resolving the largest and most complex disputes. However, in this case, the Post Office's staunch denial of any wrongdoing and refusal to acknowledge the possibility of faults in the Horizon system created a significant barrier to successful mediation.

The Post Office's staunch denial of any wrongdoing ... created a significant barrier to successful mediation

WD STOCK PHOTOS/SHUTTERSTOCK

Additionally, the power dynamics at play in the Horizon case may have also contributed to the failure of mediation. The Post Office, as a large and powerful institution, may have been perceived as having more resources and leverage in the mediation process, which could have made it difficult for the subpostmasters to negotiate on an equal footing. Mediation could have provided a forum for subpostmasters to voice their grievances, seek redress and negotiate a settlement with the Post Office. It could have helped to address the underlying issues of accountability, transparency, and ethical conduct in a more constructive and collaborative manner.

The UK Parliament intervened to overturn the criminal convictions of the subpostmasters. The decision of Parliament to intervene in a matter dealt with through the courts is controversial. Firstly, because it called into question the integrity of the criminal justice system and the Post Office's handling of the case. The wrongful convictions of the subpostmasters highlighted serious flaws in the investigation and prosecution process, including the reliance on flawed evidence from the Horizon system and the failure to adequately consider alternative explanations for the discrepancies.

We all need to be mindful about the risk to the rule of law if Parliament overrides the court process

DANGEROUS PRECEDENT?

Secondly, and perhaps more importantly, because Parliament overruled the courts by overturning the criminal convictions, thereby exposing flaws in the criminal justice system, this raises serious concerns about the separation of powers (between the Courts and Parliament). Although this case is considered by some to be unique, this sets a precedent that could allow the UK Parliament to overturn other criminal convictions in the future, which could undermine the rule of law. The majority view is that given the time that has elapsed, in order to ensure the convictions were overturned quickly, Parliament's intervention was appropriate. However, we all need to be mindful about the risk to the rule of law if Parliament overrides the court process.

Whatever people's views, this case raises questions about accountability and transparency, and highlights the devastating impact of wrongful convictions on individuals' lives. It serves as a stark reminder of the importance of upholding justice, fairness and integrity in legal systems, and the importance of ethics and the behaviour of lawyers in achieving that, as well as highlighting the need for reforms to prevent such miscarriages of justice from happening again. ■

The long and tort of it

Third-party arbitration funding is now a multi-billion Euro industry, but what happens when a case is lost? With reference to Danish law, Jacob C Jørgensen FCIArb explores the conditions under which arbitrators may face a tort liability

The industry of funding major arbitrations has experienced a substantial surge in recent years[1]. Arbitration funders are not, however, parties to the arbitration, nor do they sign the terms of reference or similar procedural agreements used under the rules of different arbitration institutions. In light of the considerable investments made by funders in major commercial disputes, it is not unlikely that some might explore the possibility of raising claims against both counsels and arbitrators (or their insurance companies) where a funded case is lost.

ARBITRATOR IMMUNITY

Arbitrator immunity is a fundamental principle aimed at protecting arbitrators from personal liability for their actions or decisions made during arbitration proceedings. The concept is enshrined in various arbitration rules: article 41 of the International Chamber of Commerce 2021 Arbitration Rules stipulates:

"The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the ►

Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law."

Similar rules are found in the rules for the International Centre for Dispute Resolution (ICDR) (article 38), Singapore International Arbitration Centre (SIAC) (rule 38), Hong Kong International Arbitration Centre (HKIAC) (article 46), article 31.1 of the London Court of International Arbitration (LCIA) Rules 2020 and the Stockholm Chamber of Commerce (SCC) Rules (article 52).

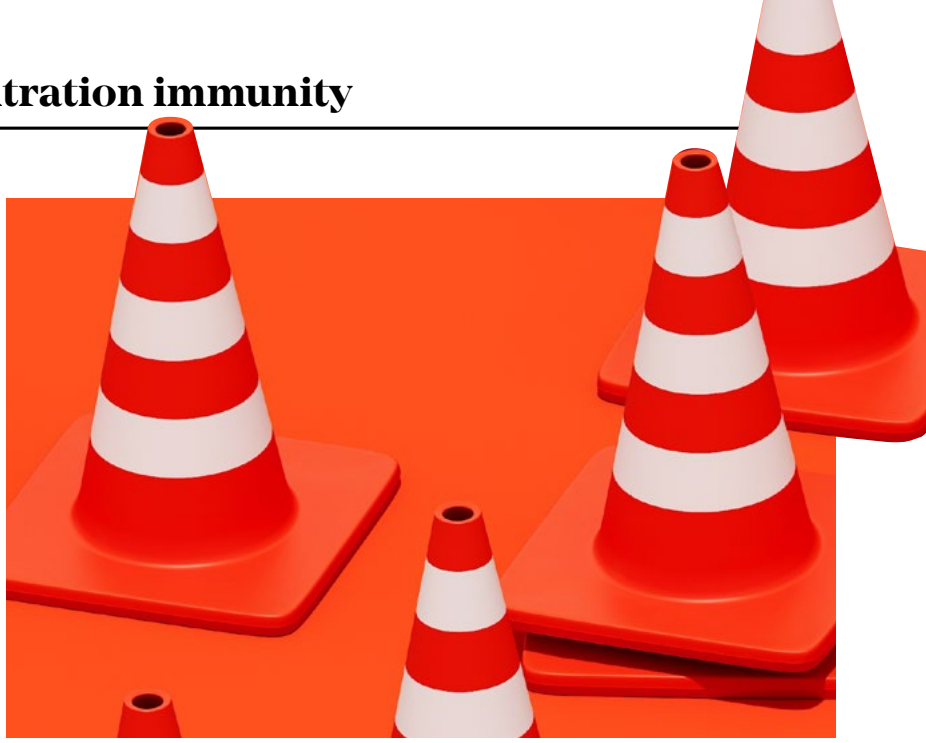
However, the immunity provided by these clauses is not absolute, and does not generally apply in cases of deliberate default or gross negligence that may give rise to liability under the *lex arbitri* (or possibly under the laws of other jurisdictions where damages are incurred as a result of the wrongdoings of an arbitrator). In fact, there is a noteworthy and fundamental difference in how common law and civil law approach the topic of immunity.

The common law approach is based on the concept of 'judicial immunity' in that judges and arbitrators are perceived as performing, essentially, the same role. Under common law, arbitrators are therefore entitled to an almost unqualified immunity by virtue of their 'quasi-judicial' function.[2] This principle is embedded in section 29 of the English Arbitration Act 1996, which stipulates:

"An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith."

