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“Third-Party Funding” in International Commercial Arbitration

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PREFACE

I am grateful for all of the professors who have encouraged me throughout the years and particularly to Maud Piers – who introduced me to the fascinating world of international arbitration – for her invaluable comments and guidance in this endeavour. Many thanks as well to Pascal Hollander and Eric De Brabandere for taking the time to meet me for an interview. Furthermore, I wish to thank my dear friend Wouter Van Der Veken for his advice and editorial assistance. Finally, I could not have written this thesis without the support of my family. All errors are my own.

Thibault De Boulle

LIST OF ABBREVIATIONS USED

| | |
|----------|--|
| ABA | American Bar Association |
| AFSL | Australian Financial Services Licence |
| ALF | Association of Litigation Funders of England and Wales |
| ASIC | Australian Securities and Investment Commission |
| ATE | After-the-event |
| BTE | Before-the-event |
| CDS | Credit default swaps |
| CFA | Conditional fee agreement |
| DBA | Damage-based agreements |
| EJF | European Justice Forum |
| GDP | Great British Pounds |
| IBA | International Bar Association |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICDR | International Centre for Dispute Resolution |
| ILR | Institute for Legal Reform of the U.S. Chamber of Commerce |
| LCIA | London Court of International Arbitration |
| LFA | Litigation funding agreement |
| NYCBA | New York City Bar Association |
| PCA | Permanent Court of Arbitration |
| TPF | Third-party funding |
| U.K. | United Kingdom |
| UNCITRAL | United Nations Commission on International Trade Law |
| U.S. | United States |
| USA | United States of America |
| USD | United States Dollar |
| USSC | Supreme Court of the United States |
| VAT | Value Added Tax |

INTRODUCTION

Third-party funding (hereinafter “TPF”) has become one of the “hot topics” in international arbitration and the heretofore fledgling and virtually unknown industry with only a few years of history is evolving into a veritable and thriving practice with each day that passes.¹ It is gradually gaining traction and credibility in the collective consciousness of the global legal community. SEIDEL enunciates this evolution nicely by saying that an ‘emerging’ industry (*i.e.* the TPF industry) has become a ‘maturing’ one.²

Although TPF has existed in litigation in various forms and in several jurisdictions for quite some time and despite the fact that it has been met with some resistance, TPF is now becoming a feature of international arbitration³ due to both the exponential growth of international investment and commercial disputes over the last fifty years, and the increasing costs to go to arbitration.⁴ This growth parallels the globalisation in international commerce, where international arbitration is becoming the dominating type of dispute resolution.⁵ A significant number of parties (referred to in industry jargon as “funded party”) in international arbitrations, whether in financial distress or otherwise,⁶ are

¹ S. SEIDEL, “Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future”, *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 504; E. DE BRABANDERE and J. LEPELTAK, “Third Party Funding in International Investment Arbitration”, *Grotius Centre Working Paper Series* N°2012/1 2012, 6 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078358.

² S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>; S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 47.

³ Some funders report an increase of ten percent of their investments in international arbitration disputes. C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 3 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

⁴ For a concise overview of recent cases in jurisdictions who are familiar with TPF, see C. MILES and S. VASANI, “Case notes on third-party funding”, 35(1) *Global Arb. Rev.* 2008, www.lalive.ch/files/Third_Party_Funding.pdf; see also S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>; S. KHOURI and K. HURFORD, “Third-party funding: Snapshots from around the globe”, 7(5) *Global Arb. Rev.* 2012, 25-31.

⁵ S. SEIDEL, “Investing in International Arbitration Claims”, *Iberian Lawyer Magazine* 4 January 2011, www.iberianlawyer.com/index.php/67-practice-areas/legal-updates/litigation-adr/3439-investing-in-international-arbitration-claims-; S. SEIDEL, “Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future”, *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500; S. SEIDEL, “Funding international arbitration – a growth industry?”, *CDR* 24 November 2011, 1 and <http://fulbrookmanagement.com/wp-content/uploads/2011/11/CDR-Funding-international-arbitration--a-growth-industry.pdf>; S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 30 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁶ Financially healthy companies may rely on TPF for reasons other than lack of sufficient finances. *Infra*; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

exploring the possibility of using third-party funders (hereinafter “funder”)⁷ to provide the necessary capital to finance their meritorious claims, in return for a percentage of the compensation granted to the funded party if successful, whether by settlement or an arbitrator’s award.⁸ The financing of these costs by a third party, who only invests in the proceedings with the hopes of making a profit and has no interest in the substantive issues of the dispute, is becoming pivotal and indispensable for impecunious claimants and defendants to resolve their disputes with arbitration. In short, international arbitration continues its dramatic growth on the one hand, and on the other hand, the ability to prosecute the arbitration claims is shrinking.

Next to the clear advantages of TPF, there is no doubt that TPF has its share of shortcomings and a lot of issues remain open and are even growing. On the one hand, the rise of TPF is thus being lauded for increasing the access to justice for impecunious claimants and more and more jurisdictions are beginning to welcome the claim-financing business; on the other hand, TPF is being vilified and criticised for several reasons.

This thesis will first try to canvas the concept of TPF and try to achieve a better understanding of the compelling reasons for the recent growth of this phenomenon by discussing and analysing different definitions and comparing TPF to other funding mechanisms. Subsequently, after a brief history of TPF, this thesis will illuminate the rationale behind TPF and identify the industry participants. The last topic that this thesis will cover, are the issues needing to be addressed in order to support the ebullition of TPF. The author acknowledges that many of the debates and discussions about TPF are based on empirical assumptions and predictions due to the lack of hard data available to date.

Furthermore, this thesis will highlight some interesting cases in which the issue of TPF has been raised.⁹ The reader will notice that the majority of these cases are litigation and investment arbitration cases.¹⁰ This can be explained by the simple fact that litigation is a type of dispute resolution that is significantly more public than arbitration and that the majority of arbitral awards in international

⁷ Funders have been described with different names, including third party financiers, litigation funders, litigation financing entities, alternative dispute funders and third-party funders. A definitive name has thus not been agreed upon. This thesis will use third-party funders.

⁸ S. SEIDEL, “Insurers Today, Third Party Funders Tomorrow?”, *Insurance Day* October 29 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

⁹ S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

¹⁰ For instance see *Société Foris A.G. v S.A. Veolia Propriété* (anciennement dénommée S.A. Onyx), RG No. 05/01038, Court of Appeal of Versailles, 12e Ch. Sect. 2, June 1, 2006, in which the Court took no issue with the fact that the arbitration had been funded by a specialized party.

investment law are published, in contrast to international commercial arbitration where publication is an exception.¹¹

This author also points out that this thesis will often rely on analogical reasoning with TPF in litigation and in international investment arbitration,¹² due to the lack of precedents and established practices in international commercial arbitration. Moreover, rules of confidentiality in arbitrations and confidentiality clauses in funding agreements make it onerous to discuss and examine TPF in international arbitration, which makes this phenomenon all the more opaque. Put differently in KANTOR's words, even if there were precedents for TPF in international arbitration to date, "*those precedents are themselves currently locked away behind bars of confidentiality*".¹³

Nevertheless, the principles and the concepts of TPF remain mostly the same, regardless of the type of dispute resolution it is used in. Some of the issues accompanying TPF in international commercial arbitration have already been addressed in litigation and is thus worth analysing as well.¹⁴ The key difference is the stage where the proceedings take place. DUNN notes that:

*"In terms of external funding, there is not much difference between litigation and arbitration."*¹⁵

¹¹ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 6 and <http://ssrn.com/abstract=2078358>; see for instance V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 450-451 for some interesting recent funded litigation cases in Australia, the U.K. and the U.S.

¹² International investment arbitration is a special category of arbitration, premised on bilateral and multilateral investment treaties and involves Sovereign States and investors; see for more information on TPF in international investment arbitration E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 1-19 and <http://ssrn.com/abstract=2078358>; C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 101-121; W. VAN BOOM, "Third-Party Financing in International Investment Arbitration", *Erasmus School of Law, Rotterdam, the Netherlands, Working Paper Series K12, K20, K41* 2011, 1-67 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114.

¹³ M. KANTOR, "Risk management tools for respondents – here be dragons" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 68.

¹⁴ See for instance *Minister for Transport for Western Australia v Civcon Pty Ltd* [2003] WASC 99. In this case, Master Sanderson made no distinction between the principles governing TPF of arbitration and the principles that would apply to TPF of litigation. There may be sound reasons why TPF for arbitration and litigation should not be governed by identical legal principles, especially the pervasive fact that one process is essentially private, while the other uses public institutions. See L. THOMAS, "Confidentiality in Arbitration: The English Law Perspective", *Squire Sanders International Arbitration News* 2013, 11-12 and www.squiresanders.com/files/Publication/bfa63ce4-9bcd-44fc-8eae-08f219a66927/Presentation/PublicationAttachment/abdbf613-9b29-4060-b2d5-0975f2ab4dbd/International-Arbitration-News-March-2013.PDF.

¹⁵ S. DUNN, "Class of its Own", 4(2) *CDR* 2010, 14.

Moreover, the way TPF is treated and regulated in litigation can prove to be important for international arbitration awards during proceedings to annul, vacate, enforce or recognize arbitration awards in state courts. Hence, the necessity to discuss TPF in litigation as well.

This thesis aims to inform students, academics as well as arbitration practitioners, for whom the topic in question is relatively new, but also for those who are familiar with it, but want to broaden their knowledge on the subject. The author acknowledges that TPF is most often seen on the claimant side – although TPF of respondents is also conceivable – and this thesis will therefore generally address the matter from their point of view. Moreover, as the title reads, this thesis will only focus on commercial claims and not claims such as human rights cases, class actions,¹⁶ and mass torts.¹⁷ Additionally, TPF could also occur in the latter claims, but this will not be subject to discussion in this thesis.

Furthermore, this thesis will focus on the leading jurisdictions for TPF at the moment, namely the United Kingdom (hereinafter “U.K.”), the United States of America (hereinafter “USA”) and Australia.¹⁸ It should be noted that there are some other jurisdictions with a developed TPF industry, such as Germany,¹⁹ but due to a language barrier and space limitations, these jurisdictions will not be discussed those in this thesis.²⁰ Finally, although the author assumes that the reader has a general understanding of international arbitration, some terms will nevertheless be explained going along.

FIRST PART – INTRODUCTION TO THIRD-PARTY FUNDING

I. DEFINING THIRD-PARTY FUNDING

Despite the fact that this is one of the “hot topics” in international arbitration, it is noteworthy that our view of TPF remains rather hazy.²¹ SCHERER put it correctly when he said:

¹⁶ It should be noted that studies have found that TPF supports the growth of group actions. C. VELJANOVSKI, “Third-Party Litigation Funding in Europe”, 8 *J.L. Econ. & Pol’y* 2012, 420; J. BEISNER, J. MILLER and G. RUBIN, “Selling lawsuits, buying trouble: third-party litigation funding in the United States”, *U.S. CHAMBER INSTITUTE FOR LEGAL REFORM* 2009, 4-9 and <http://legaltimes.typepad.com/files/thirdparty litigation financing.pdf>; see for instance *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/05, 4 August 2011, in which the first ever mass claim in international investment arbitration was funded by a third party.

¹⁷ Typically, the claims consist of breach of contract claims, such as fraud, embezzlement, bribe and corruption, antitrust, IP infringement. S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 4 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

¹⁸ S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 48.

¹⁹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 655.

²⁰ For an overview of TPF in other jurisdictions, the author encourage the reader to read L. NIEUWVELD, and V. SHANNON, *Third-party funding in international arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 256 p.

²¹ See e.g. X, “Litigation finance offers golden opportunity for law firm chief marketing officers”, 2013, www.burfordcapital.com/articles/golden-opportunity-for-law-firm-chief-marketing-officers/#.

*“The exact definition of third party funding, however, remains elusive and its legal and ethical implications in international arbitration, mostly unexplored.”*²²

There is still no consensus on how this new economic activity should be understood. Some qualify TPF as commercial lending contracts, others consider it to be a form of insurance contracts.²³ In view of the recent development of this burgeoning industry and with no clear answer in sight, definitions are still being created, adapted and becoming more established as time goes by.²⁴

The International Business Law Journal organised two roundtable discussions (hereinafter “Roundtable Discussions”) on TPF.²⁵ Among other topics, the issue of defining TPF was keenly debated. The participants to the discussion did not manage to reach a consensus regarding the definition of TPF.

1. Third-party funding *sensu stricto*

ENDICOTT, GIRALDO-CARRILLO and KALICKI’s definition is what this author considers to be TPF *sensu stricto*. They consider TPF to be a financing method which involves the funding of litigation or arbitration by *bona fide* specialized providers who are neither parties to the dispute nor closely connected with it, and whose sole interest is potential profit²⁶ in return for providing financing.²⁷ This

²² M. SCHERER, “Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 95.

²³ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 9 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²⁴ S. SEIDEL, “Investing in International Arbitration Claims”, *Iberian Lawyer Magazine* 4 January 2011, www.iberianlawyer.com/index.php/67-practice-areas/legal-updates/litigation-adr/3439-investing-in-international-arbitration-claims-; M. DESTEFANO, “Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?”, 80 *Fordham L. Rev.* 2012, 2794.

²⁵ The Roundtable Discussions were held in Paris on January 27, 2012 and on April 18, 2012.

²⁶ The possibility exists that the funder is not *bona fide* because it has other motives than pure financial gain, such as causing harm to the opposing (non-funded) party. L. LÉVY and R. BONNAN, “Third-party funding: Disclosure, joinder and impact on arbitral proceedings” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 80.

²⁷ A. ENDICOTT, N. GIRALDO-CARRILLO and J. KALICKI, “Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2)”, *Kluwer Arbitration Blog* 13 March 2012, <http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>; see also R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 10; J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1653-1654; M. DESTEFANO, “Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?”, 80 *Fordham L. Rev.* 2012, 2818; M. MANIRUZZAMAN, “Third-party funding in international arbitration – a menace or panacea?”, *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>; C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 11 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; G. AFFAKI, “A financing is a financing is a

type of financing will be envisaged throughout this thesis to identify TPF and to distinguish TPF from other types of funding relationships.²⁸ In other words TPF in this thesis should be read as TPF *sensu stricto*.

The quintessential scenario for TPF *sensu stricto* that predominates in international arbitration is an arrangement between a client and an institutional funding corporation, who is unconnected with a legal action, in which it is agreed that the funder will cover a party's legal costs and expenses of a legal claim²⁹ in exchange for a share in any future compensation. In other words, it is non-recourse financing by an institutional funder where repayment is contingent on the client's success of his or her claim.³⁰ Hedge funds and other financial institutions can also be involved in TPF. However, this is most likely on a one-off basis and this thesis will focus on institutional funders whose sole (or large part of its) business is TPF.

Ultimately, TPF *sensu stricto* is too narrow to capture the full range of relevant agreements, which is why TPF *sensu lato* will be discussed hereafter.

2. Third-party funding *sensu lato*

TPF *sensu stricto* is but one source of financing available to a party. These other types of funding relationships often differ only in a subtle manner from TPF *sensu stricto* and can be qualified as TPF *sensu lato*.³¹ As said, this thesis will mostly focus on TPF *sensu stricto*. Nevertheless, in order to give the reader an understanding of the complexity and the multi-faceted character of TPF, it is worth discussing TPF *sensu lato* as well. BOGART put it correctly:

financing..." in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 11; L. LÉVY and R. BONNAN, "Third-party funding: Disclosure, joinder and impact on arbitral proceedings" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 78; P. PINSOLLE, "Le financement de l'arbitrage par les tiers", 2 *Rev. arb.* 2011, 385-387.

²⁸ *Infra*.

²⁹ The funding concerned can be the funding of several things, namely the legal fees, an order, award, or judgment rendered against that party, or both. M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1275-1276.

³⁰ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 8; S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 2-3 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

³¹ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 9-11.

*“Financing of arbitration claims by third parties is neither new nor capable of being characterised in the rather black and white manner so often employed by press and academic writing. In reality, the practice is complex and multi-faceted.”*³²

Another definition describes TPF as *“every possible contract where the pay-out under that contract is linked to the proceeds of litigation”*³³. This definition also covers lawyers’ contingency fee arrangements and insurance contracts, even though they are held by different stakeholders and regulated by different entities. In other words, this definition describes TPF *sensu lato*.

Another funder avers that there is no such thing as TPF as funding of claims exists in many forms, including contingency fee arrangements or insurance contracts. In addition, the distinction between a funder and a subrogated insurer can be either non-existent – in terms of practical implications – or quite significant – when looking at a commercial definition. Consequently, it is almost impossible to find a one-size-fits-all definition of TPF. Rather, it remains for the community to “label” the practices that are to be considered TPF.

SCHERER categorizes TPF as *“any financial solution offered to a party regarding the funding of proceedings in a given case”*.³⁴ Viewed in this way, funders do not differ from after-the-event (hereinafter “ATE”) insurers, save in terms of financial implications. SEIDEL nevertheless considers contingency fee arrangements to be a distinct business in particular because, in cases of such fee arrangements, the client does not have specific knowledge of the amount corresponding to the legal services that were provided during the litigation or arbitration, whereas TPF enables the client to have such information.

2.1. Attorney financing

Attorney financing is arguably the most obvious source of TPF since counsel can (in some jurisdictions) agree with their client that only a part of his or her usual fee (or no fee at all) will have to be paid during the arbitral proceedings, and that he or she will only be remunerated when a successful

³² C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

³³ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Third Party Funding in International Arbitration in Europe: Part 1 – Funders’ Perspectives”, *RDAl/IBLJ* 2012, 209.

³⁴ M. SCHERER, “Out in the open? Third-party funding in arbitration”, *CDR* 2012, 58 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

outcome was achieved.³⁵ This kind of financing of disputes is undeniably a type of TPF and therefore merits discussion in this thesis.

Three types of attorney financing can be identified and will be discussed separately: (i) *pro bono* legal representation; (ii) contingency fee arrangements; and (iii) conditional fee arrangements. Finally, the respective relationship with TPF *sensu stricto* will be discussed.

2.1.1. *Pro bono*

In short, *pro bono* legal representation involves the attorney carrying all costs related to representing his or her client, without a reasonable expectation of reimbursement, with the exception of reimbursements by the losing party in jurisdictions where the loser pays the winner's attorney fees.³⁶ *Pro bono* legal representation is not regarded as a traditional type of TPF because the money does not usually change hands between the attorney and the client. However, in practice, the client may not experience a big difference with TPF because in both types of financing, the financial burden has been shifted from the client to a third party.

It should be noted that it is highly unlikely that *pro bono* representation will play any role in international commercial arbitration where the cases are international disputes between two corporations. This explains the conciseness of the discussion on this topic. Still, the existence of it is worth mentioning to give the reader a general overview of all the existent types of TPF and for the integrality of this thesis.

2.1.2. Contingency fee arrangements

Contingency fee arrangements are defined as “any arrangement whereby the lawyer's fee depends in whole or in part on the success of the claim”.³⁷ Working on a contingency basis thus means that if there is no recovery, then the lawyer does not receive any fee and the practical consequence of this is *pro bono* representation.³⁸ On the other hand, if there is recovery, then the lawyer's legal services will be repaid along with a handsome additional fee based on a percentage or fraction of the amount

³⁵ C. KAPLAN, “Third-party funding in international arbitration: Issues for counsel” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 70.

³⁶ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 6.

³⁷ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1655; see also A. SHAJNFELD, “A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements”, 54 *N.Y.L. Sch. L. Rev.* 2010, 775.

³⁸ H. KRITZER, *Risks, reputations, and rewards: contingency fee legal practice in the United States*, Stanford University Press, 2004, 258-259.

recovered.³⁹ Similarly to *pro bono* representation, the lawyer assumes the financial risks. Therefore, such arrangements are only entered into by lawyers if they consider the claim to be sufficiently strong and a sufficient recovery is contemplated to offset the risk to the lawyer of non-payment.⁴⁰

Contingency fee agreements are common practice in the USA.⁴¹ In contrast, English law traditionally imposed particularly stringent prohibitions on contingency fee arrangements. In *Bevan Ashford v. Geoff Yeandle*,⁴² Vice-Chancellor SCOTT expressly held that the prohibition on contingency fees extended to arbitrations,⁴³ and dismissed earlier suggestions from STEYN LJ in *Giles v Thompson* that, because arbitration was a consensual process, the same public policy objections based on the tort of champerty⁴⁴ might not apply.⁴⁵ However, since 1 April 2013, contingency fee agreements can now also be used in civil litigation.⁴⁶ Nevertheless, as the use of TPF grows, and in light of calls for a more liberal approach to such funding and contingency fees, there will inevitably be further debate and developments with regard to the scope and effect of such arrangements on international arbitrations sited in England or governed by English law.⁴⁷

As for the situation in other jurisdictions, MARTIN sates that:

*“[M]any countries including the UK, Australia, the Netherlands, Belgium, Germany and South Africa have become more amenable to third parties financing lawsuits, typically on a contingency basis.”*⁴⁸

Nevertheless, “pure” (as in ‘no win no fee’ arrangements) contingency fee arrangements are still prohibited in France, Switzerland and in a number of other European jurisdictions, such as Belgium, Denmark, Finland, Norway, Portugal, Sweden and Spain.⁴⁹

³⁹ M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1293-1292-1293.

⁴⁰ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, 8(4) *TDM* 2011, 12 and www.imf.com.au/docs/default-source/site-documents/tdm_tpf_oct2011.

⁴¹ The United States Supreme Court (hereinafter “USSC”) confirmed the legality of contingency fee agreements in *Stanton v. Embrey*, 93 U.S. 548 (1877), p. 556.

⁴² *Bevan Ashford v Geoff Yeandle* [1998] 3 WLR 172.

⁴³ C. KAPLAN, “Third-party funding in international arbitration: Issues for counsel” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 71.

⁴⁴ *Infra*.

⁴⁵ *Giles v Thompson* [1993] UKHL 2, [1994] 1 AC 142, [1993] 3 All ER 321.

⁴⁶ See <http://www.justice.gov.uk/civil-justice-reforms/main-changes>.

⁴⁷ C. MILES and S. VASANI, “Case notes on third-party funding”, 35(1) *Global Arb. Rev.* 2008, www.lalive.ch/files/Third_Party_Funding.pdf.

⁴⁸ S. MARTIN, “Litigation Financing: Another Subprime Industry That Has a Place in the United States Market”, 53 *VILL. L. Rev.* 2008, 107.

⁴⁹ See D. WEHRLI, “Contingency Fees / Pactum de Palmario “Civil Law Approach””, 26(2) *ASA Bulletin* 2008, 246; see also C. KAPLAN, “Third-party funding in international arbitration: Issues for counsel” in B. CREMADES

2.1.3. Conditional fee arrangements

Conditional fee arrangements (hereinafter “CFA”) are similar to contingency fees, with the exception that the client has to pay a discounted fee (instead of no fee) unless the client wins.⁵⁰ In other words, the attorney carries the entire risk of loss in contingency fee arrangements, while the risk is divided in CFAs, thus ensuring the attorney to at least receive some remuneration. If the claim is successful, the lawyer is then paid his or her usual fee plus an uplift or ‘success fee’, without the uplift being more than 100 % of the lawyer’s normal fees which would be payable if there was no CFA.⁵¹

CFAs are allowed and commonly used for funding in civil litigation in England.⁵² There are some English solicitors who are working with CFA in arbitrations.⁵³ If the seat of arbitration is England, the arbitral tribunal can determine the amount of costs to be recovered on such basis as it sees fit, with the exception if parties agreed otherwise.⁵⁴ Furthermore, the tribunal can decide that the recoverable costs will be a reasonable amount in respect of all costs reasonable incurred.⁵⁵ This implies that it’s possible that the costs awarded to the claimant, if he has entered into a CFA under English law, could include recovery of the success fee, unless the losing party shows that it was unreasonable.⁵⁶

CDAs, as in arrangements where an additional fee is paid in the event of a successful outcome of the proceedings,⁵⁷ are also permitted in a number of jurisdictions such as France, Switzerland, Belgium, Denmark, Finland, Norway, Portugal, Sweden and Spain.⁵⁸

2.1.4. Applicability to arbitration of the prohibitions against attorney financing

and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 71.

⁵⁰ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 6.

⁵¹ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, 8(4) *TDM* 2011, 12-13 and www.imf.com.au/docs/default-source/site-documents/tm_tpf_oct2011.

⁵² Section 58 of the Courts and Legal Services Act 1990.

⁵³ See section 58A of the Courts and Legal Services Act 1990, which stipulates that CFAs may be made in relation to proceedings, which are defined to include “any sort of proceedings for resolving disputes”. Hence, CFAs are not just possible in litigation, but also in arbitration.

⁵⁴ See section 63 of the Arbitration Act 1996.

⁵⁵ See section 63(5) of the Arbitration Act 1996.

⁵⁶ Under section 63(5) of the Arbitration Act 1996, any doubt as to the reasonableness of the costs, shall be resolved in favour of the paying party. See I. MEREDITH and S. ASPINALL, “Do alternative fee arrangements have a place in international arbitration?”, 72 *Arbitration* 2006, 23-24.

⁵⁷ Remember the difference with “pure” contingency fee arrangements whereby a lawyer is only remunerated on the basis of a proportion of the amount recovered.

⁵⁸ See D. WEHRLI, “Contingency Fees / Pactum de Palmario “Civil Law Approach””, 26(2) *ASA Bulletin* 2008, 246; see also C. KAPLAN, “Third-party funding in international arbitration: Issues for counsel” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 71.

The national rules that prohibit certain forms of attorney financing are clearly intended to apply to domestic litigation. The question thus remains whether these rules also apply to international arbitration.

In France, for instance, the Paris Court of Appeal ascertained that pure contingency fee agreements were possible in international arbitration, despite being invalid in principle, because such agreements were widely recognized as valid in international commerce.⁵⁹ As for Switzerland (where contingency fee agreements are also invalid in principle), it appears that the prohibition also applies to Swiss lawyers in international arbitration.⁶⁰

To date, no general answer can be reliably offered with regard to the question at hand. No uniform application of the prohibitions against attorney financing in international arbitration can be discerned *prima facie*. This issue demands an extensive comparative analysis of the respective national rules and this is not within the ambit of this thesis. Nevertheless, this author encourages commentators and scholars to investigate and analyse this issue in order to give attorneys more certainty as to whether attorney financing is permitted in international arbitration.

2.1.5. Relationship with third-party funding *sensu stricto*

Prima facie, contingency fee arrangements are similar to TPF with the exception that in TPF the funder is an outside entity, such as banks, financial institutions and specialized TPF corporations,⁶¹ rather than the client's attorney or law firm. This funder is not subject to the same professional and ethical rules as attorneys. The funder has more freedom to determine his financial commitment and has the opportunity – in some jurisdictions – to be involved in the management of the case. Furthermore, the funder can weigh in on the choice of counsel, whereas in contingency fee agreement, the choice of counsel is by definition predetermined.⁶² Finally, whereas TPF requires the investment of third-party capital, contingency fee arrangements require lawyers to invest their professional services instead of capital.

⁵⁹ Court of Appeal of Paris 10 July 1992, *Rec. Dalloz* 1992, 459, note J. CHARLES; *Rev. Arb.* 1992, 609, note L. PHILIPPE.

⁶⁰ D. WEHRLI, "Contingency Fees / Pactum de Palmario "Civil Law Approach"", 26(2) *ASA Bulletin* 2008, 250.

⁶¹ *Infra*.

⁶² M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1293-1294.

The key difference here is that the financing is provided by a party (*i.e.* the lawyer) already involved in the arbitration. TPF on the other hand, adds a new party (*i.e.* the funder) to the proceedings.⁶³ Another difference is that funders are making an investment, rather than providing a service for a fee.⁶⁴ Furthermore, where lawyers are subject to mandatory ethics rules and bar associations,⁶⁵ TPF is still mainly unregulated.⁶⁶

Law firms unwilling to undertake contingency work can only serve solvable clients who can pay their fees. TPF allows these firms to take on cases like this by ensuring that potential clients are properly resourced. The client will notice little difference between TPF and contingency fee arrangements in practice because in both cases he or she will not (or only partially) have to pay in case of a less than favourable outcome of the claim.⁶⁷

Many law firms are usually reluctant to discuss sizeable contingency fee arrangements because it involves an almost undue degree of risk and⁶⁸ law firms try to avoid risk as much as possible, especially now in the current economic turbulence. Law firms therefore welcome TPF because it means payment of their fees on a regular basis.⁶⁹

Furthermore, contingency or conditional fee arrangements are only partial solutions to the problem because they only cover the legal fees and not for instance the arbitrators' fees.⁷⁰ Therefore, contingency arrangements and conditional fee agreements⁷¹ sometimes collaborate with funders to share the risk.⁷²

⁶³ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1655.

⁶⁴ M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1293-1294.

⁶⁵ For instance in the USA, lawyers are governed by state bar associations. These associations most often base their codes of ethics on the ABA Model Rules of Professional Responsibility. L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 133-134.

⁶⁶ *Infra*.

⁶⁷ C. BOGART, "Overview of arbitration finance" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 53.

⁶⁸ C. HENDEL, "Third Party Funding", *Latin Arbitration Law* 2010, www.latinarbitrationlaw.com/third-party-funding/.

⁶⁹ C. BOGART, "Third party funding in international arbitration", *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

⁷⁰ C. HENDEL, "Third Party Funding", *Latin Arbitration Law* 2010, www.latinarbitrationlaw.com/third-party-funding/.

⁷¹ *Infra*.

⁷² S. SEIDEL, "Investing in International Arbitration Claims", *Iberian Lawyer Magazine* 4 January 2011, www.iberianlawyer.com/index.php/67-practice-areas/legal-updates/litigation-adr/3439-investing-in-international-arbitration-claims-.

The participating funders at the Roundtable Discussions agreed that alternative fee arrangements with counsel are not necessary but are welcomed. However, this could mean that the lawyer becomes a co-funder of the case, something some funders are not fond of because it has already taken too large a part in the funding of the case.⁷³

2.2. Legal expenses insurance

2.2.1. General

Legal expenses insurance is one of the most common types of TPF⁷⁴ and is used to cover the financial risks associated with a lawsuit. Traditional insurance policies will cover the legal representation or will pay any award or judgement against the insured party, or sometimes even both.⁷⁵ The key feature of traditional insurance is that the insurance policies often contain provisions transferring a significant amount of control over the case from the claimholder to the insurance company.⁷⁶ For instance, the insurance company may have discretion to decide how vigorously and zealously they should pursue the case and when to settle.⁷⁷ This feature is also what separates insurance from attorney financing from the client's point of view, because the client retains control over the management of the dispute in all three types of attorney financing.⁷⁸ The explanation for the gaping difference in control exercised by the funders lays in the fact that insurance companies are, in contrast to attorneys, untethered from codes of conduct and professional ethics requiring to act in the client's best interest regardless of the likelihood of success.⁷⁹

2.2.2. Specialized forms of insurance

⁷³ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAI/IBLJ* 2012, 216.

⁷⁴ M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1295-1296; this arrangement is often used in automobile and malpractice insurance; see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAI/IBLJ* 2012, 656; S. SEIDEL, "Insurers Today, Third Party Funders Tomorrow?", *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

⁷⁵ M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1295-1296.

⁷⁶ M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1295-1296; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 9; S. SEIDEL, "Control" in Third-Party Funding: a Doctrine Out of Control", *CDR* 2011, 62 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>.

⁷⁷ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 5-6.

⁷⁸ *Supra*.

⁷⁹ D. RICHMOND, "Other People's Money: the Ethics of the Litigation Funding", 56 *Mercer L. Rev.* 2005, 651-652, 659-664.

Besides the traditional insurance policies, there are also specialized forms of insurance that can be purchased either before or after the occurrence of an incident that gives rise to a dispute,⁸⁰ namely ATE insurance and “before-the-event” (hereinafter “BTE”) insurance.⁸¹ BTE and ATE insurance are thus taken out before or after an event has occurred, such as an accident or a contractual dispute, to protect the insured party⁸² against the risk of having to pay the other parties costs, such as legal fees, expert’s fees, arbitrator’s fees, in the event that party loses in subsequent litigation or arbitration⁸³ or to cover the policyholder’s own out-of-pocket disbursements, or both.⁸⁴ However, it should be noted that coverage of the insured parties’ own legal fees is not common in practice. Therefore, ATE insurance is often combined with a CFA, because a CFA protects the insured parties’ liability for its own legal fees.⁸⁵

If the purchaser succeeds in the litigation/arbitration, a premium will then have to be paid to the insurer.⁸⁶ The difference between these specialized types of insurance and traditional insurance is that the specialized insurance policies will cover the attorney fees and other expenses, without taking full control over the proceedings and it will not cover the payment of awards or judgments, which is most often the case in traditional insurance. Therefore, ATE and BTE insurance policies usually do not require the insured party to transfer most of the control of the case to the insurer.⁸⁷

2.2.3. Relationship with third-party funding *sensu stricto*

In practice, TPF and ATE insurance may have a lot of similarities. Both are intensively interested in determining the chance of success of a claim, and both have access to capital, which they can advance to support the claim.⁸⁸ There is nonetheless a fundamental conceptual difference, namely the investment aspect that TPF has and ATE does not. This is reflected in, for instance, France where

⁸⁰ M. DE MORPURGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int’l & Comp. L.* 2011, 353.

