The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to **CJCLitigationFundingReview@judiciary.uk**. If you have any questions about the consultation or submission process, please contact **CJC@judiciary.uk**.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	Public
First name:	Guy
Last name:	Pendell
Location:	London, United Kingdom
Role:	Chair, ICC United Kingdom Arbitration and ADR Committee
Job title:	Partner, Solicitor Advocate
Organisation:	ICC United Kingdom
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

ICC United Kingdom
Level 39, One Canada Square, Canary Wharf
London, E14 5AB

CJC Review of Litigation Funding

Consultation Response by the ICC United Kingdom Arbitration and ADR Committee

SUBMISSION

Introduction

This consultation response is submitted to the CJC by the ICC United Kingdom Arbitration and ADR Committee (the "**Committee**").

The International Court of Arbitration of the International Chamber of Commerce ("**ICC**") is the world's leading arbitral institution, established in 1923. The ICC administers a significant number of English (usually London) seated arbitrations each year.

The Committee consists of 50 members of the ICC United Kingdom. It is a consensus-based forum that convenes members and stakeholders to shape international business rules, standards, and policy advocacy.

In responding to the consultation questions, the Committee has limited itself to those questions relating to international arbitration.

Relevant questions

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?

a. If not, why not?

b. If so, which types of dispute and/or form of proceedings should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?

c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

Submission by the Committee

Importance of TPF in arbitration

1. In the experience of the Committee, third party funding ("**TPF**") is used, regularly but not with a high frequency, in English-seated arbitrations, particularly high-value commercial arbitration.

2. Whilst commercial arbitration was widely available before the advent of TPF, the Committee considers that TPF can provide access to justice and equality of arms in cases of need, and thus is an important facility to users of commercial arbitration.

3. London is a leading centre for international arbitration, providing a reliable and effective place for arbitration, alongside several other leading centres around the world. International

arbitration law and practice to a significant degree operates on a transnational basis, and it is beneficial to users for there to be consistency in the practice of international arbitration in the leading centres (and the imposition of additional burdens/restrictions can impact users' choice of seat). Any regulation or reform directed towards any part of international arbitration, therefore, should be considered with that in mind.

TPF in arbitration as opposed to litigation (question 6(a))

4. The Committee would encourage the CJC to consider carefully whether there is any evidence of the need for additional regulation in relation to the use of TPF in international arbitration. Any potential regulation of TPF in arbitration should be considered with careful regard to the particular characteristics of international arbitration. In the view of the Committee, doing so may point in the direction of TPF in arbitration being subject to a different and/or more flexible regulatory regime than TPF in litigation. That is for the following reasons:

5. First, in the experience of the Committee, TPF in arbitration is typically used in sizeable business-to-business disputes (as is the case for the vast majority of international arbitration with any connection to London, England & Wales or the UK as a whole).[1] The Committee has not observed that users of arbitration are likely to suffer from the same vulnerabilities which might apply to claimants in mass and consumer court claims, as discussed in the CJC's Interim Report. Users of TPF in English-seated arbitrations are typically commercial entities, able to access sophisticated legal advice, including advice on their TPF arrangements.[2]

6. Second, there are already differences between TPF in litigation and arbitration, including:

    a. *Disclosure requirements*: Under some[3] (but not all)[4] of the rules of the major arbitral institutions, disclosure requirements relating to funding have been imposed on parties, different to those imposed on parties litigating before the English court, to manage conflicts of interest that TFP may generate. Similarly, the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**") which are widely followed as reflecting market standards emphasize the importance of disclosing relationships with entities that have a direct economic interest, including funders.

    b. *Recovery of funders' fees*: Whilst there is no single costs regime in arbitration, and a wide discretionary power is typically given to arbitral tribunals, there is authority that in English-seated arbitration funders' fees can (subject to various conditions being satisfied, including those fees being incurred necessarily by the claimant and

[1]The minimum headline quantum of most funded arbitral claims is likely to be £10 million, and it is likely the majority will have claim values in excess of this level.

[2]Consumer disputes are not typically subject to arbitration agreements, and arbitration agreements may be unenforceable under consumer legislation based on considerations of value and/or fairness. Arbitration is not used for mass tort claims (since arbitration requires a contract containing an arbitration clause) and is little used for mass or collective actions generally.

[3]Article 11(7) of the ICC Rules (2021), Article 44 of the HKIAC Rules (2018), Rule 38 of the SIAC Rules 2025, Article 13a of the VIAC Rules (2021), Rule 14(1) of the ICSID rules and Article 20(4) of the Danish Institute of Arbitration Rules (2021). The new SIAC Rules 2025 place a particular emphasis on TPF.