On the other hand, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which has been used as a template for the Arbitration Acts in more than 120 jurisdictions worldwide, addresses neither the issue of the arbitrators' liability nor their immunity.[3]

The civil law approach to immunity is based on the view that there is a contractual relationship between the parties and the arbitrators, and that the parties have agreed to grant the arbitrators immunity from liability under their contract – much like under a commercial agreement excluding a party's liability.[4] However, under most civil law jurisdictions, it is not possible to exclude the liability of a party in case of wilful misconduct or gross negligence.[5]



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By way of example, under Dutch law an arbitrator may be held liable for damages in the event of gross negligence without any requirement for the arbitrator to have acted in bad faith.[6]

Similarly, under Swedish law, where the Arbitration Act does not contain any provisions specifically regulating the liability of arbitrators, the prevailing view is that an arbitrator's liability is treated much the same as any other party in a contractual relationship when it comes to assessing the applicability of liability excluding clauses. Accordingly, article 52 of the SCC Rules (2023)[7] limits the arbitrator's liability *"unless an act or omission constitutes wilful misconduct or gross negligence"*.[8]

Under Danish law and Norwegian law, which have both based their Arbitration Acts on the UNCITRAL Model Law, the position is the same as under Swedish law.[9]

ARBITRATOR LIABILITY

What is the liability of arbitrators *vis-à-vis* third-party arbitration funders? Under the laws of the Scandinavian countries, the immunity of arbitrators is solely based on the articles in the rules of procedure, which apply by virtue of the contract that the arbitrators are seen to have entered into with the parties to the arbitration. ▶

"An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith"

Seeing that there is no direct contractual relationship between the arbitrators and any third parties funding the arbitration, and in the absence of a general immunity protection at law (as the one found in the English Arbitration Act), the arbitrators are not protected against possible claims raised in tort by an arbitration funder who has funded an unsuccessful arbitration.

Accordingly, a third-party arbitration funder can raise a claim in tort against the arbitrators asserting that they breached their duty of care to the funder by failing to perform their duties diligently and competently when they decided the dispute.

Under the laws of the Scandinavian jurisdictions, the requirements for successfully raising a tort claim in this context can briefly be summarised as follows:

1 Negligence To establish whether there is negligence, one will generally have to compare the actual conduct of the arbitrators to the hypothetical conduct of experienced international arbitrators. Arbitrators are expected to conduct themselves professionally and with a reasonable level of international dispute resolution experience when it comes to resolving procedural issues, interpreting the contract, assessing the evidence and applying the governing law of the contract correctly. In this regard, the conduct of the arbitrators can be juxtaposed with the different guidelines on international arbitration issued by UNCITRAL or Ciarb when assessing whether the arbitrators have acted negligently. Where the arbitrators have conducted themselves in a manner that deviates from what an experienced international arbitrator would have done, they risk being deemed to have acted negligently.

2 Proof of loss Secondly, a tort liability requires proof that a loss has been incurred. This condition will rarely pose a problem in that the third-party funder will usually have lost its 'invested' funds in the dispute in the form of legal, expert and administrative costs, etc. The more difficult question in this regard is whether the third-party funder can successfully claim loss of profits (i.e. loss of the portion of the amount claimed by the funded party in the arbitration that was not awarded).

3 Causality This condition is more challenging as is the case in most tort claims. The third-party funder would have to show that the loss was incurred as a result of the negligence of the arbitrators and that their negligence was a '*conditio sine qua non*'– that is, that the loss would not have occurred 'but for' the negligent conduct of the arbitrators.

4 Foreseeability This condition requires the third-party funder to show that it was foreseeable for the arbitrators that their negligence would result in the loss incurred. Where the tribunal has been informed that one of the parties (or both) are being funded by a third party, this condition will rarely present a challenge.

5 Absence of contributory negligence Finally, the third-party funder will likely face challenges where the arbitrators can point to 'ineffective representation' by the counsel representing the funded party in the arbitration. Where the counsel has failed to offer substantiated arguments the arbitrators will often be able to exonerate themselves from liability with reference to the fact that their findings were dictated by the manner in which the 'case was presented' to them by counsel for the funded party in the arbitration.

The fact that arbitrators may attract liability for gross procedural errors despite the immunity protection embedded in most institutional rules of procedure has been established several times in both common law and civil law jurisdictions. Errors that may give rise to liability include: excluding an arbitrator from the deliberation process[10], lack of impartiality and/or independence, an unreasonable or unjustified resignation by an arbitrator, corruption, fraud, forgery, etc.[11]

The more difficult question is whether – and if so under which conditions – arbitrators can be held liable in tort for having failed to correctly apply the governing law of the contract or for having misinterpreted the contract.

The general view under Scandinavian law seems to be that arbitrators will likely be given considerable wiggle room when determining whether a failure to correctly decide a case on its merits can give rise to a tort liability – provided, of course, that the arbitrators have acted in good faith and have complied with the ▶

A third-party arbitration funder can raise a claim in tort against the arbitrators asserting that they breached their duty of care to the funder by failing to perform their duties diligently and competently

rules of procedure. 'Honest mistakes' made in the assessment of the evidence and/or in relation to applying the contract and/or the governing law correctly will therefore only very rarely give rise to a tort liability.[12]

CASE LAW

The available reported case law on the issue of tort liability of arbitrators is scarce, although some guidance may be found – for example, in tort cases where a lawyer has prepared a testament for a client designed to ensure that a certain beneficiary receives a certain portion of the probate estate of the client. Where the testament fails to meet this goal, the lawyer may face a claim in tort raised by the disgruntled beneficiary

In the Danish case, *UfR 2008.1324 V*,[13] a lawyer was thus held liable in tort for the loss suffered by a foundation, which had been established in connection with a testament drafted by the lawyer. It had been a clear prerequisite for the testator that the foundation would be tax exempt, which turned out not to be the case.[14]

Another group of cases concerns the tort liability of lawyers *vis-à-vis* buyers of real estate. In the Danish case *UfR 2010.2375 H*,[15] the lawyer represented the seller of an apartment. The lawyer failed to observe the rules on the maximum price that could be demanded for the apartment as regulated in the Danish Cooperative Housing Association Act and consequently the buyer of the apartment suffered a loss when he resold the property at a lower price (as allowed by said Act). The Supreme Court found that the lawyer should have informed both his client (the seller) and the buyer that the transaction was governed by the special rules set out in the mentioned Act. The lawyer was thus held liable for damages and was ordered to pay compensation to the buyer for the incurred loss.

Finally, a lawyer may attract a tort liability *vis-à-vis* the tax authorities. In *UfR 2000.365/2 H*[16] (often referred to as the *Thrane* case), a company in which there were only liquid assets and a tax debt was sold at an inflated price after the business had ceased. The sale was assisted by the seller's lawyer, by an accountant and by the buyer's bank. It was agreed between the parties that the purchase price would be transferred from the buyer's bank to the seller's bank and that the company's funds would be transferred to the buyer's bank on the same day. This emptied the company of funds without any tax being paid. In their assessment of the lawyer's liability, the Danish Supreme Court

3DJUSTINCASE/SHUTTERSTOCK

emphasised that the transfer was not a normal business transaction. Therefore, the advisers should have been aware of the risk that the tax authorities could suffer a loss. The seller's lawyer was therefore held liable for the tax authorities' loss.

