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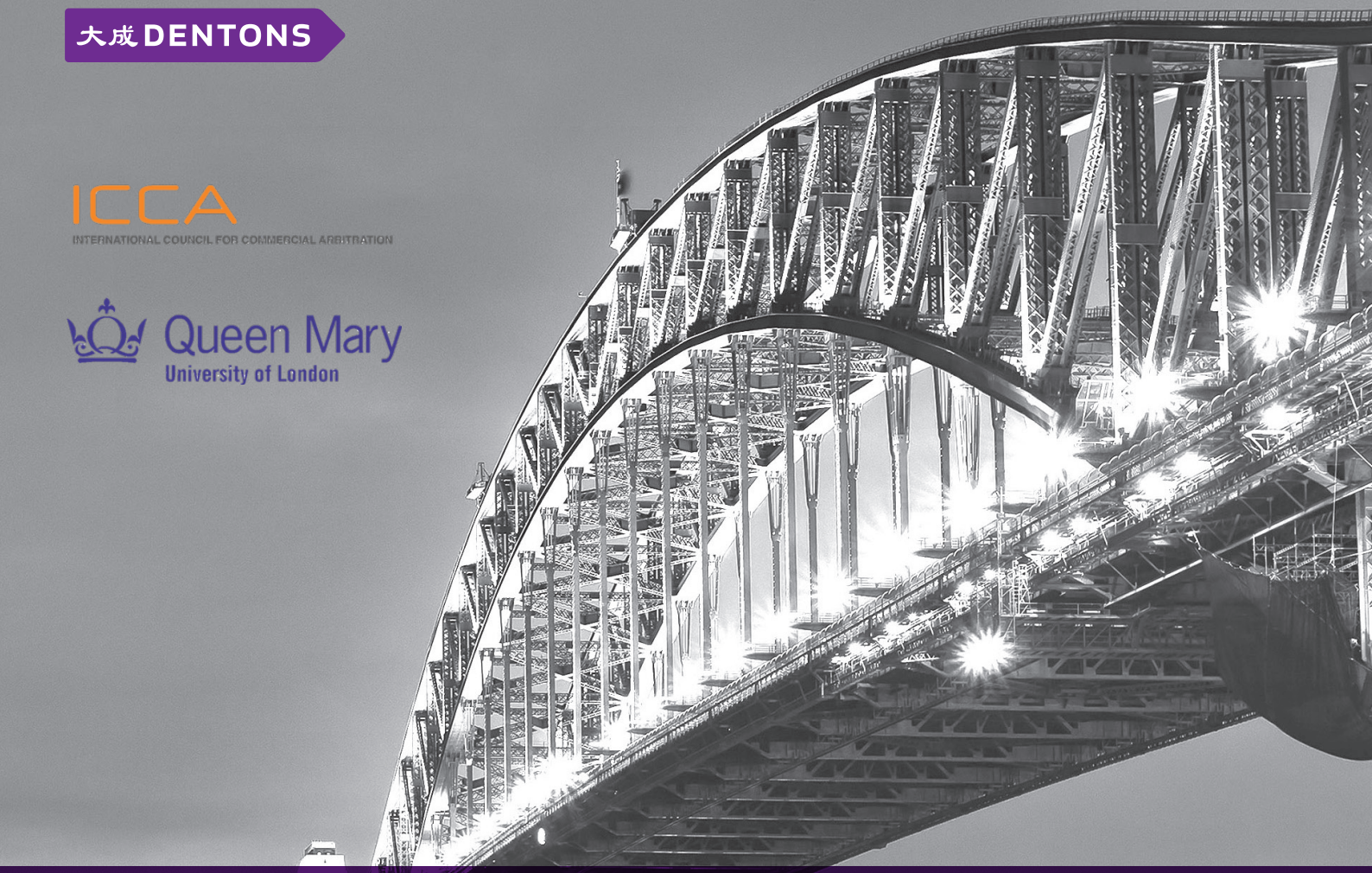

Launch of the ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration

17 April 2018
Sydney

ICCA-Queen Mary Task Force Principles on Third-Party Funding

A. Principles Regarding Disclosure and Conflicts of Interest

A.1. A party and/or its representative should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.
A.2. Arbitrators and arbitral institutions have the authority to expressly request that the parties and their representatives disclose whether they are receiving support from a third-party funder and, if so, the identity of the funder.