⁸¹ S. SEIDEL, “Insurers Today, Third Party Funders Tomorrow?”, *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

⁸² Some insurers only offer insurance to claimants and not respondents.

⁸³ For example, see the website of TheJudge, an independent UK broker of commercial litigation funding and ATE insurance: www.thejudge.co.uk/index.php/after-the-event-insurance/international-arbitration-funding.

⁸⁴ M. KANTOR, “Risk management tools for respondents – here be dragons” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 57-61.

⁸⁵ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 13 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

⁸⁶ B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 12 and www.curtis.com/siteFiles/Publications/TDM.pdf.

⁸⁷ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 10.

⁸⁸ S. SEIDEL, “Insurers Today, Third Party Funders Tomorrow?”, *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

insurance companies are barred from taking a share of the proceeds.⁸⁹ Nevertheless, it is not uncommon for insurers to work in partnership with funders and it is likely that this will continue to grow.⁹⁰ The type of return further differentiates TPF and insurance contracts since the return to the funder is usually either a percentage of the recovery or a multiple of the capital invested (or whichever is higher).⁹¹

2.3. Loans

Loans are usually used to obtain small loans from the client's attorney or law firm or from a traditional bank or other financial institution⁹² to finance claimants with small claims in exchange for a share of a favourable outcome.⁹³ Conversely, the TPF *sensu stricto* market is so lucrative due to generally bulky claims involved.⁹⁴ The key difference with the aforementioned types of financing is the fact that loans must be repaid regardless of the outcome of the dispute. AFFAKI also notes that:

*“[F]unds offer much more in terms of bundled claim management services than the mere supply of money and, consequently, are not in direct competition with banks in the lending business.”*⁹⁵

The primary advantage of this type of TPF is that the client, unlike for instance with traditional insurance, retains complete control over the management of the dispute. The obvious disadvantage of loans is that the client cannot alleviate the risks of losing the case because the client has to repay the lender regardless of the final disposition of the dispute.

Despite the – in the author's view – obvious difference between TPF *sensu stricto* and loans, TPF can sometimes be qualified as loans, which has legal and ethical consequences.⁹⁶ For instance in the U.S., recently introduced legislation calls the product of lawsuit funding a loan.⁹⁷

⁸⁹ R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 10; in the U.K., ATE insurance premiums are non recoverable on a litigation's success since 1 April 2013. S. SEIDEL, “Insurers Today, Third Party Funders Tomorrow?”, *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

⁹⁰ S. SEIDEL, “Insurers Today, Third Party Funders Tomorrow?”, *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

⁹¹ See S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 2 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

⁹² D. RICHMOND, “Other People's Money: the Ethics of the Litigation Funding”, 56 *Mercer L. Rev.* 2005, 650-651.

⁹³ M. DE MORPUGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int'l & Comp. L.* 2011, 356-357.

⁹⁴ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1656; see also J. LYON, “Revolution in Progress: Third-Party Funding of American Litigation”, 58 *UCLA L. Rev.* 2010, 578.

⁹⁵ G. AFFAKI, “A financing is a financing is a financing...” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 11.

2.4. Assignment of a claim

Assignments of claims may occur for numerous reasons, such as mergers and acquisitions and liquidation following bankruptcy.⁹⁸ There are two traditional examples of assignment of claims: assignment of contractual rights to third parties and factoring agreements.⁹⁹ The latter is a debt collection agreement in which the original creditor sells his or her claims to a third-party debt collection agency (“factor”) for a price lower than its worth in exchange for prompt payment.¹⁰⁰ Subsequently the factor becomes the new creditor and pursues the claim hereafter.

By assigning a claim, the party loses full control over the management of the lawsuit, including the power to settle and the power to choose attorneys, and the funder will become a party to the arbitration.¹⁰¹ CREMADES explains the difference between assignment of a claim and TPF:

“[W]hereas in the assignment of lawsuits the litigant sells the lawsuit itself, in third party funding the litigant merely sells the possible “fruits” of the lawsuit.”¹⁰²

In TPF the client does indeed usually assign a share of the proceeds of the successful claim to the funder, instead of assigning the right to pursue the claim.¹⁰³ The main difference is thus that assigning a claim involves the sale of the claim, whereas with TPF, the claim remains entirely with the original creditor.¹⁰⁴ However, it is likely that the funder will have some kind of influence on the lawsuit. For

⁹⁶ *Infra*.

⁹⁷ See for an overview V. SHANNON, “Recent Developments in Third-Party Funding”, 30(4) *J. Int. Arb.* 2013, 449-450.

⁹⁸ M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1296-1299.

⁹⁹ B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 11 and www.curtis.com/siteFiles/Publications/TDM.pdf; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 655.

¹⁰⁰ M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1296-1299.

¹⁰¹ L. LÉVY and R. BONNAN, “Third-party funding: Disclosure, joinder and impact on arbitral proceedings” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 87.

¹⁰² B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 11 and www.curtis.com/siteFiles/Publications/TDM.pdf.

¹⁰³ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 8.

¹⁰⁴ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 655; S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 7 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

this reason, it is sometimes onerous to distinguish in practice between TPF and assignments of claims from a client's point of view if we use the criteria of having control of the lawsuit to make the distinction. SEBOK states that the funder is an assignee and that the contract between the funder and the funded party should be a contract in assignment and not maintenance if the funder assumes full control of the lawsuit.¹⁰⁵ However, it is this author's view that it is unlikely that a funder will have full control of the lawsuit. Nevertheless, one should be cautious when qualifying a funding agreement as either a TPF or an assignment of claim.

2.5. Donations or free financial assistance

Besides the traditional scheme of a funders who funds the arbitral proceedings with the purpose of making a profit, there are also proceedings in international arbitration where the proceedings are funded by a disinterested third party, such as a foundation, in which case the funder does not have the intention of making profit. These instances can be qualified as donations rather than funding agreements. The party thus receives donations, which he can keep, regardless of the outcome of the proceeding.¹⁰⁶ A vivid example is the ICSID case of *Philipp Morris v Uruguay*, where the Campaign for Tobacco-Free Kids, an organisation funded by the Bloomberg Foundation, supported the Uruguayan Government financially.¹⁰⁷

2.6. Conclusion

While there are a range of funding options for international arbitration claims, the financial benefits and risks associated with these claims mean that they are likely to provide attractive opportunities for funders into the future and accordingly be a valuable resource for claimants. The challenge will be to ensure that the interests of claimants and funders are kept in appropriate balance and reflect the mutuality of risks and benefits.¹⁰⁸

The different funding arrangements might have the same results in practice. In other words, the main difference between TPF and any of the above-mentioned funding arrangements, is more of a

¹⁰⁵ A. SEBOK, "The inauthentic claim", *Cardozo Legal Studies Research Paper No. 298* 2010, 56 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593329##.

¹⁰⁶ B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 17 and www.curtis.com/siteFiles/Publications/TDM.pdf.

¹⁰⁷ *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7; see C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 10-11 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 103.

¹⁰⁸ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 14 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

conceptual nature. Where TPF is clearly an investment, the other funding arrangements have different objectives. This does raise the question whether it is still necessary to have TPF, when there are already a number of alternatives available.

II. IDENTIFICATION OF INDUSTRY PARTICIPANTS

1. Potential clients

There are different types of potential clients who could need outside funding at some point to finance the litigation or arbitration in which they are involved, ranging from individuals, to law firms and corporations and even sovereign states.¹⁰⁹ Although the literature on TPF focuses almost exclusively on the funding of claimants when discussing potential clients, defendants can use TPF just as well.¹¹⁰ A financially distressed defendant, who is attacked with a frivolous claim, deserves funding protection as well as a financially distressed claimant.¹¹¹ The traditional situation where a defendant may seek TPF, is thus when a counter-claim is filed by him or her.¹¹²

However, the availability of TPF is not always well-known, causing harm to the industry, because the industry appears only to promote claimants' claims and it could be portrayed as a tool designed to abuse defendants.¹¹³ No doubt that it will take some time for defendant funding to develop. During the Roundtable Discussions, the participants were of the view that there is a clear demand for defendant funding. Noteworthy is that none of the participants in attendance reported having already funded such cases.

¹⁰⁹ S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 4 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

¹¹⁰ *Infra*; see for a brief overview of the funding options for a defendant B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 16-25 and www.curtis.com/siteFiles/Publications/TDM.pdf; see also S. SEIDEL, "Maturing Nicely", *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>; S. SEIDEL, "Insurers Today, Third Party Funders Tomorrow?", *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>; S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 7 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

¹¹¹ S. SEIDEL, "Funding international arbitration – a growth industry?", *CDR* 24 November 2011, 3 and <http://fulbrookmanagement.com/wp-content/uploads/2011/11/CDR-Funding-international-arbitration--a-growth-industry.pdf>.

¹¹² B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 16 and www.curtis.com/siteFiles/Publications/TDM.pdf.

¹¹³ S. SEIDEL and S. SHERMAN, "The Time Is Now For Third Party Funders & Defendants To Beat Their Swords Into Plowshares", *Corporate LiveWire* 5 September 2012, www.corporatelivewire.com/top-story.html?id=the-time-is-now-for-third-party-funders-defendants-to-beat-their-swords-into-plowshares.

With respect to investment arbitration, it should be noted that sovereign States are also increasingly being funded by third parties, thus making TPF not a mechanism exclusively relied upon by private entities, such as corporations, law firms and individuals.¹¹⁴

2. Potential funders

The most common funding entities are the client's attorney or law firm, an insurance company, an institutional funder, such as Juridica Investments, Burford Capital and Calunius Capital,¹¹⁵ or other financial institutions, such as corporations, banks, hedge funds.¹¹⁶ Some financial institutions indeed offer TPF, but usually on a one-off basis and this activity is only a part of their wide offer of traditional financial investments. Furthermore, there are also institutional funders that are specialized in TPF and whose sole business activity is the funding of arbitration and litigation claims.¹¹⁷ It is rather self-evident that the majority specialized funders are based in jurisdictions with an established or developing TPF industry, such as Australia, the USA, and the U.K.

III. HISTORY

In short, the TPF industry is still relatively young, with only few facts and figures available as to the extent to which, and the types, sizes en general nature of the matters in which TPF is being used.

1. Growth in the use of third-party funding in domestic litigation

In the litigation context, a clear shift in judicial attitude can be observed from being reluctant to accept TPF, to the current situation where many jurisdictions have a relaxed attitude towards TPF.¹¹⁸ The

¹¹⁴ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 7 and <http://ssrn.com/abstract=2078358>.

¹¹⁵ See www.international-arbitration-attorney.com/third-party-funding-3/ for an overview of the most prominent funding institutions; see also S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 20-21 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; R. LOWE, "Speculate and arbitrate to accumulate", 2013 and www.ibanet.org/Article/Detail.aspx?ArticleUId=804e46e3-dfc0-4966-b16e-31627803970c; see also B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 13-16 and www.curtis.com/siteFiles/Publications/TDM.pdf.

¹¹⁶ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 4-5; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 8 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; S. SEIDEL, "The third man", *The Eur. Law.* 2011, 5 and <http://fulbrookmanagement.com/publications/EL-May2011.pdf>; S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 3 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

¹¹⁷ *Infra*.

¹¹⁸ See BURFORD CAPITAL LIMITED, "Acceptance of Litigation Finance Continues in Various Jurisdictions", *Burford* 27 February 2014, www.burfordcapital.com/articles/acceptance-of-litigation-finance-continues-in-various-jurisdictions/.

future growth and further development of the TPF industry will depend on the direction of the jurisprudence in the jurisdictions with a developed TPF industry, as well as in jurisdictions where TPF is beginning to manifest itself.¹¹⁹ The jurisprudence in question is mostly related to the funders' and attorneys' professional and ethical responsibilities,¹²⁰ and the procedural safeguards inserted in the sophisticated legal systems.¹²¹ It remains to be seen whether jurisdictions will also apply these rules and safeguards to TPF agreements in international arbitration matters and not just in the context of litigation, for which they were originally intended.¹²²

TPF is now widely seen as an important means of facilitating access to justice for claimants who have meritorious claims but are unable to finance litigation.¹²³ TPF is most commonly used in Australia, England and the USA.¹²⁴ Australia has the largest TPF industry and it is believed that the TPF industry was born approximately 25 years ago in Australia,¹²⁵ where it is now an established part of the civil justice system.¹²⁶ England now has a TPF industry, which is only closely behind Australia in its use of

¹¹⁹ S. RANDAZZO, "Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows", *Daily J.* September 10 2010; L. SOLOMON, "Perspective: Third-Party Litigation Financing: It's Time to Let Clients Choose", *N.Y.C. L.J.* 13 September 2010, www.newyorklawjournal.com/id=1202471825734/Perspective:-Third-Party-Litigation-Financing:-It's-Time-to-Let-Clients-Choose?slreturn=20140216144015; V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 443.

¹²⁰ *Infra.*

¹²¹ L. SOLOMON, "Perspective: Third-Party Litigation Financing: It's Time to Let Clients Choose", *N.Y.C. L.J.* 13 September 2010, www.newyorklawjournal.com/id=1202471825734/Perspective:-Third-Party-Litigation-Financing:-It's-Time-to-Let-Clients-Choose?slreturn=20140216144015; M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1291-1292.

¹²² V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 443-444.

¹²³ W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30(1) *J. Int. Arb.* 2013, 17; M. RODAK, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", *U. Pa. L. Rev.* 2006, 503; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 2 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

¹²⁴ C. BURKE ROBERTSON, "The Impact of Third-Party Financing on Transnational Litigation", 44. *Case W. Res. J. Int'l L.* 2011, 165-166; M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1278; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 11; M. MALESKE, "Hedging bets: third-party litigation funding gains steam in the U.S.", *Inside Counsel* 1 December 2009, www.insidecounsel.com/2009/12/01/hedging-bets; S. SEIDEL, "Investing in International Arbitration Claims", *Iberian Lawyer Magazine* 4 January 2011, www.iberianlawyer.com/index.php/67-practice-areas/legal-updates/litigation-adr/3439-investing-in-international-arbitration-claims-; V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 443-452.

¹²⁵ In Australia, one of the possible explanations for the development of TPF is the fact that contingency fee arrangements (*supra*) are prohibited. Therefore, there was a need for another type of funding to cover the legal expenses and this is where TPF made his grand entrance. J. BEISNER, J. MILLER and G. RUBIN, "Selling lawsuits, buying trouble: third-party litigation funding in the United States", *U.S. CHAMBER INSTITUTE FOR LEGAL REFORM* 2009, 9 and <http://legaltimes.typepad.com/files/thirdparty litigation financing.pdf>; see also S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 3 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; S. SEIDEL and S. SHERMAN, "Corporate governance" rules are coming to third party financing of international arbitration (and in general)" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 35.

¹²⁶ Litigation funding in Australia emanated from funding claims by company liquidators and bankruptcy trustees in the late 1990s under their statutory powers to sell assets (including claims) of the insolvent company or bankrupt concerned. It broadened to include non-insolvency and multi-party commercial claims in the early

TPF.¹²⁷ As for the U.S., the TPF industry is slowly developing since the early 1990s, but is still lagging behind those in Australia and the U.K.¹²⁸ A possible explanation is the fact that contingency fees¹²⁹ and other payment schemes were first permitted in the USA and therefore there was less need for TPF.¹³⁰ However, the industry is now garnering attention,¹³¹ with companies continuing to enter the U.S. market.¹³² Considering the exponential growth of TPF in domestic litigation, especially in Australia, the U.K. and the USA, it is very probable that such funding will surge in commercial arbitration as well.

In Europe,¹³³ although Germany,¹³⁴ Austria, and Switzerland¹³⁵ have developed some kind of TPF market, TPF is nonetheless nearly non-existent in other civil law nations.¹³⁶ The absence of TPF in

2000s. C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 1 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; C. BURKE ROBERTSON, “The Impact of Third-Party Financing on Transnational Litigation”, 44. *Case W. Res. J. Int’l L.* 2011, 165-166; see also S. RANDAZZO, “Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows”, *Daily J.* September 10 2010; V. SHANNON, “Recent Developments in Third-Party Funding”, 30(4) *J. Int. Arb.* 2013, 444; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 71-94.

¹²⁷ For a brief overview of the evolution of TPF in the U.K., see C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 101-102; M. DESTEFANO, “Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?”, 80 *Fordham L. Rev.* 2012, 2822; S. RANDAZZO, “Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows”, *Daily J.* 10 September 10 2010.

¹²⁸ The TPF industry was first used for small-scale consumer cases and has since been further unfolding into a market for commercial investments as well. M. DE MORPURGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int’l & Comp. L.* 2011, 362; M. DESTEFANO, “Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?”, 80 *Fordham L. Rev.* 2012, 2823; S. RANDAZZO, “Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows”, *Daily J.* September 10 2010.

¹²⁹ *Supra.*

¹³⁰ B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 5 and www.curtis.com/siteFiles/Publications/TDM.pdf.

¹³¹ For instance, the American Bar Association (hereinafter “ABA”) is now paying more attention to issues that third-party litigation funding could entail, such as the influence of a funding relationship on the attorney-client relationship and on the ethical and professional duties of attorneys. See AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

¹³² For instance, in June 2011, it was announced on www.FT.com that Astraea Capital, a specialist financing company, was poised for a GBP 100 million flotation on the London Stock Exchange’s AIM market. Astraea is expected to compete against other funders which have launched on AIM in recent years and which offer funding for legal claims in the U.S., such as Burford Capital Ltd. and Juridica Investments Ltd.; C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 1 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; see also J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1661-1662.

¹³³ There is currently no legislation in Europe that specifically addresses TPF. M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAI/IBLJ* 2012, 654.

¹³⁴ See for instance <http://portal.foris.de>.

civil law countries can be explained by a number of reasons, such as costs and procedural rules, a less litigious culture, and the traditionally more personal nature of a claim.¹³⁷ If the TPF industry continues to grow in other jurisdictions, and the benefit of this funding becomes clear, together with the skyrocketing litigation costs, the favourable experience in Germany with TPF and the expected economic growth, it is likely that the TPF industry will also grow in civil law countries.¹³⁸

2. Availability of third-party funding in international commercial and investment treaty arbitration

TPF in international arbitration is a relatively recent phenomenon in both international investment arbitration and international commercial arbitration.¹³⁹ It is considered new, not in the way that a new financing method was invented, but new in the way that an already existing financing method is now being used in another industry than litigation.¹⁴⁰ TPF in arbitration is in many ways very similar as TPF in litigation. However, due to the nature of arbitral proceedings, there are some subtle nuances that need to be identified and analysed.

¹³⁵ In Switzerland, a draft of continental law to prohibit litigation funding was declared invalid by the Federal Supreme Court in Lausanne on December 10, 2004 because it was contrary to the Constitutional principle of freedom of commerce. See Decision of the Federal Supreme Court, Dec. 10, 2004, FTD 131 I 223 (Switz.) (interpreting art. 27 of the Federal Constitution of the Swiss Confederation of 18 Apr. 1999, Sr 101); see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 654; M. DE MORPURGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int’l & Comp. L.* 2011, 360.

¹³⁶ M. MANIRUZZAMAN, “Third-party funding in international arbitration – a menace or panacea?”, *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>; M. DE MORPURGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int’l & Comp. L.* 2011, 399-405 (description of the relevant laws in eleven civil law countries); for a more detailed discussion of these jurisdictions, as well as the current position of numerous other countries on third-party funding, I refer to L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 71-240.

¹³⁷ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1662; M. DE MORPURGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int’l & Comp. L.* 2011, 405-408.

¹³⁸ M. DE MORPURGO, “A Comparative Legal and Economic Approach to Third-Party Litigation Funding”, 19 *Cardozo J. Int’l & Comp. L.* 2011, 408-411.

¹³⁹ TPF in international investment arbitration is however comparatively significant in contrast to international commercial arbitration.

¹⁴⁰ Recent conferences such as the conference held on 15 June 2011 and organized by the New York State Bar Association Dispute Resolution Section and Fordham University School of Law; titled the ‘round table on third party funding of international arbitration claims: the newest “new new thing”’ and the ICC conference held on 26 November 2012, titled ‘third party funding in international arbitration’ indicate just how new third-party funding in international arbitration is.

As for commercial arbitration, despite the lack of hard data due to the private, secretive and often confidential nature of arbitration,¹⁴¹ one can notice several indications and anecdotal evidence that denote an exponential growth of the demand for TPF services.¹⁴² First, the subject has caught the eye and pen of the news media, academics, and scholars in recent years and conferences have been organized solely around TPF in international arbitration.¹⁴³ A vivid example of the increased attention that TPF in international arbitration is receiving, is the recently launched ‘Third-Party Funding Taskforce’, which is organized by the International Council for Commercial Arbitration (“ICCA”) in collaboration with the Centre on Regulation, Ethics and Rule of Law at Queen Mary, University of London. This taskforce will study and table recommendations regarding the procedures, ethics and related policy issues relating to TPF in international arbitration.¹⁴⁴

Second, as already noted above,¹⁴⁵ TPF is thriving in domestic litigation, especially in the past five years – particularly in Australia and England and the skills and experience developed in this area have contributed to the exponential growth of TPF in international arbitration.¹⁴⁶

Third, the increase of the volume of disputes resolved in arbitration, the escalating costs incurred during these proceedings and the rapid professionalization of arbitration finance as an asset class, with specialist funders explicitly stating in marketing materials that they offer funding for international arbitration as well,¹⁴⁷ all point towards the likely use of it.¹⁴⁸ Commercial arbitration, as a type of

¹⁴¹ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 1 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; G. AFFAKI, “A financing is a financing is a financing...” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 10.

¹⁴² D. SAMUELS, “Third-party funding: avoiding the pitfalls”, *Global Arb. Rev.* 2011; M. KANTOR, “Costs and third-party funding in international arbitration”, 5(2) *Global Arb. Rev.* 2010.

¹⁴³ For example see the 32nd Annual Meeting of the ICC Institute of World Business Law: Third Party Funding in International Arbitration organised on November 26th 2012 and the Roundtable Discussion referred to above; see also S. SEIDEL, “Duty to Know”, *CDR* September 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/08/1Aug2012-Duty-to-Know.pdf>; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>; S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 47; S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 3 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 18-19.

¹⁴⁴ See www.arbitration-icca.org/projects/Third_Party_Funding.html.

¹⁴⁵ *Supra*.

¹⁴⁶ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 1 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; see also C. HENDEL, “Third Party Funding”, *Latin Arbitration Law* 2010, www.latinarbitrationlaw.com/third-party-funding/; S. SEIDEL, “Funding international arbitration – a growth industry?”, *CDR* 24 November 2011, 3 and http://fulbrookmanagement.com/wp-content/uploads/2011/11/CDR-Funding-international-arbitration-_a-growth-industry.pdf.

¹⁴⁷ *Infra*.

dispute resolution, is now used throughout the world, with thousands of cases being administered by arbitral institutions, such as the International Chamber of Commerce (hereinafter “ICC”), the International Centre for Dispute Resolution (hereinafter “ICDR”) and the London Court of International Arbitration (hereinafter “LCIA”).¹⁴⁹ Given the vast amount of cases heard by these institutions, the increasing costs of arbitration, and the volume of available funds of funding corporations in arbitration, there is a solid chance that the use of TPF in arbitration will increase in the future.¹⁵⁰

The following are some recent statistics in order to give the reader an idea of the magnitude of the international arbitration business. First, the ICC registered an average of approximately 800 requests for arbitration per year from 2009 through 2012.¹⁵¹ As for the amounts at stake, in 2009, almost 30% of the disputes heard involved amounts over USD 10 million.¹⁵² Second, the ICDR grew rapidly over the past six years; 621 cases were administered in 2007, increasing to an impressive 996 cases in 2012, involving parties from ninety-two countries.¹⁵³ It is indisputable that parties in arbitration often incur substantial costs during the arbitral proceedings; costs such as legal fees, expert fees, compensation of the arbitrators, registration fees to the administering institution and other institutional fees.¹⁵⁴

Furthermore, as will be discussed into more detail below,¹⁵⁵ arbitral tribunals often have a broad discretion on how to allocate costs. For instance, the tribunal can decide that the losing party has to pay the winning party’s costs, hence increasing the costs of arbitration even further.

Furthermore, specialized funding corporations¹⁵⁶ are making their services available to international arbitration claims. Due to this professionalization, funders have acquired a high degree of subject

¹⁴⁸ C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#; S. SEIDEL, “Investing in International Arbitration Claims”, *Iberian Lawyer Magazine* 4 January 2011, www.iberianlawyer.com/index.php/67-practice-areas/legal-updates/litigation-adr/3439-investing-in-international-arbitration-claims-.

¹⁴⁹ The primary focus will be on these three arbitral institutions throughout this thesis.

¹⁵⁰ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1662.

¹⁵¹ Available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>; see also S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 3 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

¹⁵² J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1662.

¹⁵³ Available at https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2015007&RevisionSelectionMethod=LatestReleased.

¹⁵⁴ See G. BORN, *International Commercial Arbitration*, AH Alphen aan den Rijn, Kluwer Law International, 2009, 84.

¹⁵⁵ *Infra*.

matter expertise, resulting in a more efficient process, a better assessment of risk, and a better understanding of pricing.¹⁵⁷ All of these elements result in the increase of parties seeking to use this financing option.¹⁵⁸

Finally, the lucrative business of TPF has been used and questions have been raised and discussed in international investment arbitration awards,¹⁵⁹ which are generally publicly available, unlike commercial arbitration awards.¹⁶⁰ This evolution can be considered an indication of the probable use of in the more confidential industry of international commercial arbitration. This is exactly why this thesis will discuss some investment arbitration awards.

Nevertheless, despite the extensive press coverage of this rapidly emerging practice and the recent attention it enjoyed from academia,¹⁶¹ TPF of dispute resolution remains a subject of some mystery.¹⁶² The knowledge vacuum is considered to be the industry's biggest enemy because it negatively impacts the acceptance and growth of the industry.¹⁶³

To date, arbitration practitioners and parties to arbitral procedures have little knowledge about TPF and are even suspicious of it. This can be explained by the historical prohibition against stranger funding under the common law doctrines of maintenance and champerty. These doctrines made

¹⁵⁶ *Infra*.

¹⁵⁷ S. SEIDEL, ““Control” in Third-Party Funding: a Doctrine Out of Control”, *CDR* 2011, 61-62 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>.

¹⁵⁸ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1658.

¹⁵⁹ See for instance W. RAUBALL, “EuroGas AG: European Investment-Fund Financed Billion-Lawsuit of EuroGas Group against the Slovak Republic”, *BusinessWire* 6 November 2012, www.businesswire.com/news/home/20121106005568/en/EuroGas-AG-European-Investment-Fund-Financed-Billion-Lawsuit-EuroGas#UwtRNxIH9TA in which a case is mentioned where a Luxemburg fund financed the 1 billion EUR ICSID claim of an European gas company.

¹⁶⁰ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1651; see also A. MOURRE, “Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions...”, *Kluwer Arbitration Blog* 28 May 2009, <http://kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions.../>.

¹⁶¹ S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

¹⁶² C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#; for investment arbitration proceedings where external financing was used, see B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 25 and www.curtis.com/siteFiles/Publications/TDM.pdf.

¹⁶³ S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 2-3 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; S. SEIDEL, “Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future”, *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500; S. SEIDEL, “Duty to Know”, *CDR* September 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/08/1Aug2012-Duty-to-Know.pdf>; S. SEIDEL and S. SHERMAN, ““Corporate governance” rules are coming to third party financing of international arbitration (and in general)” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 35.

financial support of litigation by a third party a crime as well as a tort in certain jurisdictions and this for public policy reasons.¹⁶⁴ The effect of these doctrines has been relaxed over the past couple of years in some jurisdictions by the deterioration of the laws against these doctrines. This topic will be discussed in a further subsection.¹⁶⁵

IV. WHY THIRD-PARTY FUNDING?

In international arbitration, party autonomy is a sacrosanct principle and it allows parties to determine how the proceedings are to be conducted, subject to mandatory rules of jurisdiction and, if applicable, to arbitral institution rules.¹⁶⁶ TPF of arbitration claims is therefore, in principle, often allowed.¹⁶⁷ The attention given to TPF in recent years can be explained by some important advantages that TPF entails.¹⁶⁸ Both claimants and respondents can take the advantage of TPF at any stage during the arbitration proceedings and beyond (*i.e.* at the stage of the enforcement of the arbitral award).¹⁶⁹ The New York City Bar Association (hereinafter “NYCBA”) recently issued a Formal Opinion on third-party litigation financing, illuminating some of the advantages and some of the core concerns:

*“Non-recourse litigation financing is on the rise, and provides to some claimants a valuable means for paying the costs of pursuing a legal claim, or even sustaining basic living expenses until a settlement or judgment is obtained. It is not unethical per se for a lawyer to advise on or be involved with such arrangements. However, they may raise various ethical issues for a lawyer, such as the potential waiver of privilege and interference in the lawsuit by a third party. A lawyer representing a client who is party, or considering becoming party, to a non-recourse funding arrangement should be aware of the potential ethical issues and should be prepared to address them as they arise.”*¹⁷⁰

¹⁶⁴ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 2 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

¹⁶⁵ *Infra*.

¹⁶⁶ S. SEIDEL, “Funding international arbitration – a growth industry?”, *CDR* 24 November 2011, 1 and <http://fulbrookmanagement.com/wp-content/uploads/2011/11/CDR-Funding-international-arbitration--a-growth-industry.pdf>.

¹⁶⁷ R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 10.

¹⁶⁸ As for international arbitration, funders have a particular interest in funding investment arbitration cases because of the potential for massive recoveries. C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 7 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; S. SEIDEL, “Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future”, *Financier Worldwide* July 2012, 37 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500.

¹⁶⁹ M. MANIRUZZAMAN, “Third-party funding in international arbitration – a menace or panacea?”, *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

¹⁷⁰ NEW YORK CITY BAR ASSOCIATION, “Formal opinion 2011-2: third party litigation financing”, 2011, www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02.

In this paragraph, some of these main advantages of TPF will be discussed as well as some of the vices and reasons why TPF should be restricted or even prohibited.

1. Explaining the recent increase of third-party funding

1.1. Access to justice

The first and perhaps foremost reason for the increase is that TPF is considered a solution for realising the public policy ideal of increasing access to justice.¹⁷¹ As a result from the financing, parties can have a realistic chance of vindicating their rights by having the opportunity to go to arbitration, without the risk of being pushed into economic dire straights by pursuing the claim.¹⁷² In other words, TPF levels the playing field by which disputes are resolved.¹⁷³ The lack of access to justice could also affect the perceptions about the fairness and legitimacy of international arbitration, as such.¹⁷⁴ The latter is a risk that the international arbitration community most definitely should try to avoid.

Open and equal access to arbitration for parties who want to make use of it, is a fundamental characteristic of any meaningful system.¹⁷⁵ This author shares the opinion of DE BRABANDERE and LEPELTAK when they state that the increase of the access to justice is the most important advantage of TPF.¹⁷⁶ This incisive motive should be the backbone of the drive for further development of TPF.

¹⁷¹ M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1313; L.S. SCHANER and T.G. APPLEMAN, "The rise of 3rd-party litigation funding", *Law360* 21 January 2011, www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding; S. SEIDEL, "Duty to Know", *CDR* September 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/08/1Aug2012-Duty-to-Know.pdf>; S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 29 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; BURFORD CAPITAL LIMITED, "Everything Must Change", *Burford* 28 March 2014, www.burfordcapital.com/articles/everything-must-change/; M. TADDIA, "Litigation funding: calling for backup", *L.S.Gaz.* 3 March 2014, www.lawgazette.co.uk/practice/litigation-funding-calling-for-backup/5040166.article; C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 102; C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 106.

¹⁷² G. AFFAKI, "A financing is a financing is a financing..." in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 10.