The *Thrane* case has attracted renewed interest and attention in recent years due to the 'dividend washing' scandal, in which a number of major law firms across Europe have been involved and have subsequently been sued in tort by, among others, the Danish tax authorities. One particular case should be mentioned in this context as it may serve to illustrate the extent of the duty of care that lawyers are deemed to have towards third parties.

On 2 November 2023, the Danish Supreme Court ordered one of Denmark's largest law firms, Bech-Bruun, to pay more than half a billion DKK (including interest) in tort damages to the Danish tax authorities.[17] The case, which was initiated in April 2020 in the Eastern Division of the Danish High Court, arose out of a tax opinion prepared by Bech-Bruun in 2014 for German bank the North Channel Bank. In the tax opinion, Bech-Bruun gave advice on how the bank could participate as a depository bank in so-called '*cum-ex*' transactions, also known as 'dividend washing', involving double refunds of dividend withholding tax – in other words, tax fraud.

The general view under Scandinavian law seems to be that arbitrators will likely be given considerable wiggle room when determining whether a failure to correctly decide a case on its merits can give rise to a tort liability

OMRAVESTUDIO/SHUTTERSTOCK

In its judgment the Supreme Court held, among other things, that Bech-Bruun's tax lawyer who had prepared the tax opinion "had to realise that there was an obvious risk that North Channel Bank, together with others, was involved in preparing a model for unjustified refunds of dividend tax". In this connection, the Supreme Court emphasised that, in an email from the bank's German lawyers, the lawyer had been "made aware of the risk of double refund of dividend tax" and that he therefore had "to be aware of the risk of setting aside the interests of the tax authorities". Further, the Supreme Court emphasised that the lawyer had found himself in "an elevated responsibility risk environment" as the envisaged '*cum-ex*' transactions appeared to have no commercial justification.

Danish case law (and in particular the *Bech-Bruun* case) clearly demonstrates that lawyers in a variety of cases can be held liable in tort *vis-à-vis* third parties that suffer a loss as a result of legal services provided to a client. In the context of dispute resolution services, it is thought, however, that arbitrators will be allowed a considerable margin of error when it comes to deciding a commercial dispute on its merits. That said, where procedural errors are made or where it is evident that certain key findings in the award are not in line with the contract or with the applicable law, arbitrators may suddenly find themselves 'on the other side of the bench' facing an uncomfortable degree of scrutiny in a tort action brought by a financially strong arbitration funder with substantial litigation experience.

CONCLUSIONS

The use of third-party arbitration funding has increased over recent years and is today a multi-billion Euro industry. In light of the considerable investments made by funders in major commercial disputes, it is not unlikely that some might explore the possibility of raising claims against both counsels and arbitrators (or their insurance companies) where a funded case is lost.

International arbitrators should be aware of this risk – in particular since the *lex arbitri* will generally not grant immunity and since the waiver of liability set out in the rules of procedure of most arbitration institutions will not protect arbitrators against tort claims raised by a third-party arbitration funder given that they, the funder, is not a party in the arbitration and thus not a party in the contractual relationship between the arbitrators and the claimant and the respondent.

Moreover, arbitrators acting in *ad hoc* arbitrations[18] should verify whether their professional indemnity insurance policies provide adequate cover both in terms of limits and scope. In this connection it is worth mentioning that some policies afford only limited cover or no cover at all for legal work involving foreign law.

Finally, the large arbitration institutions could consider expanding the usual immunity protection set out in their procedural rules – for example, with a provision whereby a funded party undertakes to hold harmless indemnity and protect the arbitrators from and against tort claims raised by that party's third-party arbitration funder. ■

References

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Countering corruption

Ciarb's head of policy, **Cristen Bauer**, looks at the international arbitration community's efforts to prevent corruption

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Corruption exists at both local and national levels in all societies, but the globalisation of the economy, an increase in cross-border trade and investment, and the emergence of an international financial system with its complex web of international transactions, entities and agreements, have given the problem an international dimension. In fact, the World Bank estimates that around 5% of global GDP is lost annually to corruption.[1]

To tackle the problem, NGOs, and international and intergovernmental organisations including the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD), have worked over the past several decades with public officials and members of the legal and business community to develop tools and instruments to mitigate against corruption in international business transactions.

In recent years, the international arbitration community has also started to look at the problem more closely, and the London Commercial Court's October 2023 decision to set aside the award against Nigeria on the basis of fraud has – yet again – reignited a debate about arbitration and corruption.[2]

For some, the *Nigeria v P&ID* case is seen as an extreme outlier in arbitration.[3] For others, it serves as another example of the challenges of using private dispute resolution mechanisms, especially where state funds are involved.[4] What is clear is that this case leaves many unanswered questions for the arbitral community about what should be done to mitigate corruption in arbitration.

WHAT ARE THE ISSUES?

The *Nigeria v P&ID* case highlights some of the reasons why safeguarding against corruption in arbitration remains a complex issue. Some of the features of the arbitral process are the very issues rubbing up against anti-corruption efforts. Confidentiality and party autonomy are key attributes of arbitration, but these features also potentially make arbitration an attractive forum for disputes arising out of corrupt transactions or agreements. In a similar vein, countries with a lower rule of law or which ▸

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rank lower on Transparency International's Corruption Perceptions Index may also be jurisdictions where businesses and investors seek access to justice through arbitration over domestic courts.[5] The applicable rules and the seat of the arbitration will also be important factors in whether the proceedings have additional protections against corruption.

While arbitration can provide an effective forum to flexibly resolve disputes, it is important to note that arbitrators have limited jurisdiction and fewer tools than courts to investigate allegations of corruption, compel documents or sanction perjured written or oral evidence.[6] Globally, there are also differing standards of proof, a non-uniform approach to unlawful practices, and different codes of conduct for officials, practitioners and neutrals.

Finally, there are also several scenarios in which corruption can occur at various stages in the arbitral proceedings: corruption allegations pleaded by the respondent as a challenge to jurisdiction; corruption allegations raised when the merits of the case are considered; corruption pleaded as a challenge to the recognition or enforcement of an arbitral award; fraudulent arbitration proceedings brought as a way to cover money laundering activities by issuing a 'clean' arbitral award; and corruption amongst the arbitrators themselves where parties have influenced the outcome of the decision.[7]

WHAT IS BEING DONE?