[4]The LCIA rules do not mandate third-party funding disclosure, though tribunals may order it under general duties of impartiality and fairness. Similarly, the AAA rules lack explicit requirements, but recent AAA-ICDR amendments encourage discussing third-party funding and funder identity to aid arbitrator disclosures and conflict checks.

reasonable in amount) be recovered as part of adverse costs recovery generally. This recovery in arbitration has been endorsed by two judgments of the English court.[5]

c. *Liability for adverse costs*: Funders can be made the subject of adverse costs orders in litigation, by way of non-party costs orders.[6] However, funders will not be privy to arbitration agreements and section 61 of the Arbitration Act 1996 which deals with awards of costs contains no power to award against a non-party.[7]

7. These divergences have been established by arbitration-specific practice, rules and case law, developed over many years across many different jurisdictions. The Committee considers the CJC should be slow to recommend regulation which affects these, or the wide discretion afforded to arbitrators under the Arbitration Act 1996 and various institutional rules. Moreover, in the Law Commission's recent review of the Arbitration Act 1996, consultees raised disclosure requirements (6(a) above) and adverse costs (6(c) above), but the Law Commission decided to recommend preservation of the *status quo*.

8. Third, if the UK, and London in particular, is to remain a leading centre for international arbitration, great care needs to be taken. Specifically, any regulation impacting the practice of international arbitration in the UK, should not result in the UK becoming less accessible, or being perceived to be a less attractive venue, than other centres for arbitration elsewhere.

9. Fourth, the application and enforcement of regulation of TPF in arbitration, particularly international arbitration, could be highly complex and may result in satellite disputes. There is no requirement for either legal representatives or arbitrators in English-seated arbitrations to be English-qualified lawyers, and they often are not. It is not uncommon in international arbitrations (seated in London and elsewhere) for lawyers to come from, and operate in, different jurisdictions. Litigation funding agreements used in international arbitration are not necessarily subject to English law, nor are disputes under them necessarily resolved in the English courts. Funding is also sometimes provided informally, for example by parties' affiliates. It would be difficult effectively to regulate the use of TPF in arbitration where the only connection with the jurisdiction is the choice of an English seat, or where only one party to the proceedings might find that the effect of TPF regulation impacts them. Indeed, that might inadvertently result in an imbalance between the parties, or their legal counsel.

10. Fifth, the international arbitration market is well placed to self-regulate. Many if not most arbitrations where TPF is deployed are administered by and/or subject to the rules of arbitral institutions and associations such as the ICC, the London Court of International Arbitration, the London Maritime Arbitrators Association, etc. Those bodies are alive to the issues that TPF raises and are well placed to establish bespoke rules for their users, but with rules that apply

[5] *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm); *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm). The arbitrator in *Essar* held that the funder's fee was recoverable as "*other costs*" under section s 59(1)(c) of the Arbitration Act 1996 which refers to "*legal or other costs of the parties*" and the court agreed. Some members of the Committee also have experience of funders' fees being claimed as a standalone head of damage.

[6] Section 51 of the Senior Courts Act 1981.

[7] See also Principle C.4 in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (April 2018), which states that "*[i]n the absence of an express power, in applicable national legislation or procedural rules, a tribunal would lack jurisdiction to issue a costs order against a third-party funder*".

consistently across all jurisdictions.[8] As noted above, many institutional rules already regulate TPF at least in respect of disclosure requirements and the IBA Guidelines already address TPF.

Regulation of TPF in arbitration (question 6(b))

11. The leading regulatory regime for TPF in England (albeit a voluntary one), the Code of Conduct of the Association of Litigation Funders, does not apply to arbitration.[9] The Committee does not have experience of arbitration being outside that code's scope causing any significant issues in practice.

12. The Committee does have experience of the *PACCAR* decision (negatively) affecting TPF in arbitration and considers its impact should be reviewed by the CJC.

Types of arbitration (question 6(c))

13. The Committee has experience of many different types of English-seated commercial arbitration, including international, domestic and trade arbitrations, across a number of industry sectors. As noted above, many of these have developed specific practices under institutional and trade association rules and the Committee feels that the CJC should be cautious imposing regulation that interferes with these arrangements.

14. As noted above, the Committee has not encountered significant volumes of UK consumer arbitration, and no UK consumer arbitrations involving TPF.

15. Investment treaty and public international law arbitration is an important part of the UK legal market. However, in the experience of the Committee these arbitrations are rarely conducted under ICC Arbitration Rules with English seats, however, many of the factors and concerns identified above would also be relevant to the use of TPF in investment treaty and public international law arbitrations too.

For further information

The Committee would be pleased to provide any clarification or further assistance the CJC might require.

[redacted]

27 February 2025

[8]The significance of the practices adopted by different arbitral institutions and organisations was recognised by the Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 at [89]-[91] and [103].

[9]Under its Article 1, the Code of Conduct only applies to court litigation. However, another TPF organisation, the International Litigation Funders Association, has a code also covering arbitration.