¹⁷³ B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 34 and www.curtis.com/siteFiles/Publications/TDM.pdf; see also S. RANDAZZO, "Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows", *Daily J.* September 10 2010; S. MARTIN, "The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed", 10 *Fordham J. Corp. & Fin. L.* 2004, 77.

¹⁷⁴ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 41 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962

¹⁷⁵ C. BOGART, "Overview of arbitration finance" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 51-53.

¹⁷⁶ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 7 and <http://ssrn.com/abstract=2078358>.

Some arbitral proceedings are a contest of equals if the companies are of equal size and the amount at stake is manageable for both parties. In that event, one would expect the dispute to be resolved based purely on its merits and not because one of the parties has a larger bargaining power.¹⁷⁷ However, the problems occur if one of the parties is much smaller than the other. Increasing expenses (such as lawyer fees, procedural costs, etc.) associated with the pursuit of high value claims and the need to manage the financial risks relating to the pursuit of these substantial claims certainly are a couple of reasons that can explain the rising interest in and demand for TPF.¹⁷⁸

The possible impact on the future economic and financial viability and stability of the company can also discourage a party to submit its dispute to arbitration. TPF shifts the liability for the costs to the funder, thereby giving more companies the opportunity to engage in an arbitral procedure. No longer is international arbitration the prerogative of large multinationals because of TPF. Small and medium-sized companies exercising their rights through arbitration claims is becoming increasingly common.

Arbitration has become a great international industry, enormously competitive and also prohibitively expensive with the level of costs continuing to rise at an unsustainable rate,¹⁷⁹ resulting in bargaining imbalances if one of the parties is significantly bigger than the other and is thus a type of dispute resolution with an enormous demand for funding.¹⁸⁰ It can be argued that justice should not only be available for ‘deep-pocket’ companies, but also for smaller, for instance SME’s, companies which have a meritorious claim or a solid defense, but do not have the resources to go to arbitration. This will

¹⁷⁷ C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

¹⁷⁸ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 1 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; it has been observed however that in the event of a non-distressed claimant, the incentive to resort to TPF may be less important because of the high-return rates usually requested by funders. See for a discussion on this topic A. ROSS, “The dynamics of third-party funding”, 7(1) *Global Arb. Rev.* 2012, 14-15; SEIDEL, the chairman and founder of Fulbrook Management LLC, predicts that funding of private international arbitration claims will become one of the most important areas of funding in the couple of years. S. SEIDEL, “Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future”, *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500.

¹⁷⁹ S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 10 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

¹⁸⁰ B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 2 and www.luzmenu.com/cremades/Noticias/128/128.pdf; for instance in the U.K., the required legal budget for each arbitration case is typically between £1 and £5m (CALUNIUS CAPITAL LLP, Memorandum: A European Perspective, 15th June 2011, 2 and www.calunius.com/media/1549/tpf%20of%20international%20arbitration%20claims%20the%20newest%20new%20new%20thing.pdf); K. DURCAN, “International arbitration: getting pricier, but still growing”, *L.S.Gaz.* 16 October 2008, www.lawgazette.co.uk/48011.article; S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 5 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

not only benefit the smaller enterprises, but might also boost the public opinion about the procedural systems as a whole. Otherwise, we could end up back in the times of Jeremy Bentham when he said:

*“Wealth has indeed the monopoly of justice against poverty.”*¹⁸¹

Even if the weaker of the two parties has a very strong case on the merits, it would have a difficult time turning down a less-than-reasonable settlement offer that would free it of the burdens of ongoing dispute resolution or even relinquish his or her claim.¹⁸² Without a credible threat of taking the case through arbitration (and also enforcement proceedings), the weaker of the parties would have to settle with a one-sided settlement agreement.¹⁸³ RODAK refers to this as the ‘bargaining-power-equalizing’ function of TPF.¹⁸⁴ BOGART says the following about the situation where bargaining imbalances occur:

*“Where bargaining imbalances threaten to skew settlement, the solution is more likely to be found in a market mechanism than in procedural reform.”*¹⁸⁵

TPF will thus have a positive impact on settlements because the financially stronger parties will lose the power to impose a one-sided settlement agreement and will have a bigger incentive to negotiate a (more favourable) settlement at an earlier stage of the dispute because of the increased leverage of the adversary provided for by the TPF.¹⁸⁶ The fact that funding agreements are often structured as to favour an early settlement by providing that a smaller amount will be charged if the case is settled at an earlier stage also contributes to the positive effect TPF has on settlements.¹⁸⁷

¹⁸¹ Letter of March 1787, The works of Jeremy Bentham, vol. 3, chapter XII; B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 2-3 and www.luzmenu.com/cremades/Noticias/128/128.pdf.

¹⁸² M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 514.

¹⁸³ C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 522.

¹⁸⁴ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 503.

¹⁸⁵ *Ibid.*

¹⁸⁶ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 515; A. DOBNER, “Litigation for Sale”, 144 *U. Pa. L. Rev.* 1996, 1536-1537.

¹⁸⁷ B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 34 and www.curtis.com/siteFiles/Publications/TDM.pdf; for example, in 2009, Burford Capital Limited agreed to fund Gray Development Group and in the funding agreement it was determined that Burford would advance USD 5 million in exchange for 33% of any settlement and 40% of any judgment. In other words, Gray Development Group had to pay less to Burford if they reached a settlement (B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 14 and www.curtis.com/siteFiles/Publications/TDM.pdf); see also *Anglo-Dutch Petroleum v. Haskell*, 193 S.W.3d 87 (Tex. 2006), 105 where the Texas Court of Appeals noted:

The following examples are two recent cases, which give a clear indication that TPF is more and more accepted as a mean to improve the access to justice. The cases relate to the access to the civil courts and not to arbitration, as such, the same principles nevertheless apply and are therefore relevant for arbitration as well. The first case is the English Court of Appeal decision of *Arkin v. Borchard Lines, Ltd.* (hereinafter “*Arkin*”). In this case the Court acknowledges that TPF could indeed offer access to justice. In their judgment, the Court referred to commercial funders as funders “*who provide help to those seeking access to justice which they could not otherwise afford.*”¹⁸⁸ Lord Justice JACKSON, in his published report of his review of the costs of civil litigation in England, concluded that TPF promotes access to justice.¹⁸⁹ A similar opinion was expressed by Justice KIRBY in the Australian High Court decision in the case of *Campbells Cash and Carry Pty Limited v. Fostif Pty Limited* (hereinafter “*Fostif*”). Justice KIRBY expressly emphasized “*the importance of access to justice, as a fundamental human right which ought to be readily available to all.*”¹⁹⁰

1.2. Maintain financial stability

Secondly, by using TPF, companies can maintain enough cash flow and avoid liquidity or budgetary problems¹⁹¹ so they can continue their usual business or even invest in new business activities when they are pursuing a meritorious claim, without bearing the risk of going bankrupt.¹⁹² Companies might withdraw from arbitration procedures, if they risk a cash drain when they would continue the

“*because of the increasing returns to which appellees were entitled, the manner in which the agreements were structured may actually have encouraged settlement.*”

¹⁸⁸ *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; see also M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1281; N. DIETSCH, “Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries”, 38 *N.Ky. L. Rev.* 2011, 699.

¹⁸⁹ See R. JACKSON, “Review of civil litigation costs: final report”, TSO 2010, 117 and www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf; see also S. SEIDEL, “Maturing Nicely”, CDR May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

¹⁹⁰ *Campbells Cash and Carry Pty Limited v. Fostif Pty Limited* [2006] HCA 41; the High Court of Australia confirmed in this case that it is not contrary to public policy under Australian law for a funder to finance and control litigation in the expectation of profit, nor that this amounts to an abuse of the court’s process. See also W. ATTRILL, “Ethical Issues in Litigation Funding”, unpublished paper, 2009, 3-7 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf for a discussion on this case.

¹⁹¹ Although some companies may use TPF to control their financial risk, most funding agreements involve impecunious claimants who lack sufficient financial resources to bring their claim. W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30(1) *J. Int. Arb.* 2013, 18; S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 22 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

¹⁹² L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 12; M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1275-1276; C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 3 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; BURFORD CAPITAL LIMITED, “Everything Must Change”, *Burford* 28 March 2014, www.burfordcapital.com/articles/everything-must-change/.

procedures. At that point, they are making a balance of what would engender the most damage; the cash flow issues with resulting stagnation of their business or withdraw their claim and stop the arbitration procedure.

TPF can be a solution to this dilemma by giving the companies the opportunity to continue their business and proceed with the arbitration. In this way, corporations can unlock the often substantial value they have tied up in unresolved claims and allows them to proceed with arbitrations while retaining control of their exposure to loss.¹⁹³ In other words, TPF allows the party to offload the financial risk and cost of the proceedings off their balance sheets by transferring the risks to the funder.¹⁹⁴ These legal and experts fees and other costs are often substantial and can run in the millions while pursuing a claim in international arbitration. Not only the claimant has to make these expenses, but also the respondent. The concern in many arbitral procedures is that if the claim fails, the claimant will be liable for not only its own legal fees and expenses, but also for the respondent's costs.¹⁹⁵ The ability to spread and share these risks with a third party may be attractive, even to client with strong businesses and cash flows.

1.3. Attractive investment from a funder's perspective

From a funder's perspective, TPF in international arbitration has an irresistible allure due to myriad reasons:¹⁹⁶ (i) the speed of arbitral proceedings;¹⁹⁷ (ii) the high enforceability of arbitral awards because of many treaties providing for international enforcement, such as the New York

¹⁹³ C. BOGART, "Third party funding in international arbitration", *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

¹⁹⁴ X, "Third-party Litigation Funding", *Financier Worldwide* 2012 and www.financierworldwide.com/article.php?id=9328&page=1; C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 4 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 4 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; S. SEIDEL and S. SHERMAN, "'Corporate governance' rules are coming to third party financing of international arbitration (and in general)" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 35.

¹⁹⁵ This will depend on whether the applicable *lex loci arbitri* contains provisions under which the winner is usually entitled to recover its costs from the loser, unless the parties have agreed otherwise. Alternatively, where institutional rules apply, generally, the rules leave the arbitral tribunal with a wide discretion on costs. However, see art. 42 of the UNCITRAL Arbitration Rules 2010 and art. 28(4) of the London Court of International Arbitration Rules.

¹⁹⁶ S. SEIDEL, "Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future", *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 12.

¹⁹⁷ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 5 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

Convention;¹⁹⁸ (iii) the prevalence of high-value claims;¹⁹⁹ (iv) the expertise of the decision-makers; (v) funders usually seek a share of the recovery in the range of 15% to 50%, depending on the costs and risks involved in funding the dispute;²⁰⁰ and (vi) the stagnation of the worldwide economy and the accompanying uncertainty causes funders to have an increased interest TPF because they consider TPF as a way to make investments that are unrelated to the unpredictable and financial markets.²⁰¹

1.4. Assessment of the merits of a claim

Furthermore, another reason for choosing TPF is the early, independent,²⁰² and fine-tuned assessment of the merits of a potential claim that one receives when contacting a funder.²⁰³ Once the funder

¹⁹⁸ The New York Convention 1958 governs the recognition and enforcement of foreign awards. There are currently 147 countries that have signed the New York Convention. For an up-to-date list of the signatories countries of the New York Convention, see <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 11.

¹⁹⁹ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 5 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 24.

²⁰⁰ The return of the funder is said to be determined on a case-by-case basis and varies enormously among funders. There are multiple ways to calculate the final share that the funder will receive. The pricing can be based on a percentage of the final award, or a multiple of the initial investment made by the funder, or an amount calculated using a combination of these two options. The amount that the funder will receive can also depend on the stage in which the case is settled. In general, funders aim to triple the value of the investment. L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 28-29; E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/1*, 5 and <http://ssrn.com/abstract=2078358>; S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 7-15 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; L. ATHERTON, “Third party funding in arbitration: a perspective from England”, *KL Gates LLP Newsstand: Arbitration World* 2009, http://m.klgates.com/arbitration-world-10-01-2009/#third_party; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 507; M. SCHERER, “Out in the open? Third-party funding in arbitration”, *CDR* 2012, 55 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration; S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 25.

²⁰¹ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 12; M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1283-1284; E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/1*, 6 and <http://ssrn.com/abstract=2078358>; R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 12; S. SEIDEL, “Funding international arbitration – a growth industry?”, *CDR* 24 November 2011, 1 and <http://fulbrookmanagement.com/wp-content/uploads/2011/11/CDR-Funding-international-arbitration--a-growth-industry.pdf>; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

²⁰² In contrast, it is difficult for both the client and its attorney to perform an objective assessment of the claim. For instance, the client has its own perception about the facts underlying the claim, and the attorney sees the case as an opportunity to earn hourly fees. C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 12 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²⁰³ A. ENDICOTT, N. GIRALDO-CARRILLO and J. KALICKI, “Third-party funding in arbitration: innovation and limits in self-regulation (part 1 of 2)”, *Kluwer Arbitration Blog* 13 March 2012,

received the request, it will perform a meticulous due diligence analysis in order to better assess the possibilities of success or the likelihood of failure.²⁰⁴ The party, who requested the funding, will subsequently have an indication of the strength of his claim or defense due to the ability of funders to engage in a disinterested, dispassionate assessment.²⁰⁵ CREMADES notes on this topic:

*“The proponents of third party financing in international arbitration see the presence of the professional financier as a guarantee that there is solid basis for the claim. The respondent should reconsider his defense with regard to a claim that has passed the study of a financing entity and its advisors.”*²⁰⁶

Proponents thus believe that TPF will not lead to frivolous claims because funders will only fund a claim which has a reasonable chance of succeeding, since its investment will otherwise be for naught.²⁰⁷ The simple fact that TPF agreements are usually entered into after the party decided to pursue the claim further rebuts the argument²⁰⁸ that TPF will lead to frivolous claims.²⁰⁹ Furthermore, the presence of a funder could lead to an early settlement because the respondent’s believe that if the claimant is funded, he must have a strong case.²¹⁰ Early settlements are most often beneficial for the

<http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>; B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 34 and www.curtis.com/siteFiles/Publications/TDM.pdf; C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 5 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; S. SEIDEL, “Control” in Third-Party Funding: a Doctrine Out of Control”, *CDR* 2011, 62 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>; M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1305.

²⁰⁴ *Infra*.

²⁰⁵ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 12 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962;

²⁰⁶ B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 6 and www.luzmenu.com/cremades/Noticias/128/128.pdf; see also See R. JACKON, “Review of civil litigation costs: final report”, *TSO* 2010, 117 and www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf.

²⁰⁷ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 518-519; S. MARTIN, “The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed”, 10 *Fordham J. Corp. & Fin. L.* 2004, 77; D. RICHMOND, “Other People’s Money: the Ethics of the Litigation Funding”, 56 *Mercer L. Rev.* 2005, 660-661; S. SEIDEL and S. SHERMAN, “The Time Is Now For Third Party Funders & Defendants To Beat Their Swords Into Plowshares”, *Corporate LiveWire* 5 September 2012, www.corporatelivewire.com/top-story.html?id=the-time-is-now-for-third-party-funders-defendants-to-beat-their-swords-into-plowshares; L. NICCOLÒ, “The Arbitrator and the Arbitration Procedure: Third Party Funding in International Commercial Arbitration – An Overview” in C. KLAUSEGGER *et al.* (eds.), *Austrian Yearbook of International Arbitration*, Munich, C.H.Beck, 2012, 95.

²⁰⁸ *Infra*.

²⁰⁹ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 519.

²¹⁰ W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30(1) *J. Int. Arb.* 2013, 23; S. PERRY, “Third-party Funding: an Arbitrator’s Perspective”, *Global Arb. Rev.* 23 November 2011, <http://globalarbitrationreview.com/news/article/29981/third-party-funding-arbitrators-perspective>; R. MNOOKIN and L. KORNHAUSER, “Bargaining in the Shadow of the Law: The Case of Divorce”, 88 *Yale L.J.* 1979, 972-973;

claimant for several reasons, such as reduced costs.²¹¹ The Texas Court of Appeals ruled in the same in the *Anglo-Dutch Petroleum v. Haskell* case with respect to the opinion that TPF will not lead to funding frivolous claims:

*“Presumably, prior to making an investment pursuant to a similarly structured agreement, an investor would consider the merits of the suit and make a calculated risk assessment on the probability of a return on its investment. An investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit.”*²¹²

With respect to the opinion that TPF could prompt early settlements, BOGART states that:

*“There is no evidence to suggest that claimants hold out for higher settlements because they need to pay the funder something, any more than there is evidence of claimants wanting higher settlements to cover the bank interest they have had to pay to borrow money for their legal fees.”*²¹³

BOGART then makes the following analogy to prove his point. He says that plaintiffs in the USA commence litigation with lawyers who offer contingency fees.²¹⁴ The plaintiffs in question know that by entering into a contingent fee arrangement, they will be giving up a part of a potential settlement. However, these plaintiffs accept this from the outset as a part of the price of the arrangement and there is no suggestion that plaintiffs in a contingent fee arrangement do not settle at the proper settlement value of their cases because of the presence of the contingent fee. TPF in arbitration is no different.²¹⁵

1.5. Third-party funding in international investment arbitration

W. VAN BOOM, “Third-Party Financing in International Investment Arbitration”, *Erasmus School of Law, Rotterdam, the Netherlands, Working Paper Series K12, K20, K41* 2011, 49 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114; J. MOLOT, “Litigation Finance: A Market Solution to a Procedural Problem”, 99 *Geo. L. J.* 2010, 70-73.

²¹¹ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 520.

²¹² *Anglo-Dutch Petroleum v. Haskell*, 193 S.W.3d 87 (Tex. 2006), 104-105.

²¹³ C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

²¹⁴ *Supra*.

²¹⁵ C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

DE BRABANDERE and LEPELTAK consider the increase of arbitral proceedings²¹⁶ and the publication of the majority of arbitral awards in international investment law as another reason for the increase of TPF in international investment arbitration.²¹⁷ The possibility of determining the outcome of the proceedings more easily decreases the uncertainty of the proceedings before the commencement of these, hence the funder will obtain better knowledge of the possible outcome and may thus objectively decide to invest in an arbitral procedure. As noted above,²¹⁸ because of the lack of consistent publication of arbitral awards in international commercial arbitration, this reason only counts for international investment arbitration and not for international commercial arbitration.

Furthermore, investment arbitration is more attractive than commercial arbitration at this moment for TPF for the following reasons. First and foremost, investments in international investments claims can be more lucrative because investment treaty claims usually by far exceed the amount of compensation requested in international commercial arbitration. Second, the ICSID Convention is more appealing to funders than the New York Convention because awards can easily be recognized and enforced through the former. The New York Convention, even though this convention facilitates enforcement, it nevertheless contains possibilities for review by domestic courts. On the other hand, article 54(1) of the ICSID Convention states that there are no review possibilities by national courts. Calunius Capital LLP on the other hand reason state that only very few funders want to get involved in investment treaty arbitrations because of the longer investment period due to longer case duration and more pronounced risk profiles.²¹⁹

DE BRABANDERE and LEPELTAK also give legitimate reasons why investment arbitration is more attractive than commercial arbitration. However, Calunius Capital LLP, an active funder, proclaims that investment arbitration is less attractive because of the length of the procedures thereof.

2. Objections against further increase of third-party funding

One of the key issue that feeds the suspicion and scepticism of TPF is the fact that a stranger to the attorney-client relationship²²⁰ is introduced in the proceedings whose mere interest in and connection with the dispute is the capitalistic aim of making a profit and this issue results in several disadvantages

²¹⁶ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 47 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²¹⁷ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 6-7 and <http://ssrn.com/abstract=2078358>.

²¹⁸ *Supra*.

²¹⁹ CALUNIUS CAPITAL LLP, Memorandum: A European Perspective, 15th June 2011, 2 and www.calunius.com/media/1549/tpf%20of%20international%20arbitration%20claims%20the%20newest%20new%20new%20thing.pdf.

²²⁰ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 25 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

and negative consequences.²²¹ This scepticism contributes to the not so flattering names by which funders are occasionally described: ‘vulture investors’,²²² ‘gamblers’,²²³ or even ‘loan sharks’.²²⁴ WENDEL goes even further by saying that that TPF is:

*“objectionable in the same way as prostitution, selling babies, surrogate pregnancy, or establishing a market mechanism for the allocation of blood or organs for transplantation is potentially believed to be – namely, some things just should not be for sale.”*²²⁵

Furthermore, another concern is that TPF will prompt frivolous claims and increase the volume of cases because TPF makes it possible for claims of questionable merit to be litigated or put through arbitration.²²⁶ As opposed to contingency fee agreements, funders supposedly do not have the same incentives as lawyers working on a contingency fee basis. They claim that funders lack the ethical duty to advise clients when claims are frivolous and that lawyers, when they are working on contingency basis, rather spend their time on cases that are likely to be successful, as opposed to cases with a low probability of success.²²⁷ They also argue that the likelihood of a lawsuit’s success is only one component. The other component is the potential amount of recovery. Therefore the potential recovery could outweigh the likelihood of actually achieving that recovery.²²⁸ KANTOR explicitly states that:

“These companies – like all sophisticated investors – will base their funding decisions on the present value of their expected return, of which the likelihood of a lawsuit’s success is only one component. The other component is the potential amount of recovery. If that potential

²²¹ J. BEISNER, J. MILLER and G. RUBIN, “Selling lawsuits, buying trouble: third-party litigation funding in the United States”, *U.S. CHAMBER INSTITUTE FOR LEGAL REFORM* 2009, 1 and <http://legaltimes.typepad.com/files/thirdparty litigation financing.pdf>;

²²² M. KANTOR, “Third-party Funding in International Arbitration: An Essay About New Developments”, 24 *ICSID Rev.* 2009, 66; S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 9 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

²²³ J. MOLOT, “Litigation Finance: A Market Solution to a Procedural Problem”, 99 *Geo. L. J.* 2010, 96.

²²⁴ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 2 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²²⁵ W. WENDEL, “Alternative Litigation Financing and Anti-Commodification Norms”, *DePaul L. Rev.* (forthcoming 2013), 4 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261343.

²²⁶ S. RANDAZZO, “Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows”, *Daily J.* September 10 2010; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 518.

²²⁷ J. BEISNER, J. MILLER and G. RUBIN, “Selling lawsuits, buying trouble: third-party litigation funding in the United States”, *U.S. CHAMBER INSTITUTE FOR LEGAL REFORM* 2009, 1 and <http://legaltimes.typepad.com/files/thirdparty litigation financing.pdf>; C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 106.

²²⁸ *Ibid.*, p. 5-6.

recovery is sufficiently large, the lawsuit will be an attractive investment, even if the likelihood of actually achieving that recovery is small.”²²⁹

There is however no conclusive evidence that TPF of claims promotes frivolous claims. Moreover, this author considers it to be unlikely that a prudent funder will use its capital to fund a weak claim.²³⁰

Furthermore, some commentators fear that in the future funders will create portfolios consisting of high-risk claims (*i.e.* frivolous or unmeritorious claims) and low-risk claims (*i.e.* claims with a good chance of success) to hedge the high-risk claims and sell them to third-party speculators as derivatives.²³¹ Third-party speculators would thus have the possibility to invest in and profit from frivolous claims that would otherwise, when sold individually, not have a market with speculators.²³² TPF could thus, in time, evolve into complex financial engineering involving other related financial products (e.g. credit default swaps), but it remains to be seen as the market develops and demand grows in the years ahead.²³³ To date, this concern is pure speculation and lays beyond the scope of this thesis. This author nevertheless deemed it necessary to identify this issue due to the potential impact it could have on further development of TPF.

²²⁹ M. KANTOR, “Third-Party Funding in International Arbitration: An Essay About New Developments”, 24 *ICSID Rev.* 2009, 53; see also C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 46-47 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²³⁰ R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 10 and www.fticonsulting.com/global2/media/collateral/united-states/third-party-funding-incentives-and-outcomes.pdf; S. RANDAZZO, “Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows”, *Daily J.* September 10 2010.

²³¹ S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 9 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf; A. ROSS, “The dynamics of third-party funding”, 7(1) *Global Arb. Rev.* 2012, 14; C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#; R. LOWE, “Speculate and arbitrate to accumulate”, *IBA Global Insight* 2013 and www.ibanet.org/Article/Detail.aspx?ArticleUid=804e46e3-dfc0-4966-b16e-31627803970c; P. EBERHARDT and C. OLIVET, “Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom”, *Corporate Europe Observatory* 2012, 58 and www.fulbrookmanagement.com/wp-content/uploads/2013/03/profitting-from-injustice-CEO.pdf; S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 29.

²³² S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 9 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf; G. AFFAKI, “A financing is a financing is a financing...” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 12.

²³³ M. MANIRUZZAMAN, “Third-party funding in international arbitration – a menace or panacea?”, *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

Another concern is that TPF could have a negative impact on settlements because a rational claimant would be reluctant to settle for any amount offered that is less than the principal amount advanced by the funder.²³⁴ In this way, the presence of TPF disincentives funded claimants to settle. Both the proponents²³⁵ and the critics of TPF thus cite the industry's effect on settlements as support for their respective positions.

Additionally, there are also concerns of an ethical nature. The critics argue that by entering into a TPF agreement, the claimant will lose control over strategic decisions in the strategy of the lawsuit or the arbitral procedure because funders want to protect their investment.²³⁶ The undesirable consequences of this shift of control could be the rise of conflicts of interest for the client's attorney,²³⁷ confidentiality concerns insofar the funder requires the disclosure of privileged information to him, who does arguably does not enjoy attorney-client privilege.²³⁸

By providing funding, funders gain a degree of economic power in the relationship with the funded claimant and in relation to the outcome of the dispute. Another concern is that due to the amount at stake, an unscrupulous funder might take advantage of its economic power by insisting on unfair terms in a funding agreement, or even use its economic position to renegotiate terms to the detriment of the vulnerable client at a mature stage of the procedure.²³⁹ Due to the necessity of the funding for the continuation of the procedure, funded claimants might then agree with these inequitable terms because otherwise they would have to withdraw their claim.

There are of course some factors that offer protection against unfair terms, proposed by a funder. In the context of international commercial arbitration, many clients of funders are themselves experienced commercial parties who may have decided to obtain funding for their claim in order to appropriately manage the risks of pursuing the claim. Such clients expect and demand professionalism from a funder and normally will not be tricked into agreeing on unfair terms, also because they usually

²³⁴ B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 36 and www.curtis.com/siteFiles/Publications/TDM.pdf; M. RODAK, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", *U. Pa. L. Rev.* 2006, 522.

²³⁵ *Supra*.

²³⁶ J. BEISNER, J. MILLER and G. RUBIN, "Selling lawsuits, buying trouble: third-party litigation funding in the United States", *U.S. CHAMBER INSTITUTE FOR LEGAL REFORM* 2009, 7-8 and <http://legaltimes.typepad.com/files/thirdparty litigation financing.pdf>; S. RANDAZZO, "Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows", *Daily J.* September 10 2010; D. RICHMOND, "Other People's Money: the Ethics of the Litigation Funding", 56 *Mercer L. Rev.* 2005, 651-652; M. RODAK, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", *U. Pa. L. Rev.* 2006, 517; G. AFFAKI, "A financing is a financing is a financing..." in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 11.

²³⁷ *Infra*.

²³⁸ *Infra*.

²³⁹ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 6 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

have access to well-resourced legal advisers, in-house or external. Another self-evident factor that offers protection against unfair terms is the fact that there is competition among funders as well. They cannot afford to build up a lamentable reputation in a competitive market, which the funding industry is. They will prefer to agree on less attractive contract terms with the funded claimant, rather than losing business in the future.

For these reasons BEISNER, MILLER and RUBIN suggest that the lawmakers and regulators should prohibit TPF in the U.S.²⁴⁰

V. DUE DILIGENCE

1. Funders

A funder's decision to fund a claim or defence is typically an investment decision, which needs rigorous investigation because the investment can result both in a substantial benefit, as well as in a sizeable loss. When contemplating whether the claim or defence are frivolous or, on the contrary, serious enough to merit funding, it behoves funders to undertake a rigorous, expensive and extensive vetting process, taking into account various factors, which bear on the financial risks it is being asked to assume or to share.²⁴¹ Financing a claim thus requires a mixture of knowledge on the level of international arbitration proceedings, rules and regulations and at the same time a thorough knowledge of international finance.²⁴² However, little is known about the methodology of funders in taking the decision to finance a certain arbitral procedure.²⁴³ The diligence investigation can be performed by both an in-house team and outside counsel, depending on the strength of the in-house team of the funders.²⁴⁴

²⁴⁰ B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 12 and www.curtis.com/siteFiles/Publications/TDM.pdf.

²⁴¹ Only a small percentage of the claims that seek funding eventually end up with funding. For instance, in Fulbrook Management LLC, only about one claim out of 12 requests end up being funded. S. SEIDEL, "Investing in commercial claims, nutshell primer", *Fulbrook Management Publications* 2011, 15 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; R. MULHERON and P. CASHMAN, "Third-Party Funding of Litigation: A Changing Landscape", 27 *Civil Justice Quarterly* 2008, 316; the process reportedly involves expenses of around \$ 100,00 and usually takes up to 2-3 months. C. HENDEL, "Third Party Funding", 2010, www.latinarbitrationlaw.com/third-party-funding/; B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 15 and www.curtis.com/siteFiles/Publications/TDM.pdf; C. VELJANOVSKI, "Third-Party Litigation Funding in Europe", 8 *J.L. Econ. & Pol'y* 2012, 420.

²⁴² E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 5 and <http://ssrn.com/abstract=2078358>; S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 29 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

²⁴³ *Ibid.*; B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 12-15 and www.curtis.com/siteFiles/Publications/TDM.pdf.

²⁴⁴ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAI/IBLJ* 2012, 214-215; S. RANDAZZO, "Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows", *Daily J.* September 10 2010; S. SEIDEL, "Investing in Commercial Claims,

Funders may become involved in a claim at the very outset of the proceedings even before a claim is filed or even before the claimant has hired legal counsel. Alternatively, the arbitral proceedings may have already begun when funders become involved.²⁴⁵ Unsurprisingly, there is less need for extensive due diligence if the arbitral proceedings are already in a developed stage.

Various factors should be considered before entering into a funding agreement.²⁴⁶ These factors include: the prospects of success of the claim,²⁴⁷ possible counterclaims, the terms of the arbitration agreement, the arbitral institution and composition of the tribunal, the seat of the arbitration,²⁴⁸ the substantive law of the dispute, the quantum of the claim²⁴⁹ in comparison with the likely costs and risks of pursuing the claim and the risks associated with enforcing and obtaining payment under an award (including the question of whether the respondent has assets of value in a state which is a signatory to the New York Convention),²⁵⁰ the solvency of the respondent and the prospects of recovery,²⁵¹ the duration and merits of the proceedings, the possibility of the lawyers sharing risks through the success fee.²⁵²

Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 18 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 47 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²⁴⁵ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1654.

²⁴⁶ See generally S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 24-28.

²⁴⁷ As for the probability of success, it varies from a probability of success of 70% or higher to a likelihood of success of about 50%. L. ATHERTON, “Third party funding in arbitration: a perspective from England”, *KL Gates LLP Newsstand: Arbitration World* 2009, http://m.klgates.com/arbitration-world-10-01-2009/#third_party; R. ROTHWELL, “Storm raging over investing in litigation”, *L.S.Gaz.* 7 February 2012, www.lawgazette.co.uk/64162.article; S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 25.

²⁴⁸ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Third Party Funding in International Arbitration in Europe: Part 1 – Funders’ Perspectives”, *RDAI/IBLJ* 2012, 212.

²⁴⁹ For instance, some funders target cases where the claim is for between USD five million and an upper limit of USD one billion. M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Third Party Funding in International Arbitration in Europe: Part 1 – Funders’ Perspectives”, *RDAI/IBLJ* 2012, 213.

²⁵⁰ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 5 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; see also A. ROSS, “The dynamics of third-party funding”, 7(1) *Global Arb. Rev.* 2012, 19.

²⁵¹ R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 11-12 and www.fticonsulting.com/global2/media/collateral/united-states/third-party-funding-incentives-and-outcomes.pdf; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 4.

²⁵² For an example of the calculation of the value of a claim by Calunius, see L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 31-33; B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 5-6 and www.luzmenu.com/cremades/Noticias/128/128.pdf; J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1654; L. NIEUWVELD and

2. Clients

By the same token as the funders, the client has to perform a meticulous due diligence process with respect to the funder. Before entering into a funding agreement, the claimants and their lawyers should do careful due diligence on the funders, both in relation to the funder's financial standing and track record and the experience and competence of its staff.²⁵³

SECOND PART – ISSUES REGARDING THIRD-PARTY FUNDING

I. LEGAL ETHICS AND DOCTRINES AND THIRD-PARTY FUNDING

There are still some mechanisms and ethical principles in existence that could prevent the TPF industry from developing in some jurisdictions because the doctrines in question can affect the validity and enforceability of TPF agreements. Considering the competition going on between countries and arbitral institutions to attract arbitral proceedings,²⁵⁴ it is important to know if TPF agreements will be recognised and enforced in subsequent court proceedings. If this is not the case, parties may be reluctant to go to the jurisdiction in question.