On a national level, many jurisdictions have enacted anti-corruption laws to prohibit individuals and companies from bribing public officials at home and abroad – for example, the United States Foreign Corrupt Practices Act (FCPA), the UK Bribery Act and the Canadian Corruption of Foreign Public Officials Act (CFPOA). On an international level, there are several notable anti-corruption instruments, initiatives and resources that are useful for arbitrators, counsel and experts to consider.

International instruments and initiatives

- The **1997 OECD Anti-Bribery Convention** establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions.[8]
- The **2003 United Nations Convention against Corruption** is a legally binding anti-corruption instrument that covers preventive measures, criminalisation and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.[9]
- The International Chamber of Commerce (ICC) has several relevant texts, including the **ICC Rules on Combating Corruption**; the **ICC Anti-corruption Clause**, which companies can include in their contracts; and the **ICC Guidelines on Agents, Intermediaries and Other Third Parties**, which guides on how to choose, remunerate and manage third parties and intermediaries in the public and private sector.[10]
- The ICC's Commission on Arbitration and ADR has a **Task Force Addressing Issues of Corruption in International Arbitration**, which is working on developing tools to recognise signs of corruption and guidelines for arbitral tribunals.[11]
- The University of Basel's 2019 **Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators** is currently being updated to address current legal issues and risks in the industry, and will address applicable law and public policy, *mens rea*, issues of evidence and sanctions.[12]
- **United Nations Commission on International Trade Law (UNCITRAL) Working Group III** on Investor-State Dispute Settlement Reform recently published Codes of Conduct for neutrals in investment treaty disputes.[13]
- UNCITRAL Working Group III is also working on reform of **Procedural and Cross-cutting Issues**, including a **Draft Provision 9 on Denial of Benefits**, which would provide that a contract party may deny the benefits of an agreement if the investment was made by way of corruption, fraud or deceitful conduct.[14]
- UNCITRAL's 2014 **Rules on Transparency in Treaty-based Investor-State Arbitration**

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Arbitrators have limited jurisdiction and fewer tools than courts to investigate allegations of corruption, compel documents, or sanction perjured written or oral evidence

include a set of procedural rules aimed at providing more transparency and accessibility to the public.[15]

- The **International Bar Association (IBA)** has several important texts including the IBA Anti-Corruption Guidance for Bar Associations, IBA Guidelines on Conflicts of Interest in International Arbitration 2024 and the IBA Rules on the Taking of Evidence.[16]
- The IBA also has an **Anti-Corruption Survey** to better understand the issues faced by lawyers around the world, their awareness of the risks, the laws and the international implications.[17]

Ciarb has several guidelines that can help mitigate corruption

- **Ciarb Guideline on Applications for Interim Measures** article 6.3 on arbitrators' power to modify order of an interim measure granted based on a fraudulent basis.[18]
- **Ciarb Guideline on Interviews for Prospective Arbitrators** articles 1.4, 2, and 3, which provide a duty of confidentiality, impartiality and independence of arbitrators.[19]
- **Ciarb Guideline on Jurisdictional Challenges** articles 1.5–1.7 raise arbitrators' active role to raise particular subject matter, such as corruption, money laundering and fraud at a jurisdictional stage.[20]
- **Ciarb Guideline on Party-appointed and Tribunal-appointed Experts** article 4.2, which provides duty of impartiality from experts in spite of payment made by the appointing party.[21]
- **Ciarb Code of Professional and Ethical Conduct for Members**.[22]

WHAT IS NEXT?

Despite these existing instruments and initiatives, we also recognise the need to do more to preserve the legitimacy of private dispute resolution mechanisms and safeguard against corruption in all its forms. Ciarb is committed to maintaining a high-quality standard for ADR professionals, and we will continue to work to train and educate neutrals, counsel and experts in the industry to equip them with the tools they need to resolve disputes effectively.

Want to get involved in our anti-corruption efforts? Contact us at policy@ciarb.org

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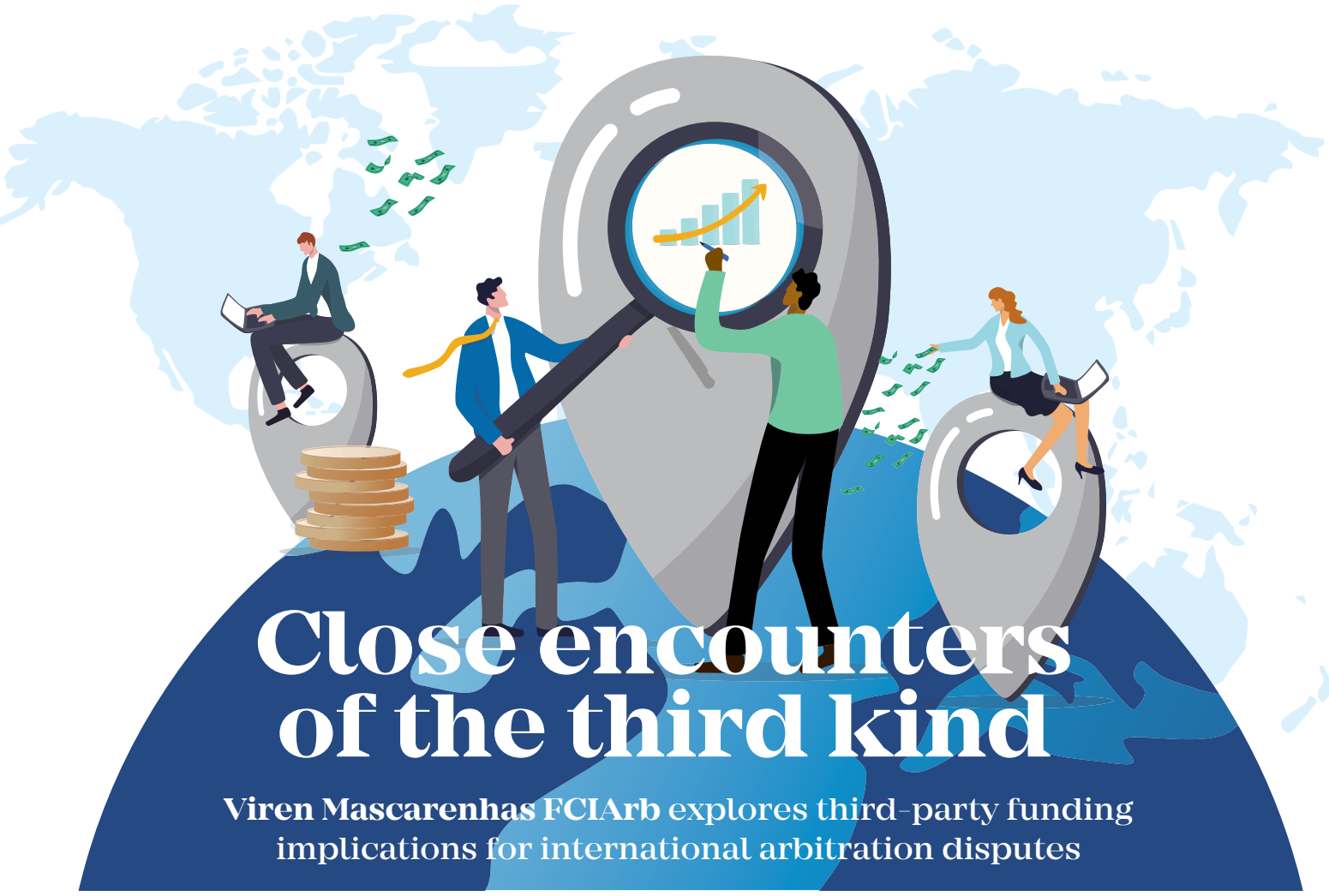

