

# Third-Party Funding in International Commercial Arbitration: It is About Time for Regulations

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**Abstract:** Third-party funding (TPF) is a species of the common law doctrine of maintenance and champerty. With the burgeoning of global trade, the need for funding arbitral proceeding of high magnitude have witnessed an upward trend. TPF is a method wherein the impecunious party to the dispute enters into a contract with a third-party, who is not a party to the arbitration agreement, to finance the arbitration proceeding and run the risk of either paying or receiving the proceeds, costs, or award awarded against or in favor of such party. TPF, on one hand, provides a gateway to justice to the impecunious party and on the other hand, causes an impediment to the recognition and enforcement mechanism of arbitral awards. TPF flourishes as an alternative to support arbitral proceedings by acting as an investment for the financiers but what impact it has on the market, in the long run, is still unclear. TPF assists the struggling party to appoint highly qualified specialists and a learned arbitrator through financial assistance but restricts the party autonomy and raises justifiable doubts as to the independence and impartiality of the arbitrator due to the leverage the financier holds in such an arrangement. Last but not least, TPF may also, at times, result in the disclosure of attorney-client communication to the financier. The present article is an analytical study of TPF as a mechanism in international commercial arbitration and what challenges it poses to its practice. Moreover, the article places reliance on the work of various scholars, and adopting the inductive approach of reasoning, reflects upon the plausible remedies for challenges that TPF poses to international commercial arbitration.

**Keywords:** Third-Party Funding; Commercial Arbitration; International; Challenges; Regulation.

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Conflict Studies Quarterly

Issue 41, October 2022, pp. 60–77

DOI: 10.24193/csq.41.4

Published First Online: 01 October / 2022

## Setting up the Stage:

### An Introduction to Third-Party Arbitration Funding

The concept of third-party funding (TPF) in international commercial arbitration (ICA) is a novel trend that has swept the international arbitration community on the fence regarding legitimizing its practice while its practice keeps burgeoning among international users. TPF is a phenomenon that holds the potential of getting morphed into mainstream practice in ICA practice. TPF can manifest in many forms, such as contingent or conditional fee arrangement with the attorney, debt instruments, legal proceeding insurance, or a complete transfer of the underlying claim to a third party, consequently, it becomes imperative to have a proper definition to anchor the entire discussion. Nieuwveld and Sahani (2017) have defined TPF as “a financing method in which an entity that is not a party to a particular dispute funds another party’s legal fees or pays an order, award, or judgment rendered against that party, or both” (p. 1). Santos (2017) defined TPF in its general and broad sense as “third-party funding involves an unrelated party providing financial support to a claimholder in order to support litigation or arbitration costs” (p. 918). Whereas Yeoh (2016) has defined TPF narrowly and in light of the third-party funder and not the arrangement itself as “third party funder (TP funder) as (a) a professional person or entity which (b) finances a legal claim or defence in which it has no pre-existing interest, and (c) from which it receives a financial benefit” (p. 116). For the purpose of this article third-party arbitration funding (TPAF) is defined as a method wherein the party to an arbitration agreement enters into a contract with a third-party, who is not a party to the arbitration agreement, to finance the arbitration proceeding and run the risk of either paying or receiving the proceeds, costs, or award awarded against or in favor of such party.

TPF is a species of the common law doctrine of maintenance and champerty. Winfield (1919) in his work pointed out that maintenance and champerty “were known almost exclusively as modes of corruption and oppression in the hands of the King’s officers and other great men” (p. 143). The unleashed sword of the feudal lords upon the distressed peasants was the cause of the development of the doctrine of maintenance and champerty (Cremades, Jr, 2011). In *Campbells Cash and Carry Pty Limited vs. Fostif Pty Limited* (2006, HCA 41 para 68), the High Court of Australia stated:

“The law of maintenance and champerty has been traced to the Statute of Westminster the First (3 Edw I c 25) of 1275. Some trace it back to Greek law and Roman law. Be this as it may, Coke identified maintenance as an offence at common law and champerty was a particular species of maintenance. Although traditionally identified as a common law offence, several early statutes are understood as affirming or declaring that common law...”

Maintenance is the act of financially supporting a stranger’s lawsuit and when such financial support is done with the intention of receiving financial gain from the judgment

in such a lawsuit it is called champerty. The doctrine of maintenance and champerty is founded upon public policy; it is to ensure the proper administration of justice by protecting the defendant from a legal proceeding that is against the public policy (*Giles v Thompson*, 1993, 2 W.L.R. 908). With the evolution of the social structure and the legal system around the globe, the doctrine of maintenance and champerty are no longer considered an offense under major common law legal systems including England, Australia, and others. Moreover, Major jurisdictions have even abolished maintenance and champerty as a tortious claim under certain instances, such as access to justice to the impecunious party, and administration of justice (*Campbells Cash and Carry Pty Limited vs. Fostif Pty Limited*, 2006, HCA 41; *Giles vs. Thompson*, 1993, 2 W.L.R. 908). Lastly, the doctrine of maintenance and champerty is not applicable to arbitration proceedings (*Unruh vs. Seeberger*, 2007, 2 HKC 609).