The doctrines of maintenance and champerty have greatly influenced the overwhelming development of TPF and have proven to be roadblocks for further growth of TPF in common law countries. These are separate doctrines, but are so closely related that they are often addressed together in scholarly work as well as throughout this thesis. The interpretation and application of these doctrines differ significantly in the different jurisdictions. Conversely, the debate on ethical issues in civil law countries is more focused on professional attorney ethics rules and ownership of claim constraints, rather than on the application of the doctrines of maintenance and champerty to TPF relationships. *Prima facie*, these jurisdictions appear to be free from the antiquated doctrines of maintenance and champerty and their possible constraints of TPF arrangements.

V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 29; S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 16 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

²⁵³ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 7 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

²⁵⁴ S. SEIDEL, "Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future", *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500; S. SEIDEL, "Third-party investing in international arbitration claims: To invest or not to invest? A daunting question" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 17.

This section will examine the definition, the historical developments of the doctrines of maintenance and champerty. Furthermore, this section will look at the concept of usury and some other ethical issues surrounding TPF that could prohibit or limit attorney collaboration with funders. Each subsection will conclude by considering how the national laws and local rules may affect TPF of international arbitration claims.

1. National law limitations on funding agreements

1.1. Maintenance and champerty

Traditionally, the participation and investment of third parties in domestic litigation have been frowned upon because the proceedings might become corrupted by allowing parties, who are unconnected with the merits of the dispute and whose main motive is profit, to participate in the procedure.²⁵⁵ The idea of the lawyer taking a share with his client in the outcome of the dispute was condemned illegal in the Anglo Saxon world through the medieval doctrines of maintenance and champerty.²⁵⁶

1.1.1. Definition

As it will become clear from the definitions hereafter, TPF is a form of the ancient²⁵⁷ doctrines of maintenance and champerty. Maintenance is the “*assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the cause; meddling in someone else’s litigation.*”²⁵⁸ Champerty is “*an agreement between an officious intermeddler in a lawsuit and a*

²⁵⁵ X, “Third-party litigation funding: tipping the scales of justice for profit”, *Namic* May 2011 and www.namic.org/pdf/publicpolicy/1106_thirdPartyLitigation.pdf; S. RANDAZZO, “Third Party Funding of Lawsuits Gains Ground But Raises Eyebrows”, *Daily J.* September 10 2010.

²⁵⁶ B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 3-4 and www.luzmenu.com/cremades/Noticias/128/128.pdf; for an overview of the origins, historical prohibitions and developments of the doctrines of champerty and maintenance, see B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 3-10 and www.curtis.com/siteFiles/Publications/TDM.pdf; J. MORGAN, “Third-party funding – legal aspects”, *a paper presented to the London Common Law and Commercial Bar Association* on 12 March 2008, 2-3 and www.39essex.com/docs/articles/JMO_Third_Party_Funding_March2008.pdf; M. RADIN, “Maintenance by Champerty”, 24 *Calif. L. Rev.* 1935, 48-78; J-F, NG, “The Role of the Doctrines of Champerty and Maintenance in Arbitration”, 76(2) *Arbitration* 2010, 208-213; W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30(1) *J. Int. Arb.* 2013, 17.

²⁵⁷ The historical roots of the doctrine of champerty date back to ancient Greece and Rome; see for a detailed overview of the historical origins of champerty A. DOBNER, “Litigation for Sale”, 144 *U. Pa. L. Rev.* 1996, 1543-1546.

²⁵⁸ B.A. GARNER, *Black’s Law Dictionary*, Thomson West, 2007, 973; see also J-F, NG, “The Role of the Doctrines of Champerty and Maintenance in Arbitration”, 76(2) *Arbitration* 2010, 208-213; D. RICHMOND, “Other People’s Money: the Ethics of the Litigation Funding”, 56 *Mercer L. Rev.* 2005, 652-655; L. NIEUWVELD

litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds."²⁵⁹ For instance, an exception to the champerty prohibition is contingency fee agreements, which are agreements between the lawyer and the client by virtue of which the lawyer initiates litigation and pays client's costs, agreeing a contingency fee on any damages awarded.²⁶⁰ These doctrines are sometimes coupled with barratry, which is the "*vexatious incitement to litigation, especially by someone soliciting potential legal clients.*"²⁶¹ Or in other words:

*"[p]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty."*²⁶²

1.1.2. History

Maintenance and champerty were designed to prevent powerful men from misusing the courts by financing civil disputes in which they had no legitimate interest, merely for the purpose of harassing and ruining their rivals or enemies.²⁶³ Because the courts were too weak at the time to control such abuses, the Judges imposed a blanket prohibition to foreclose the problem.²⁶⁴ Thus the situation in the nineteenth century in the U.K.²⁶⁵ was that maintenance and champerty were considered immoral, unethical, and against public policy and therefore made illegal.²⁶⁶ Today, champerty prohibitions are aimed at discouraging frivolous litigation,²⁶⁷ diminishing resistance to settlement,²⁶⁸ and reducing interference with the attorney-client relationship.²⁶⁹

and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 40.

²⁵⁹ *Ibid.*, p. 246. **Supra previous note**

²⁶⁰ *Supra*.

²⁶¹ Barratry is a separate doctrine, but is often consumed by the doctrines of maintenance and champerty in both literature and case law; hence, the focus on maintenance and champerty in this section. L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 40; see also C. HODGES, J. PEYSNER, and A. NURSE, "Litigation Funding: Status and Issues", *Oxford Legal Studies Research Paper Series* 2012, 12.

²⁶² *In re Primus*, 436 U.S. 412, 424 n. 15, 98 S.Ct. 1893, 1900 n. 15, 56 L.Ed.2d 417, 429 n. 15 (1978).

²⁶³ D. RICHMOND, "Other People's Money: the Ethics of the Litigation Funding", 56 *Mercer L. Rev.* 2005, 651-652; M. STEINITZ, "Whose Claim Is This Anyway? Third-Party Litigation Funding", 95 *Minn. L. Rev.* 2011, 1278-1282.

²⁶⁴ W. ATTRILL, "Ethical Issues in Litigation Funding", unpublished paper, 2009, 1-2 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf; see also L. NIEUWVELD, "Third party funding – maintenance and champerty – where is it thriving?", *Kluwer Arbitration Blog* 7 November 2011, <http://kluwerarbitrationblog.com/blog/2011/11/07/third-party-funding---maintenance-and-champerty---where-is-it-thriving/>; see also M. RADIN, "Maintenance by Champerty, 24 *Calif. L. Rev.* 1935, 64.

²⁶⁵ The doctrines were born in the U.K. L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 40.

²⁶⁶ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 40; M. RADIN, "Maintenance by Champerty, 24 *Calif. L. Rev.* 1935, 48.

²⁶⁷ *Supra*.

So in theory, some Anglo-Saxon countries continue to characterize the intervention of a third party as dishonest. In practice, however, there has been a substantial relaxation of these rigid ethical regulations in many jurisdictions²⁷⁰ and outright repealed in others.²⁷¹ Nowadays, the traditional statutory and case law prohibitions and criminal and tortious consequences of champerty and maintenance have mostly faded away and have been abolished,²⁷² which has resulted in several jurisdictions becoming more supportive and flexible towards TPF.²⁷³ The result has been the healthy and laudable development of a solid, sophisticated and growing market and industry with an increasing number of parties using, or contemplating using TPF.²⁷⁴

Maintenance and champerty still exists in some jurisdictions, but there is definitely a tendency towards relaxation of the doctrines, by abolishing them or by introducing exceptions.²⁷⁵ Lord NEUBERGER, the President of the U.K. Supreme Court, sums up the current situation and conception of the doctrines in the U.K. by expressing the following:

“Thus, the public policy rationale regarding maintenance and champerty has turned full circle. Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule of law. Now, it might be said, the exact reverse of the prohibition is justified for the same reason. The argument advanced by

²⁶⁸ *Infra*.

²⁶⁹ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 510; see also *infra*.

²⁷⁰ For instance in the U.K., a more relaxed approach was already perceptible in 1908 in the case of *British Cash and Parcel Conveyors v. Lamson Store Service* [1908] 1 KB 1006.

²⁷¹ B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 4 and www.luzmenu.com/cremades/Noticias/128/128.pdf; W. ATTRILL, “Ethical Issues in Litigation Funding”, unpublished paper, 2009, 2 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 40.

²⁷² L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 42; M. SCHERER, “Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 95.

²⁷³ In England, champerty was de-criminalized in 1967. 28 states in the US and New South Wales and Victoria in Australia, also no longer prohibit champerty, hence opening the gates for third-party funding; see also A. JONES, “The next national investment craze: lawsuits!”, *The Wall Street Journal Blog* 2010 and <http://blogs.wsj.com/law/2010/06/04/the-next-national-investment-craze-lawsuits/>.

²⁷⁴ C. HENDEL, “Third Party Funding”, 2010, www.latinarbitrationlaw.com/third-party-funding/.

²⁷⁵ J-F, NG, “The Role of the Doctrines of Champerty and Maintenance in Arbitration”, 76(2) *Arbitration* 2010, 208-213; D. RICHMOND, “Other People’s Money: the Ethics of the Litigation Funding”, 56 *Mercer L. Rev.* 2005, 652-655; M. DESTEFANO, “Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?”, 80 *Fordham L. Rev.* 2012, 2821; A. LIPTAK, “Lenders to Those Who Sue Are Challenged on Rates: In Ohio Case, Court Says Fees Are Too High”, *N.Y. Times* 19 May 2003, www.nytimes.com/2003/05/19/us/lenders-to-those-who-sue-are-challenged-on-rates.html.

*Acemoglu and Robinson appears positively to support the development of litigation funding, as a means of securing effective access to justice.*²⁷⁶

Nevertheless, maintenance and champerty are not dead just yet. Courts can still invalidate a TPF contract on the grounds that the contract is champertous and hence contrary to public policy.²⁷⁷ For instance, the Institute for Legal Reform of the U.S. Chamber of Commerce (hereinafter “ILF”) recommend a vigorous renewal of the former prohibition of the Anglo-Saxon champerty law.²⁷⁸

TPF of litigation or arbitration varies from state to state in the U.S. and so does the attitude towards maintenance and champerty.²⁷⁹ It can be observed that the doctrines have in fact been declining and are being relaxed since the mid-nineteenth century.²⁸⁰ Some states retain the common law doctrines, where others have renounced them.²⁸¹ There are currently thirty-two states and the District of Columbia that still have some kind of prohibition based on the champerty doctrine.²⁸² The highest courts of several states have explicitly rejected champerty and maintenance doctrines. The 1997 Massachusetts Supreme Court decision in *Saladini v Righellis* is typical. In ruling that the doctrines of maintenance and champerty shall no longer be recognised in Massachusetts, the Court reasoned that:

“The champerty doctrine is [no longer] needed to protect against the evils once feared:

²⁷⁶ D. NEUBERGER, “From Barretty, Maintenance and Camperty to Litigation Funding”, *Harbour Litigation Funding First Annual Lecture* 8 May 2013, 20-21 and <http://adam1cor.files.wordpress.com/2013/05/lord-neuberger-harbour-litigation-lecture-8-may-2013.pdf>.

²⁷⁷ S. SEIDEL, ““Control” in Third-Party Funding: a Doctrine Out of Control”, *CDR* 2011, 61 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>.

²⁷⁸ B. CREMADES, “Third party funding in international arbitration”, unpublished paper, 2011, 5 and www.luzmenu.com/cremades/Noticias/128/128.pdf; see also L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 43; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

²⁷⁹ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 5-10 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; L. NIEUWVELD, “Third party funding – maintenance and champerty – where is it thriving?”, *Kluwer Arbitration Blog* 2011, <http://kluwerarbitrationblog.com/blog/2011/11/07/third-party-funding---maintenance-and-champerty---where-is-it-thriving/>; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAI/IBLJ* 2012, 653-654; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 508-509.

²⁸⁰ J. LYON, “Revolution in Progress: Third-Party Funding of American Litigation”, 58 *UCLA L. Rev.* 2010, 581-582.

²⁸¹ Massachusetts, New Jersey, Arizona, and other states have abolished the doctrine of champerty completely. N. DIETSCH, “Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries”, 38 *N.Ky. L. Rev.* 2011, 694; P. BOND, “Making Champerty Work: An Invitation to State Action”, 150 *U. Pa. L. Rev.* 2002, 1333-1341; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 510-512.

²⁸² J. LYON, “Revolution in Progress: Third-Party Funding of American Litigation”, 58 *UCLA L. Rev.* 2010, 581-583.

speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position.”²⁸³

Conversely, the Ohio Supreme Court ruled in *Rancman v Interim Settlement Funding Corporation* in 2003 that a funding company’s advance to a litigant in return for a percentage of the recovery was void under principles of champerty and maintenance, regardless of whether the advances were considered loans or investments.²⁸⁴ Lying in the middle of these extremes are state courts that have limited – but not abolished – the common law doctrines. For instance in the 1996 *Kraft v Mason* case, a Florida appellate court held that an arrangement in which the litigant obtained TPF in exchange for relinquishing set percentages of the ultimate recovery was not prohibited by champerty because the financier had neither instigated the litigation nor set the terms of the loan.²⁸⁵

Finally, one could regard these doctrines as an already existing legal framework for TPF, hence making further regulation²⁸⁶ redundant. However, these doctrines materially predate the TPF industry and are therefore less than ideal frameworks, especially considering the inconsistency of its form and application among different jurisdictions,²⁸⁷ as well as its lack of relevance to modern business transactions.²⁸⁸

1.2. Usury

Usury laws, which prohibit loans at abuse interest rates, are akin to champerty prohibitions with respect to their historical significance.²⁸⁹ The obvious question that emerges here is whether TPF agreements can be qualified as loans with respect to the applicability of usury because it *prima facie* appears that usury regulations would render most funding agreements illegal.

²⁸³ C. MILES and S. VASANI, “Case notes on third-party funding”, 35(1) *Global Arb. Rev.* 2008, www.lalive.ch/files/Third_Party_Funding.pdf.

²⁸⁴ *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721.

²⁸⁵ *Kraft v Mason*, 668 So. 2d 679 (Fla. Dist. Ct. App. 1996).

²⁸⁶ *Infra*.

²⁸⁷ *Supra*.

²⁸⁸ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 511-512.

²⁸⁹ M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 512; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 655; see for instance the usury rate caps in the recently filed legislation on lawsuit loans in the U.S. V. SHANNON, “Recent Developments in Third-Party Funding”, 30(4) *J. Int. Arb.* 2013, 449-450; for a description of the historical background of usury laws, see S. MARTIN, “The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed”, 10 *Fordham J. Corp. & Fin. L.* 2004, 58.

For instance in Germany, the courts frame TPF agreements by referring to the concept of usury. The limitation imposed by usury, eventually caused funders to curtail their interests in the award.²⁹⁰ Usury is a handy concept to avoid abuses by the funders. However, it remains manifestly uncertain whether all TPF agreements can be qualified as loans. Conversely, the law in most states of the U.S. consider TPF agreements to be investments rather than loans due to their contingent nature.²⁹¹ The latter implies that funders are therefore not subject to the statutory limits on interest rates.

Nevertheless, local prohibitions against usury can, under certain conditions, still affect the validity of funding agreements if the funder seeks a high rate of return if the claim is successful.²⁹²

1.3. National limitations in international arbitration

The various doctrines were originally aimed at preventing certain practices in the context of litigation. That leaves open the question whether these doctrines apply in the private world of arbitration. There is a possibility that the remaining restrictions or prohibitions imposed by these doctrines do not have any bearing on arbitral disputes due to the inapplicability of the public policy protection of the national civil justice system, which is the basis for the prohibitions in the court litigation context, in the private world of arbitration where the will of the parties is usually paramount.²⁹³ Nevertheless, the answer appears to be affirmative,²⁹⁴ especially considering that international arbitrations are or should be regulated for the most part by the parties' agreement.²⁹⁵

There are a number of possibilities whereby the doctrines could play in international arbitration as well. First, the parties and the arbitral tribunal have to comply with mandatory laws of the seat of arbitration in international arbitration. Second, a court can, in set aside or enforcement proceedings, impose its view on the validity of TPF agreements or decide that the TPF agreement is contrary to public policy. However, there are several reasons to believe that champerty and related doctrines do

²⁹⁰ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 655.

²⁹¹ M. RODAK, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", *U. Pa. L. Rev.* 2006, 512.

²⁹² C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 17 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²⁹³ C. HENDEL, "Third Party Funding", *Latin Arbitration Law* 2010, www.latinarbitrationlaw.com/third-party-funding/; S. SEIDEL, "Third-party investing in international arbitration claims: To invest or not to invest? A daunting question" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 22.

²⁹⁴ See e.g. *Fausone v US Claims, Inc.*, 915 So. 2d 626 (Fla. Dist. Ct. App. 2005), where the Court upheld the confirmation of the arbitration award in which it was determined that the funder could recover unpaid amounts under the funding agreement.

²⁹⁵ S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 10 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

not operate with the same force for funding agreements in international arbitration.²⁹⁶ In other words, there is a legitimate doubt that these doctrines could or would be applied to annul arbitral awards for the following reasons.

As noted above,²⁹⁷ the rationale behind the doctrines was to protect public courts from vexatious litigation. It can be argued whether this rationale should be extended to funding of claims in arbitration. As for the U.K., the issue was settled in 1998 in the above-mentioned case of *Bevan Ashford v Geoff Yeandle*,²⁹⁸ in which it was decided that champerty does extend to arbitration.²⁹⁹ However, WILLEMS notes that

*“The common law has never had any difficulty with accepting that these principles do not apply to litigation or arbitration abroad, as English public policy is not applied extraterritorially.”*³⁰⁰

The *Otech Pakistan v. Clough Engineering* case from the Singapore Court of Appeal is illustrative in this regard. The Court expressly stated:

*“In our judgment, it would be artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not the other because it is conducted in private.”*³⁰¹

Even if the prohibitions imposed by champerty and the related doctrines would apply to funding agreements that are subject to arbitration, it is still a matter of debate and uncertainty whether these prohibitions would have some, if any, effect on the arbitral proceedings, as such, or on resulting awards. As noted above,³⁰² disregarding mandatory law of the seat of arbitration can indeed be a ground for annulling an award on the basis that “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”³⁰³ However, usually only mandatory procedural law can be a ground for annulling an award, and not

²⁹⁶ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 18 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

²⁹⁷ *Supra*.

²⁹⁸ *Bevan Ashford v Geoff Yeandle* [1998] 3 WLR 172.

²⁹⁹ In contrast, see *Giles v Thompson* [1993] UKHL 2, [1994] 1 AC 142, [1993] 3 All ER 321 where the Court acknowledged that champerty did not apply in arbitral proceedings.

³⁰⁰ M. WILLEMS, “Third Party Funding: A Paper for the Society of Construction Arbitrators”, *Howrey LLP* October 2009, www.constructionarbitrators.org/sites/default/files/local/browser/documents/SCA%20-%20Third%20Party%20Funding%20Paper.pdf. Willems cited *Mansell v Robinson* [2007] EWHC 101 (QB).

³⁰¹ *Otech Pakistan Pvt. Ltd. v. Clough Eng'g Ltd.*, [2006] SGCA 46.

³⁰² *Supra*.

³⁰³ Art. V(d) of the New York Convention.

mandatory substantive law, which champerty and related doctrines are generally regarded to be. The doctrines are generally invoked to obtain criminal sanctions or tortious liability³⁰⁴ and not to refuse the relief of the funder in the case,³⁰⁵ nor to affect any other procedural aspect.

Mandatory substantive law can only be a ground for the annulment of an award if that law is of public policy. However, this author shares the view of ROGERS that champerty and related doctrines are not of public policy, since they are aimed at the parties to the funding agreement and not at the outcome of the funded dispute.³⁰⁶ Nevertheless, it appears that most commentators still assume that awards will be refused enforcement for reasons of public policy,³⁰⁷ despite the fact that there are no publicly available cases where recognition and enforcement has been refused simply because a funder was involved in the proceedings.

Moreover, it is also unlikely that funding agreements are within the reach of the law of the seat of arbitration (and by extension enforcement jurisdictions) because these agreements are not part of arbitration agreements. Invalidating funding agreements that have no formal relationship to the legal seat, would thus imply the extraterritorial application of national law. ROGERS states that this is only possible when:

*“Only if one of the parties to the funding agreement (the funder, the party, or the attorney) were a local citizen, or the agreement bore some other relationship to the seat, would extraterritorial application of laws against champerty be a reasonable extension.”*³⁰⁸

In the typical setting of TPF in international commercial arbitration, the parties to the funding agreement are not locals and the funding agreement would stipulate another substantive law by which it would be governed than the substantive law of the seat.³⁰⁹ Extraterritorial application of champerty or related doctrines to invalidate funding agreements would arguably be a ‘bridge too far’.

1.4. Conclusion

³⁰⁴ *Supra*.

³⁰⁵ *Oil, Inc. v. Martin*, 381 Ill. 11, 44 N.E.2d 596 (1942).

³⁰⁶ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 20 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³⁰⁷ J-F, NG, “The Role of the Doctrines of Champerty and Maintenance in Arbitration”, 76(2) *Arbitration* 2010, 208-213; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 13-14.

³⁰⁸ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 21 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; see also *Law Society of Singapore v Kurubalan S/O Manickam Rengaraju* [2013] SGHC 135.

³⁰⁹ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 21 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

It is this author's view that TPF in international arbitration is a too recent phenomenon without clear national precedents or established practices to discover trends as for the application of these doctrines in international arbitration. There have been jurisdictions that consider TPF agreements to be within the purview of the courts when deciding on enforcing, annulling or setting aside arbitral awards.³¹⁰ The author expects that this issue will continue to be subject to lively and sometimes acrimonious debate, until the TPF industry accrues big enough so that key jurisdictions will have to determine the effects of the doctrines on TPF agreements.

2. The attorney's ethical duties

It should be noted that the following subsections are more of a theoretical nature due to the fact that local ethical rules are not generally deemed to apply to counsel for parties in international arbitration.³¹¹ The detachment of local ethical rules in international arbitration may create some interesting opportunities, which will be discussed later on.³¹² Nevertheless, it seems that some funders are reluctant to accept that none of the ethical rules will apply, and are therefore still cautious, for instance when transferring legal documents from and to the client's attorney.

It is not within the ambit of this discussion to identify and analyse the various domestic procedural law provisions regarding the attorney's ethical duties. Some provisions will nevertheless be mentioned with the mere aim of giving the reader a better understanding of what is meant exactly.

2.1. Privilege

The funders, in order for the funder to do a proper due diligence and decide on whether or not to fund, the funder needs access to all the relevant information to the claim, which both the claimant and the claimant's lawyer can possess.³¹³ The relevant information could also include a written legal analysis of the client's counsel. However, among the funders participating with the Roundtable Discussions, there was a consensus that such a written legal analysis is not required to evaluate the chances of success of a claim. Some funders are even actively avoiding receiving such a written analysis due to the risk of it becoming discoverable in certain jurisdictions. This is a question relating to privilege or professional secrecy issues that may vary depending on the jurisdictions involved, noting that the U.S.

³¹⁰ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 14.

³¹¹ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 14 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³¹² *Infra*.

³¹³ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 25 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

is one of the most challenging jurisdictions in this respect and is a reason for some funders to refuse to operate in the U.S.³¹⁴

Documents prepared by a lawyer or documents for the purpose of the dispute usually enjoy a legal privilege: either the attorney-client or work-product privilege.³¹⁵ There is a risk that this legal privilege will be waived when these documents are given to the funder,³¹⁶ or that communications between the funder and the funded claimant and/or claimant's lawyer about the claim will not be protected by privilege in jurisdictions which do not recognize a common-interest privilege.³¹⁷

The common-interest privilege is considered to be an exception to the attorney-client privilege.³¹⁸ It protects communications when two or more clients simultaneously consult with an attorney on matters of common interest. The idea behind this privilege is to give persons, who share a common interest, the ability to communicate with each other and with their attorneys in order to prosecute or defend their claims more efficaciously.³¹⁹ That leaves open the questions whether funders are included in the group of persons to which the common interest privilege applies and whether the attorney-client privilege and common interest privilege applies to confidential information in international arbitration.³²⁰ To date, there are absolutely no definite answers available.³²¹ AFFAKI states that questions like these are most likely to be resolved on a case-by-case basis.³²²

³¹⁴ It is therefore crucial for a funder to discover whether the jurisdiction of the dispute offers protection against disclosure orders.

³¹⁵ M. STEINITZ, "The Litigation Finance Contract", 54 *Wm. & Mary L. Rev.* 2012, 474-476.

³¹⁶ Most jurisdictions have adopted strict rules limiting information which an attorney may disclose to non-clients. See for a list of examples C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 26 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³¹⁷ For example, in the U.S., it has been argued in relation to funded litigants that communications between the funder and the funded client or client's lawyer are not protected by common-interest privilege because the funder's interest in the outcome of the litigation is commercial, rather than legal. See NEW YORK CITY BAR ASSOCIATION, "Formal opinion 2011-2: third party litigation financing", 2011 and www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02; AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, 13-15,

www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf; D. RICHMOND, "Other People's Money: the Ethics of the Litigation Funding", 56 *Mercer L. Rev.* 2005, 652; C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 109-111.

³¹⁸ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 26 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³¹⁹ *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe* 89-129, 902 F.2d 244 (4th Cir. 1990), p. 249; the counsel of the respective clients with a common interest can thus exchange privileged communications in order to prepare a defense without waiving either privilege. See *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir. 1992), p. 94; for more cases on 'common-interest privilege', see B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 38 and www.curtis.com/siteFiles/Publications/TDM.pdf.

³²⁰ AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, 32-34, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

However, as practice has indicated, the risk of a waiver of privilege has to be put into perspective because this author is not aware of a single case or decision that would have led to the loss of privilege of communication with a funder in Europe.³²³ Nevertheless, the lawyer should fully explain to the client the risks associated with the disclosure.³²⁴ As for the U.S., two illustrative cases can be found where the question of the applicability of the common interest privilege regarding funders was at hand. The first reported case is the case of *Leader Techs., Inc. v. Facebook, Inc.*, in which the court found that the common interest privilege did not exist in the respective case because the potential funders, who received documents from the plaintiff, merely expressed an interest in financing the proceedings and did not fully consummate the deal, which the court deemed necessary for the common interest privilege to be extended to potential funders.³²⁵ Conversely, in the case of *Devon IT, Inc. v. IBM Corp.*, the court ruled that the documents shared between the plaintiff and its funder were protected by the common interest privilege.³²⁶ The author acknowledges that these two cases involved U.S. federal litigation and *prima facie* may seem irrelevant for international arbitration. Nonetheless, comparable considerations could apply in international arbitrations, depending on the applicable law governing the proceedings. Until further developments, the author concludes that the issue of the applicability of common interest privilege regarding funders remains unsettled.

In practice, to elude discussions on whether the privileges apply and to protect themselves against disclosure requests, the funder and the funded party usually enter into a confidentiality agreement at the outset or they agree on a confidentiality clause in the funding agreement.³²⁷ The author foresees that this will remain the common practice until the issue is settled.

³²¹ M. ALRASHID, J. WESSEL and J. LAIRD, "Impact of Third Party Funding on Privilege in Litigation and International Arbitration", 6(2) *DRI* 2012, 108; L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 55-56; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 26-27 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³²² G. AFFAKI, "A financing is a financing is a financing..." in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 13.

³²³ CALUNIUS CAPITAL LLP, Memorandum: A European Perspective, 15th June 2011, 3 and www.calunius.com/media/1549/tpf%20of%20international%20arbitration%20claims%20the%20newest%20new%20new%20thing.pdf

³²⁴ D. RICHMOND, "Other People's Money: the Ethics of the Litigation Funding", 56 *Mercer L. Rev.* 2005, 675-676.

³²⁵ *Leader Techs., Inc. v. Facebook, Inc.*, 719 F.Supp.2d 373 (D. Del. 210).

³²⁶ *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160; for a more elaborate discussion on these two cases, see C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 111.

³²⁷ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 9 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAl/IBLJ* 2012, 217.

2.2. The beneficiary of the attorney's ethical duties

As a general principle, the attorney's ethical duties are first and foremost those that he or she has towards his or her client. In the context of TPF, the question that arises is: who is considered the attorney's 'client'? It can be argued that the funding company becomes a client as well by funding one of the parties in arbitration. Some of the attorney's duties cannot be shared, which makes this issue all the more important. For instance, under French law,³²⁸ the attorney-client privilege³²⁹ cannot be divided and the attorney cannot be released from it by its client.³³⁰ This means that in those jurisdictions, the funder does not enjoy the same attorney-client privilege as the funded client.

It is conceivable nevertheless in current TPF practice that the original client (*i.e.* the funded party) could 'withdraw'³³¹ from the case.³³² In that case, the funder would be the only party giving instructions to the attorney and would be the one paying his or her fees. This could arguably justify a requalification as the 'client'. Moreover, it can also be argued that in the event the funder is allowed to give instructions to the attorney,³³³ certain duties of the attorney, such as the duty to advise and the duty of loyalty, could be extended to the funder. As it will be discussed in more depth further on, qualifying the attorney as a client or extending certain duties of the attorney to the funder can cause conflicts of interest to arise.³³⁴

2.3. The lawyer's 'duty-to-know' and 'duty-to-tell' about third-party funding

Considering the growth of TPF, the question that arises is whether lawyers have a so called 'duty-to-know' and 'duty-to-tell' their clients about TPF. This robust duty can be divided into two: an ethical duty and a legal one.³³⁵ First, the duty to advise is among the attorney's main ethical obligation.³³⁶

³²⁸ Règlement Intérieur National, art. 2.1; Cass. 1ère civ., 6 April 2005, n° 00-19.245.

³²⁹ *Supra*.

³³⁰ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 657; C. KAPLAN, "Third-party funding in international arbitration: Issues for counsel" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 74.

³³¹ For instance where the funder is an insurer.

³³² M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 657.

³³³ It appears that this is not allowed in all legal systems. *Infra*.

³³⁴ *Infra*.

³³⁵ S. SEIDEL, "Duty to Know", *CDR* September 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/08/1Aug2012-Duty-to-Know.pdf>; see also S. SEIDEL, "Maturing Nicely", *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

³³⁶ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 658.

This duty may be found in several explicit and implicit rules in various jurisdictions. For example, in the U.K. the SRA Code of Conduct 2011 (hereinafter “SRA Code”), lays down this duty. The SRA Code emphasises the overriding importance that the ‘public interest’ plays in this situation and it reads as follows:

*“Where two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice. Compliance with the Principles is also subject to any overriding legal obligations.”*³³⁷

The SRA Code also states that the solicitor has to:

*“[D]iscuss with the client how the client will pay.”*³³⁸

This latter obligation could include the duty to tell the client of the possibility of obtaining TPF as such, as well as the possible consequences of the funding agreement, in particular regarding the potential conflicts of interests that could arise.³³⁹ The question remains whether the attorney has this duty when he is not aware of the funding. The majority of the participants at the Roundtable Discussions seemed to believe that an additional obligation cannot be placed on the attorney if he or she is unaware of the funding.³⁴⁰ This author agrees with the majority, especially considering that the funding agreement often contains a confidentiality clause,³⁴¹ which prohibits the funded client from disclosing the existence of the agreement.

As for the legal duty, SEIDEL notes that a legal obligation can be taken from various legal sources. For instance in the *Adris v Royal Bank*³⁴² decision of 2010, the Queen’s Bench found that a solicitor’s failure to obtain costs insurance for his client, protecting against adverse costs that later were incurred,

³³⁷ Available at <http://www.sra.org.uk/solicitors/handbook/code/>; see also S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

³³⁸ SRA Code, r2.03(1)(d), see www.sra.org.uk/Solicitors/code-of-conduct/rule2.page.

³³⁹ C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 109; AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, 24, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

³⁴⁰ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 659.

³⁴¹ *Infra*.