Close encounters of the third kind

Viren Mascarenhas FCIArb explores third-party funding implications for international arbitration disputes

There is a recognition by the arbitration community that third-party funding (TPF) is here to stay. For their part, third-party funders are keen to fund arbitration matters, but they like, typically, to hold them in portfolios of diversified disputes.

First, regarding disclosure, General Standard 6(b) of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (2024) provides that *"any legal entity or natural person having a controlling influence on a party, or a direct economic interest in, or a duty to indemnify, a party for the award to be rendered in the arbitration may be considered to bear the identity of such party"*.

The Explanation to General Standard 6 provides that *"third-party funders and insurers may have a direct economic interest in the prosecution or defence of the case in dispute, a controlling influence on a party to the arbitration or influence over the conduct of proceedings, including the selection of arbitrators. These distinctions may be relevant when considering whether such entities should be considered to bear the identity of a party"*.

Third-party funders are keen to fund arbitration matters, but they like to hold them in portfolios of diversified disputes

Rule 14 of the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules also provides for disclosure of third-party funders. And recent iterations of several arbitration institutional rules call for such disclosure, highlighting the overall trend in support of disclosure of the existence of TPF to assess arbitrator independence and impartiality.

Second, the disclosure rules are based on the assumption that the third-party funder and claimant have entered into the funding agreement directly. Third-party funders continue to fund single cases or a portfolio of cases that will be brought by a single claimant (or its affiliates). However, increasingly, third-party funders seek to deploy larger amounts of capital by entering into portfolio funding arrangements directly with law firms. These portfolios are typically not limited to arbitrations, but include other kinds of disputes (such as IP disputes) that the law firm is considering pursuing on partial or full contingency for its clients. In turn, the law firm enters into the contingency funding ▶

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Funders recognise that the likelihood of success depends not only on the merits of a particular case, but also on the counsel who presents it

relationship directly with the client who will be the claimant in the arbitration, setting out the terms for the law firm's recoveries depending on the outcome of the case. The law firm would not disclose the funding arrangement, but the IBA Guidelines contain provisions to assess arbitrator independence and impartiality based on relationships with counsel to the parties. It may be the case that such terms will get disclosed at the end of the arbitration when determining allocation of costs and expenses in the arbitration.

Third, notwithstanding the hype that third-party funders will result in a drastic increase in investor-state dispute settlement (ISDS) cases, TPFs have become more cautious and disenchanted with funding investment treaty arbitrations. Their major concerns include the length of time of such proceedings (especially with increasing requests for bifurcation or trifurcation by respondent states), length of annulment proceedings (especially if pursuing non-ISDS claims) and lack of compliance by sovereigns with awards, resulting in lengthy and costly enforcement proceedings. While funding is still available in principle for ISDS, funders pay close attention not only to the merits of the case, but the collection risk associated with the specific respondent state and the amount of sunk costs incurred by the claimant investor associated with the investment (as opposed to expected lost profits), especially for disputes in the extractives industry.

Fourth, in contrast to ISDS claims, third-party funders are keen to fund commercial international arbitrations, especially when the arbitrations are seated in pro-arbitration, commercially friendly jurisdictions (minimising the likelihood of the courts of the seat of arbitration annulling an award) and the respondent(s) have relatively deep pockets (or at least enforceable assets).

Fifth, choice of counsel remains crucial to securing funding for international arbitration matters. Notwithstanding legitimate concerns of diversity and inclusion, the arbitration bar continues to persist, especially in ISDS matters, but also in high-stakes international commercial arbitrations. Third-party funders recognise that the likelihood of success depends not only on the merits of a particular case but also on the counsel who presents it. Additionally, counsel plays a significant role in selecting the arbitrators who will decide the case, accounting for prior professional experience and reputations within the arbitration bar. Claimants would do well to choose experienced arbitration counsel from the outset to interface with the third-party funder in terms of conducting due diligence into the matter, preparing the estimates of legal fees and expenses of the arbitration, and advising them during the funding process. Funders who have declined to fund an opportunity are wary of second looks, even if appropriate counsel subsequently comes on board.

Sixth, the secondary market for monetising an arbitration award through its partial or full assignment or transfer is active and growing. This option may be attractive for award creditors seeking to monetise the award, especially if the underlying arbitration proved lengthy and costly. The discount rate for the purchase will depend on the type of award (investment arbitration or commercial arbitration); the identity of the award-debtor, including collection risk (especially if the award debtor is a sovereign); and the number of award/judgment creditors pursuing the same award-debtor's assets in different enforcement proceedings. Hedge funds focused on distressed assets are especially interested in purchasing these awards. The ecosystem also includes investigators and asset tracers who identify the quantum and whereabouts of the award-debtor's enforceable assets.

Seventh, third-party funding of arbitrations is expanding to include new insurance products. For example, arbitration award default insurance is available as early as when the investment is made and generally before a dispute has arisen. Award creditors may obtain judgment preservation insurance to mitigate the risk of a favourable arbitral award being annulled. Increasingly, clients are seeking insurance to secure up-front financing backed by the insurance policy that can be used to either cover the cost of the insurance premium and related expenses or bring forward case proceeds that may be used for any business purpose. The financing loans may be underwritten in parallel with the insurance underwriting, and the underlying assumption is that financing will be cheaper given the loans are being made against insurance-backed judgments or portfolios. ■

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PACCAR, Post Office and third-party funding

Dr Hasan Tahsin Azizagaoglu addresses some misconceptions about litigation funding following the *PACCAR* decision

