

2024
Volume 6, Issue 3



Institute for Transnational Arbitration
ITA IN REVIEW

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The Journal of the Institute for Transnational
Arbitration





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VOL. 6

2024

No. 3

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ITA in Review is

a Publication of the
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BOOK REVIEW:

THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: A CRITICAL APPRAISAL AND PRAGMATIC PROPOSAL BY MOHAMED F. SWEIFY

Reviewed by Nilufar Hossain

I. INTRODUCTION

Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal,¹ presents an insightful and well-crafted analysis of third-party funding that skillfully analyzes some of the industry's challenges. The book explores what Sweify views as fundamental flaws of third-party funding—the risk of claim control by the funder and his perceived shift of arbitration from a forum for justice to a forum for funders' profits. Beginning with a discussion of the historical grounding of third-party funding in access to justice, the author posits that the purported shift of control from a party to the funder is fundamentally at odds with arbitration as a forum of justice. Sweify is careful to underscore that his goal is not to call for the abandonment of third-party funding, but rather to reconceptualize it in a new framework in an effort to minimize claim control issues and protect the fundamental due process interests of funded parties. Sweify's work concludes with practical suggestions for such reform.

II. THE BOOK

This book presents its arguments across six chapters, which are reviewed in sequence below.

Chapter one, entitled *Mapping third party funding*, provides a broad overview of the various forms of sources of financing available for legal disputes. These options, summarized in detail by Sweify, include lawyers' contingency fees, insurance, loans, and assignments. The author also emphasizes that funding must not interfere with

¹ MOHAMED SWEIFY, *THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: A CRITICAL APPRAISAL & PRAGMATIC PROPOSAL* (2023).



fair procedural process or trample on the rights of the funded party who should be treated fairly and equitably.

In Chapter two, which is called *Abandoned promise*, the author contends that third-party arbitration funding in its current form is imperfect and ripe for reform. Sweify considers funding to be at odds with efficiency and fairness that are the hallmarks of arbitration. Notwithstanding the author's criticisms of funding, the chapter is well-balanced. It underscores that the solution to challenges with funding is grounded in reform and not a blanket ban of funding. In addition, Sweify compares arbitration funding to alternative forms of financing—attorney contingency, insurance, loans—and carefully illustrates why arbitration funding may be the superior choice depending on the circumstances.

Chapter three, *A Historical Framework*, examines the historical development of the premodern doctrines of maintenance and champerty through the lens of access to justice. Champerty and maintenance prohibited the involvement of third parties in litigation, including for purposes of providing funding, when those third parties had no connection to the dispute otherwise. Over time, various jurisdictions such as Australia, the United Kingdom, and the United States have relaxed prohibitions against champerty and maintenance which has allowed the third-party funding industry to flourish in those jurisdictions in particular. Sweify provides a well-researched overview of champerty and maintenance in these jurisdictions. He then proceeds to analyze the impact of these doctrines on arbitration in particular with respect to access to justice, efficiency and control of the arbitral proceedings, as well as challenges to the enforcement of awards.

Chapter four, *Asymmetric imbalances*, presents a detailed analysis of disclosure of third-party funding in arbitration. It then proceeds to assess how the disclosure of funding may impact the decision making of arbitrators at various stages of the arbitration—during the proceedings as well as before and after. For example, Sweify discusses how knowledge about the existence of funding might sway an arbitrator's views during the jurisdictional phase or when a party requests security for costs. His



analysis also includes a helpful review of how some courts have addressed funding when choosing to enforce (or not) an arbitral award.

Chapter five, *Regulation calculus*, examines regulatory arguments surrounding third-party funding. Sweify's analysis is comprehensive. First, he presents the arguments for a complete ban of third-party funding in arbitration. He then examines the arguments in favor of funding with existing regulations. Sweify then proceeds with a discussion of funding in the context of more comprehensive regulatory reform. His ultimate conclusion is a helpful one—that regulatory reform of third-party funding should be led by arbitral institutions who are best placed to provide consistency.

Finally, in Chapter six, *Nurturing the promise*, Sweify surveys different definitions of third-party funding. His purpose in doing so is to set the groundwork for proposing his new regulatory framework that is centered around the essential role of arbitral institutions within the third-party funding industry. Sweify acknowledges that his proposal for reform may not be immediately feasible, but stresses that the long-term goal is to arrive at a more “ideal arbitration funding paradigm.”

III. CONCLUSION

Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal provides its readers with substantially more than an overview of third-party funding. Sweify's work is an invaluable contribution towards an understanding of the challenges that funding poses to the normative goals of arbitration—access to justice, due process, and party control.

The book's insights depend, however, on accepting the author's premise that the interests of an arbitral party and those of the funder are necessarily in tension, which in many instances is not the case. Indeed, third-party funding can only grow as an industry and as a more widespread tool for access to justice, if users of third-party funding experience it as helpful to advancing their interests in a particular arbitral dispute, rather than experiencing it as a zero-sum competition between the funded party and the funder. Sophisticated funders recognize the importance of alignment



of interests between the funded party, counsel, and the funder and strive to achieve that with their investments.



NILUFAR HOSSAIN leads Omni Bridgeway's international arbitration investments in the U.S. At Omni Bridgeway, one of the world's largest providers of legal finance, Nilufar works with corporate clients and attorneys globally to source and structure legal investments, conduct and oversee due diligence, and manage funded claims through to resolution, focusing on international arbitration and cross-border litigation and judgment enforcement matters. Nilufar began her legal career practicing with the New York offices of King & Spalding LLP and Freshfields Bruckhaus Deringer LLP. Nilufar received her J.D. from New York University School of Law, her M.A. from Middlebury College, and her B.A. from Harvard College, where she graduated *magna cum laude*.

INSTITUTE FOR TRANSNATIONAL ARBITRATION OF THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

I. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

II. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of



the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a free subscription to ITA's quarterly law journal, *World Arbitration and Mediation Review*, a free subscription to ITA's quarterly newsletter, *News and Notes*, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

III. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

IV. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

V. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary



international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to *ITA in Review*, ITA's law journal edited by ITA's Board of Editors and published in three issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) a listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.



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