³⁴² *Adris & Ors v The Royal Bank of Scotland Plc* [2010] EWHC 941 (QB).

was a “gross breach of the Consumer Credit Act of 1974 s. 78”. The lawyer has to provide his or her client with competent advice, *in casu* about the possibility of acquiring TPF in the form of insurance.³⁴³

II. FULL DISCLOSURE OF THIRD-PARTY FUNDING AGREEMENTS?

Compulsory disclosure of the presence of a funder has become a hotly debated issue with widespread importance and relevance. It will be shown in this section that, to date, no (mandatory) disclosure obligation as such exists. The issue of finding an ideal balance between the need for disclosure and the need for confidentiality and privilege³⁴⁴ is now being addressed by scholars, practitioners and funding companies.³⁴⁵ Such transparency rules could undermine the strength of international commercial arbitration because arbitration as a method for dispute resolution derives so much of its value from its strict confidentiality.³⁴⁶

This issue is of paramount importance due to the numerous interests at stake in international arbitration and the legal questions that relate to it.³⁴⁷ Questions such as: should there be a disclosure obligation? What should be disclosed? When should a funding agreement, or its existence, be disclosed? What is the rationale for requiring that disclosure? Who should enforce any general and mandatory disclosure? Can tribunals use their discretion to intervene in or take into consideration the relationship between the funder and the funded party, in particular in view of the allocation of costs? This subsection aims at addressing some of these questions by discussing some of the reasons that could justify a potential obligation to disclose funding agreements and the possible scope of such an obligation. Finally, this subsection will conclude by discussing a proposal for a disclosure obligation of TPF agreements.

1. Is there a disclosure obligation for third-party funding?

³⁴³ S. SEIDEL, “The Lawyer’s “Duty-to-Know & Duty-to-Tell” in Third Party Funding: A Time to Recognise & Respect these Obligations”, *Corporate LiveWire* 30 July 2012, [www.corporativelivewire.com/top-story.html?id=the-lawyers-duty-to-know-duty-to-tell-in-third-party-funding-----a-time-to-recognise-respect-these-obligations.](http://www.corporativelivewire.com/top-story.html?id=the-lawyers-duty-to-know-duty-to-tell-in-third-party-funding-----a-time-to-recognise-respect-these-obligations;); S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

³⁴⁴ *Supra*.

³⁴⁵ S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

³⁴⁶ S. SEIDEL and S. SHERMAN, ““Corporate governance” rules are coming to third party financing of international arbitration (and in general)” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 40.

³⁴⁷ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 651.

Many national courts have already settled and defined the issue of which financial interests are to be disclosed. For example, the USSC determined that a party's parent corporations and any public shareholder owning more than 10% of the party's stock should be identified and thus needs to be disclosed.³⁴⁸

However, funders - whether institutional funders, banks or insurers – are, to date, not subject to a disclosure obligation in international arbitration.³⁴⁹ The involvement of a funder in an international arbitration case will thus most often be unknown or unknowable because there is no specific disclosure obligation, as such, in any of the rules of the leading arbitral institutions.³⁵⁰

However, there are situations where the arbitral tribunal or the opposing party will obtain knowledge of the involvement of a funder, for instance when the funding relationship is disclosed voluntarily³⁵¹ or when the funder of funded party is under an obligation to disclose such information because it is a listed company. Nevertheless, as a general principle, funders and funded parties are not subject to a disclosure obligation. The discussion will therefore now shift to discussing a potential introduction of such a disclosure obligation.

2. Rationale behind a disclosure obligation of third-party funding agreements

The key question in the context of international arbitration is whether – and, if so, to what extent – the funding relationship and perhaps even the contents of the funding agreements should be disclosed. The ascertainment of the existence of a funding arrangement is desirable for three reasons in particular. First, disclosure is arguably necessary to avoid possible conflicts of interest and to ensure that the arbitrator's impartiality and independence are maintained.³⁵² Second, disclosure is also arguably

³⁴⁸ See Rule 29(6) of the Rules of the USSC.

³⁴⁹ C. BOGART, "Third party funding in international arbitration", *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#; W. ATTRILL, "Ethical Issues in Litigation Funding", unpublished paper, 2009, 15 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf; There are some exceptions for TPF in litigation. See for instance Practice Note CM 17 of the Federal Court of Australia, which requires the disclosure of TPF relationships at or prior to the initial case management conference. V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 449-450; the Practice Note CM 17 was replaced by a new practice note, issued on 9 October 2013. Both Practice Notes are identical in content, save for some small details, which are not relevant for this discussion. The Practice Note is available at www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm17.

³⁵⁰ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", 8(4) *TDM* 2011, 9 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2

³⁵¹ See for instance *Oxus Gold PLC v Republic of Uzbekistan et al.*, UNCITRAL, 31 August 2011 in which the claimant (Oxus Gold) voluntarily stated in a press release that it obtained TPF to fund their dispute with Uzbekistan. The press release is available at: www.reuters.com/article/2012/03/01/idUS101378+01-Mar-2012+RNS20120301.

³⁵² M. SCHERER, "Out in the open? Third-party funding in arbitration", *CDR* 2012, 56 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

necessary to assess whether the funded party should be subject to an order for security for costs and to assess the potential influence on the allocation of costs. Lastly, disclosure could also be necessary in order to give arbitral tribunals the opportunity to assess the need to impose a duty of confidentiality on funders. The former reason will be discussed first.

2.1. Preventing conflicts of interest

Due to the growing TPF industry, potential conflicts of interest are arising in international arbitration.³⁵³ With regard to conflict of interest, the distinction has to be made between on the one hand conflicts of interest in the relationship between the funded party and the funder, which will be discussed first, and on the other hand conflicts of interest for the appointed arbitrator(s).

2.1.1. Three-cornered relationship between funded party – funded party's lawyer – funder

Although a typical funding agreement is entered into between a client and a funder, it cannot be qualified simply as a plain bilateral relationship because of the presence of the client's lawyer.³⁵⁴ As this section will describe, this so-called three-cornered relationship³⁵⁵ can give rise to numerous potential conflicts of interest.

The problems that can arise – both at the stage of concluding the funding agreement and the stage of the arbitration proceedings as such – are usually the result of a conflict between: (i) the client's interest (*i.e.* achieve the for him or her most favourable outcome); (ii) the attorneys interest (*i.e.* getting paid); and (iii) the funder's interest (*i.e.* achieve the biggest return on investment).³⁵⁶

After discussing the issue of funders controlling the proceedings and the related conflicts of interest, this section will examine the possibilities to avoid these kinds of conflicts.

A. Control over the proceedings

³⁵³ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1651.

³⁵⁴ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 10 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³⁵⁵ C. KAPLAN, "Third-party funding in international arbitration: Issues for counsel" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 74.

³⁵⁶ LAMM and HELLBECK refer to this inconvenient situation as a "*Bermuda Triangle of divergent interests*". C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 107.

Many firms offering TPF are run by highly experienced former dispute lawyers who are focused on the successful management and resolution of funded claims. With a broad range of specialist skills and experience, a funder can add real value to the management and resolution of arbitration claims. The influence of the funder on the claim management depends on the contractual arrangements between the funder and claimant and on the application of the rules regarding maintenance and champerty to the particular funding agreement and arbitration.³⁵⁷ As explained above,³⁵⁸ the doctrines of maintenance and champerty, as they apply to arbitration, are not settled and will likely be clarified piecemeal as disputes arise and come before domestic courts.³⁵⁹ *Prima facie*, the issue of contractually transferring control does not seem that pressing in international arbitration, considering the private and contractual nature of arbitration³⁶⁰ and because

*“the funding agreement between the client and the third-party funder is an arm’s-length transaction and does not involve a fiduciary relationship – in contrast to the lawyer-client relationship – the client may legitimately bestow rights on the third-party funder, including the right to discharge counsel and make strategic decisions about the course of the litigation.”*³⁶¹

Nevertheless, it appears that funders do not become involved in claim management, for reasons related in good part to the restrictions imposed by the above-mentioned doctrines.³⁶²

The main predicament with TPF is the addition of a different interest in the proceedings, in particular the interest of the funder, which is to make the largest possible return on its investment. Since funders do not have an interest in the substantive issues of the proceedings and (usually) their sole goal is making a profit, the inherent risk exists that parties might bequeath by contract the control of the arbitral proceedings to the funder.³⁶³ Funders want to protect their investments by being involved in the management of the case and thus exercising some control over the proceedings. However, the level

³⁵⁷ *Infra*.

³⁵⁸ *Supra*.

³⁵⁹ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 5 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

³⁶⁰ S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 22.

³⁶¹ AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, 21-23, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

³⁶² S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 9-10 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

³⁶³ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 9-11; S. SEIDEL, “Funding international arbitration – a growth industry?”, *CDR* 24 November 2011, 1 and <http://fulbrookmanagement.com/wp-content/uploads/2011/11/CDR-Funding-international-arbitration-a-growth-industry.pdf>.

of control differs from funder to funder, ranging from simply receiving progress reports, to being the *de facto* party that appoints the attorneys, the arbitrator and who conducts settlement talks.³⁶⁴ While some funders do not get involved in the management of cases and see themselves as mere passive investors in the client's case, others shall exercise a substantial amount of control over the proceedings to monitor the investment.³⁶⁵

TPF entities can thus be divided into two groups with regard to the exercised amount of control: (i) the ones that have a 'hands-off' approach; and (ii) the ones that have a 'hands-on' approach. A 'hands-off' approach is what most funders wield and it means that the funder takes no control over the claim.³⁶⁶ A 'hands-on' approach means that the financing entity offers support for the case and not that it has control over it, as the decisions remain to be taken by the client and its counsel. However, according to some, there would be nothing wrong with funders having the possibility to exercise some form of control. An entity who invests in the client itself to become a controlling shareholder would 'own' and hence control the client's claims despite that it will often know little about these claims, whereas at least the funders have an intimate understanding of the claim and how best to pursue it.³⁶⁷

B. Potential conflicts of interest

In theory, the claimant's lawyer has to protect his or her client's interest and has to give the client candid advice on the virtues and vices of the funding proposal.³⁶⁸ However, in practice, it's possible that the claimant's lawyer acts in his or her own interest and suggests funding regardless of the strength/weakness of the claim at hand. Funding equals getting paid for the lawyer so this is unquestionably a legitimate concern.

Furthermore, the lawyer may be excessively influenced by the funder, bearing in mind that the funder is essentially the lawyer's paymaster and is sometimes even selected or vetted by the funder before his

³⁶⁴ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1655.

³⁶⁵ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAl/IBLJ* 2012, 210; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 23 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³⁶⁶ S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 10 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

³⁶⁷ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAl/IBLJ* 2012, 211.

³⁶⁸ Most professional rules for lawyers contain such an obligation. W. ATTRILL, "Ethical Issues in Litigation Funding", unpublished paper, 2009, 16 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf; C. KAPLAN, "Third-party funding in international arbitration: Issues for counsel" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 73.

or her appointment.³⁶⁹ More generally, the funder always retains the ‘power of the purse’ (*i.e.* the power to discontinue further payments).³⁷⁰ This could result in the situation where the claimant’s lawyer will favour the funder’s interests due to purse strings rather than the interests of the claimant, and by doing so, would harm his or her independence.³⁷¹ Ambiguity arises in such a situation, because of the uncertainty as to whom the actually represents.

The lawyer acting for the claimant remains at all times the claimant’s lawyer and owes duties and responsibilities solely to the claimant. However, TPF can, according to some, pose a potential threat for the foundation of the attorney-client relationship because TPF may tend to corrupt, or may pose the risk of corrupting, this relationship,³⁷² by causing the attorney to harm his or her professional and ethical obligations to the client.³⁷³ A good example of this issue can be found in the SRA Code in which it is determined that “*acting for a client when instructions are given by someone else*” is an “*indicative behaviour*” could be contrary to the attorney’s obligation to act in his or her client’s interest.³⁷⁴

Furthermore, it is rather unlikely that the claimant’s lawyer will be in the best position to negotiate a good funding agreement with the funder, considering that the funder in fact is paying him.³⁷⁵ In other words, there is also a risk of unfair terms in the funding agreement. The latter is problematic because the claimant’s lawyer is obliged to ensure the proper protection of his or her client’s interests at all times.

³⁶⁹ C. KAPLAN, “Third-party funding in international arbitration: Issues for counsel” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 75.

³⁷⁰ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1655; G. AFFAKI, “A financing is a financing is a financing...” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 13.

³⁷¹ M. DESTEFANO, “Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?”, 80 *Fordham L. Rev.* 2012, 2794; AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, 26-29, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf; C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 109.

³⁷² B. CREMADES, B., “Third party funding in international arbitration”, unpublished paper, 2011, 5-6 and www.luzmenu.com/cremades/Noticias/128/128.pdf.

³⁷³ *Supra*; M. STEINITZ, “Whose Claim Is This Anyway? Third-Party Litigation Funding”, 95 *Minn. L. Rev.* 2011, 1324-1325; D. RICHMOND, “Other People’s Money: the Ethics of the Litigation Funding”, 56 *Mercer L. Rev.* 2005, 651-652, 659-664.

³⁷⁴ SRA Code, ch. 1, IB (1.25).

³⁷⁵ See for example the formal opinion issued by the Ethics Committee of the NYCBA in which it is determined states that the lawyer and the client may face a conflict of interest when the lawyer is negotiating a financing agreement with the funder. Available at <http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02>; see also S. SEIDEL, “The lawyer’s “duty-to-know & duty-to-tell” in third party funding: a time to recognise & respect these obligations”, *Corporate LiveWire* 30 July 2012, 1-2 and www.fulbrookmanagement.com/2012/07/30/the-lawyers-duty-to-know-duty-to-tell-in-third-party-funding-a-time-to-recognise-respect-these-obligations/.

The claimant's lawyer will likely be asked to provide regular reports to enable the funder to monitor progress of the claim and to ensure compliance with the claimant's obligations under the funding agreement.³⁷⁶ The funders present at the Roundtable Discussions had a consensus regarding the monitoring of the legal team. They all were of the opinion that they should not directly instruct them, but only monitor them on a monthly basis.³⁷⁷ This can be done for instance by including monthly monitoring clauses in the funding agreement. The funder might also want to have a say in the strategy, ordinarily determined by their client and his attorney. For instance, some funders may provide in the funding agreement that the claimant's attorney owes a duty of care and a fiduciary duty not only towards the claimholder, but also towards the funder.³⁷⁸ However, as a general rule, the claimant's attorney does not have any fiduciary or advisory role towards the funder.³⁷⁹

There is a legitimate concern that "*an attorney's primary loyalty will, as a practical matter, rest with the person or entity who pays him.*"³⁸⁰ This concern will arguably be most problematic in situations where the funder has the right to choose the lawyer³⁸¹ and situations where the funder offers the prospect of repeat business for the lawyer.³⁸² The ILF says that TPF implies the breakdown of attorney-client relationship, both in trust and in respect of the privilege constitutionally vested in the professional activity of the attorney. They point out that this might foster frivolous litigation.³⁸³

³⁷⁶ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 5 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

³⁷⁷ S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 9 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

³⁷⁸ V. WAYE, "Conflicts of Interest between Claimholders, Lawyers and Litigation Entrepreneurs", 19 *Bond L. Rev.* 2007, 233.

³⁷⁹ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 34.

³⁸⁰ *Oliver v. Board of Governors*, 779 SW 2d 212, 215 (Ky, 1989).

³⁸¹ In practice, funders would not agree to fund a case where they have doubts about the capacities of the legal counsel selected by the party seeking funding. The Law Council of Australia expressly stated on this issue that it is only reasonable for a funder to make the choice of lawyer or to veto the choice made by the claimant. Law Council of Australia, Standing Committee of Attorneys-General, *Litigation Funding* (14 September 2006), [95]; S. SEIDEL, "'Control' in Third-Party Funding: a Doctrine Out of Control", *CDR* 2011, 61 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAI/IBLJ* 2012, 215; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAI/IBLJ* 2012, 652.

³⁸² W. ATTRILL, "Ethical Issues in Litigation Funding", unpublished paper, 2009, 9 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf; AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*, February 2012, 16, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

³⁸³ W. ATTRILL, "Ethical Issues in Litigation Funding", unpublished paper, 2009, 5 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf.

The following example delineates a possible conflict of interest that could occur in the event a party turns to TPF. Imagine the situation where parties go into settlement negotiations.³⁸⁴ The funder and the funded claimant might have divergent interest on this matter. The involvement – some might say intrusion – of a funder could deter the prospect of a settlement of the dispute by the parties if it does not satisfy the funder’s requirements, though acceptable to the client.³⁸⁵ For instance, the funder might prefer an early and cheap settlement in order to improve its cash flow, where the claimant might prefer not giving in so easily and negotiate a more interesting settlement by dragging the negotiations out.³⁸⁶ Now, the possible conflict of interest comes into play if the funder has chosen the lawyer, and not the claimant himself who the lawyer is representing. The lawyer may thus be incentivised to advise the claimant to accept the settlement, even where the settlement may not be in the claimant’s best interest.³⁸⁷ This could lead up to situations where the funder’s influence, considering the sole financial interest that he has, results in an ‘abuse of process’.³⁸⁸

Thus far, there hasn’t been an arbitration case that has dealt with this issue explicitly. However, the High Court of Australia addressed this issue in the *Fostif* case,³⁸⁹ in which the Court ruled that the influence of the funder did not constitute an ‘abuse of process’ and stated that it was unsurprising that a funder would want a certain control over the proceedings. Approximately simultaneously with the *Fostif* decision, the English Court of Appeal ruled in the *Arkin* case³⁹⁰ that the use of TPF could be upheld so long as the claimant would be the party in control of the conduct of the litigation and the party primarily interested in the result of the litigation. A clear distinction thus has to be made here with the *Fostif* decision where the funder could exercise a vast degree of control. The scope of the *Arkin* doctrine remain unclear, and it is uncertain whether the considerations that might make TPF permissible *in casu* (i.e. a competition claim), also apply, for instance, in an arbitral procedure.

³⁸⁴ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 658.

³⁸⁵ M. MANIRUZZAMAN, “Third-party funding in international arbitration – a menace or panacea?”, *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

³⁸⁶ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1657; V. WAYE, “Conflicts of Interest between Claimholders, Lawyers and Litigation Entrepreneurs”, 19 *Bond L. Rev.* 2007, 238.

³⁸⁷ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 8 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

³⁸⁸ E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/1*, 8 and <http://ssrn.com/abstract=2078358>; S. SEIDEL, “Control” in Third-Party Funding: a Doctrine Out of Control”, *CDR* 2011, 62 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>.

³⁸⁹ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited*, [2006] HCA 41.

³⁹⁰ *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.

The divergent interests between the funder and the funded party could also lead up to the stagnation of the proceedings in the event that the relationship between the funder and the funded party becomes muddled. In other words, the effectiveness of the arbitral procedure is, because of the existence of a funding agreement, subjected to the cooperation and the good understanding between the funder and the funded party. For instance if the funder decides to stop paying the legal fees, the proceedings could be forced to stop.³⁹¹

C. How to avoid conflicts of interest from occurring?

The participants at the Roundtable Discussions are of the opinion that in the event a conflict of interests occurs between the funder and the funded party, the attorney has to withdraw from the case.³⁹² This explains why some law firms are rather hesitant to accept cases in which their client is being funded.³⁹³

It is the author's view, there are two ways to avoid conflicts of interest with respect to the triangular relationship mentioned above, namely: (i) drafting a funding agreement that deals with potential conflicts of interest; and (ii) having a disclosure obligation. This former will be discussed first.

The ILF believe that TPF implies a serious distortion of parties' incentive in reaching an agreement since it is not only their interests at stake but also those of the funder.³⁹⁴ BOGART agrees with this and acknowledges that funded clients have to consider the economic implications of the funding agreement with respect to the amount of control the funder will have for instance when it comes down to a settlement.³⁹⁵ BOGART also believes that a properly negotiated and understood funding agreement does not make settlements more arduous because parties know at the outset of the proceedings that they will be given up a part of the eventual settlement.³⁹⁶ The art thus lies in a proper funding

³⁹¹ See for example *S&T Oil Equipment & Machinery Ltd. v. Romania*, ICSID Case No. ARB/07/13. In this case, an alleged misrepresentation led to the discontinuation of the proceedings because the funder stopped paying the procedural fees. For an in depth discussion of this case, see B. CREMADES, "Third party litigation funding: investing in arbitration", 8(4) *TDM* 2011, 25-32 and www.curtis.com/siteFiles/Publications/TDM.pdf; see also C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 43-44 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

³⁹² M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAL/IBLJ* 2012, 658.

³⁹³ Other law firms regard TPF as a welcoming option to finance their practice. S. SEIDEL, "Maturing Nicely", *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

³⁹⁴ B. CREMADES, "Third party funding in international arbitration", unpublished paper, 2011, 5 and www.luzmenu.com/cremades/Noticias/128/128.pdf.

³⁹⁵ C. BOGART, "Third party funding in international arbitration", *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#

³⁹⁶ C. BOGART, "Overview of arbitration finance" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 54.

agreement in which settlement provisions are clearly negotiated and agreed upon. In some cases, the fact that a funder has agreed to fund a claim may noticeably increase the chance of the claim being settled at an early stage by agreement.³⁹⁷

To avoid these kinds of conflicts of interest, the identification and management of potential conflicts should be addressed in the funding agreement by the funder, the claimant, and the claimant's lawyer. KHOURI, HURFORD and BOWMAN point out that the following should be expressly recognised, despite the fact that conduct rules, which deal with lawyer's professional obligations, often already have a provision about prohibiting a lawyer from acting if there is a conflict of interest³⁹⁸:

*"The agreement should expressly recognise that the lawyer who has the conduct of the claim owes his or her professional and fiduciary duties to the claimant and that, in the event of a conflict of interest between the claimant and the funder, the lawyer may continue to act solely for the claimant, even if the funder's interests are adversely affected by him or her doing so."*³⁹⁹

The claimant's lawyer has to protect his client's interest at all time, even if the funder's interest requires him to act differently. They also mention another way to deal with settlement disputes. The question of whether or not to settle can also be dealt with in the funding agreement. For instance, the following could be a provision in the funding agreement:

*"Any irreconcilable difference over settlement must be referred to nominated counsel for a binding expert opinion on whether the settlement is a reasonable, or the agreement may include some other form of dispute resolution clause to address this situation."*⁴⁰⁰

It is thus very important to have a properly drafted funding agreement that deals with these issues because by doing so, one can avoid a possible deadlock situation if a conflict of interest occurs.

The second method to avoid conflicts of interest is a disclosure obligation. It is this author's view that

³⁹⁷ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 5 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2.

³⁹⁸ For example, see English Solicitors' Code of Conduct 2011. *Infra*.

³⁹⁹ W. ATTRILL, "Ethical Issues in Litigation Funding", unpublished paper, 2009, 17 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf.

⁴⁰⁰ C. BOWMAN, K. HURFORD and S. KHOURI, "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *TDM* 2011, 8 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAI/IBLJ* 2012, 658.

if the funder intervenes significantly in the proceedings, and if this involvement causes concern with respect to potential conflicts of interest,⁴⁰¹ the funding agreement should automatically be disclosed to the arbitrators.⁴⁰² This would allow the arbitrators to assess the role of the funder in the proceedings and his overall degree of involvement. As noted above, such a disclosure obligation does not yet exist. Hence, the discussion of a proposal for a disclosure obligation further on.⁴⁰³

2.1.2. Independence of arbitrators

A. General

Not only the claimant's lawyer can cause conflicts of interest, but also the appointed arbitrator(s) because the involvement of a funder may raise the issue of impartiality or independence of the arbitrator(s) in certain circumstances. Several elements are amplifying the possibilities for arbitrator conflicts of interest: the overall increase of funded cases;⁴⁰⁴ the fact that the number of institutional funders that are funding international arbitration cases is still very small;⁴⁰⁵ and the often close relations between elite law firms and leading arbitrators.⁴⁰⁶

The emergence of conflicts of interest during the proceedings can have catastrophic consequences because the parties may challenge the arbitrator's independence at any stage of the arbitration, which could result in the need to appoint a new arbitrator and this could disrupt the proceedings significantly, especially if this occurs in a later stage of the arbitration.⁴⁰⁷ Perhaps more insidiously is when the conflict becomes known after the award has already been issued. The latter situation could result in the annulment or the denial of the recognition or enforcement of the award.

⁴⁰¹ *Supra.*

⁴⁰² M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 653.

⁴⁰³ *Infra.*

⁴⁰⁴ *Supra.*

⁴⁰⁵ *Supra.*

⁴⁰⁶ M. GOLDSTEIN, "Should the Real Parties in Interest Have to Stand Up? Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration", 8(4) *TDM* 2011, 7.

⁴⁰⁷ Art. 14(2) ICC Arbitration Rules, art. 8(1) ICDR Arbitration Rules, art. 10.4 LCIA Arbitration Rules; art. 13(1) UNCITRAL Arbitration Rules; see also J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1666-1669; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 29-30 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; S. SEIDEL, "Third-party investing in international arbitration claims: To invest or not to invest? A daunting question" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 22.

Considering the sheer volume of the resources put into arbitral procedures, events like these are to be avoided at all costs. For these reasons, conflicts of interest should be addressed as soon as possible, preferably prior to the appointment of the arbitrator.

The fact of the matter is that despite the general requirement of independence and impartiality of an arbitrator in arbitral rules, these rules do not sufficiently address this issue in light of the growth of the TPF practice.⁴⁰⁸ Independence and impartiality of the arbitrator is required in order to ensure full integrity in the arbitral proceedings.⁴⁰⁹ These two requirements diverge from each other in a subtle manner. Impartiality refers to the state of mind of the arbitrator and independence refers to previous or current relationships with other parties.⁴¹⁰ The latter thus also encompasses relationships with funders to one of the parties in an arbitration.⁴¹¹

The independence and impartiality requirement of the arbitral tribunal is one of the most fundamental principles in international arbitration, due to the private nature of arbitration.⁴¹² Arbitral rules uniformly require the arbitrators to remain independent and to disclose information⁴¹³ and circumstances that could harm their independence, which is a clear indication of the importance of this principle in arbitration. Protecting these principles is therefore of paramount importance.

B. Potential conflicts of interest

The presence of a funder can undeniably harm the independence of arbitrators and result in conflicts of interest. The following are some examples of potential conflicts of interest in order to bestow the reader a better understanding of the problem that TPF might cause for the independence and impartiality of the arbitrator. For instance, a situation could arise where a person acts as an arbitrator in a case in which the claimant is financed by the same funder who had also financed a claimant in

⁴⁰⁸ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1651-1652; see for instance art. 11(1) of the ICC Arbitration Rules, art. 5 LCIA Arbitration Rules, art. 7 ICDR Arbitration Rules and art. 12(1) UNCITRAL Arbitration Rules; also see J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1665.

⁴⁰⁹ G. BORN, *International Commercial Arbitration*, AH Alphen aan den Rijn, Kluwer Law International, 2009, 1463.

⁴¹⁰ K. DAELE, *Challenge and Disqualification of Arbitrators in International Arbitration*, AH Alphen aan den Rijn, Kluwer Law International, 2012, 36; see also A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 1999, 220.

⁴¹¹ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1652.

⁴¹² L. YU HONG and L. SHORE, “Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives”, 52(4) *Independent and Comparative Law Quarterly* 2003, 935.

⁴¹³ With regard to arbitral proceedings conducted under the ICC, ICDR or LCIA Arbitration Rules, prospective arbitrators have the obligation to disclose information about their independence to respectively the ICC Secretariat (art. 11(2) ICC Arbitration Rules), the ICDR administrator (art. 7(1) ICDR Arbitration Rules), or the LCIA Registrar (art. 5.3 LCIA Arbitration Rules).

another case in which the same person (*i.e.* the arbitrator) acted as that claimant's counsel. Put differently, the same funder's involvement in two cases with the same person acting in two different capacities (*i.e.* arbitrator and counsel), could raise issues of impartiality and independence of the latter, hence causing conflict of interests.⁴¹⁴ This concern is especially fitting for international arbitration, considering that counsel and arbitrators are often drawn from essentially the same pool.⁴¹⁵

Furthermore, as noted above,⁴¹⁶ it is possible that the funder has the power to appoint the arbitrator. In the latter situation, it is practically self-evident that the funder would turn to arbitrators with whom it had prior commercial relationships and contacts. Such a situation could only increase the doubts with respect to the arbitrator's independence and impartiality.

Multiple appointments of the same arbitrator indirectly made by the same funder,⁴¹⁷ an existing relationship between the funder and the arbitrator's law firm and shares held by the arbitrator in the funding corporation are some other examples of situations which could lead to a conflict of interest.⁴¹⁸

To avoid potential conflicts of interest in situations of 'repeat appointments' of the same arbitrator by the same funder,⁴¹⁹ the IBA Guidelines require disclosure of these 'repeat appointments' if the arbitrator in question has had more than two appointments in the last three years by the same party,⁴²⁰

⁴¹⁴ M. MANIRUZZAMAN, "Third-party funding in international arbitration – a menace or panacea?", *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 29 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; L. LÉVY and R. BONNAN, "Third-party funding: Disclosure, joinder and impact on arbitral proceedings" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 85.

⁴¹⁵ S. MENON, "Some Cautionary Notes for an Age of Opportunity", *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 7-8 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁴¹⁶ *Supra*.

⁴¹⁷ Commonly referred to as 'repeat appointments' by commentators. C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 28 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁴¹⁸ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1665; see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 652.

⁴¹⁹ See for instance *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14 (May 5, 2011), in which the tribunal stated that multiple appointments might affect an arbitrator's ability to exercise independent judgment; see also S. MENON, "Some Cautionary Notes for an Age of Opportunity", *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 14-15 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁴²⁰ IBA Guidelines 3.1.3.

and three or more appointments in the last three years by the same law firm.⁴²¹ However, the current IBA Guidelines contain no provisions in which TPF is mentioned expressly because they were written before the advent of TPF. This might change in the future because a sub-committee of the IBA Task Force responsible for the IBA Guidelines has been constituted and is considering whether the IBA Guidelines require modifications in light of recent developments, such as TPF.⁴²²

C. Current applicable rules

Let us now take a look at the current applicable rules with regard to an arbitrator's independence and the disclosure of conflicts of interest when an arbitration is conducted under the auspices of the ICC, the ICDR, or the LCIA or when the arbitration is conducted on an *ad hoc* basis.

The arbitral rules use different standards to determine what information and circumstances should be disclosed. The UNICTRAL Arbitration Rules provide that the arbitrator must disclose all circumstances *"likely to give rise to justifiable doubts as to his or her impartiality or independence."*⁴²³ The LCIA Arbitration Rules provide in similar fashion that the arbitrator shall disclose circumstances *likely to give rise to any justified doubts as to his impartiality or independence."*⁴²⁴ The ICDR Arbitration Rules similarly require the disclosure of *"any circumstance likely to give rise to justifiable doubts."*⁴²⁵ The ICC Arbitration Rules require disclosure of *any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."*⁴²⁶

Lastly, the International Bar Association's Guidelines on Conflict of Interest in International Arbitration (hereinafter "IBA Guidelines") likewise provide that the arbitrator must disclose circumstances that *"may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence."*⁴²⁷ Therefore, in theory, arbitrators have to disclose the pertinent information with regard to the TPF relationship if one of the parties in arbitration is being funded.

⁴²¹ IBA Guidelines 3.3.7.

⁴²² See R. MOHTASHAMI, "Arbitration News: Newsletter of the International Bar Association Legal Practice Division", 19 IBA 1 February 2014, [www.mwe.com/files/Publication/33a21191-bf0f-418e-a862-6a94f8786390/Presentation/PublicationAttachment/271f0480-ebca-4b0e-89c0-54dd0599bac9/Arbitration%20News%20\(Feb%202014\).pdf](http://www.mwe.com/files/Publication/33a21191-bf0f-418e-a862-6a94f8786390/Presentation/PublicationAttachment/271f0480-ebca-4b0e-89c0-54dd0599bac9/Arbitration%20News%20(Feb%202014).pdf); C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", Penn State Law Research Paper No. 51-2013 2013, 32 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁴²³ Art. 11 UNCITRAL Arbitration Rules.

⁴²⁴ Art. 5.3 LCIA Arbitration Rules.

⁴²⁵ Art. 7 ICDR Arbitration Rules.

⁴²⁶ Art. 11(2) ICC Arbitration Rules.

⁴²⁷ General Standard 3(a) IBA Guidelines.

However, an arbitral tribunal can only properly exercise control over funded proceedings if it is aware of the existence of the funding in the first place. There aren't any rules that specifically require a party in arbitration to disclose its funding relationship and many arbitrators and lawyers are discussing whether such an obligation should be introduced.⁴²⁸ Moreover, funding agreements often contain a confidentiality clause, which results in the situation where arbitrators rarely know if a party is being funded.⁴²⁹

Although the institutional arbitration rules require the arbitrator to be independent, the question of how to interpret independence remains unanswered because none of the rules mentioned above defined the concept. The IBA Guidelines were created with the purpose of tackling this problem by providing lists of specific circumstances that may give rise to questions about an arbitrator's independence and impartiality and these circumstances have to be disclosed by the arbitrator.

