



James Clanchy  
COMMERCIAL ARBITRATOR

[www.jamesclanchy.com](http://www.jamesclanchy.com)

# Regulation of arbitration: where it comes from, who it is for, and its impact on maritime arbitrators

**James Clanchy, FCIArb**

**ICMA XX, Copenhagen  
CS8, 26 September 2017**

## Why regulate arbitration?

- *Winter is coming*  
Gary Born, in a lecture in New York, May 2016
- *Is it the beginning of the end?*  
Sundaresh Menon, ICCA 2012 opening address, Singapore
- *A cosy community transformed into an ethical no-man's land*  
Catherine A Rogers, Professor of Ethics, Regulation, and the Rule of Law, Queen Mary, University of London  
*Ethics in International Arbitration*, OUP 2014

## The answer: (self-) regulation

- Regulation: a definition

*A sustained and focused attempt to ensure that the conduct of arbitrators, attorneys, experts, and third-party funders comports with ethical standards in order to ensure the fairness of arbitral outcomes*

Catherine A Rogers, *Ethics in International Arbitration*, OUP 2014

- Legislitis: a definition

*A virulent affliction which manifests itself in an involuntary urge to publish A6 booklets of rules, guidelines or principles*

Toby Landau QC, *A Pause for Thought in International Arbitration: The Coming of a New Age?* ICCA Congress Series 17

## Regulation: examples

- SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding, 31 March 2017
  - ‘External Funder’ includes insurers and might extend to FD&D
  - gives power to arbitrators to investigate ‘any funding relationship’ and to order disclosure of funding (club cover?)
  - not to be construed as an approval of funding (or of insurance)
- ICCA-QMUL Task Force on Third Party Funding in Arbitration
  - draft report submitted for public consultation, 1 September 2017
  - contains ‘Principles’ for arbitrations involving TPF
  - definitions of TPF purport to include insurance
  - has a carve out for ‘maritime arbitration’



“Third-party funding raises a host of ethical issues...”

ICCA – QMUL Task Force established in mid-2013



## ICCA – QMUL Task Force: mission

- **Co-chair Catherine Rogers on the Task Force and third-party funding**

- **ICCA:** What makes the work of the Task Force on Third-Party Funding in International Arbitration important?

**Catherine Rogers:** *The law and practice surrounding third-party funding has been called the “climate change” of international arbitration. As always, practice runs ahead of collective understanding of the issues and of regulation (where appropriate). The Task Force brings together academics, practising lawyers, representatives with arbitral institutional experience, governmental policymakers, and leading funders to examine the key issues and make recommendations for how they should be dealt with.*

[NB: no insurers are represented on the Task Force]

## Issues identified by the Task Force

- Conflicts
- Privilege
- Allocation of costs
- Security for costs
- Control
- Tensions between funders, parties, and lawyers

All mundane features of arbitrations supported by insurers and clubs

## Regulation: where it comes from

- The arbitration ethics industry
- Big Law
- The ‘noblesse de robe’
- Investor-state arbitration: cross-contamination
- The silo effect (tunnel vision)
- The Woozle effect (evidence by citation: nonfacts becoming factoids)

## Regulation: who it is for

- Its proponents: symbolic capital
- Arbitral institutions: virtue signalling
- Lawyers
  
- Self?
- Users?
- Arbitration communities?

## Regulation: its impact on maritime arbitrators

- Collateral damage from the drive to regulate TPF
  - SIAC Practice Note for cases involving External Funding
  - notion that arbitral institutions are the guardians of ethics and should be arbitration's police
  - notion that maritime arbitration is of secondary importance
  - driving shipping away from the institutions: reducing choice
- Repeat appointments issue
  - Is it time to revisit the 'smaller or specialised pool of individuals' exemption for maritime arbitration in the IBA Guidelines?
  - Does the maritime arbitration community have an inclusive notion of itself, which recognises its own diversity?

If winter is coming, the answer is *hygge*.

Thank you

<http://jamesclanchy.com>