Notwithstanding the expedited and final award rendered in an arbitral proceeding, there is an actual fear mounting around the costs of arbitral proceedings, the cost of the arbitrators, the fee of the institution, and over and above all these fees is the stupendous legal representation fee of the attorneys. As per the White and case LLP, International Arbitration Survey (2018), 'Cost' continues to be seen as arbitration's worst feature, followed by 'lack of effective sanctions during the arbitral process', 'lack of power in relation to third parties' and 'lack of speed'. The market for TPF has escalated by over five hundred percent in the last decade (Delaney, 2014). And the factors which influenced the increase in the demand for dispute funding are, according to Nieuwveld and Sahani (2017):

- a. Increasing access to justice.
- b. Companies pursuing a means to seek a meritorious claim without affecting its cash flow to conduct usual business.
- c. Worldwide market turbulence and uncertainty.
- d. Third-party funding arrangements operating as means of raising capital for general operating expenses or the meet new business agendas.
- e. Enabling companies that are facing bankruptcy to seek funding in order to generate cash flow for their business.

In the recent few years, there has been a shift in the perception of the international users regarding adopting TPF to finance ICA, whereas earlier the users were reluctant to adopt TPF but now there is acceptance of TPF among the users (Messina, 2019). However, many prospective parties to ICA do not fully understand the trend of TPAF, that is, what advantages TPAF offers, what are the challenges it entails and how best to tackle such issues? Consequently, it becomes imperative to conduct a detailed study of TPF in ICA in order to make aware the prospective parties regarding TPAF and how to best tackle the challenges posed by TPAF.

The article is divided into three parts reflecting the dichotomy of good and evil in the practice of TPF in ICA and how to expel the prevailing evils in the practice of TPF in ICA. The first part encompasses the benefits of TPF in ICA, the second part deals with the challenges that third party poses to ICA, and lastly how to address the issues which TPF presents in ICA. Followed by a conclusion and future outlook.

### **The Good Samaritan: Benefits of Third-Party Arbitration Funding**

The TP funder is the good Samaritan, who assists the party in need of financial or legal aid to conduct an arbitration proceeding. TPAF offers a few primary benefits which make it an alluring option for the parties to an arbitration proceeding. Generally, the foremost advantage of TPF is that it increases access to justice for the parties who cannot otherwise afford to maintain a meritorious claim (Khouri *et al.*, 2011; Santos, 2017; Messina, 2019). The costs surrounding an international commercial arbitration tend to increase and the argument that arbitration is a less expensive alternative to litigation does not necessarily stand true (Coomber, 2017; Trusz, 2013). The various fees associated with arbitration proceedings places a substantial burden on the parties, such as administrative fees of the arbitral institution, attorney fee, expert evidence fees, and, last but not least, the compensation of the arbitrators appointed to resolve the dispute. These escalated costs can consequently erect a financial obstacle and act as catalysts aggravating impediments to access arbitration. TPF allows the party to an international commercial arbitration involving multi-million dollar claims to shift the burden of cost and the risk of loss upon the TP funder. In pertinence to it, TPF especially appeals to two types of parties: first, the impecunious party, and second, the financially stable entities.

On the face of it, TPAF might assist impecunious or disadvantaged parties to an arbitration agreement. There is no doubt that when disputants are in a balanced situation, in terms of the size and sum at risk, and the availability of funds in the hands of the disputants, a battle of equals can take place. On the flip side, the battle might become a David-and-Goliath fight when one party is disadvantaged due to a dearth of resources and funds in contrast to the opponent and it is imperative for the former party to initiate arbitral proceedings to redeem his right (Goeler, 2016). Considering such a setting, despite a concrete case, a dearth of monies might prevent the disadvantaged party to access arbitration (Bogart, 2013). Thus, in such cases, TPF allows the disadvantaged party to level up and compete against his opponent, fostering access to justice. Analyzing funding arrangements in such situations it is axiomatic that TPF arrangement promotes access to justice because it is better to share the pie with the funder than to have no pie at all, that is, it is beneficial for the impecunious party to recover some part of the damages than to recover nothing at all.

The funder who invests his money in the claim of the funded party does so only after doing his due diligence on the ability of the claim to reap the benefit the funder seeks. The funder in order to ensure a likable outcome provides quality legal assistance, expert advice having the required skill sets and experience which the disadvantaged party would not be able to obtain themselves. Getting access to such legal assistance, expert opinion, and experienced arbitrators levels the playing field and increases the odds of a favorable case (Yeoh, 2016).