A.3. or the purposes of disclosure, the term "third-party funder" refers to any natural or legal person who is not a party to the dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and

b) such support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute.

A.4. In light of any disclosures made regarding the participation of any third-party funder or insurer, arbitrators and arbitral institutions should assess whether any potential conflicts of interest exist between an arbitrator and a third-party funder, and assess the need to make appropriate disclosures or take other appropriate actions that may be required under applicable laws, rules, or Guidelines.

B. Principles Regarding Privilege and Professional Secrecy

B.1. The existence of funding and the identity of a third-party funder is not subject to any legal privilege.

B.2. The specific provisions of a funding agreement may be subject to confidentiality obligations as between the parties, and may include information that is subject to a legal privilege; as a consequence, production of such provisions should only be ordered in exceptional circumstances.

B.3. For information that is determined to be privileged under applicable laws or rules, tribunals should not treat that privilege as waived solely because it was provided by parties or their counsel to a third-party funder for the purpose of obtaining funding or supporting the funding relationship.

B.4. If the funding agreement or information provided to a third-party funder is deemed to be disclosable, the tribunal should permit appropriate redaction, or take other appropriate measures, and limit the purposes for which such information may be used.

C. Principles on Final Award (Allocation) of Costs

C.1. Generally, at the end of an arbitration, recovery of costs should not be denied on the basis that a party seeking costs is funded by a third-party funder.

C.2. When recovery of costs is limited to costs which have been "incurred" or "directly incurred", the obligation of a party to reimburse the funder in the event of a successful outcome is generally sufficient for a tribunal to find that the costs of a funded party come within that limitation.

C.3. The question of whether any of the cost of funding, including a third-party funder's return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure.

C.4. In 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.

D. Principles on Security for Costs

D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.

D.2. The terms of any funding arrangement, including ATE, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights).

D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

Program

Tuesday, 17 April 2018
Sydney, Australia
7:30-8:30am

Welcome:	Jean-Christophe Honlet (Partner and Head of International Arbitration, Dentons, Task Force Member)
Introduction:	Donald Donovan (President, ICCA)
Overview of Report:	Prof. Catherine Rogers and Prof. Stavros Brekoulakis (Co-chairs, Task Force)
Disclosure and Conflicts of Interest:	Audley Sheppard, QC (Task Force Member)
Privilege and Professional Secrecy:	Ania Farren (Task Force Member)
Costs and Security for Costs:	Prof. Julian Lew, QC (Task Force Member)
Third-Party Funding in Investment Arbitration:	Prof. Gabrielle Kaufmann-Kohler (President elect, ICCA)
Questions and Conclusion:	Lawrence Teh (Partner, Dentons)

Overview of the Task Force

Recent years have seen an upsurge in the number of third-party funders, the number of funded cases, the number of law firms working with third-party funders, and the number of reported cases involving issues relating to funding. At the same time, international arbitration is increasingly used not only for disputes between commercial parties, but also disputes between states and commercial parties, and in state-to-state disputes. The participation of states has focused attention on the integrity of the process, with particular emphasis on transparency and arbitrator conflicts of interest. Despite the increased attention on third-party funding, many questions remain, most notably about potential arbitrator conflicts of interest, confidentiality, privilege, costs and security for costs. This seminar will officially launch the final report of the joint Task Force established in 2013 between ICCA and the Institute for Regulation and Ethics, School of International Arbitration, Queen Mary, University of London. The Task Force is made up of arbitrators, counsel, government, academics and third-party funders and has, since its inception, undertaken sustained study and discussion of the key issues arising from third-party funding of arbitration. The Task Force hopes that parties, counsel and arbitrators may reference or invoke the Principles and analysis in its Report to address issues that arise in the course of an arbitration, in entering into a funding agreement, and in continued discussions and debates regarding third-party funding.

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