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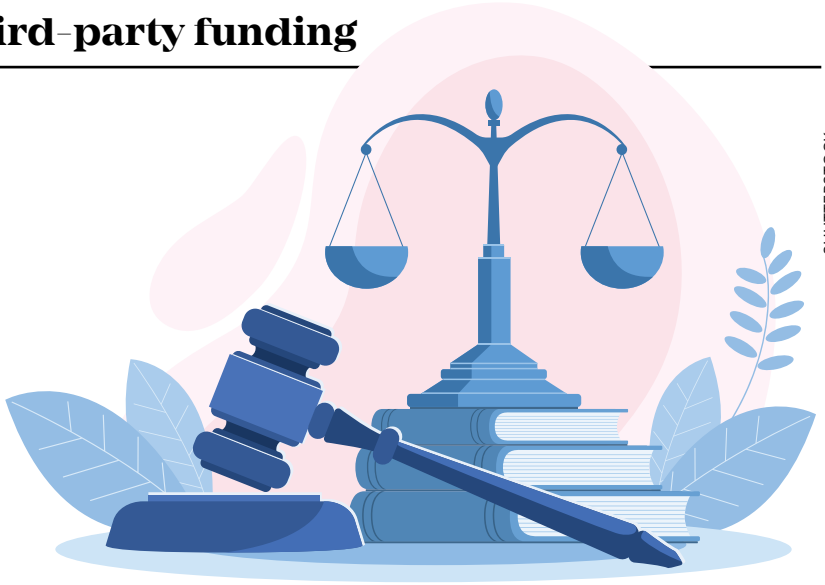
The fundamental obstacle in tackling any legal issue is that individuals often don't fully grasp what they are looking for in the first place and, as a relatively new phenomenon, third-party funding is not exempt from the problem.

In *PACCAR*, the Supreme Court determined by a majority that litigation funding agreements (LFAs), which are based on a share of any damages recovered, are considered damages-based agreements (DBAs).* As a result, many existing LFAs may become unenforceable unless they meet the conditions outlined under section 58AA of the Courts and Legal Services Act 1990. It was also unclear whether this decision would apply to arbitration, especially if the arbitration is seated in London or governed by English law.

Following the decision, funders immediately renegotiated their LFAs for ongoing opportunities, converting their percentage-based models to multiple-based returns or ensuring their structures meet the statutory conditions. During this time, litigation funders' pricing and structuring methodologies became a hot topic. However, only a few discussed the truth about the percentage model, which is that, in general, among the ▶

The Post Office scandal undoubtedly raised public awareness about the significance of litigation funding



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two basic models it is the most appropriate structure to align the interests of all parties involved. There are many ways to combine these two basic models and create hybrid structures.

PERCENTAGE PAYS OFF

In its simplest form, the percentage-based model typically involves the funder receiving the invested amount plus a percentage of the proceeds, while the multiple-based model means the funder receives the invested amount plus a multiple of that amount. Both the multiple and percentage options vary depending on the risk and the duration of the dispute.

In a video discussion for Thomson Reuters Legal Europe titled 'Litigation funding: pricing methodologies', Adrian Chopin, Managing Director at Bench Walk, pointed out to LionFish Litigation Finance Limited Managing Director Tets Ishikawa that the main issue with the multiple-based model is that you cannot align the incentive, especially in a low-win scenario, because it is a fixed-fee structure. In such cases, the funders are likely to get a very large proportion of the damages in a low-win. In other words, contrary to the misconception, the multiple-based system is more favourable to funders in low-wins.

These misaligned incentives are also evident in high-win scenarios, where the funder is likely to receive a much smaller proportion since they will be paid a fixed multiple agreed upon under the LFA. Therefore, percentage-based returns align the incentives of both the funder and the claimant, ensuring a fair distribution of proceeds in both low- and high-win scenarios.

COMMERCIAL REALITY

However, unlike the general perception, litigation funders are commercially practical. In cases with a low-win scenario, they are likely to accept a haircut on their returns to ensure they do not receive the majority of the proceeds. This was also the case in the Post Office scandal, where some people accused the funder of taking a larger portion of the returns.

However, former subpostmaster Alan Bates, who founded the Justice for Subpostmasters Alliance, has stated that these allegations were unjust and promoted by organisations that do not want to face similar class actions. Bates noted that the funder involved increased its commitment when the other side tried to inflate the costs and ultimately accepted a reduced return to ensure the victims received some compensation.

Contrary to the misconception, the multiple-based system is more favourable to funders in low-wins

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Dr Hasan Tahsin Azizagaoglu works at Bench Walk Advisors, where he oversees the due diligence process for proposed cases for funding, the negotiation of funding arrangements and the subsequent management of cases. He has been recognised by several directories, including Lawdragon, and named among the 2023 and 2024 Lawdragon 100 Global Leaders in Litigation Finance. Additionally, he serves as a member of the organising committee for Istanbul Arbitration Days and holds a PhD in private international law.

People who raise these concerns are usually either deliberately trying to limit claimants' ability to bring large collective actions via litigation funding or simply do not understand how financial pricing works. Like any other pricing model, the one adopted by funders reflects the commercial reality and the relevant risks involved in each case, including the merits of the case, its duration, enforcement and recovery issues. Additionally, since it is a non-recourse loan, the client owes the funder nothing if the case is lost. Furthermore, funders usually bid against each other, striving to offer the best pricing to secure the case. Therefore, the commercial reality is quite different from how it is often portrayed by critics.

FAIR FUNDING

The Post Office scandal undoubtedly raised public awareness of the significance of litigation funding. Recent media coverage played a crucial role in prompting the Government to recognise the impact of the *PACCAR* decision and address the unintended consequences. Without this intervention, the ruling could have restricted the funds available for such claims. Given the high legal costs, litigation funding is vital for individuals seeking to hold large organisations accountable for their wrongdoings.

However, policymakers must be careful while drafting a bill to regulate the market to avoid putting any further burdens on the industry by following in the footsteps of their European counterparts. For example, fixing a cap on funders' returns, as suggested in the Voss Report, would lead to fewer cases being funded and, more importantly, encourage a tactic where defendants intentionally increase legal costs, making cases economically unviable for funders. Besides, it is a misguided conclusion that funders demand unjustified returns while actively competing with each other to meet the client's commercial expectations to get the mandate over an opportunity. Therefore, clinging to these misconceptions and imposing unnecessary additional regulatory burdens would only show that we haven't learned from the Post Office scandal. ■

*The Litigation Funding Agreements (Enforceability) Bill which is expected to overturn the judgment was postponed due to the UK election.

MR.YANUKIT/SHUTTERSTOCK

Taking the stand

Ciarb's newly appointed Europe Branch chair, **Dr Phillip Landolt FCIArb**, considers witness evidence in international arbitration

Except for 'look-sniff arbitrations' in the commodities sector, it is decidedly rare for an arbitration to be 'on the documents only'. This is true not just for common law inspired arbitrations, but also for civilian ones. It is rarely oral argument that keeps arbitration from being on the documents only. It is the virtually invariable resort to witnesses as a component of the evidentiary mix. Witness evidence is indeed a cardinal type of evidence in arbitration, perhaps vying only with documentary evidence in order of importance.