TPF may also be beneficial for entities with sufficient resources opting for alternative options to fund their arbitration proceeding (Goeler, 2016). Entities having sufficient business and cash flows intend to reasonably manage the risk involved in arbitration of high magnitude by seeking external financial support. In fact, the claimant might be ambivalent to allocate funds for initiating and conducting the arbitral proceeding. It is since the arbitral proceeding is a highly uncertain event and might turn out to be a prolonged struggle to recover alleged damages. Taking the assistance of TPF allows the claimant to allocate the risk and burden of high costs relating to the claim sought in the arbitral proceeding upon the funder. Thus, TPF is an alluring option for an established business due to its risk management and financial support abilities.

### **A Bad Omen:**

#### **Challenges Posed by Third-Party Arbitration Funding**

Upon the deconstruction of the TPF arrangement, it comes to light that a third person who is not a signatory to the arbitration agreement acquires an interest in the outcome of the arbitration proceeding. Such interest in the arbitral claim by an external entity is associated with certain risks that TPF brings to ICA (Yeoh, 2016; Santos, 2017; Messina, 2019). The funder does not invest out of love or affection or as a philanthropist but for the generation of wealth, as that is the way the cookie crumbles. The funder entering into an agreement with the party to an arbitration agreement is considered a bad omen for the arbitral proceeding and the enforceability of the award due to the inherent risks which are associated with TPF arrangements. The major challenges that TPF poses to the arbitral process and the recognition and enforcement of the awards are important for the clients and their lawyers to understand to facilitate an informed decision and whether to enter into such TPF agreements at all. The major challenges posed by TPF in ICA can be broadly classified into five categories: a) unfair terms and dominance over the claim; b) conflict of interest; c) frivolous claims and discourage settlements; d) disclosure of TPF agreements and the concern of costs; e) the concern of confidentiality and breach of privilege.

#### **Unfair Terms and Dominance Over the claim**

Before the funder enters into a TPF arrangement with the claimant, the funder conducts due diligence on the claim, and if found suitable for investment, negotiates with

the claimant the terms of the TPF agreement. Due to the funder's financial advantage, the funder has substantial leverage in the negotiation process and could consequently overexercise its leverage by adopting unfair terms in the TPF agreement, such as appropriating disproportionate share, seeking control over the arbitral proceeding at various stages, recommending the counsel and others (Yeoh, 2016; Santos, 2017).

As it is correctly pointed out in the famous proverb, 'he who pays the piper calls the tune', something very similar might be seen in a TPF arrangement between the funder and the claimant. The interest of the funder rests on the success of the arbitral proceeding, there might be temptations for the funder to control the proceeding and impose its view at different stages of the proceeding (Bertrand, 2011). The given situation is exacerbated by the role of the funder in recommending the counsel for selection, who will represent the claimant in the arbitration proceeding (Yeoh, 2016). Moreover, the claimant's lawyer may side with the funder in influencing the claimant's decisions because of the possibility of recurrent business from the funder (Yeoh, 2016).

There is also a possibility that the funder might assist the claimant in the selection of the arbitrator, though it is not axiomatic that such assistance will be improperly exercised as the interest of the funder rests upon a favorable outcome of the dispute. Furthermore, such assistance is welcomed if the claimant is inexperienced in the procedure of appointment; the claimant may actually benefit from such conduct. However, the disclosure of involvement of the TP funder by the claimant or the appointed arbitrator still exists in such cases (Beechey, 2019).

### **Conflict of Interest**

It is a globally recognized principle of commercial arbitration that the arbitrators appointed to adjudicate the dispute between the disputants must be independent and impartial (United Nations Commissions on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration, 1985). The principle of independence and impartiality is also reflected in all institutional rules (See LCIA Rules, Art. 10 (1) and (3); ICC Rules 2012, Art. 14 (1); UNCITRAL Rules 2010, Art. 12; SIAC Rules 2010, Art. 11 (1); HKIAC Rules, Art. 11 (4)), moreover, the institutional rules require the arbitrator to disclose all grounds that could reasonably be construed as grounds for disqualification. The International Bar Association (IBA) on the 22<sup>nd</sup> of May 2014, issued color-coded guidelines for determining the existence of justifiable doubts as to the independence and impartiality of an arbitrator, though not binding but can be used around the world (International Bar Association, 2014).