The IBA Guidelines provide that arbitrators should disclose their past or present relationships with the parties to the dispute and the law firms representing the parties.⁴³⁰ The arbitrator can also have a financial conflict. Subsequently, the question of which corporate interests should be disclosed in international arbitration rises. The IBA Guidelines provide us with the following answer: only a "significant financial interest" in the outcome of an arbitration can form the basis for an arbitrator to have a financial conflict.⁴³¹ This standard is not as clear as for example the one provided by the USSC cited above⁴³² and BOGART notes that TPF of a party in arbitration would not create such a financial interest unless the arbitrator and the funder were the same person.⁴³³

BOGART points out the following hypothesis that could cause a conflict of interest, namely the situation where a funder is funding the action before the arbitrator, and simultaneously funding a separate matter in which the arbitrator's firm is counsel. According to BOGART this is clearly not a conflict of interest because under the IBA guidelines, only parties and their affiliates can create such

⁴²⁸ L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 26.

⁴²⁹ S. SEIDEL, "Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future", *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500; *supra*.

⁴³⁰ Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest.

⁴³¹ See general standard 2(d) IBA Guidelines.

⁴³² *Supra*.

⁴³³ C. BOGART, "Overview of arbitration finance" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 53-54.

conflicts and funders are, under the law of any common law country,⁴³⁴ not affiliates, nor are funders affiliates under the definition of an affiliate in the IBA guidelines.⁴³⁵

TRUSZ, who does not share BOGART's opinion, states that funders becomes an affiliate of the funded party due to the power the funder subsequently receives to control the party's dispute.⁴³⁶ Assuming that the funder would be qualified as an affiliate of the funded client, the arbitrator would subsequently be subject to a disclosure obligation of several circumstances that are enumerated in the IBA Guidelines.⁴³⁷ It is clear that this issue is not yet settled and ambiguity still exists. However, it can and should be noted that the IBA Guidelines expressly state that any doubt as to whether an arbitrator should disclose should be resolved in favour of disclosure.⁴³⁸ This author thus recommends arbitrators to disclose the respective information as long as this issue is not settled.

However, this author cannot emphasize enough, that regardless of this discussion on the qualification of funders as affiliates, the current arbitral rules and IBA Guidelines will have no effect on TPF relationships in practice as long as the arbitrator does not know of the existence of the funding agreement. It is therefore of paramount importance for the arbitral tribunals to be informed about the existence of TPF from the outset,⁴³⁹ in order to be in a proper position to assess possible conflicts of interest resulting from TPF relationships.⁴⁴⁰

D. How to avoid conflicts of interest from occurring?

⁴³⁴ The term 'affiliate' often has different definitions in various jurisdictions. C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 36 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁴³⁵ C. BOGART, "Third party funding in international arbitration", *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#; see for the definition of affiliate footnote 5 of the IBA Guidelines.

⁴³⁶ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1670.; Black's Law Dictionary 67 (9th ed. 2009) defines affiliate as "a corporation that is related to another corporation by shareholdings or other means of control"; for a more in depth discussion on whether funders can be qualified as affiliates, this author recommends the reader to read C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 34-41 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁴³⁷ See, for example, IBA Guidelines 2.3.6: "The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties"; for more information on the IBA Guidelines and more examples of how the funder as an affiliate could be implicated by several circumstances mentioned in the IBA Guidelines, see J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1670-1673.

⁴³⁸ General Standard 3(c) IBA Guidelines.

⁴³⁹ M. SCHERER, "Out in the open? Third-party funding in arbitration", *CDR* 2012, 57 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 31 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁴⁴⁰ M. SCHERER, "Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 97.

The end result of the above-mentioned different standards⁴⁴¹ is a lack of consistency and certainty among arbitrators with regard to the scope of an arbitrator's disclosure obligations and due diligence obligations in case of potential conflicts of interest.⁴⁴² It is this author's view that some of the (potential) conflicts of interest could be avoided if there was more certainty by developing and introducing a uniform code of conduct for arbitrators. However, the feasibility of such a uniform code of conduct seems questionable considering the highly competitive market between the arbitral institutions. This author therefore poses the – for now – rhetorical question whether there would be willingness among these institutions to develop such a code of conduct.

2.2. Disclosure obligation to decide on allocation of costs or security for costs

TPF has a strong chance of having a certain influence on the costs of the arbitration proceedings at several stages of the proceedings: (i) at any time during the course of the proceedings when the arbitral tribunal decides on security for the costs of the arbitration; and (ii) at the time of the final decision by the arbitral tribunal regarding the allocation of the arbitration fees. As noted above,⁴⁴³ the TPF relationships tend to remain confidential due to confidentiality clauses in the funding agreement and, as this section will later show,⁴⁴⁴ the funders prefer to keep this relationship confidential.⁴⁴⁵

The question whether TPF agreements should be considered by the arbitral tribunal when deciding on allocation of costs or security for costs should therefore be discussed together with the discussion on whether to create a disclosure obligation or not.⁴⁴⁶ Even if tribunals should indeed take funding relationships into account, this rule would remain dead letter if the tribunals would remain unaware of the funding agreements.

After an introduction on how arbitral tribunals decide on the allocation of costs and security for costs in international arbitration in general, this section set forth the opposing views expressed by funders, commentators and arbitrators. This section concludes with the author's view on the most apt approach towards allocation of costs and security for costs when TPF is involved.

2.2.1. Allocation of costs in international arbitration

⁴⁴¹ *Supra*.

⁴⁴² S. MENON, "Some Cautionary Notes for an Age of Opportunity", *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 12 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁴⁴³ *Supra*.

⁴⁴⁴ *Infra*.

⁴⁴⁵ *Infra*.

⁴⁴⁶ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 47 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

The allocation of liability for costs is in international arbitration usually decided by the arbitral tribunal who has a broad discretion on the issue, unless the parties' agreement,⁴⁴⁷ the arbitration rules or applicable statutes provide otherwise.⁴⁴⁸ SCHERER explains how arbitral tribunals decide on adversary's costs in practice:

*"While there are no express international standards, and although the "costs follow the event" rule whereby the losing party pays for its adversary's costs is not universally accepted, tribunals often allow the prevailing party to recover reasonable costs from the losing party."*⁴⁴⁹

Arbitral tribunals thus generally have a broad discretion for decisions about cost-shifting, and there does not seem to be any clear coherent system or procedure in this respect.⁴⁵⁰ In practice, three different cost allocation schemes that are used by arbitral tribunals can be distinguished: the 'cost follow the event' principle ('English rule'),⁴⁵¹ the 'pay your own' approach ('American rule')⁴⁵² and the factor dependent approach.⁴⁵³ The 'English rule' implies that the unsuccessful party will be ordered to pay the cost of the successful party.⁴⁵⁴ A key objective of this rule is preventing frivolous arbitral procedures.⁴⁵⁵ However, in the event the parties to the arbitral procedure did not agree on how to costs should be allocated, then the arbitral tribunal will still have discretion, making it unsure which rule/principle they will apply and therefore leaving the door open for frivolous claims. In order for this objective to become truly effective, parties should have the certainty that the English rule will apply.

⁴⁴⁷ R. HARFOUCHE, and J. SEARBY, "Third-Party Funding: Incentives and Outcomes", *Global Arb. Rev.* 2013, 11.

⁴⁴⁸ See, e.g., art. 37 ICC Arbitration Rules, art. 31 ICDR Arbitration Rules, art. 28 LCIA Arbitration Rules, art. 61(2) ICSID Convention, and art. 42(1) UNCITRAL Arbitration Rules; see generally G. BORN, *International Commercial Arbitration*, AH Alphen aan den Rijn, Kluwer Law International, 2009, 2488-2502.

⁴⁴⁹ M. SCHERER, "Out in the open? Third-party funding in arbitration", *CDR* 2012, 56 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

⁴⁵⁰ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 3 and <http://ssrn.com/abstract=2078358>;

⁴⁵¹ See Civil Procedure Rules, rule 44.2(2)(a) for litigation and Arbitration Act 1996, sec. 61(2) for Arbitration in England.

⁴⁵² In France, parties usually bear their own legal costs too, despite the fact that art. 700 of the French Code de Procédure Civile grants judges the power to order the unsuccessful party to pay the successful party's legal costs. W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30(1) *J. Int. Arb.* 2013, 19.

⁴⁵³ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 11 and <http://ssrn.com/abstract=2078358>; see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAL/IBLJ* 2012, 215.

⁴⁵⁴ The English rule is used both in the United Kingdom and Australia. G. BARKER, "Third-Party Litigation Funding in Australia and Europe", 8 *J.L. Econ. & Pol'y* 2012, 468; W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30(1) *J. Int. Arb.* 2013, 19.

⁴⁵⁵ R. HARFOUCHE, and J. SEARBY, "Third-Party Funding: Incentives and Outcomes", *Global Arb. Rev.* 2013, 10.

This rule explains why, in the U.K., an unique ATE insurance market has arisen.⁴⁵⁶ It is common practice for plaintiffs in a domestic English matter to take out an after-the-event insurance policy⁴⁵⁷ at the time of commencing litigation. Such a policy encompasses the payment of an adverse costs award in the event one is rendered and can therefore be used as security for costs if required. BOGART is of the opinion that every major litigation funder in the U.K. requires plaintiffs in English cases to have such insurance cover.⁴⁵⁸

The ‘American rule’ implies that both parties will be responsible for their own expenses and the costs related to the procedure will be split evenly between the parties.⁴⁵⁹ Arbitral tribunals can adopt this rule and still deviate from it in situations such as bad faith of where the case turned out to be a frivolous one.⁴⁶⁰ The factor dependent approach implies that both parties are liable for the costs based on the level of success.⁴⁶¹ If for instance the claimant’s claim is not entirely successful on all issues, then the tribunal could decide that some of the costs should be covered by the respondent. There is now a tendency for arbitral tribunals to move away from the American rule and more towards the English rule.⁴⁶² The arbitral tribunals now prefer an approach where they take the specific circumstances and facts of the case into consideration. This approach can be qualified as some sort of ‘middle road’ in between the ‘American rule’ and the ‘English rule’.⁴⁶³ The *Thunderbird Gaming* case is a good example of this approach. In this case, the claimant had to pay the costs of the respondent state because the tribunal ruled that certain claims were frivolous and that the proceedings were conducted in bad faith.⁴⁶⁴

2.2.2. Security for costs in international arbitration

⁴⁵⁶ M. KANTOR, “Risk management tools for respondents – here be dragons” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 57-61; *supra*.

⁴⁵⁷ *Infra*

⁴⁵⁸ C. BOGART, “Third party funding in international arbitration”, *Burford Capital* 22 January 2013, www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

⁴⁵⁹ M. KANTOR, “Risk management tools for respondents – here be dragons” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 58.

⁴⁶⁰ J. ROSELL, “Arbitration costs as relief and/or damages”, 28 *Journal of International Arbitration* 2 2011, 119.

⁴⁶¹ S.D. FRANCK, “Rationalizing costs in investment treaty arbitration”, 88 *Wash. U. L. Rev.* 2011, 793.

⁴⁶² L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 27.

⁴⁶³ D. SMITH, “Shifting sands: cost-and fee allocation in international investment arbitration”, 51 *Virginia Journal of International Law* 2011, 758.

⁴⁶⁴ *International Thunderbird Gaming Group v. United Mexican States*, UNCITRAL, Award, 26 January 2006; for a discussion of more cases where the tendency for arbitral tribunals to move away from the American rule is illustrated, see E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/1*, 12-13 and <http://ssrn.com/abstract=2078358>; see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le debat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 661-662.

Considering the significant costs that international arbitral proceedings entail and the possibility of cost-shifting in arbitration because of the discretionary power of the arbitral tribunals to allocate costs, it is sometimes recommended to order security for costs in order to ensure the succeeding party – claimant or respondent – that it can recover its costs.⁴⁶⁵ An arbitral tribunal may order the payment of the security for costs, during the course of the proceedings.⁴⁶⁶ Let us assume – for the sake of argument – that tribunals will consider TPF agreement when deciding on security for costs,⁴⁶⁷ the tribunals will thus be able to order security for costs during the proceedings and not only at the outset, for instance after they have learned of the existence of the TPF relationship.

Despite the “tool” of security for costs not being universally accepted,⁴⁶⁸ it is nevertheless gradually getting traction to become common practice in international arbitration proceedings.⁴⁶⁹ However, security for costs is not always available. It depends on the possible agreement of the parties on that subject,⁴⁷⁰ the applicable arbitral rules or the national laws at the seat of arbitration.⁴⁷¹ The ICC, LCIA, ICDR, and UNCITRAL Arbitration Rules each contain a provision giving the arbitral tribunal the authority to order security for costs.⁴⁷² Tribunals ordinarily – under currently prevailing standards – order security for costs if: (i) the requesting party shows that it has a solid chance of succeeding on the merits; and (ii) that the opposing party does not possess sufficient financial means to satisfy a potential future adverse costs award.⁴⁷³ The arbitral tribunal will also consider if bad faith was involved in the party’s actions when determining to grant security for costs.⁴⁷⁴

⁴⁶⁵ M. SCHERER, “Out in the open? Third-party funding in arbitration”, *CDR* 2012, 56-57 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration; J. WAINCYMER, *Procedure and Evidence in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 641.

⁴⁶⁶ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAI/IBLJ* 2012, 659; see e.g. art. 25(2) LCIA Arbitration Rules.

⁴⁶⁷ *Infra*.

⁴⁶⁸ Especially civil law jurisdictions are unfamiliar with security for costs. Providing security for costs is considered to be a typically English legal mechanism. W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30(1) *J. Int. Arb.* 2013, 19.

⁴⁶⁹ W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30(1) *J. Int. Arb.* 2013, 19.

⁴⁷⁰ Some funders, such as Harbour Litigation Funding Ltd. And IMF Ltd., offer security for costs to their clients as part of the funding package. W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30(1) *J. Int. Arb.* 2013, 17.

⁴⁷¹ J. WAINCYMER, *Procedure and Evidence in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 621-622.

⁴⁷² Art. 28(1) ICC Arbitration Rules; art. 25.1 LCIA Arbitration Rules; art. 21 ICDR Arbitration Rules; art. 26 UNCITRAL Arbitration Rules.

⁴⁷³ M. SCHERER, “Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 97; G. BORN, *International Commercial Arbitration*, AH Alphen aan den Rijn, Kluwer Law International, 2009, 2003-2005.

⁴⁷⁴ J. WAINCYMER, *Procedure and Evidence in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 648-650; see also W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order

2.2.3. Should the arbitral tribunal take funding agreements into account when deciding on the allocation of costs and security for costs?

TPF in arbitration can give rise to a number of issues regarding the costs of the arbitration. Let us imagine the situation where a party, who does not have the financial resources to pay any adverse costs in the event its claim is unsuccessful, initiates a claim in arbitration after obtaining the necessary funding. It is rather unlikely in such a case that the prevailing party will recover its costs from the funded party who lost. Moreover, it is equally unlikely that the prevailing party will be able to recover its costs from the funder because a funder is (usually) not a party to the action, nor does the funder (generally) control the proceedings.⁴⁷⁵ Some funding agreements nevertheless expressly state that the funder is not liable for adverse costs to nip any debate on the issue in the bud.⁴⁷⁶

The moot point is whether TPF agreements should and could be taken into account by the arbitral tribunal when determining to grant the requested security for costs or when deciding on the allocation of costs.⁴⁷⁷ Two divergent views can be identified among commentators on this issue. This section will first discuss why arbitral tribunals cannot and should not take TPF agreements into account, after which it will be discussed why tribunals should consider TPF agreements for that purpose.

A. Critics

Some commentators argue that not considering TPF when deciding on security for costs is nothing but logical,⁴⁷⁸ since TPF has already been rejected on previous occasions as an element to determine the awards of costs.⁴⁷⁹ Recent international investment arbitration cases confirm that TPF agreements

Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 20 for more circumstances warranting a security for costs.

⁴⁷⁵ C. BOGART, “Overview of arbitration finance” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 55; M. SCHERER, “Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 96-97.

⁴⁷⁶ W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 18.

⁴⁷⁷ E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/1*, 4 and <http://ssrn.com/abstract=2078358>.

⁴⁷⁸ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 660; L. LÉVY and R. BONNAN, “Third-party funding: Disclosure, joinder and impact on arbitral proceedings” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 80.

⁴⁷⁹ W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 21; see for instance

should not be taken into account when deciding on the allocation of costs. For instance in the recent *Kardassopoulos v Georgia* case, Georgia reasoned that because Kardassopoulos was being funded by a third-party, they should not have to bear his costs of the arbitral proceedings. The arbitral tribunal subsequently noted that it found:

*“no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs.”*⁴⁸⁰

Leading arbitrators, such as VAN DEN BERG, concur with the decision to not take TPF into account when determining costs.⁴⁸¹

Allowing TPF to be considered for either awards of costs or security for costs would indeed cause some uncertainty among the parties involved in the arbitration. Furthermore, there is an inherent risk of stifling meritorious claims if a tribunal would order the claimant, who has only limited financial resources, to provide security for costs based on the simple fact that he or she is being funded because if the funder then refuses to cover these costs, the claimholder would be compelled to stop the arbitral proceedings.⁴⁸² For instance in the *Hamester*⁴⁸³ case, the arbitral tribunal refused to grant security for costs because this could potentially stifle the claim due to the fact that the claimant relied on external funding.

There is also a risk of delaying the proceedings if arbitral tribunals would routinely take TPF into account when considering granting security for costs, because it's likely that the opposing party would almost automatically apply for security once it would become aware that its adversary is being

Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia, ICSID Case No. ARB/05/18 and ARB/07/15, Award of 3 March 2010.

⁴⁸⁰ *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15, Award of 3 March 2010; see also the discussion of the cases of *ATA Constr., Indus. & Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/02 (July 11, 2011) and *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/05/14 (April 28, 2011), in which the same reasoning as the *Kardassopoulos* decision was cited, by E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/1*, 14-15 and <http://ssrn.com/abstract=2078358>; see also W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 22; C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 102-103.

⁴⁸¹ S. PERRY, “Third-party Funding: an Arbitrator’s Perspective”, *Global Arb. Rev.* 23 November 2011, <http://globalarbitrationreview.com/news/article/29981/third-party-funding-arbitrators-perspective>; see also W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 22; C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 107.

⁴⁸² W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 23,

⁴⁸³ *Gustav F.W. Hamester GmbH & Co. K.G. v. Republic of Ghana* (ICSID Case No. ARB/07/24) Arbitral Award of June 18, 2010.

funded.⁴⁸⁴ TPF also raises the question regarding the possibility for the funded party to recover the incurred costs. If the funder paid for all of the funded party's attorney fees and all other costs, who should be considered to have incurred the costs in question? The client does not suffer any loss as such because the funder covers all the costs.

As for the funder, the issue remains that it is not a party to the arbitration. It is undeniably questionable if a different treatment with regard to security for costs between claimants relying on TPF and claimants using other funding models⁴⁸⁵ can be justified because TPF is fundamentally not different than for instance insurance or bank loans. It appears that the use of other funding models to finance a claim have not been taken into account when determining security for cost.⁴⁸⁶ Hence, it is this author's view that claimants should arguably not be treated differently for the sole reason that he or she chose to rely on TPF, instead of an other type of funding.

Furthermore, as discussed above,⁴⁸⁷ funders may be more reluctant to disclose the TPF relationship if they know at the outset of the proceedings that the relationship could be considered for determining security for costs and thus preventing conflicts of interest to become known, which could eventually result in the annulment of the award. Therefore, the necessity to prevent conflicts of interest should be favoured over eliminating funding relationships from determining security for costs.⁴⁸⁸

The most important reason why arbitral tribunals cannot consider TPF for awards on costs is the lack of jurisdiction of the tribunal to order the funder to pay adverse costs because the funder is not a signatory to the arbitration agreement, nor is it a party to the arbitration proceedings.⁴⁸⁹ Put differently, the international arbitrators cannot address the TPF agreement because the funding agreement is alien to the legal relations between the claimant and the respondent and the arbitrator is only competent with

⁴⁸⁴ W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 24.

⁴⁸⁵ *Supra*.

⁴⁸⁶ W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 24.

⁴⁸⁷ *Supra*.

⁴⁸⁸ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1679.

⁴⁸⁹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 661; W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 27; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 45 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; M. SCHERER, "Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 97.

respect of these parties.⁴⁹⁰ In general, the arbitral tribunal thus lacks the required jurisdiction to order the funder to pay any adverse costs, with the exception of instances where the arbitration agreement is considered to be extended (e.g., under available theories, such as *alter ego*, implied consent) or *de facto* assigned to the funder (e.g., if a company buys the claim, award, the company who initiated the claim).⁴⁹¹ The only leverage that tribunals have to ensure contributions from the funders appear to be at the security for costs stage.

B. Proponents

Other commentators champion the taking into account of TPF for decision on allocation of costs and security for costs. Their main concern is that claimants, who lack sufficient available finances for the arbitration, would abuse the system via TPF relationships because he or she would gain from succeeding in the arbitration, but would be unable to pay for costs if the claim is unsuccessful.⁴⁹² Put differently, this could create some sort of a “moral hazard” because the party can only gain from the proceedings.⁴⁹³ KALICKI describes this as the ‘arbitral hit and run’.

*“Security for costs is more likely to be awarded where] the claimant’s arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called ‘arbitral hit and run’, and described by arbitrators and commentators alike as particularly compelling grounds for security for costs.”*⁴⁹⁴

⁴⁹⁰ E. DE BRABANDERE and J. LEPELTAK, “Third party funding in international investment arbitration”, *Grotius Centre Working Paper Series N°2012/I*, 3 and <http://ssrn.com/abstract=2078358>.

⁴⁹¹ M. SCHERER, “Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 97; M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 661; C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 36 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; L. LÉVY and R. BONNAN, “Third-party funding: Disclosure, joinder and impact on arbitral proceedings” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 82.

⁴⁹² J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1679.

⁴⁹³ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 660; W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, *30 J. Int. Arb.* 1 2013, 26-27.

⁴⁹⁴ J. KALICKI, “Security for Costs in International Arbitration”, *TDM* 5 2006, www.transnational-dispute-management.com/article.asp?key=827.

Although this thesis has argued above that it is very unlikely that TPF would encourage frivolous claims,⁴⁹⁵ this is nevertheless a legitimate concern, which is expressed several commentators.⁴⁹⁶ A TPF relationship can indeed be an indication that the party has insufficient financial resources for the arbitration and some argue that the relationship should therefore be disclosed so that the arbitral tribunal could consider it for security for costs.⁴⁹⁷ However, TPF is not always used for lack of finances for the arbitration.⁴⁹⁸

Furthermore, many arbitral tribunals have considered the precarious financial situation insufficient to order security for costs and require also a fundamental change in circumstances.⁴⁹⁹ The reasoning behind this is that the party requesting security for costs, knew of the financial situation of its adversary when they entered into the business relationship, regardless of the TPF agreement.⁵⁰⁰ Nevertheless, it is this author's opinion, as is it KIRTLEY and WIETRZYKOWSKI's view,⁵⁰¹ that ordering security for costs can and should be justified to protect respondents from spurious claims when TPF is used abusively. It remains to be seen whether arbitral tribunals will adopt this line of reasoning.

Who then would have to bear the risk of having to pay security for costs or an adverse costs award: the funded client or the funder? It is possible, if not probable, that the client and the funder agree on a maximum adverse costs award that the funder would pay if the client loses the case.⁵⁰² However, most funders are reluctant to assume liability for adverse costs award because they already bear a vast amount of financial risk.⁵⁰³ There is nonetheless a possibility that funders may find themselves liable to provide security for costs and LAMM and HELLBECK reason that the risk is greater when the so-called 'English Rule'⁵⁰⁴ applies.⁵⁰⁵ An illustrative example of this issue is the *Arkin* case⁵⁰⁶, in which

⁴⁹⁵ *Supra*.

⁴⁹⁶ *Supra*.

⁴⁹⁷ W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 28.

⁴⁹⁸ *Supra*.

⁴⁹⁹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 651; see also W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 20.

⁵⁰⁰ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1679.

⁵⁰¹ W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 30.

⁵⁰² L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 12-13.

⁵⁰³ For instance IMF Ltd. expressly state that they offer payment of any adverse costs as a part of the funding package. W. KIRTLEY and K. WIETRZYKOWSKI, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 *J. Int. Arb.* 1 2013, 18.

⁵⁰⁴ *Supra*.

⁵⁰⁵ C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 111.

the Court ruled that the funder was liable for all costs up to the amount of its contribution to the litigation because the Court determined that justice would be better served if costs could be recovered from the funder whose financing permitted a claim, that proved to be without merit, to be pursued.⁵⁰⁷

If the client would be ordered to pay security for costs due to the presence of TPF, the principle of access to arbitral justice could be harmed.⁵⁰⁸ Let me explain. By increasing the financial risk on the funding company, the likelihood that the funding agreement would be terminated would also increase. Assuming that TPF will most of the time be used by parties with insufficient financial funds, increasing the probability of the termination of the funding agreement or the dismissal of the claim⁵⁰⁹ because the party did not comply with the order could thus decrease the access to justice. This is problematic especially considering that the original intention for the introduction of TPF was to increase the access to justice.⁵¹⁰ Arbitrators thus have the task to undertake a delicate balancing exercise between the right of the claimant of access to justice and the protection of the respondent for the incurred costs.⁵¹¹

Given the sensitivity of this balancing exercise, the circumstances that could justify an order for security for costs should therefore be strictly limited. A ‘blanket approach’, as KIRTLEY and WIETRZYKOWSKI call it,⁵¹² whereby security for costs would be automatically ordered if TPF is involved, would create an inequitable distinction between claimants with meritorious claims who relied on TPF rather than on alternative types of financing.⁵¹³

DE BRABANDERE and LEPELTAK argue in favour of considering TPF agreements for the purpose of deciding on the allocation of costs or security for costs. They note that the decisive factor in the decision on the allocation of costs will be the level of influence of the funder on the proceedings and the costs. Therefore, they suggest that tribunals should make a distinction between cases in which funders influenced the proceedings gravely and cases where the funder only had a marginal influence

⁵⁰⁶ *Supra*.

⁵⁰⁷ *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; see also C. LAMM and E. HELLBECK, “Third-party funding in investor-state arbitration” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 111-112.

⁵⁰⁸ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 660.

⁵⁰⁹ See e.g. Arbitration Act 1996, sec. 41(6).

⁵¹⁰ *Supra*.

⁵¹¹ W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 27; C. BOGART, “Overview of arbitration finance” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 55.

⁵¹² W. KIRTLEY and K. WIETRZYKOWSKI, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?”, 30 *J. Int. Arb.* 1 2013, 30.

⁵¹³ *Supra*.

on the proceedings. The tribunal could then, if the interference had a negative influence on the proceedings, for instance by delaying the proceedings, take the TPF agreement into account when considering the allocation of costs.⁵¹⁴

There is some case law from local courts in the USA and in England⁵¹⁵ in which the courts ruled that the responsibility of the funder should be extended to pay for the successful adverse party's litigation costs. For instance in *Abu-Ghazaleh v Chaul*, the District Court of Appeal of Florida concluded that the funders were parties to the lawsuit because they had the control to direct the course of the proceedings and were therefore liable for the victorious defendant's fees and costs.⁵¹⁶ It is clear that a consensus does not yet exist about taking the TPF into account for ordering security for costs or for the allocation of costs.⁵¹⁷

Those in favour of considering TPF agreement for awards on costs, have to also realize that the main concern is the opacity of TPF agreement. If the funding relationship should be taken into account, then a disclosure obligation would have to be imposed at the outset of the arbitration.⁵¹⁸ However, to date, the leading arbitral institutions do not have any rules, which require a party to disclose if it is being funded.

Such an obligation could give the tribunal the opportunity to assess whether it has to order the funded party to provide security for costs and whether it should take the funding agreement into account when allocating the costs. For example, if the tribunal finds out that the funded party could not participate in

⁵¹⁴ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 15 and <http://ssrn.com/abstract=2078358>.

⁵¹⁵ In *Dymocks Franchise Systems (NSW) Pty Ltd. v. Todd (Costs)*, [2004], 1 W.L.R. 2807, the Court made the distinction between "pure" funders and third-party funders who had substantial control over the proceedings. The Court found that justice requires that the funder would pay the successful party's costs if the proceedings fail if the funder had substantial control. "Pure funders" will generally not have to carry the awarded costs. In the *Arkin* case, the Court ruled that the funder had to pay the successful party's adverse costs to the extent of the amount funded.

⁵¹⁶ *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009); see also S. SEIDEL, "Investing in Commercial Claims, Nutshell Primer", *Fulbrook Management LLC Publications* 2011, 26-27 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>; M. KANTOR, "Third-Party Funding in International Arbitration: An Essay About New Developments", 24 *ICSID Rev.* 2009, 56; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 36-37 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; C. LAMM and E. HELLBECK, "Third-party funding in investor-state arbitration" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 108.

⁵¹⁷ *Supra*.

⁵¹⁸ It is also possible that the respondent or the tribunal becomes aware of the fact that the claimant is being funded, without an obligation to disclose, for instance in the event of a leak. See on the issue of timing of disclosure of TPF and the impact on ICSID jurisdiction, the recent case of *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1 (decision on jurisdiction, 21 December 2012, paras. 239-259); M. SCHERER, "Out in the open? Third-party funding in arbitration", *CDR* 2012, 56 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

the arbitration without the funding agreement, it then could order security for costs in order to ensure that the funded party would be able to pay a future adverse costs award. A funding agreement, however, may not automatically lead to the tribunal ordering security for costs because, as noted above,⁵¹⁹ it might well be that the funded party turned to TPF for reasons other than being impecunious.⁵²⁰

Despite the sound reasons for arguing that TPF should be taken into account, the fact of the matter is that no publicly available case has ruled in favour of this view yet, leaving the discussion wide open.

2.3. Giving arbitral tribunals the opportunity to assess the need to impose a duty of confidentiality on funders

Confidentiality in international commercial and investment arbitration are a topic from which much debate has sprung.⁵²¹ The issue that merits further evaluation is the impact that the presence of a funder could or even should have on confidentiality in international arbitration.

2.3.1. Confidentiality in international arbitration

Confidentiality in arbitration arises through the agreement of the parties, by either selecting arbitration rules with explicit provisions thereof, or under domestic statutory regulations. However, only few national laws⁵²² regulate confidentiality in arbitration because of the fact that a sizeable number of countries have adapted the UNCITRAL Model Law⁵²³, whose drafters made it clear that:

*“confidentiality may be left to the agreement of the parties or the arbitration rules chosen by the parties.”*⁵²⁴

For instance, article 22(3) of the ICC Arbitration Rules states that

⁵¹⁹ *Supra*.

⁵²⁰ For instance, if the funded party uses TPF because it wants to manage his risks or facilitate his cash flow. M. SCHERER, “Out in the open? Third-party funding in arbitration”, *CDR* 2012, 58 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

⁵²¹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 663.

⁵²² Worldwide, there are only a few countries that expressly address the confidentiality of the arbitral process, countries such as New Zealand, Norway, Spain, Romania, Peru and the Philippines. I. SMEUREANU, “Confidentiality in arbitration revisited: protective orders in the Philippines”, *Kluwer Arbitration Blog* 4 November 2011, <http://kluwerarbitrationblog.com/blog/2011/11/04/confidentiality-in-arbitration-revisited-protective-orders-in-the-philippines/>.

⁵²³ Belgium is one of the latest countries who has adapted his current Arbitration Act into a new Arbitration Act which is based on the UNCITRAL Model Law and it entered into force on 1 September 2013.

⁵²⁴ Report of the Secretary General on Possible Features of a Model Law in International Commercial Arbitration, UN Doc. A.CN.9/207, para. 17, in XII Y.B. UNCITRAL 75, 90 (1981).

“[U]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.”

The parties thus have to request confidentiality orders and that the tribunal does not have the discretionary power to do so.⁵²⁵

2.3.2. Are third-party funders bound by a duty of confidentiality?

For the sake of argument and to facilitate further debate on the possible influence of the presence of a funder on the confidentiality of arbitration, let us assume that a duty of confidentiality exists and that this duty falls first on the parties in arbitration and their respective counsel.