Witness evidence is indeed a cardinal type of evidence in arbitration, perhaps vying only with documentary evidence in order of importance

But *vis-à-vis* documentary evidence, witness evidence presents remarkable complexities resulting in its probative value being starkly more variable. It varies extensively as a function of the characteristics of the person who is testifying, as a function of their perception of it, and as a function of what befalls that person after having apprehended it. This potential breadth of variation is moreover expanded further by factors external to the witness, such as how counsel presents the witness evidence, how it is examined and the arbitrator's wherewithal to assess it.

Since the assessment of witness evidence is so nettlesome, why does one even bother with it in adjudication and in arbitration in particular? The simple answer is that one of the most readily available means of finding out about virtually anything is to ask someone about it. To borrow from the classic wording of Rule 401 of the US Federal Rules of Evidence, witness evidence ▶

SALIVANCHUK SEMEN/SHUTTERSTOCK

as a class is eminently capable of the *"tendency to make a fact more or less probable"*. So since time immemorial, witnesses have been resorted to in order to prove or disprove a case in dispute.

Since witness evidence in international arbitration is a fact of life, the enquiry is when should, and how can, arbitration maximise its reliability and the precision of assessing it?

RELIABILITY RULES

In arbitration, there are a number of rules favouring the reliability of witness evidence. For example, witnesses will generally need to take an oath as to the truth or include an affirmation of truthfulness at the end of a witness statement. Further, it is a generalised rule of practice that a witness may not attend another witness's testimony until they themselves have been examined, and, if they are a party, they are examined before all other witnesses. Also, as reflected in Rule 4(7) of the IBA Rules on the *Taking of Evidence in International Arbitration*, in principle if a witness is requested to attend for examination and fails to do so, their evidence is treated as inadmissible. Moreover, it is usual in arbitration to record the actual words of the witness's oral testimony, which, in the form of a transcript, become an evidentiary record.

Perhaps the most significant reduction of incentives on witnesses to tell the truth is how opposing witnesses are examined. Arbitrators casually interrupt cross-examination

However, many of the safeguards promoting the reliability of witness evidence that one finds in civil procedure before courts are in arbitration attenuated or missing. The strictures on preparing witnesses are not applied. The reality in arbitration is that direct witness evidence is heavily coached, often beyond the legitimate concerns of efficiency and ensuring that the witness is not overly affected by nervousness and unfamiliarity with the situation. The generalised use of witness statements in international arbitration favours a party's control over its witnesses. At any rate, there is no strict prohibition on asking one's own witnesses leading questions, which happens routinely.

Despite the widespread use of oaths and statements of truth, penalties for untruthfulness are infrequent in arbitration, as contrasted with the serious consequences of perjury before most courts. Swiss arbitration is one of the rare instances where there can be criminal liability for wilful untruthfulness in arbitration testimony, but the enforcement of such liability is vanishingly rare. The absence of the formalism of court premises and attire also signals to witnesses a lack of solemnity requiring no unusual truthfulness. If a witness is aware of the confidentiality of arbitration, this too dampens incentives to tell the truth.

CROSS-EXAMINATION

Perhaps the most significant reduction of incentives on witnesses to tell the truth is how opposing witnesses are examined. Arbitrators casually interrupt cross-examination. Breaks are ordered when examination starts to heat up. Increasingly decisions are made to conduct witness examination remotely, exclusively with an eye to costs and time savings, with diminishing offsetting concern for the ability to observe the witness and how they behave. Even where hearings are physical, witnesses are often placed so far away that it is difficult for arbitrators to assess their demeanour.

In arbitration it seems that there is a general acceptance of the legitimacy of business persons providing an overtly self-interested account of events, and they are not pressed to any extent where demeanour would register.

This phenomenon may be attributed to two factors operating in international arbitration. For one, it is doubtless a by-product of the ethos of consent in ▶

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arbitration. In a somewhat misplaced observance of this ethos, counsel and arbitrators are often reluctant to challenge witnesses and to expose untruthfulness. Secondly, it does seem that it is the product of the civilian law approach to witness examination.

Cross-examination is at the very heart of procedural rights in common law systems. The American Evidence Law professor John Henry Wigmore famously gushed that cross-examination is the "greatest legal engine ever invented for the discovery of truth". The cross-examination Wigmore was referring to is a highly developed and ramified system with rules of exclusion of evidence like the English and Commonwealth rule in *Browne v Dunn*, and, crucially, the role of putting psychological pressure on witnesses to register their demeanour and gauge the firmness of their testimony. Witnesses are placed cheek by jowl with judges who scrutinise their every reaction. Judges do not interrupt cross-examination. Their judgments will generally address the quality of every witness's evidence, and in particular their demeanour as a witness.

QUESTIONING IN CIVILIAN LAW

Wigmore's statement tends to raise a chortle with civilian lawyers. They find it bombastic and archly remark that Americans do fancy their engines. In civilian systems, the judge leads the questioning. The judge will obligingly tender questions to the witness, and patiently and passively listen to most answers. Follow-up questions to explore inconsistencies and unclarity are a distinct rarity. Judges will admonish crass speculation, but are generally impervious to whether or not the witness had direct perception of what they are testifying to.

ABOUT THE AUTHOR

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A party's reliance on the reduced evidentiary standards in arbitration can be severely punished where, contrary to this practice, the arbitrators unexpectedly apply a rigorous common law standard

Once the judge has finished asking all of his or her questions, counsel will be invited to question the witness – first counsel who called the witness, then opposing counsel. The judge will be extremely begrudging in allowing follow-up questions. The impression is generally that the witness has been given the opportunity to express themselves on a subject and whatever they say is self-delimiting.

The judge will orally summarise the testimony for a reporter to enter into the minutes of the examination, which the witness will sign. Usually the questions asked, and, as a rule, the actual words the witness uses and their demeanour in using them, are entirely lost as elements of evidence. Judgments will almost never broach the quality of any witness's evidence.

The common law and its cross-examination distinctly favours the reliability of witness evidence and the judge's ability to assess it. Civilian systems respond to the comparative unreliability of witness evidence by more frequent resort to other sources of evidence, in particular documentary evidence. However, this leaves evidentiary gaps, *vis-à-vis* what prevails in common law systems. In civilian judgments, these tend to be filled with more prominent use of evidential inferences and reliance on the burden of proof to settle evidentiary questions.

ARBITRATION APPROACHES

In arbitration the relaxation of common law rigour in cross-examination generally entails a depreciation in the reliability of witness evidence. Perhaps equally worrisome, a party's reliance on the reduced evidentiary standards in arbitration can be severely punished where, contrary to this practice, the arbitrators unexpectedly apply a rigorous common law standard. The award of the highly distinguished arbitrators that Justice Knowles *in Nigeria v P&ID* recently refused to enforce was powerfully, perhaps conclusively, influenced by the failure of the respondent's counsel in cross-examination to challenge factual assertions in the claimant's quantum claim. It may well have been that, in the informal context of arbitration, the respondent expected a less unitary and purist approach.