Let us consider a hypothetical yet plausible situation; a party 'Mr. X' appoints an international acclaimed arbitrator 'Mr. Y' for resolution of the dispute. Mr. Y is also the attorney for the company 'Co. Z' and represents Co. Z in several of its legal recourses. Co. Z is funding the claim of Mr. X, whereas Mr. Y who is the attorney of Co. Z is acting

as an arbitrator. There is clearly a conflict of interest on part of Mr. Y, who is serving as an attorney for Co. Z, as well as the arbitrator in a dispute in which Co. Z has a direct financial interest. The opponent upon the knowledge of such a conflict of interest can challenge the appointment of the arbitrator, causing a delay in the resolution of the dispute.

Similar circumstances can be born in different settings, such as an attorney from the same law firm that represents the funded party as well as the funder acts as an arbitrator in an arbitral proceeding funded by the same funder, such circumstances can lead to a slippery slope for the arbitral proceeding by calling into question the independence and impartiality of the arbitrator and consequently jeopardizing the entire arbitral process (Yeoh, 2016).

The consequences of a conflict of interest between the party or arbitrator and the funder can put the efficiency of ICA at risk. Conflict of interest can lead to challenging the composition of the arbitral tribunal on the ground of a lack of independence and impartiality. That will cause undue delay and may even increase the cost of the arbitration. Moreover, the award by such an arbitrator can even be set aside under Article V(2) of the New York Convention.

### **Frivolous Claims and Discourage Settlements**

In contrast to the benefit of the TPF arrangement of access to justice, the TPF arrangement also opens the flood gates to frivolous claims (Clanchy, 2017). When a party has the opportunity to fund its dispute — which otherwise he would not have pursued — it encourages trivial claims. Having said that, the argument that funding instigates frivolous claims lacks merit as the funder acts as a gatekeeper filtering frivolous claims because it is the money of the funder which is at risk and the funder would rather discard such frivolous claims than encourage them. Moreover, Santos in her work (2017) reflected that on average only 5 to 10 percent of all cases are finally funded.

Further, it can be argued that TPF discourages possible settlement of the claim. It is due to the shift in the financial risk concerning the claim to the funder, and thus the funded party becomes disinterested in a settlement. That being said, in practice it illuminates just the opposite.

As the popular adage states, time is money. It is actually in the interest of the funder to settle the dispute fast, in order to claim its interest in the dispute than to wait for a long and unpredictable outcome of the proceeding. The risk of non-enforceability of the awards reinforces the swift settlement of the claim by the funder. Consequently, in a funding arrangement settlement of the dispute is encouraged rather than discouraged. Though a more important question appears at this junction, that is, what appears to be a 'swift settlement' in view of the funder might not always be considered an 'acceptable

settlement' by the funded party, reflecting the adverse control of the funder of the claim specifically regarding the final say on the settlement (Khoury *et al.*, 2011; Santos, 2017).

### **Disclosure of Third-Party Funding Agreements and the Concern of Costs**

The major concern that surfaces in a funded arbitral proceeding is the lack of knowledge regarding the proceeding being funded by an external third party due to which the issue of conflict of interest might arise. One of the fundamental principles of arbitration is the independence and impartiality of the arbitral tribunal and upon the involvement of the funder, this principle is at risk of being jeopardized. Moreover, there exist concerns regarding the solvency of the funded party and its ability to pay costs or award passed against it. Disclosure of TPF arrangements to the tribunal or to the opponent is not an issue in itself but forms a substantial part of the issue of the efficacy of the arbitral proceeding and its outcome, in terms of, whether the arbitral tribunal has the power to direct the parties to disclose the existence of a TPF agreement and whether the tribunal has the power to order security for costs in a third-party funded arbitral proceeding against the funder?

Primarily the question of when a TPF agreement can be disclosed to a stranger or third-party rests upon the terms consented by the funded-party and the funder of a TPAF agreement (Khoury *et al.*, 2011; Santos, 2017). Until the advent of the International Chamber of Commerce Arbitration Rules, 2021, there exist no proper rules of the premier arbitration institutes providing for disclosure of funding arrangements by the parties. However, the non-funded party may get to know about the funding during the arbitral proceeding, either during the due-diligence stage, the case management stage, the negotiation stage, or at any later stage of the proceeding.

The arbitral tribunal possesses the power to grant security for cost, the tribunal exercises its discretion in deciding when to impose such orders as there exists no uniform rule promulgated in this regard to this day (Brekoulakis *et al.*, 2017). The tribunal exercises its power with caution and after doing its due diligence on the financial condition of the party against whom it intends to pass such security for costs order. If the tribunal is of the opinion that the party to the proceeding would be unable to pay the substantial prospective award monies if passed against such party, the burden of proving the contrary lies on such party and the tribunal may pass an order for security for costs.

With respect to TPF arrangement, a typical scenario may arise; an impecunious party enters into a funding agreement with a giant funding firm to financially support its arbitral claim with a provision that the funder is not liable for adverse cost orders. In such an instance, it seems that the impecunious party will be unable to remit the adverse cost order justifying the order of the tribunal for security for costs. Due to such circumstances, it is generally asserted, that to protect the respondent's right, the mere presence of a funder should justify an order of security for costs (Scherer, 2013).