As for the question whether funders that participate in international arbitration are bound by a duty of confidentiality, two different approaches can be identified.⁵²⁶ First, the funder may be considered to be part of the funded party. In that capacity, the funder will be in principle held to the same duty of confidentiality as the parties. Second, the funder may be treated like any other third party in arbitration. This implies that the funders will be bound by a duty of confidentiality, only if they expressly sign a promise of confidentiality, as is the practice for third parties in international arbitration. Until this discussion is settled, it is recommended that the arbitral tribunal asks the funders to sign a confidentiality agreement in order to avoid later complications.

This discussion may seem purely theoretical considering that a disclosure obligation is not yet in existence for TPF agreements. The arbitral tribunals may thus not be aware of the fact that one of the parties is being funded, hence it will not be able to assess the question whether it is necessary to ask the funder to sign a promise of confidentiality. A possible solution would be for the tribunal to systematically ask the parties if they are being funded.⁵²⁷

3. Feasibility of a disclosure obligation

⁵²⁵ See also art. 30 LCIA Arbitration Rules and art. 34 ICDR Arbitration Rules.

⁵²⁶ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 663.

⁵²⁷ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 664.

Because of the lack of institutional rules⁵²⁸ containing disclosure obligations for TPF agreements, the current situation is that there is not a general disclosure obligation. Most often, the issue of disclosure of the TPF agreement will be dealt with in the funding agreement itself. Most funding agreements contain confidentiality provisions.⁵²⁹ All things considered, it is nevertheless meaningful to discuss the feasibility of creating such a general obligation.

3.1. Issues with establishing a disclosure obligation

Such a disclosure obligation will be challenging to establish and implement in practice because of issues such as the difficult hurdle of defining TPF agreements and what would thus fall within the scope of such a disclosure obligation.⁵³⁰ As explained above,⁵³¹ one could go for a broad definition of TPF, such as any financial solution offered to a party regarding the funding of proceedings in a given case. Such a definition covers all kinds of funding agreements, such as lawyers' contingency fees or certain types of insurance products.⁵³² If such a broad definition were used as to determine the required funding agreements that need to be disclosed, then all of these situations would have to be disclosed.

One could also narrow the definition by adding certain requirements to the above mentioned definition, such as requiring that the funder has to be a third party to the proceedings, thus excluding lawyers' contingency fees; or that the funder has to be a professional, thus excluding *ad hoc* solutions like borrowing money from a relative; or that the funder is entitled to a percentage of the award or a cost multiple, thus excluding different types of insurance products.⁵³³

The question remains why such narrowly defined TPF agreements should be subject to mandatory disclosure requirements whereas other types of funding, which fall within the broader definition of TPF agreements, should not be disclosed. The reasons that could justify a mandatory disclosure apply not only for TPF *sensu stricto* but also TPF *sensu lato*. For example, the concerns about liability for adverse costs may be equally justified if the claimant has recourse to a contingency fee arrangement or an after-the-event insurance arrangement. Same thing with conflicts of interest because they can also

⁵²⁸ At this moment, the ICSID Convention, the ICSID Arbitration Rules, nor the UNCITRAL Arbitration Rules contain any relevant provision that would oblige the funded party to disclose the funding agreement.

⁵²⁹ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 16 and <http://ssrn.com/abstract=2078358>; A. ROSS, "The dynamics of third-party funding", 7(1) *Global Arb. Rev.* 2012, 19.

⁵³⁰ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 652; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 33 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁵³¹ *Supra*.

⁵³² *Supra*.

⁵³³ M. SCHERER, "Out in the open? Third-party funding in arbitration", *CDR* 2012, 58 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

arise if a presiding arbitrator X in an arbitral procedure, funded by an insurer, which at the same time is insuring a case in which X operates as counsel. In sum, one has to determine which situations in international arbitration proceedings should be subject to disclosure obligations and here rests the real difficulty of this issue.

Assume there is a disclosure obligation; further questions still remain as to the modalities of such an obligation. Questions such as, should only the existence of a TPF agreement or the actual TPF agreement with all the terms and details be disclosed and should the TPF agreement be disclosed to only the arbitral tribunal or to all the parties involved in the arbitration? As for the former question, funders will be very reluctant to disclose the exact terms of the funding agreement. As for the latter question, disclosure to the tribunal might be sufficient, considering that the tribunal will be the ultimate decision maker⁵³⁴ and considering the reasons that could justify a disclosure obligation (*i.e.* to assess the necessity for security for costs and to avoid conflicts of interest).

CREMADES believes that arbitration is becoming increasingly transparent with a greater interaction between the parties and the arbitral tribunal.⁵³⁵ The author agrees with him if he is just talking about investment arbitration and not if he's talking both of investment and commercial arbitration. International investment arbitration necessitates certain procedural transparency.

Such transparency is usually not required in international commercial arbitration, which remains private and confidential. For instance, the UNCITRAL has been working on new transparency rules for investment arbitration. The public nature of these proceedings is desirable since one of the parties is a sovereign state and is thus compelled to inform its Parliament and citizens of the liabilities that it may acquire through arbitration. For this reason, exactly who is behind the official claimant is highly relevant. DE BRABANDERE says that it's unlikely that the new transparency rules will result in a decrease of parties going to arbitration and that practice is proving this.⁵³⁶ Thus, in view of the transparency of arbitral proceedings in international investment disputes it may be argued that a TPF agreement will need to be disclosed to the tribunal.⁵³⁷

MANIRUZZAMAN does warn that there could be issues of public policy, transparency and the State's accountability to the public when the relationship between the State and the funder may not be

⁵³⁴ *Ibid.*

⁵³⁵ B. CREMADES, "Third party funding in international arbitration", unpublished paper, 2011, 6 and www.luzmenu.com/cremades/Noticias/128/128.pdf.

⁵³⁶ Question asked to professor Eric De Brabandere on 15 May 2013.

⁵³⁷ E. DE BRABANDERE and J. LEPELTAK, "Third party funding in international investment arbitration", *Grotius Centre Working Paper Series N°2012/1*, 15-16 and <http://ssrn.com/abstract=2078358>.

perceived as level playing because of the overbearing control exercised by the funder.⁵³⁸ For now, there are no signs that denote a same evolution in international commercial arbitration. There is no need for publicity like in investment arbitration where this is favourable because one of the parties is a state.

3.2. Funders' perspective on disclosure

To discuss the funders' perspective, this author mainly relies on two recent conferences on TPF where many funders were present, namely the Roundtable Discussions⁵³⁹ and the ICC Institute of World Business Law's 32nd annual meeting on "Third-Party Funding in International Arbitration" held in Paris on 26 November 2012 (hereinafter "ICC Meeting").

Funders are in general reluctant to disclose, if not their involvement as such, then at least the funding agreements,⁵⁴⁰ unless the client is obliged to do so under applicable legal disclosure obligation or if particular situations justify such disclosure, such as a possible conflict of interest between one of the arbitrators and the funder.⁵⁴¹ Among the participants to the Roundtable Discussions, there was a clear predilection for non-disclosure of the funding agreements, because of the suspicion that disclosure could adversely influence a tribunal.⁵⁴²

At the ICC Meeting, the TPF corporations present were also not in favour of an extensive disclosure of the terms and conditions whatever might have been agreed between the funder and its client as in many respects confidentiality rules⁵⁴³ apply for various reasons (including the sensitive nature of information, or matters involved may be concerned with the economics of the deal, etc.) and in their view no question of mandatory disclosure should arise, let alone the fact that there does not exist, to

⁵³⁸ M. MANIRUZZAMAN, "Third-party funding in international arbitration – a menace or panacea?", *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

⁵³⁹ *Supra*.

⁵⁴⁰ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 8 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; see for instance C. BOGART, "Third Party Funding in International Arbitration: An Overview of Arbitration Finance", *Burford Capital* February 2013, www.burfordcapital.com/wp-content/uploads/2013/02/Burford-article-Third-Party-v1.2internal-no-symbol.pdf; B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 9; L. LÉVY and R. BONNAN, "Third-party funding: Disclosure, joinder and impact on arbitral proceedings" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 79.

⁵⁴¹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 652.

⁵⁴² M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part I – Funders' Perspectives", *RDAl/IBLJ* 2012, 218.

⁵⁴³ M. RODAK, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", *U. Pa. L. Rev.* 2006, 517.

date, any established rules on the international level that requiring such disclosure.⁵⁴⁴ The funders guard themselves against the disclosure of the funding agreements by using confidentiality agreements or by including a confidentiality clause in the funding agreement.⁵⁴⁵

If for any reason the conflict of interests, transparency, adverse costs, or security for costs is in issue, or a settlement is being discussed, only limited disclosure of TPF is tolerable.⁵⁴⁶ Naturally, the funder can agree to a full disclosure. In some situations this is beneficial for a funder, for instance where the claimant enters into settlement discussions and the disclosure of a funding agreement might bring additional pressure on the defendants to show that it has the financial wherewithal to pursue the claim. At times, it is important or even necessary to voluntarily disclose the presence of a funder.⁵⁴⁷

Nevertheless, there are also funders in favour of a mandatory disclosure requirement and they are of the opinion that arbitral tribunals should automatically ask the parties in arbitration to reveal both the funding relationship and, if applicable, the name of the funder in question.⁵⁴⁸ Among the proponents for disclosure, the majority is opposed to the systematic transmission of a full copy of the funding agreement, as opposed to for instance only notifying the arbitrators of the funding relationship.⁵⁴⁹ These funders do not want the entire funding agreement to be disclosed because the agreement should not have any direct relationship to the arbitral tribunal's decision. The author is under the impression that funders could agree on a disclosure of the funding relationship, without disclosing the entire funding agreement, if they would have enough guarantees that the arbitral tribunal would not take the funding agreement into account in their decisions.⁵⁵⁰

⁵⁴⁴ M. MANIRUZZAMAN, "Third-party funding in international arbitration – a menace or panacea?", *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

⁵⁴⁵ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *RDAl/IBLJ* 2012, 217; C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 8 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁵⁴⁶ M. MANIRUZZAMAN, "Third-party funding in international arbitration – a menace or panacea?", *Kluwer Arbitration Blog* 29 December 2012, <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

⁵⁴⁷ L. NIEUWVELD, "NAI jong oranje hosts third-party funding event", *Kluwer Arbitration Blog* 20 October 2012, <http://kluwerarbitrationblog.com/blog/2012/10/20/nai-jong-oranje-hosts-third-party-funding-event/>.

⁵⁴⁸ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 652; see also B. APPELBAUM, "Lawsuit Loans Add New Risk for the Injured", *The New York Times* 16 January 2011, www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=all&r=0; V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 448-449; S. MARTIN, "Litigation Financing: Another Subprime Industry That Has a Place in the United States Market", 53 *VILL. L. Rev.* 2008, 115; S. MARTIN, "The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed", 10 *Fordham J. Corp. & Fin. L.* 2004, 55.

⁵⁴⁹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 653.

⁵⁵⁰ *Infra*.

Why then are the funders so reluctant and even afraid for disclosure? NIEUWVELD gives a good example to explain the reasons for the scepticism towards a disclosure obligation. She gives the example of the defence insurance market in the USA. At times, an insurer's presence is perceived as the presence of "deep pockets" which could soften a jury's discomfort in awarding large damages. Despite the absence of a jury in international arbitration, it is possible that a tribunal may feel more comfortable being less concerned about the damages when deeper pockets are involved. The tribunal may also take the presence of a funder into account when deciding on security for costs or the allocation of the costs of the arbitration.⁵⁵¹ NIEUWVELD concludes by saying that the question whether the "deep pocket" phenomenon already exists in the TPF arena for international arbitration is premature to answer due to insufficient information at this time.⁵⁵²

In a response to NIEUWVELD's blog, GOLDSMITH, SCHERER and FLECHET make an interesting remark regarding the reason not to disclose TPF because of the overriding fear that the claimant being funded might be perceived as backed by a "deep pocket" vis-à-vis potential counterclaims asserted against it by the respondent.⁵⁵³ They claim that in the absence of a liability insurance policy or some form of ATE liability insurance arrangement,⁵⁵⁴ the typical funder would not assume liability for the payment of damages resulting from the successful counterclaim. They say that at most, any liability for the funder would derive from its creation of costs in the arbitration. This, however, would be very onerous to obtain in international arbitration because the funder is a third party in the arbitral proceedings and third parties are not usually subject to the tribunal's jurisdiction for purposes of awarding costs. Therefore, there would not be a reasonable basis for perceiving the funder as a "deep pocket" for purposes of the claimant's substantive liability.

Another potential consequence of the disclosure of the funding agreement is the possibility that the arbitral tribunal will not award any costs to the (successful) claimant because the claimant did not incur any cost due to the funding of these costs by a funder.⁵⁵⁵ Finally, the opposing party might change its approach and his strategy when discovering the funding relationship. For instance, the

⁵⁵¹ See for instance the recent international investment arbitration cases of *ATA Constr., Indus. & Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/02 (July 11, 2011); *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/05/14 (April 28, 2011); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15, Award of 3 March 2010.

⁵⁵² L. NIEUWVELD, "NAI jong oranje hosts third-party funding event", *Kluwer Arbitration Blog* 2012, <http://kluwerarbitrationblog.com/blog/2012/10/20/nai-jong-oranje-hosts-third-party-funding-event/>.

⁵⁵³ See the comment section at <http://kluwerarbitrationblog.com/blog/2012/10/20/nai-jong-oranje-hosts-third-party-funding-event/>.

⁵⁵⁴ See S. SEIDEL, "Insurers Today, Third Party Funders Tomorrow?", *Insurance Day* 29 October 2011, <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/>.

⁵⁵⁵ See for instance the recent award in *Quasar de Valores SICAN S.A. vs. the Russian Federation*.

opposing party could drag out the proceedings with the hopes of depleting the funder's investment in the dispute.

It remains to be seen whether agreed standards will be established and whether pragmatic solutions will be identified in response to what has become an issue of growing concern in international arbitration.⁵⁵⁶ This author expects that this issue will be dealt with in the near future. Nonetheless, it is worth discussing a proposal for a disclosure obligation while awaiting a binding solution from the arbitral institutions or the creators of *ad hoc* arbitration rules.

4. Proposal of a disclosure obligation

Due to the rise of TPF, arbitral institutions should adopt their rules to create a disclosure obligation of funding relationships, hence mitigating the risk for potential conflicts of interest. TRUSZ suggests an interesting proposal to the problems caused by TPF, which also addresses the concerns of funders against a disclosure obligation of the funding relationship.⁵⁵⁷ As explained above,⁵⁵⁸ one of the reasons why funders are reluctant to have the funding relationships disclosed and why they include confidentiality clauses in their funding agreements is that they fear that arbitrators will take it into consideration when deciding on the security for costs or the allocation of costs.

Another argument was that the opposing party in arbitration could alter its strategy once he or she discovered the funding relationship.⁵⁵⁹ TRUSZ tackles both these arguments with her proposal, by ensuring that the disclosed funding information will remain confidential if the funder and the claimholder choose to disclose their funding relationship and that the arbitral tribunal will not consider the relationship when deciding on awards of costs or security for costs. Put another way, the two main objections of funders against disclosure are covered and safeguarded in this proposal, thus incentivizing the funder and the claimholder to disclose their relationship and thereby preventing conflicts of interest questions. This also implies that the funder and the claimholder would have to release the confidentiality provisions of the contract. However, this would normally not be an issue anymore because the incentives to keep the relationship confidential are diminished by the proposal.⁵⁶⁰

⁵⁵⁶ M. SCHERER, "Out in the open? Third-party funding in arbitration", *CDR* 2012, 59 and www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration.

⁵⁵⁷ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1673.

⁵⁵⁸ *Supra*.

⁵⁵⁹ *Supra*.

⁵⁶⁰ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1673-1674.

TRUSZ 's proposal consists of four different provisions and could be realistically achieved in practice because it requires only minimum changes to the current arbitral rules and system. Furthermore, this proposal also addresses the issue of who should bear the additional burden of identifying the funder and the possible conflicts of interest. In the author's view, there are three possibilities: (i) impose the disclosure obligation on the parties; or (ii) on the arbitrators; or (iii) on arbitration institutions.⁵⁶¹ As the reader will notice hereafter, TRUSZ distributed the burden on all three entities, instead of the entire burden on one.

This thesis will now address the different provisions separately in regard to institutional arbitration, as well as *ad hoc* arbitration under the UNCITRAL Rules.

4.1. Arbitrator's duty to disclose

First, the arbitrator has a duty to disclose any past and current relationships with TPF corporations to the institution.⁵⁶² As mentioned above, the arbitrators already have a disclosure obligation of information regarding conflicts of interest under the current institutional arbitration rules.⁵⁶³ Considering that TPF relationships implicate independence concerns,⁵⁶⁴ we can assume that, at least in theory, arbitrators have the obligation to disclose information concerning TPF. However, considering that arbitrators often do not know of the existence of TPF agreements and considering the unfamiliarity of many arbitrators with this recent phenomenon, they may deem it unnecessary to include such information in their disclosures. The arbitrators thus need the claimholders and the funders to disclose the funding relationships and that's where the next three provisions come into play.

4.2. Parties' duty to disclose

Second, any party receiving outside funding must disclose to the institution this funding relationship. This disclosure shall include any potential conflicts of interest that may arise from other investments made by the funder.⁵⁶⁵ This provision requires the alteration of the arbitral rules because no such duty

⁵⁶¹ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, "Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate", *RDAl/IBLJ* 2012, 653.

⁵⁶² J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1674-1675.

⁵⁶³ *Supra*; this information has to be disclosed to respectively the ICC Secretariat (art. 11(2) ICC Arbitration Rules), the ICDR administrator (art. 7(1) ICDR Arbitration Rules), or the LCIA Registrar (art. 5.3. LCIA Arbitration Rules).

⁵⁶⁴ *Supra*.

⁵⁶⁵ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1675.

yet exists. In addition, funding agreements often contain confidentiality clauses,⁵⁶⁶ prohibiting parties to disclose the funding information. This duty would apply to both the claimant and the respondent in arbitration. Due to the already confidential nature of arbitral proceedings,⁵⁶⁷ imposing a mandatory disclosure of the TPF relationship may not pose a problem to some funders because the opposing party in arbitration would not learn of the funding relationship. However, this only covers one of the arguments of funders against a disclosure obligation, namely the fear that the adversary would change his or her strategy when discovering the funding relationship.

The other concern was that the arbitral tribunal might consider the TPF relationship when deciding on awards of costs or security for costs. A mandatory disclosure without any additional safeguards will thus probably not convince many funders. However, in Australia, which has the largest TPF industry in the world,⁵⁶⁸ a mandatory disclosure of TPF relationships already exists in litigation⁵⁶⁹ and this obligation didn't seem to affect the TPF industry in a significant way. Moreover, it seems reasonable to require such a disclosure obligation in arbitration as well, if it would be required in litigation.

4.3. Conflicts of interest check by the arbitral institution

Third, in the event the funded party discloses potential conflicts of interest, the institution governing the arbitration will then automatically conduct a conflicts check. Furthermore, the arbitral institution would have to keep all the funding information confidential.⁵⁷⁰ The arbitral institution would then, together with the information received from the arbitrators, who are automatically required to disclose information pertaining to TPF upon prospective appointment,⁵⁷¹ have all the necessary information to complete the conflicts check.⁵⁷² The arbitral institution would thus receive the information from the funded party and the arbitrators, rather than investigating itself.

At the Roundtable Discussions, imposing an active duty to investigate on the arbitration institution was vigorously opposed by practitioners because they believe that it's not the arbitration institutions

⁵⁶⁶ *Supra*; see also C. DAVIES, "Arbitration and Third Party Funding: Checklist for Claimants", *Bristows News & Publications* 20 February 2013, www.bristows.com/articles/arbitration-and-third-party-funding-checklist-for-claimants.

⁵⁶⁷ *Supra*.

⁵⁶⁸ *Supra*.

⁵⁶⁹ *Supra* Practice Note, available at <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm17>.

⁵⁷⁰ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1675-1676.

⁵⁷¹ *Supra* first provision.

⁵⁷² J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1676; see also M. GOLDSTEIN, "Should the Real Parties in Interest Have to Stand Up? Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration", 8(4) *TDM* 2011, 8.

task to solve the problems that are the responsibility of the other players in international arbitration (*i.e.* the parties in arbitration and the arbitrators).⁵⁷³

The concept of allowing the arbitral institution to initiate a conflict check is not new, as it is already provided in the ICC Arbitration Rules, where the ICC Secretary General is permitted to submit an arbitration challenge to the ICC Court if he is under the impression that the arbitrator in question should not be confirmed.⁵⁷⁴ If the arbitral institution would subsequently determine that there is in fact a conflict arising from a TPF relationship and that the arbitrator therefore has to be disqualified, the delicate issue of how to communicate their decision remains. The institution has two options: (i) it could acknowledge that the disqualification is due to a conflict of interest arising from a TPF relationship; and (ii) it could simply state that the arbitrator is disqualified due to a conflict of interest, without providing the reason. In the latter option, there is still the possibility that the parties assume that the disqualification was the result from a TPF relationship.

Furthermore, there is a need for some kind of transparency in the proceedings and this need,⁵⁷⁵ together with the possibility of assumption, makes the first option of stating explicitly that TPF is the reason for disqualification the most reasonable. The adversary would thus become aware of the funding relationship, something funders are concerned about because of the possibility that this party would then adapt his strategy, in light of the newly discovered facts. If the first option were to be implemented, it would have to be accompanied by rules that determine to what extent arbitral tribunals may consider TPF relationships in their decisions on costs.⁵⁷⁶

This author acknowledges that an automatic conflict check by the institution will be time-consuming and result in an increase of the already unduly expensive proceedings.⁵⁷⁷ However, in the event the non-independence of the arbitrator becomes known after the award is rendered and the award could be subsequently annulled or denied recognition or enforcement,⁵⁷⁸ the costs will be dramatically higher than the costs resulting from the automatic conflict check because of the need to begin the entire arbitration anew.

⁵⁷³ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 653-654.

⁵⁷⁴ Art. 13(2) ICC Arbitration Rules.

⁵⁷⁵ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1676; see also S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

⁵⁷⁶ *Infra*.

⁵⁷⁷ L. LÉVY and R. BONNAN, “Third-party funding: Disclosure, joinder and impact on arbitral proceedings” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 82.

⁵⁷⁸ *Supra*.

4.4. Prohibition on taking third-party funding relationships into account by the arbitral tribunal

Finally, in order to prompt the voluntary disclosure of the funding relationship by the funder, it should be provided that the relationship cannot be considered by the arbitral tribunal for awards of costs or security for costs.⁵⁷⁹ One of the funders participating at the Roundtable Discussions shares this reasoning and stated that arbitration institutions should take the lead and amend their rules so as to require the disclosure of funding agreements and that such disclosure obligation should meet two preconditions: (i) the disclosure requirement applies to all parties involved, whether in presence of a sovereign and whether the funding is operated via an insurer or the lawyer itself; and (ii) the arbitral institution guarantees that this will not affect the arbitration proceedings. In essence, there must be some form of guarantee that the case will not be treated differently because a funder is involved and this is exactly the same as what TRUSZ suggests in this last provision.⁵⁸⁰

This last provision implicates that the arbitral rules also have to be adapted on this issue because most arbitral rules give international arbitral tribunals significant discretion in determining awards for costs, save when the parties in arbitration specified the allocation.⁵⁸¹ Hence the fear among funders that the funding relationship may be taken into account by the arbitral tribunal in their decision on costs.⁵⁸² As noted above,⁵⁸³ it is still highly debated whether the TPF agreement can be taken into account when considering awards of costs or security for costs.⁵⁸⁴ This proposal therefore expressly provides that the funding relationship cannot be considered by the tribunal and this would supposedly incentivize the voluntary disclosure because it gives a certain level of certainty to the parties of the funding relationship.⁵⁸⁵ However, it remains probable that the tribunal uses its discretion and give another reason for their decision than the TPF relationship, although it was in fact based on the funding relationship.

This author is convinced that despite the arguments in favour of considering the TPF for considering security for costs and awards of costs,⁵⁸⁶ arbitral institutions should still adopt this proposal because the virtues of this rule, namely incentivizing funders to disclose the funding relationship and thereby

⁵⁷⁹ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1677.

⁵⁸⁰ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Third Party Funding in International Arbitration in Europe: Part 1 – Funders’ Perspectives”, *RDAl/IBLJ* 2012, 218.

⁵⁸¹ *Supra*; art. 37 ICC Arbitration Rules; art. 31 ICDR Arbitration Rules; art. 28 LCIA Arbitration Rules.

⁵⁸² L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 26.

⁵⁸³ *Supra*.

⁵⁸⁴ *Supra*.

⁵⁸⁵ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1677.

⁵⁸⁶ *Supra*.

preventing potential annulment or the denial of recognition and enforcement of the award, outweigh the possibility of claimants with insufficient financial resources to abuse the arbitration proceedings.

4.5. Applicability to the UNCITRAL Arbitration Rules

Up until this point, the discussion has been on a proposal for a disclosure obligation of TPF relationships in institutional arbitration. The feasibility of such an obligation in *ad hoc* arbitration under the UNCITRAL Rules will now be considered by discussing the separate provisions and the modifications from the proposal for institutional arbitration. Due to the lack of a supervising institution in *ad hoc* arbitration, the different provisions of the proposal have to be modified in order to assure the same independence of the arbitrators in such arbitration as in institutional arbitration.⁵⁸⁷

First, a party will disclose the TPF relationship to the appointing authority, as compared to the supervising arbitral institution discussed above. The disclosure shall, just like the proposal for institutional arbitration, include conflicts that may arise from other investments made by the funder. Second, the appointing authority shall, upon receipt of notification from a party that it is receiving funding, request information from the arbitrators concerning the relationships with TPF corporations. This second provision is roughly the same as the first provision in the proposal for institutional arbitration. Third, the appointing authority, instead of the arbitral institution, shall conduct a conflicts check upon receipt of the arbitrators' disclosures and the authority shall keep all information related to the TPF confidential. Finally, the arbitral tribunal shall also, just like in institutional arbitration, not be permitted to consider TPF relationships for awards of costs or security for costs.

The current UNCITRAL Rules permit parties to bring challenges of arbitrators to the appointing authority,⁵⁸⁸ specified in the agreement to arbitrate, or, if no such specification was agreed upon, the parties can request the Secretary-General of the Permanent Court of Arbitration (hereinafter "PCA") to specify the appointing authority.⁵⁸⁹ As for the situation where parties specified an appointing authority, the process would go as follows. The party receiving TPF should disclose the funding relationship to this authority.

Subsequently, the appointing authority should request information from the prospective or appointed arbitrators regarding the funding relationship and complete a conflicts of interest check once it has received the information. The appointing authority has to specifically request this specific information because in *ad hoc* arbitration, prospective arbitrators do not disclose pertinent information to the

⁵⁸⁷ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1680.

⁵⁸⁸ Art. 13(4) UNCITRAL Rules.

⁵⁸⁹ Art. 6 UNCITRAL Rules.

appointing authority prior to their appointments. By doing so, the arbitrators will inevitably know that one of the parties is being funded since the appointing authority requested information related to their relationship with that funder. Hence, the reason why this proposal requires the arbitral tribunal to not consider TPF relationships in their decisions on awards of costs or security for costs, thus providing additional protection for the parties disclosing their TPF relationships.⁵⁹⁰

A problem could emerge if the parties did not specify an appointing authority in the agreement to arbitrate, and one of the parties requested the Secretary-General of the PCA to designate an appointing authority because the funded party is required, under this proposal, to disclose the TPF relationship to the appointing authority. By doing so, both the arbitrators and the opposing party will be implicitly informed of the funding relationship, considering that a conflicts of interest check by an appointing authority is only required when one of the parties is funded. Although the arbitral tribunal would still be prohibited from considering the TPF relationship for awards of costs or security for costs, the risks nevertheless remains that the opposing party will change his strategy once he or she receives this information and this is, as explained above, one of the main concerns of funders with the disclosure of funding relationships.

Furthermore, requesting the Secretary-General of the PCA to appoint an appointing authority to run a conflicts of interest check are additional expenses, which can and should be avoided by simply informing the opposing party and the arbitrators of the fact that it is being funded, especially considering that the opposing party and arbitrators will implicitly find out about the funding relationship anyhow if the Secretary-General is requested to specify an appointing authority.⁵⁹¹

It is the author's view that the proposal for *ad hoc* arbitration by modifying the UNCITRAL Rules would not work as smoothly as the proposal for institutional arbitration and this can be explained by the nature of the proceedings of *ad hoc* arbitration. In the proposal for institutional arbitration, the arbitral institution will conduct an automatic conflicts of interest check, whereas in the proposal for *ad hoc* arbitration, the risk connected to disclosure of the TPF relationship is much larger because of the indications of a funding relationship for the opposing party.⁵⁹² It should be noted that the parties can significantly reduce the risk by selecting an appointing authority or, even better, by choosing for institutional arbitration to resolve their dispute.

5. Conclusion

⁵⁹⁰ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1680-1681.

⁵⁹¹ J. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *Geo. L. J.* 2013, 1680-1681.

⁵⁹² *Supra*.

Both international commercial arbitration and the TPF industry, through confidentiality clauses, have a confidential nature. Although confidentiality is one of the main reasons why international commercial arbitration is such an attractive type of dispute resolution in international commerce and why funder are more willing to invest in a claim, it nevertheless creates too many problems with regard to the independence of arbitrators and the potential conflicts of interest to remain entirely confidential. There is the possibility that the conflict of interest results in the proceedings being forced to start anew, whether the conflict becomes known during the proceedings or afterwards.

It is unquestionable that TPF in international commercial arbitration as an industry is growing stubbornly and steadily by leaps and bounds and will continue to grow in the future. However, the current arbitration rules are insufficiently equipped to address the problems of independence and disclosure in light of TPF relationships. Funders have a clear predilection for keeping their investment, as such, confidential. Hence, the initiative for a disclosure obligation lays with the arbitral institutions and the creators of *ad hoc* arbitration rules to take initiative and create a disclosure obligation for both the arbitrators and the funded parties.

By imposing the obligation on the arbitral institution to keep the disclosed information confidential and by prohibiting the arbitral tribunal to consider the TPF relationship in awards of costs and security for costs, the funders will likely be more willing to disclose the funding relationship. As a result, the parties in arbitration will be more certain and convinced that the arbitral proceedings are being resolved by truly independent arbitrators. This author believes that such an obligation is necessary to safeguard the independence of the arbitrators and accompanying the strengths of international commercial arbitration entirely.

However, to date, it is practically impossible to foresee whether funding agreements will be systematically subject to a disclosure obligation in international arbitration. The same goes for the disclosure obligation of arbitrations of potential conflicts of interest with regard to TPF relationships. Nevertheless, it is this author's view that the potentially devastating consequences for arbitral awards and proceedings in the event the funding relationship is discovered should encourage reluctant funders and arbitral institutions to introduce a disclosure obligation.

III. REGULATION OF FUNDERS

1. General

Unlike lawyers, whose conduct is regulated by their local Bar or law society, funders are untethered from any overarching global or other regulatory regime, despite TPF being an investment activity.⁵⁹³ For instance, funders are not, unlike insurance companies or banks, subjected to the requirement of having adequate capital to finance all the cases on their books.⁵⁹⁴ In short, there is currently a virtual absence of any form of regulation for TPF in international arbitration;⁵⁹⁵ or as SEIDEL and SHERMAN put it, TPF is in an “*embryonic regulatory state*”.⁵⁹⁶

However, the lack of regulation does not imply that TPF, as such, is or should be prohibited, or, put differently, that anything not expressly prohibited should be taken to be permitted.⁵⁹⁷ In the author’s view, the main reason for the lack of regulation is the simple fact that the TPF industry is still very new and there hasn’t been an overriding appetite by the market and others for regulation until now. As the industry continues to grow, key jurisdictions (*i.e.* the U.K., Australia and the USA) are in the process of deciding whether to (further) regulate the industry. However, rules developed at a national level will not provide the solution for the issues on the level of international arbitration.⁵⁹⁸ It is the author’s view that the key players in further regulation will be the arbitral institutions.⁵⁹⁹ These institutions are experienced with respect to drafting arbitral rules and are thus in an ideal position to develop regulation, such as codes of conduct for arbitrators and attorney’s involved in arbitral proceedings and disclosure obligations when one of the parties in arbitration relies on TPF.

⁵⁹³ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 10 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 13.

⁵⁹⁴ As will be discussed hereafter, there is now a voluntary code of conduct in the U.K. for funders, which require the funders to maintain adequate financial resources to meet their obligations at all times and to cover aggregate funding liabilities under all its funding agreements for a minimum period of 36 months. Thus, despite the lack of regulating of TPF in legislation, there is some self-regulation already.