It seems by consequence highly advisable for arbitrators at the outset to make clear what their approach will be to witness evidence in view, notably, of the degree to which it is likely to play a prominent role in the arbitration. In doing so, they should account for the parties' expectations as to maximising its reliability and the precision of assessing it. On the whole, there should be heightened concern to ensure the reliability of witness evidence by incorporating appropriate procedural mechanisms, in particular closer adherence to the model of common law cross-examination. There should especially be a sensitivity on all sides to the evidentiary impact of witness demeanour, and awards should address this and the general quality of each witness's evidence. ■

Case note

The Federal Government of Nigeria v Process & Industrial Developments Limited

The London Commercial Court's decision in October 2023 to set aside an award against Nigeria on the basis of fraud in the arbitration process is proof that ADR is not immune to corruption. Khalifah Al Kays Yusuf reports

This case is an exceptional example of an arbitral award being set aside under section 68 of the 1996 Arbitration Act (the "Arbitration Act") due to a series of abusive practices, including bribery and fraud, which had a detrimental impact on the arbitration process and its award.

The dispute arose from a gas supply and processing agreement for Accelerated Gas Development (the "GSPA") between the Federal Government of Nigeria ("Nigeria") and Process & Industrial Developments Limited ("P&ID"), a company registered in the British Virgin Islands.

The US$6.6 billion final award rendered in 2017 was set aside and overturned by the High Court in 2023. According to the High Court judge, the Honourable Mr Justice Robin Knowles CBE, the award was "obtained by fraud".

KEY FACTS

In 2012, P&ID initiated an arbitration process, claiming that Nigeria had failed to perform its obligations under the GSPA. In 2017, the tribunal rendered a final award against Nigeria, finding Nigeria liable to pay US$6.6 billion in compensation. Due to the annual fixed interest rate, the value increased to over US$11 billion in 2023.

Nigeria attempted to set aside the partial award before the English court in 2016, but the application was found to have no merit and was dismissed.

In 2020, Nigeria took P&ID to the High Court, claiming that the award should be dismissed as the GSPA had been procured by fraud. Nigeria was granted an extension of time to challenge the award, relying on new evidence of the allegations of fraud as a strong prima facie case under s.67 and 68 of the Arbitration Act.

The allegations by Nigeria include bribery and corruption before and after the GSPA was entered

Nigeria's lawyers and leading counsels were alleged to have been involved in corrupt acts during the arbitration process

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into, and this also extended to some of Nigeria's lawyers and leading counsels who were alleged to have been involved in corrupt acts during the arbitration process. In turn, P&ID contended that Nigeria's case was "false and dishonest".

In January 2023, the judgment was rendered in favour of Nigeria, finding that: *"...the Awards were obtained by fraud and the Awards were and the way in which they were procured was contrary to public policy"*. A US$11 billion final award against Nigeria was set aside.

ACTS OF CORRUPTION ON THE PART OF P&ID

- A number of payments and wire transfers made between 2008 and 2012 to Mrs Grace Taiga, one of the key Nigerian officials, in order to increase the favourability of the GSPA terms.
- Ongoing bribery of Taiga and her family carried out throughout the arbitration period with a view to prevent the tribunal from uncovering the truth behind the nature of the GSPA.
- Improper and unauthorised access to Nigeria's confidential internal legal documents.
- Allegations of the documents being leaked and forwarded by Nigeria's legal team (forwarded by Mr Adebayo to Mr Brendan Cahill, co-founder of P&ID), which led to P&ID being able to retain and benefit from these documents without authorisation from Nigeria.

THE JUDGMENT

The question before the High Court was whether the allegations made by Nigeria met the requirement of "serious irregularity" to challenge the award under section 68(g) of the English Arbitration Act and establish whether the award was obtained by fraud or the way it was procured was contrary to public policy.

The challenge under section 68 of the Act was successful. The High Court found that the GSPA was obtained through bribery: there was a continued corruption of government officials and improper retention of Nigeria's internal legal documents, which resulted in substantial injustice.

Justice Knowles ruled that the irregularity requirement was supported by the following allegations made by Nigeria.

Firstly, P&ID relied on false evidence. The judge referred to P&ID co-founder Mr Michael Quinn's witness statement on 14 February 2014 in relation to his explanation of "how the GSPA came about". It was not mentioned that between 2009 and 2010 Taiga was given a bribe.

P&ID argued that there was no duty to disclose the existence of payments made before the GSPA was concluded due to the fact that arbitration is adversarial and the Nigerian Arbitration Act does not impose such obligation. Notwithstanding P&ID's argument, according to the judgment Mr Quinn should have been more open and transparent and refrained from dishonesty in his witness statements.

The irregularities above caused substantial injustice to Nigeria and it is likely the award would have reached a different result had the acts of bribery been disclosed to the tribunal

Secondly, P&ID's continued acts of bribery towards Taiga during the arbitration proceedings "to keep her 'on side'" and "to buy her silence about the earlier bribery". The bribes amounted to US$4,900 and included a payment for Taiga's daughter's medical expenses. They were received in July and August 2014 while P&ID was waiting for the award on liability to be rendered by the tribunal.

The judge rejected P&ID's argument that the payments were made for legitimate reasons and affirmed that they showcased the intention of "suppressing" the truth.

Moreover, until early 2019, payments continued to be made even after the final award was rendered. In September 2019, Taiga and Cahill were charged with several offences under Nigerian law, including tax evasion, money laundering and unlicensed trading.

Thirdly, P&ID retained Nigeria's internal legal documents and took advantage of the information contained therein. P&ID managed to improperly obtain Nigeria's legal strategy for the arbitration, including conditions of recommended settlement, that were material to the award.

It was ruled that such retention of documents by P&ID was not authorised and therefore improper.

The irregularities above caused substantial injustice to Nigeria and it is likely the award would have reached a different result had the acts of bribery been disclosed to the tribunal.

"P&ID has the Awards only after and by practising the most severe abuses of the arbitral process," the Honourable Mr Justice Robin Knowles noted in his closing statement.

In his final statement, Justice Knowles posed an important question about arbitration proceedings involving states and public money: *"But, unless accompanied by public visibility or greater scrutiny by arbitrators, how suitable is the process in a case such as this where what is at stake is public money amounting to a material percentage of a state's GDP or budget? Is greater visibility in arbitrations involving a state or state-owned entities part of the answer?"* ■

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Claudia Salomon FCIArb is President of the International Court of Arbitration of the International Chamber of Commerce (ICC Court), the first woman in this role in its 100–year history. Claudia is widely recognized as one of the leading arbitration practitioners of her generation, with more than 25 years' experience representing parties in some of the most complex, high value and significant disputes.

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