However, such an argument is not always meritorious, as it is well known that not only do impecunious parties enter into a funding agreement but is also well sought after by solvent parties as a funding alternative. As per the draft report of the International Council for Commercial Arbitration and Queens Mary University London Task Force on TPF (Brekoulakis *et al.*, 2017), “third-party funding is increasingly used by large, solvent companies that simply wish to share risk and maintain liquidity [...]. It is thus suggested that applications for security for costs [...] should be determined irrespective of any funding arrangement, and on the basis of impecuniousness” (p. 180).

Moreover, once all the substantial questions pertaining to the disputes are dealt with by the tribunal the question of costs subsequently occupies the mind of the tribunal. On whom to impose the costs? Generally, the rule is that the cost follows the event unless for special reasons the tribunal decides otherwise. That means the unsuccessful party to the arbitral proceedings pays the cost of the proceedings of the successful party unless the circumstances of the case speak otherwise. In this context, the major discourse is regarding, whether the mere existence of TPF should be a considerable factor in determining and computing the costs in an arbitration proceeding?

In a leading English case of *Essar v. Norscot* (2016, EWHC 2361, Comm), the English court directed Essar to pay the costs including the amount Norscot owed to his funder as per the funding agreement. Although, *Essar v. Norscot* case is a peculiar dictum resulting due to the unacceptable conduct of Essar. The issue of ownership of the claim from the perspective of the funder persists and raises impediments in ICA.

### **The Concern of Confidentiality and Breach of Privilege**

Confidentiality is one of the tenets of international commercial arbitration. Confidentiality in arbitration — operates with some exceptions — ensures that the documents, communications, and information pertaining to the arbitral proceeding are kept private between the parties to the arbitration and the tribunal and thus shall not be disclosed to any third person. The party seeking funding in an arbitral proceeding when submitting the case to any potential and prospective funder might jeopardize the confidentiality of the arbitral process (Goeler, 2016). As the funder would only be interested in investing in the arbitral proceeding after successfully vetting the claim — including the arbitration clause or agreement, the composition of the tribunal, the law applicable, the seat of arbitration, the contract itself and any other documents relating to the claim — and concluding such claim to be an investment-worthy claim. Such a process of due diligence violates the tenet of confidentiality of arbitration proceedings due to an analogy that the funder is not a signatory to the arbitration agreement, consequently not bound by the confidentiality clause (if any) between the parties to the arbitration agreement but still provided access to documents and other information pertaining to the arbitration. Such disclosure of information to the funder may lead to horrendous repercussions for

the non-funded party as the funder may utilize the acquired information to the detriment of the non-funded party in any other legal face-off between them (Goeler, 2016).

Another concern that takes birth due to the disclosure of confidential information pertaining to the arbitral proceeding to the funder is the breach of attorney-client privilege. The funder upon investing in the claim gets skin in the game and consequently, the funded party may require to disclose certain privileged communication to the funder (Messina, 2019) There may be communication between the funder and the funded party, and/or the funded party's lawyer regarding the claim which blurs the lines of attorney-client privilege under the professional code of conduct. The funder might receive from the funded party certain privileged documents prepared by the funded party lawyer diluting the sacred attorney-client privilege.

### **Exorcism of Third-party Arbitration Funding Challenges: How Best Addressed**

Funding arbitral proceeding is not scarce nowadays in the global market of budding financial firms and stupendous investment companies looking to expand their portfolio by diversifying their investment. Investment in arbitration proceedings can be lucrative subject to the funder having conducted the due diligence of the claim appropriately. The claimant might be seeking funding either to avert legal expenditure on the company's account or it does not have sufficient resources to sustain a legal proceeding without jeopardizing its assets. At a preliminary stage, apart from the due diligence conducted by the funder of the claim, there is nothing that prevents a party from funding its claim. The downside of utilizing TPF in ICA arises either during the arbitral proceeding or at the stage of enforcement of the award. Such a situation is due to the lack of regulations on TPAF which results in multifarious challenges in the arbitral process as well as in the execution of the arbitral award. The exorcism of the challenges posed by TPF in ICA is imperative to ensure access to justice for the impecunious parties and the convenience of mitigating the risks involved in maintaining an expensive legal proceeding for financially sufficient parties. The following questions are drawn up in order to address the challenges posed by TPF in ICA effectively.

#### **How to restrict the funder from using its dominant position as leverage for having unfair terms in the funding agreement with the claimant?**

Due to the asymmetric bargaining structure of the TPF agreements, there is a high risk of exploitation of the party seeking funding by the funder. The funder may strong-arm the claimant into an unfair agreement, seeking 50% or more than 50% of the award in the event of success and escaping scot-free in the event of defeat. Nevertheless, if a pragmatic approach is taken, such lopsided TPF agreements manifest only in worst-case scenarios of getting an award for less amount because the profits are based on a

fixed sum and not on the percentage of the award (Yeoh, 2016). In contrast, there are the best-case scenario TPF agreement terms, where the funder would be entitled to only 5% to 6% of the award (Parloff, 2012). More commonly, the funder would seek somewhere between the range of 20% to 40% of the award (Veljanovski, 2011). Due to the fact, that the funders also rely on the goodwill and constant cooperation of the funded party (Khouri *et al.*, 2011), as well as, conscious of the downside of acquiring more than half of the award value, which brings along with it demotivated and un-concerned party.

In *Dymocks Franchise Systems (NSW) Ltd v. Todd* (2004, 1 WLR 2807 pp. 2815) the court held that “Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs”. In *Arkin v. Borchard Lines Ltd & Ors* (2005, EWCA Civ 655) the court held that if “a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party’s costs without limit should the claim fail”. Moreover, in *Excalibur Ventures v. Texas Keystone & Ors.* (2016, EWCA Civ 1141), the United Kingdom court of appeal upheld the order of adverse cost on the funders — even though the funders were not a party to the appeal — on the ground of the ‘follow the fortunes’ approach. The United Kingdom judicial approach is unambitious, an excessive financial interest or substantial control of the conduct of a case or dispute results in roping the funder in cost orders against the funded party. Thus, the funder shall exercise adequate control over the claim, including due diligence and monitoring the case once initiated. However, unlike the national courts, the arbitral tribunals do not have the authority to impose costs on third parties including funders (Ramesh, 2020). But if a funder exercises complete control of the conduct of the arbitration proceeding it would fall foul of the public considerations, consequently rendering the arbitration funding agreement champertous thus allowing the court to intervene and impose costs on the funders.

The party seeking funding shall at all times be aware of its rights while entering into a funding agreement. The risk of unfair terms can be minimized and mitigated by seeking legal advice on the arbitration funding agreement from an attorney who practices in the area of TPF and making sure that the contract is diligently drafted and is clear of all ambiguities. Moreover, the party seeking funding shall explore the market for potential prospective third-party funders, it indirectly safeguards the party from signing an unfavorable arbitration funding agreement, as well as provides them with more options and even leverage to negotiate better terms. Further, the question of unfair terms can be answered by bringing in some regulations on TPAF or by strengthening the self-regulated model of TPAF.

## **How to avert the conflict of interest of the arbitrator(s) in a funded arbitration proceeding?**

As already pointed out herein above (under conflict of interest), the importance of independence and impartiality of an arbitrator is securing the outcome of arbitral proceedings. The involvement of a TP funder undoubtedly affects the integrity of arbitral proceedings, and it is precisely due to this that the fabric of international arbitration shall be kept well-knit and spotless by elimination of any conflict of interest of the arbitrator(s) with the funder or the funded party.

In response to the various questions raised by the practitioners as well as the academicians pertaining to the conflict of interests of the arbitrator(s) in a funded arbitral proceeding, the IBA in its 2014 guidelines on conflicts of interest in international arbitration included a third-party funder within the identity of a party to the arbitration proceeding (International Bar Association, r6b (2014)). The IBA guidelines first state that the arbitrator shall be independent and impartial throughout the proceeding (International Bar Association, r1, 2014) if the arbitrator has any reason to believe that there are any conflicts of interest between him or her and the party to the proceeding, the arbitrator shall decline to accept an appointment (International Bar Association, r2a, 2014), but if the arbitrator is not of the opinion of any conflicts of interest and accepts the appointment, he shall disclose any or all facts or circumstance which might raise a justifiable doubt as to his or her independence and impartiality in the mind of the parties to the proceeding (International Bar Association, r3a, 2014). Lastly, the arbitrator has a duty to conduct a reasonable inquiry to identify any possible conflicts of interest or of any facts or circumstances which may jeopardize his ability to act independently and impartially in the eyes of the parties (International Bar Association, r7d, 2014). As per the prevailing market practice, whenever any partner or an associate of a large legal firm takes up the role of an arbitrator, a conflict-mail is circulated in the firm requiring the members of the firm to disclose if they are representing or currently in business with either of the party to the arbitral proceeding, such internal practice of the firms helps them avoid conflicts of interest beforehand.

Thus, by reading IBA rules together, the inference is drawn that if one of the parties to the arbitration proceeding is being funded by a legal entity or a third person having a financial interest in the outcome of the arbitration proceeding and the arbitrator is aware of the involvement of the funder due to the fact, the arbitrator is a partner/associate of the legal firm representing the funder in its other matters or otherwise representation of like nature, the arbitrator shall not accept the appointment. However, if the arbitrator is aware of the involvement of a represented funder in the arbitration proceeding but is of the opinion that such representation does not affect his or her ability to act independently and impartially, the arbitrator shall disclose such facts and circumstances to the parties at the earliest possible opportunity. Such early disclosure will ensure the

integrity of the arbitral process and will avert objections at a later stage regarding any conflicts of interest of the arbitrator(s) with the funded party or the funder.

Disclosure of the TPF agreement may help avoid the harsh repercussions while maintaining the independence and impartiality of the arbitrator consequently avoiding delays and the inconvenience of finding a replacement arbitrator (Yeoh, 2016). Beechey (2019) in his work is also inclined toward disclosure of the relationship between the funder and the arbitrator at the stage of appointment of the arbitrator or during the course to avoid objections pertaining to the independence and impartiality of the arbitrator, however, he also raises the issue of practicality over theoretical articulation. Goldstein (2011), as well as Trusz (2013), have proposed that TPF agreements should be disclosed to eliminate the possibility of occurrence or perception of conflicts of interest. Stoyanov and Owczarek (2015) favor disclosure of funding agreements as a starting point to avoid conflicts of interest and point toward express disclosure requirements. Keeping in mind the IBA guidelines as well as the opinions of the various authors expressed herein above it is safe to induce the assertion that the arbitrator should at the earliest possible opportunity disclose the existence of his relationship with any third-party or legal entity that might be interested in the outcome of the arbitral proceedings in order to avert any conflicts of interest of the arbitrator in a funded arbitration proceeding.

### **How to ensure that the funder does not have the final say in respect of a settlement that is not acceptable to the funded party?**

The remedy to the issue of who has the final say in respect of a settlement is a no-brainer, the TPF agreement shall include a clause vesting the party to the arbitration with the right to make the last and final decision in respect to any possible settlement to the dispute. However, with the leverage that the funder possesses in the negotiation stage, it is almost next to impossible to make that bargain. It might only happen when the party seeking funding has an immaculate claim and a plate full of funders to select from for funding. Khouri *et al.* (2011) and Santos (2017) are also of the opinion that conflicts pertaining to whether or not to settle can be addressed by the parties beforehand in the funding agreement. The next best possible remedy would be to have a reference clause. That is to say, if the funder and the funded party reach an impasse regarding the question of settlement, the question shall be decided by a neutral third person (who shall be an attorney not related to both, the funder and the funded party) and its decision shall be final. Such a reference clause would also eliminate the possibility raised by Khouri *et al.* (2011) of the funded party's lawyer acting in favor of the funder due to the incentive of repeat business. The true solution lies in the agreement between the funder and the funded party.

## **When should the existence of a funder be disclosed to the arbitral tribunal and the opposite party?**

Having shed sufficient light on the challenges posed by TPF in ICA, it is imperative to address the elephant in the room, that is, the issue of disclosure by the funded party of TPF agreement to the tribunal as well as the opposite party. There arise multifarious questions pertaining to the disclosure of TPF agreements — raised herein above under the sub-heading ‘disclosure of third-party funding agreements and the concern of costs’ — that being said, the scope of this part of the article is limited to only the timing of disclosure. The study of the issue of disclosure of TPF agreements in ICA needs a systematic investigation. In a funded arbitral proceeding, the disclosure of TPF agreement can be done piecemeal. The existence of a funder might come to light at the stage of appointment of the arbitrator, whereas the arbitrator was aware of funding and disclosed it to avoid conflicts of interest. However, if the arbitrator was in dark regarding the existence of funding, the funding can be disclosed at any later stage of the arbitral proceeding either impliedly through the conduct of the funded party, or through an express disclosure by the funded party. Moreover, if the tribunal and the other party suspect that there exists a funder due to the conduct of the funded party, the tribunal or the other party can seek disclosure of the funding agreement. Such implied or express disclosure by the funded party affects the decisions of the court regarding the security for costs orders and/or the final costs awarded. Furthermore, another circumstance can arise where one of the parties who was not funded at the time of the commencement of the arbitral proceeding but later secured TPF. Be that as it may, the burning question that needs to be addressed is when should the existence of a funder be disclosed to the arbitral tribunal and the opposite party?

The IBA in its guidelines on conflicts of interests in international arbitration provides that the party shall at its own initiative and at the earliest possible opportunity intimate the arbitral tribunal, the other parties, and the arbitral institution or the appointing authority (if any), of any relationship whether direct or indirect, between the arbitrator(s) and the party or entity having a direct financial interest in the award to be rendered in the arbitral proceeding, and the party shall perform reasonable inquiries, and provide any relevant information regarding such relationship available to the party (International Bar Association, r7a & r7c, 2014). A person or body corporate providing funding for the arbitral proceeding is said to be an entity having a direct financial interest in the prospective award (International Bar Association, Explanation r7a, 2014). These rules read together suggest that the funded party has a duty or is under an obligation to disclose to the arbitral tribunal and the other party the presence of a funder in the arbitration to ensure the integrity and efficacy of ICA. Nevertheless, these rules of IBA are not binding but merely persuasive.

Yeoh (2016) suggests that merely disclosure of the presence of TPF, without elaborating on the details of the TPF agreement, at the earliest notice would suffice to protect the integrity of the arbitration. As per the Queen Mary University of London and White & Case LLP, 2015 International Arbitration Survey on Improvements and Innovations in International Arbitration, 76% of the respondents were in support of disclosure of the use of TPAF (Queen Mary University of London and White & Case LLP, (2015)). Beechey (2019) similarly asserts that the funded party is required to make a disclosure of the TPF agreement at the earliest possible juncture. While Stoyanov and Owczarek (2015) argue that the TPF agreement should be disclosed as soon as the funding arrangement is entered into with the funder. These authors weigh heavily in favor of a disclosure regime of TPF where the funded party should disclose the existence of an arbitration funding agreement at the earliest possible opportunity. The earliest possible opportunity should be the stage of appointment of the arbitrator(s) or before the framing of the issues in order to avoid any perceived conflicts of issues and clarify the tribunal's concerns regarding costs-related orders. In absence of any mandatory disclosure regulations, the funded party is required to disclose voluntarily as per the terms of the funding agreements (Messina, 2019), but Stoyanov and Owczarek (2015) argue that in regard to the potential consequences of disclosure upon an arbitral claim, voluntary disclosure would be unlikely in the absence of express regulations. In contrast to such an argument, Fuchs and Richman (2020) assert that till the time domestic laws come into place, voluntary disclosure of TPF agreements may become more common in the near future to pre-empt any substantial enforcement issues. Disclosure of arbitration funding at the earliest possible opportunity by the funded party should be mandatory rather than discretionary.

### **Conclusion and Future Outlook**

The trend of funding arbitration proceedings in ICA has come to stay for good and not to get lost in oblivion. The practice of funding arbitral proceedings in ICA has done some good, some bad, and some ugly. TPF is a means to mitigate the risk for a few or access to justice for others. It is beyond any doubt that TPAF poses challenges in ICA, however, these challenges are not insurmountable and can be addressed effectively through appropriate regulations, several attempts to address such challenges are already in place. Jurisdictions like Singapore and Hong Kong have taken the approach to expressly regulate TPAF, whereas the United Kingdom, France, and Switzerland foster a self-regulation approach. There exists no uniform practice for regulating TPAF in ICA globally. The need of the hour is to at least have a global or majority consensus in respect of whether there should be regulations or not to regulate TPAF in ICA.

Khouri *et al.* (2011) conclude their work by pointing toward the challenge of striking the right balance between the interest of the claimants and the funder so as to indicate

the mutuality of the risks and benefits; moreover, TPF in ICA should “be positively nurtured, not constrained”. By the statement “be positively nurtured, not constrained” the authors are reflecting on their inclination toward a regulatory regime rather than blanket restriction. Stoyanov and Owczarek (2015) found that it is expedient to atone the existing framework and there is a need to incorporate a more specific and express system of regulations. Yeoh (2016) unequivocally supports the regulation of TPF to keep a firm check on its potential pitfalls. Santos (2017) found TPF to be an important funding alternative and only a sheep in wolf’s clothing as when TPF would be addressed through regulations, all challenges posed by TPF will be neutralized. Messina (2019) points toward the need to regulate the interactions between all stakeholders involved in TPG and develop some type of standardized approach wherein all actors of TPF understand their respective roles and duties. Messina (2019) prefers a broader understanding of the TPF issues and harnessing the power of dynamic feedback from scholars, practitioners, funders, arbitrators, and the parties to arbitration to effectively address the practice of TPF in international arbitration. Lastly, Fuchs and Richman (2020) in their work conclude that express national laws should be implemented regarding the regulatory framework of TPAF in ICA. A majority consensus thus exists among scholars and jurists that TPAF should be regulated through some regulations or rules, though the degree and intensity of such regulations may vary from place to place.

The UNCITRAL Model Law on International Commercial Arbitration, 1985 make endeavours for a worldwide common *Lex-arbitri* and assist the states to modernize their arbitration laws. The Model law should be amended to include a new chapter regarding the recognition and regulation of TPAF in ICA. In furtherance of such amendment to the Model Law, the UNCITRAL shall set up a third-party international commercial arbitration funding working committee. The working committee shall provide regulations for TPAF from three perspectives, that is, the conduct of the funder, the funded party, as well as the arbitral tribunal of a funded arbitration.

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