⁵⁹⁵ S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 7 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁵⁹⁶ S. SEIDEL and S. SHERMAN, ““Corporate governance” rules are coming to third party financing of international arbitration (and in general)” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 32.

⁵⁹⁷ S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 12 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁵⁹⁸ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 33 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁵⁹⁹ MENON also advocates a bigger role for arbitral institutions in regulation. S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 25-29 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

Furthermore, arbitral tribunals generally do not have the powers to make orders against third parties due to the contractual nature of arbitration and this makes it even more intricate to regulate the conduct of funders.⁶⁰⁰ The question then that should be asked is: should TPF be regulated or not and if it is to be regulated, then by hard- or soft-law? Regulation is necessary to deal with some of the ethical issues⁶⁰¹, such as preventing the abuse of TPF arrangement for unreasonable profiteering (e.g. 90% of the award proceeds),⁶⁰² preventing unreasonable influence on the selection of arbitrators defying the requirement of impartiality and independence, preventing the possible exploitation of attorney-client privilege and confidentiality. Regulation is also necessary to ensure that the funder has the financial capacity to see the case through, by imposing appropriate capital adequacy requirements.⁶⁰³

However, overzealous regulation risks curtailing the virtues associated with TPF because it could effectively hamper the access to arbitration for disadvantaged parties with meritorious claims.⁶⁰⁴ The Code of Conduct issued by the ALF is an example of a soft-law (*i.e.* non-binding instrument), which will be discussed in detail below.⁶⁰⁵ The reason for discussing a code of conduct for the funding of litigation, is the simple fact that there is not one available yet for international arbitration.⁶⁰⁶ Nevertheless, such a code could be the first – and highly praiseworthy – step in developing a code of conduct of TPF in arbitration and could thus prove to be a serious leap forward in the funding industry.⁶⁰⁷ Furthermore, the possibility exists that international arbitration would be included in the Code of Conduct in the future.

⁶⁰⁰ C. KAPLAN, “Third-party funding in international arbitration: Issues for counsel” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 70.

⁶⁰¹ *Supra*.

⁶⁰² However, in *Deloitte Touche Tohmatsu & Ors v. JP Morgan Portfolio Services Limited* [2007] FCAFC 52, the Full Court of the Federal Court of Australia ruled that, despite the fact that the proceedings were completely controlled by a third party who funded the litigant and that the funder took the entire benefit of any proceeds, there was no abuse of process because the funder was the owner of the litigant; see also M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAI/IBLJ* 2012, 654; S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 48.

⁶⁰³ W. ATTRILL, “Ethical Issues in Litigation Funding”, unpublished paper, 2009, 11 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf.

⁶⁰⁴ C. BOWMAN, K. HURFORD and S. KHOURI, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, *TDM* 2011, 11 and www.benthamcapital.com/docs/default-document-library/573330_1.pdf?sfvrsn=2; M. RODAK, “It’s about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement”, *U. Pa. L. Rev.* 2006, 503; S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 24-25 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁶⁰⁵ *Supra*.

⁶⁰⁶ For instance SEIDEL is an advocate for regulation of TPF in international commercial arbitration. S. SEIDEL, “Third Party Capital Funding Of International Arbitration Claims: An Awakening And A Future”, *Financier Worldwide* July 2012, 38 and www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500.

⁶⁰⁷ S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 46-48.

Working under this Code of Conduct and learning from that experience is a good way to gradually become acquainted with it. It is likely that this Code of Conduct is merely the first phase in a long process of regulatory developments. At some point in the future, it may become necessary to replace the self-regulation by legislation if the voluntary regime would prove to be insufficient.

The majority⁶⁰⁸ of the participants at the ICC 32nd annual meeting felt that TPF needs to be regulated for the welfare of the arbitrating parties, and not in the least for the protection of the reputation of funders, and the stability and the longevity of arbitration as an institution itself.⁶⁰⁹ MENON shares the opinion of this majority and rhetorically asks:

*“If football were played without rules but with massive stakes and rewards, how would we condemn those playing the man instead of playing the ball?”*⁶¹⁰

However, one must be careful not to stifle the industry through overly heavy regulation.⁶¹¹ With respect to international commercial and investment arbitration, CREMADES believes that soft-law solutions, like the Code of Conduct, may be the only options reasonably available in the near future.⁶¹² HARFOUCHE and SEARBY expect that voluntary codes of conduct will continue to be in effect until they prove to be ineffective (for instance because they lack enforceability not binding) or if funders prove financially unstable. If this would prove to be the case, then statutory regulation will most likely follow.⁶¹³

⁶⁰⁸ Some international arbitration practitioners prefer to examine TPF on a case-by-case basis, rather than a general solution. M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAI/IBLJ* 2012, 654.

⁶⁰⁹ M. MANIRUZZAMAN, “Third-party funding in international arbitration – a menace or panacea?”, *Kluwer Arbitration Blog* 29 December 2012, <http://kluerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>; S. SEIDEL, “Third-party investing in international arbitration claims: To invest or not to invest? A daunting question” in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 17.

⁶¹⁰ S. MENON, “Some Cautionary Notes for an Age of Opportunity”, *Chartered Institute of Arbitrators International Arbitration Conference* 22 August 2013, 6 and www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf.

⁶¹¹ W. ATTRILL, “Ethical Issues in Litigation Funding”, unpublished paper, 2009, 15 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf.

⁶¹² B. CREMADES, “Third party litigation funding: investing in arbitration”, 8(4) *TDM* 2011, 40 and www.curtis.com/siteFiles/Publications/TDM.pdf; see also C. HENDEL, “Third Party Funding”, 2010, www.latinarbitrationlaw.com/third-party-funding/; C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 41 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁶¹³ R. HARFOUCHE, and J. SEARBY, “Third-Party Funding: Incentives and Outcomes”, *Global Arb. Rev.* 2013, 13; S. SEIDEL, “Investing in Commercial Claims, Nutshell Primer”, *Fulbrook Management LLC Publications* 2011, 27-28 and <http://fulbrookmanagement.com/publications/Nutshell-Primer.pdf>.

The following part will examine the prospects and role of self-regulation for the point of view of both the funders and the arbitration community.

2. Code of Conduct for funding of resolution of disputes within England and Wales

In the U.K., there has been a first-ever attempt at voluntary self-regulation by third-party litigation funders. An organization called the Association of Litigation Funders of England and Wales (hereinafter “ALF”) released the first ever Code of Conduct for Litigation Funders (hereinafter “Code of Conduct”) in November 2011.⁶¹⁴ Notwithstanding the fact that the Code of Conduct is for litigation funders, it could also apply in arbitrations for funders, not only those based in England and Wales, but also to other funders of arbitrations seated in those jurisdictions.⁶¹⁵ It is nonetheless regrettable that the international aspect is not covered at all in this Code.

This Code of Conduct has been regarded and welcomed as a way to impose restraints on funding practices.⁶¹⁶ For now, membership in the ALF and thus compliance with the Code of Conduct is optional.⁶¹⁷ In practice most funders join the ALF because clients are more reluctant to contract with funders that operate outside of the ALF.⁶¹⁸ Although many have welcomed this Code of Conduct, others have vilified it, in particular the lack of detail and the voluntary character of it.⁶¹⁹

The following section will elaborate on the Code of Conduct because this author considers it to be a good example of what TPF regulation could, and perhaps should, look like. This document could be the basis of further international regulation of the TPF industry.

2.1. What is it?

⁶¹⁴ The Code of Conduct is available at <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/third-party-funding>.

⁶¹⁵ A. ENDICOTT, N. GIRALDO-CARRILLO J. and KALICKI, “Third-party funding in arbitration: innovation and limits in self-regulation (part 1 of 2)”, *Kluwer Arbitration Blog* 2012, <http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>; see also S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 48.

⁶¹⁶ Most of these restraints are deemed necessary because of the significant ethical concerns to which unregulated third-party funding could lead; S. SEIDEL, “Maturing Nicely”, *CDR* May 2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-Maturing-Nicelyb.pdf>.

⁶¹⁷ J. HYDE, “CJC member rules out mandatory litigation funding code”, *L.S.Gaz.* 29 November 2012, www.lawgazette.co.uk/68561.article.

⁶¹⁸ A. ENDICOTT, N. GIRALDO-CARRILLO J. and KALICKI, “Third-party funding in arbitration: innovation and limits in self-regulation (part 1 of 2)”, *Kluwer Arbitration Blog* 2012, <http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>; for instance Calunius voluntarily subject to the Code for this particular reason (L. NIEUWVELD, “NAI jong oranje hosts third-party funding event”, *Kluwer Arbitration Blog* 2012, <http://kluwerarbitrationblog.com/blog/2012/10/20/nai-jong-oranje-hosts-third-party-funding-event/>).

⁶¹⁹ J. TRUSZ, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration”, *Geo. L. J.* 2013, 1660-1661; S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 46.

The rather concise Code of Conduct consists of ten principles that regulate the different stages of litigation funding agreements (hereinafter “LFAs”), namely the formation, use and termination. Once these LFAs are signed, they are contractually binding between the funder and the client relating to the resolution of disputes within England and Wales (clause 6). The wording “within England and Wales” give rise to some ambiguity because it is unsure if this wording solely refers to the location of the funder or the client or also to the *situs* of the dispute proceedings.⁶²⁰ This ambiguity may result in non-U.K. funders joining the ALF in order to be able to offer funding to U.K. clients or foreign clients in arbitrations, seated in the U.K.

In clause 2, the Code of Conduct defines “Funder” as follows:

“A Funder has access to funds immediately within its control or acts as the exclusive investment advisor to an investment fund which has access to funds immediately within its control.”

Clause 2 further states that these funds must be sufficient to enable a Litigant to meet the costs of resolving disputes by litigation or arbitration. Despite the fact the Code of Conduct only refers to “Litigants”, clause 2 expressly states that the Code of Conduct can also be used in arbitration proceedings. Clause 2(a) continues with entitling the Funder to a share of the proceeds if the claim is successful, in return for the provided funding. Clause 2(b) gives another regulation by prohibiting Funders from seeking payment in excess of the proceeds of a successful claim, unless the Litigant is in material breach of the LFA. Material breach is once again vague and is not further defined in the Code of Conduct.

The Code of Conduct also gives a loose definition of the role of the Funder and, more prominently, the limits of its role. According to clause 7(b and c), the Funder must refrain from taking steps “*likely to cause*” the Litigant’s attorney to violate his professional duties or to influence that attorney to cede control of the dispute.⁶²¹ The Code of Conduct thus expressly address the issue of conflicts of interest in the three-cornered relationship examined above.⁶²²

As to the magnitude of the funds, the Code of Conduct requires Funders to ensure that its funds are

⁶²⁰ A. ENDICOTT, N. GIRALDO-CARRILLO J. and KALICKI, “Third-party funding in arbitration: innovation and limits in self-regulation (part 1 of 2)”, *Kluwer Arbitration Blog* 2012, <http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>.

⁶²¹ *Supra.*

⁶²² *Supra.*

adequate to pay debts at all times and to cover funding liabilities under its LFAs for at least thirty-six months (clause 7(d)(ii)). The alert reader immediately notices the vagueness of the “adequate funds” requirement.

The Code of Conduct also allows the funder broad access to information in order to assess the merits of the claim⁶²³ and also allows the funder to observe the confidentiality of all information as defined by relevant law and the LFA (clause 5) and states that the terms of the LFA shall control the extent of the Funder’s ability to provide input on the Litigant’s decisions in relation to settlement (clause 9(a))⁶²⁴.

As for the termination of the LFAs, the Code of Conduct requires that the LFAs state whether and how the Funder can terminate the agreement (clause 9(b)). Clause 9(b) also states that if the LFA does grant the Funder the right to terminate the agreement, that right is limited to three circumstances.

First, parties could agree in the LFA that the Funder could terminate if it’s “reasonably” ceases to be satisfied with the merits of the dispute. Second, the LFA could provide a mechanism for termination if the Funder “reasonably” believes that the dispute is no longer commercially viable. Third, the LFA may allow the Funder to terminate it if the Funder “reasonably” believes the Litigant is in material breach. As is the case with “material breach” and “adequate funds”, the Code of Conduct does not offer a definition of a ‘reasonable’ belief. It does however curtail the Funder’s discretion to terminate to these grounds (clause 10). In the event the Funder does terminate the LFA, it remains liable for all funding obligations accrued to the date of termination, unless termination arises from the Litigant’s material breach (clause 11(a)). As a final solution to the situation where a dispute over termination of the LFA cannot be settled, the Code of Conduct foresees the right for both parties to obtain a binding opinion from a Queen’s Council (clause 11(b)). The latter is in contrast with international arbitration funding agreements because those usually themselves provide for international arbitration to resolve any disputes.⁶²⁵

Finally, the Code of Conduct prohibits Funders from using any misleading or unclear literature to promote these agreements to potential clients (clause 4). Additionally, any Funder must take reasonable steps to ensure that the Litigant receives independent advice on the terms of the LFA. This

⁶²³ *Supra.*

⁶²⁴ *Supra.*

⁶²⁵ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 44 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

requirement may be satisfied if the Litigant confirms in writing that it has taken advice from the solicitor instructed in the underlying dispute (clause 7(a)).⁶²⁶

Because the Code of Conduct is still very new, much remains to be seen about the way the Code of Conduct is used in practice and the way it is interpreted in international arbitration proceedings.

2.2. Criticism

The three main criticisms that the Code of Conduct has to endure are the fact that it lacks meaningful enforcement mechanisms, that it is completely voluntarily and non-binding, and finally its lack of detail.⁶²⁷ Both the ILF and the European Justice Forum (hereinafter “EJF”) are of the opinion that the Code of Conduct does not suffice as a replacement for the development of binding, official regulation of funders in litigation. Despite the fact that the criticism is focused on litigation funding, it does have implications for international arbitration as well.⁶²⁸

The concerns expressed by the ILR are threefold; firstly, the ILR has concerns about the voluntary and self-regulatory nature of the Code of Conduct; secondly, the ILR is worried about potential conflicts of interest for counsel raised by funding, including the degree of control a Funder may directly or indirectly exert over the litigation;⁶²⁹ and lastly, the ILR believes that the Code of Conduct does not offer sufficient protection for potential defendants.⁶³⁰ In the ILR Comments at 9, the ILR expresses the, somewhat surprising, opinion that litigation funding should be discouraged in all circumstances and if it were permissible to occur at all, funding should be strictly regulated through official channels.

As for the voluntary and self-regulatory nature of the Code of Conduct, the ILR believes that this will undercut the Code of Conduct’s efficacy, in particular because of the lack of any disciplinary mechanism (ILR Comments at 2). Also, the ILR notes that the Code of Conduct’s definition of “Funder” is under-inclusive and creates room for potential abuse (ILR Comments at 2-3).

⁶²⁶ A. ENDICOTT, N. GIRALDO-CARRILLO J. and KALICKI, “Third-party funding in arbitration: innovation and limits in self-regulation (part 1 of 2)”, *Kluwer Arbitration Blog* 2012, <http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>.

⁶²⁷ C. ROGERS, “Gamblers, Loan Sharks & Third-Party Funders”, *Penn State Law Research Paper No. 51-2013* 2013, 42 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁶²⁸ A. ENDICOTT, N. GIRALDO-CARRILLO and J. KALICKI, “Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 2 of 2)”, *Kluwer Arbitration Blog* 14 March 2012, <http://kluwerarbitrationblog.com/blog/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/>.

⁶²⁹ S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 48.

⁶³⁰ The report by the ILR was issued on 22 December 2011 and is available at www.instituteforlegalreform.com/doc/ilr-comments-on-the-code-of-conduct-for-litigation-funders.

Additionally, the ILR suggests that there should be a cap on the fees that a Funder may charge and the requirement that all LFAs should be in writing to protect Litigants (ILR Comments at 4, 8).

As for the criticism expressed by the EJP⁶³¹, the EJP and the ILR both emphasize the potential conflict of interest when legal counsel develops close relationships with funders.⁶³² Clause 7(a) of the Code of Conduct requires the “Funder” to ensure that the “Litigant” receives independent legal advice regarding the terms of an LFA. Both the ILR and EJP note that it is possible that such an outside legal advisor may have a financial interest in the claim being funded (EJP Comments at 11 and ILR Comments at 4, 8). For instance, imagine the situation where this outside advisor is, at the same time, counsel to the Litigant in the dispute in question. This is particularly problematic because the counsel is dependent on the claim being funded in order to earn legal fees. Furthermore, clause 7(c) says that the funders must not “control” litigation. The Code of Conduct does not give further explanation on who to interpret “control”. Hence, the author’s view that referring to the word “control”, without any specifications, is insufficient.⁶³³

The ILR also makes the comment that the Code of Conduct does not mention anything about the issue of referral fees between Funders and the Litigant’s attorneys and urges that a ban on such fees should be created (ILR Comments at 6). The EJP joins the ILR in their opinion that the Funder should have no contractual relationship whatsoever with the Litigant’s attorney in order to avoid the situation where the Funder and counsel would agree on maximizing their own profits and not on doing what’s best for the Litigant (ILR Comments at 8 and EJP Comments at 11). The ILR also argues that Funders should not own or be owned by law firms and that this should be prohibited because this situation could cause a significant conflict of interest for the firm’s lawyers because the affiliated Funders would be focused only on their own profit and not on the firm’s clients’ interests (ILR Comments at 7).

The ILR also notes that defendants are not addressed in the Code of Conduct, hence lacking protection compared to the funded Litigant whom is protected by provisions of the Code of Conduct such as the requirement that the Litigant is informed about the terms of the agreement (ILR Comments at 5-6). The respondents thus have little protection against frivolous or unsubstantiated claims, sometimes initiated in order to increase leverage for a settlement.⁶³⁴ The ILR argues that there should be a prohibition on funding of collective actions because attorneys and funders might initiate them to

⁶³¹ The EJP issued their comments on 26 February 2010, available at <http://europeanjusticeforum.org/faq/current-issues/costs-of-litigation.html>.

⁶³² *Supra*.

⁶³³ S. SEIDEL, “The Long Road Ahead”, *CDR* March 2012, 47.

⁶³⁴ M. SCHERER, A. GOLDSMITH and C. FLÉCHET, “Le financement par les tiers des procédures d’arbitrage international – une vue d’Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate”, *RDAl/IBLJ* 2012, 651.

increase the pressure for settlement, even if the underlying claims has little or no legal merit (ILR Comments at 7 and EJC Comments at 3).

Furthermore, the ILR points out that a defendant seeking to recover an award of adverse costs may be unable to do so, because the Code of Conduct has no provision that requires Funders to support the possible Litigants' liability for cost awards. As we can read in clause 8, the Code of Conduct only stipulates that if the parties to the LFA agreed to the Funder assuming any liability of such costs, this should be stated in the LFA. Hence, Funders may refuse to guarantee the payment of an adverse cost award, thus making a potential defendant vulnerable not only to being dragged into a frivolous claim that might not have been pursued in the absence of TPF, but also to being unable to recover the costs it would incur defending such a suit, even if the arbitrator rules in the defendant's favour and awards costs against the claimant.⁶³⁵

The concerns expressed by the ILR and EJC are mainly focused on litigation and the question then follows of the Code of Conduct's applicability in the context of international arbitration. In particular, the issue of whether or not the existence of a LFA would have to be disclosed to the opposing party, the institution, or potential arbitrators. The Code of Conduct contains no provision on the issue of disclosure, hence leaving it to the parties to the arbitration to decide whether or not the funding should be disclosed.⁶³⁶ It is this author's view that this omission is a clear indication of the ongoing disagreement within the funding community about disclosure.

2.3. Conclusion

The U.K. Code of Conduct is undeniably a welcome first step towards some regulation of an industry that heretofore was entirely unregulated. Nevertheless, many uncertainties and questions remain. Furthermore, it will only have a marginal impact on international arbitration due to the specificities and unique questions that arise in the arbitration context.⁶³⁷ It is however undoubtedly that the international arbitration industry needs similar concerted efforts as the Code of Conduct. Some of the rules and policies from this Code of Conduct could eventually be borrowed and modified when creating a code of conduct specifically for TPF in international arbitration.⁶³⁸

⁶³⁵ A. ENDICOTT, N. GIRALDO-CARRILLO and J. KALICKI, "Third-party funding in arbitration: innovation and limits in self-regulation (part 2 of 2)", *Kluwer Arbitration Blog* 14 March 2012, <http://kluwerarbitrationblog.com/blog/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/>.

⁶³⁶ S. SEIDEL, "The Long Road Ahead", *CDR* March 2012, 48.

⁶³⁷ C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", *Penn State Law Research Paper No. 51-2013* 2013, 45 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962.

⁶³⁸ S. SEIDEL, "Third-party investing in international arbitration claims: To invest or not to invest? A daunting question" in B. CREMADES and A. DIMOLITSA (eds.), *Dossier X: Third-party Funding in International Arbitration*, Paris, ICC Publishing S.A., 2013, 21.

To conclude this discussion on self-regulation, this author refers to KALICKI, ENDICOTT and GIRALDO-CARRILLO who said the following:

“One thing is certain however: whether regulated or not, the use of third-party funding in major arbitration cases is a development that is here to stay.”

3. Recent developments

In the three leading TPF jurisdictions, 2013 was a productive year to say the least for the legislatures in shaping the future of the TPF industry.

3.1. Australia

In Australia, there used to be a possibility that litigation funding agreement could be subject to regulation imposed by the Corporations Act 2001 requiring the funder to hold an Australian Financial Services Licence (hereinafter “AFSL”) issued by the Australian Securities and Investments Commission (hereinafter “ASIC”). The licence and associated statutory provisions demanded capital adequacy, conflicts management, mandatory disclosure and dispute resolution requirements.⁶³⁹ However, since 12 July 2012, litigation funders are no longer subject to these AFSL requirements.⁶⁴⁰

In Australia, the ASIC issued regulatory guidelines on 22 April 2013 in which it is detailed how funders should manage conflicts of interest and how certain provisions of funding agreements should be handled.⁶⁴¹ Among other things, it is stipulated in these guidelines that litigation funders must do the following in order to properly manage conflicts of interest that may occur during the litigation: maintaining adequate documentation and disclosing and handling potential conflicts of interest.⁶⁴²

⁶³⁹ W. ATTRILL, “Ethical Issues in Litigation Funding”, unpublished paper, 2009, 10 and www.imf.com.au/pdf/Ethical%20Issues%20Paper%20IMF09%20-%20Globalaw%20Conference.pdf.

⁶⁴⁰ K. CHELLEL, “‘Wild West’ of Lawsuit Funders Supports Divorcees to Soldiers”, *Bloomberg News* 8 April 2013, www.bloomberg.com/news/2013-04-08/-wild-west-of-lawsuit-funders-supports-divorcees-to-soldiers.html; see also V. SHANNON, “Recent Developments in Third-Party Funding”, 30(4) *J. Int. Arb.* 2013, 444.

⁶⁴¹ AUSTRALIAN SECURITIES & INVESTMENT COMMISSION, *13-085MR ASIC releases guidance on managing conflicts of interest in litigation schemes and proof of debt schemes*, 22 April 2013, www.asic.gov.au/asic/asic.nsf/byheadline/13-085MR+ASIC+releases+guidance+on+managing+conflicts+of+interest+in+litigation+schemes+and+proof+of+debt+schemes?openDocument; AUSTRALIAN SECURITIES & INVESTMENT COMMISSION, *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest*, 22 April 2013, www.asic.gov.au/asic/asic.nsf/byheadline/RG+248+Litigation+schemes+and+proof+of+debt+schemes%3A+Managing+conflicts+of+interest?openDocument.

⁶⁴² AUSTRALIAN SECURITIES & INVESTMENT COMMISSION, *13-085MR ASIC releases guidance on managing conflicts of interest in litigation schemes and proof of debt schemes*, 22 April 2013,

3.2. United Kingdom

In the U.K., the Jackson Reforms took effect on 1 April 2013,⁶⁴³ bringing significant changes that may affect TPF, including changes to the allowable fee agreements and cost allocations.⁶⁴⁴ For instance, damage-based agreements (hereinafter “DBA”)⁶⁴⁵ are now allowed in the U.K. with a maximum cap on the attorneys’ fees (including VAT) at 50% of the awarded damages. Furthermore, the success fee portion of CFA⁶⁴⁶ and ATE insurance premiums⁶⁴⁷ are no longer recoverable from the losing defendant.

Finally, and this could prove to be a first step towards reducing conflicts of interest with respect to the problem of settlement offers,⁶⁴⁸ the Jackson Reforms introduced cost consequences for failure to accept a settlement offer if the final judgment or award turns out to be lower than the settlement offer. Because the penalty is capped at GBP 75,000, it is unlikely to manifestly affect TPF settlements, considering that these tend to be much higher. Nevertheless, the idea of sanctioning the refusal of a decent settlement offer is extremely interesting. This could also be introduced in international arbitration, but the cap would probably have to be much higher in order to have some effect in practice.

Finally, there was the Code of Conduct by the ALF which came into effect in November 2012 and which has already been discussed in detail above.⁶⁴⁹

3.3. United States of America

www.asic.gov.au/asic/asic.nsf/byheadline/13-085MR+ASIC+releases+guidance+on+managing+conflicts+of+interest+in+litigation+schemes+and+proof+of+debt+schemes?openDocument; AUSTRALIAN SECURITIES & INVESTMENT COMMISSION, *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest*, 22 April 2013, www.asic.gov.au/asic/asic.nsf/byheadline/RG+248+Litigation+schemes+and+proof+of+debt+schemes%3A+Managing+conflicts+of+interest?openDocument; see also V. SHANNON, “Recent Developments in Third-Party Funding”, 30(4) *J. Int. Arb.* 2013, 445-446.

⁶⁴³ LORD JUSTICE JACKSON, *Review of Civil Litigation Costs*, www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf.

⁶⁴⁴ E. GRETTON, “Jackson – an overview”, *L.S.Gaz.* 27 March 2013, www.lawgazette.co.uk/70126.article; P. MACFARLANE, “Jackson reforms to litigation costs and funding”, *ABTA Ltd.* 18 April 2013, <http://abta.com/news-and-views/news/jackson-reforms-to-litigation-costs-and-funding>; V. SHANNON, “Recent Developments in Third-Party Funding”, 30(4) *J. Int. Arb.* 2013, 446-448; R. ROTHWELL, “Litigation funding: joining the party”, *L.S.Gaz.* 29 November 2012, www.lawgazette.co.uk/68531.article; B. WALLER-DAVIES, “Jackson: lawyers welcome implementation of long-awaited reforms”, *The Lawyer* 1 April 2013, www.thelawyer.com/news/practice-areas/litigation-news/jackson-lawyers-welcome-implementation-of-long-awaited-reforms/3003482.article;

⁶⁴⁵ DBA are functionally tantamount to the in the U.S. commonly used contingency fee arrangements.

⁶⁴⁶ *Supra.*

⁶⁴⁷ *Supra.*

⁶⁴⁸ *Supra.*

⁶⁴⁹ *Supra.*

In the USA, various state legislatures have filed numerous pieces of legislation primarily aimed at consumer-side TPF since the beginning of 2013.⁶⁵⁰ There are still no federal laws that are directly related to TPF, nor does the Federal Arbitration Act mention TPF. This means that potential users of TPF in the U.S. must investigate case law and statutes on a state-by-state basis, which is not necessarily positive for the further growth of the TPF industry in the U.S.⁶⁵¹ Furthermore, the majority of both the case law and statutes are focused on domestic litigation and not on international arbitration, which makes it nearly impossible at this stage of the debate to draw definitive conclusions about the status of TPF in the U.S. The lack of sufficient data seems to be the recurring theme in the story of TPF in international arbitration and it is this author's view that making educated guesses about the status of TPF in certain jurisdictions is what we are condemned to do until more case law and statutes on TPF are issued.

4. Conclusion

CONCLUSION

TPF is a fast growing industry and will undoubtedly play a vital role in international commercial arbitration in the future by becoming a commonplace financing method for international arbitration disputes.

While the market is still relatively small regarding the number of providers and available capital, there are relevant funds available for arbitrations, and they are currently being invested in cases that are considered to be strong and to have good recoverability prospects. Because of the need for transparency in investment arbitration, TPF will arguably play an even bigger role in investment arbitration. TPF is a tremendous way to outsource the financial risks connected with arbitral procedures. However, TPF also implies giving up some of the control to the funder.⁶⁵² Albeit the increase in access to justice and other advantages which TPF entails, are lauded, TPF also pose some problems for international arbitration because of the influence it may have on the conduct of the proceedings. The main problem caused by TPF agreements is that they are disconnected from the

⁶⁵⁰ V. SHANNON, "Recent Developments in Third-Party Funding", 30(4) *J. Int. Arb.* 2013, 448-450; B. APPELBAUM, "Lawsuit Loans Add New Risk for the Injured", *The New York Times* 16 January 2011, www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=all&r=0; B. BLANCHARD, "Lawsuit Lenders Facing Regulation", *KUT News* 18 March 2013, <http://kut.org/post/lawsuit-lenders-facing-regulation>; B. KRAJELIS, "Committee discusses lawsuit lending legislation", *Madison-St. Clair Record* 15 April 2013, <https://madisonrecord.com/issues/311-tort-reform/254856-committee-discusses-lawsuit-lending-legislation>.

⁶⁵¹ See L. NIEUWVELD and V. SHANNON, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 117-159 for an overview of the state laws in the U.S.

⁶⁵² S. SEIDEL, "Control" in Third-Party Funding: a Doctrine Out of Control", *CDR* 2011, 62 and <http://fulbrookmanagement.com/wp-content/uploads/2011/09/1Sep2011-Control-Article.pdf>.

main disputes, both in the sense of applicable law and jurisdiction of the tribunal. This also explains why tribunals have been reluctant to consider the relevance of a funding agreement on the question of the allocation of costs.

Despite the absence of a general obligation to disclose TPF agreements, the need to maintain the impartiality and independence of arbitrators, which is generally considered to be a fundamental principle of arbitral procedure, may require disclosure of TPF agreements.

In order for TPF to continue to grow, the doctrines of maintenance and champerty will need to be abandoned, at least to some extent.

In sum, whether the benefits of TPF outweigh the issues that may arise from introducing a stranger to the arbitral proceedings remains an open question for debate but, with a number of sophisticated entities already committed to such funding, it appears to be a question that will incite debate for some time to come. In any case, if we decide to go forward with TPF, laws and regulations, whether formal or soft, might help to avoid abuses or misuses of these new financing tools.

Finally, this author has argued that some kind of regulation is deemed to be created and should be created in the future. However, more information is required about current practices, the nature of TPF, and effects of TPF in international arbitration in order to be able to address the respective issues when developing meaningful regulation. While awaiting the arrival of hard data and more precedents on TPF in international arbitration, it appears that premature to draw clear-cut conclusions with respect to this topic. In any event, the aim of this thesis was to consolidate the knowledge on this growing phenomenon in order to better and more efficiently deal with the issues and problems surrounding TPF.

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ANNEX I – THE ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND AND WALES: CODE OF CONDUCT FOR LITIGATION FUNDERS

THE CODE

1. This code (the Code) sets out standards of practice and behaviour to be observed by Funders who are Members of The Association of Litigation Funders of England & Wales.

2. A Funder has access to funds immediately within its control or acts as the exclusive investment advisor to an investment fund which has access to funds immediately within its control, such funds

being invested pursuant to a Litigation Funding Agreement (LFA) to enable a Litigant to meet the costs of resolving disputes by litigation or arbitration (including pre-action costs) in return for the Funder:

- (a) receiving a share of the proceeds if the claim is successful (as defined in the LFA); and
- (b) not seeking any payment from the Litigant in excess of the amount of the proceeds of the dispute that is being funded, unless the Litigant is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of disputes within England and Wales.

4. The promotional literature of a Funder must be clear and not misleading.

5. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Litigant.

6. A Litigation Funding Agreement is a contractually binding agreement entered into between a Funder and a Litigant relating to the resolution of disputes within England and Wales.

7. A Funder will:

- (a) take reasonable steps to ensure that the Litigant shall have received independent advice on the terms of the LFA, which obligation shall be satisfied if the Litigant confirms in writing to the Funder that the Litigant has taken advice from the solicitor instructed in the dispute;
- (b) not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;
- (c) not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder;
- (d) maintain at all times adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund, and in particular will maintain the capacity:
 - (ii) to pay all debts when they become due and payable; and
 - (ii) to cover aggregate funding liabilities under all of its LFAs for a minimum period of 36 months.

8. The LFA shall state whether (and if so to what extent) the Funder is liable to the Litigant to:

- (a) meet any liability for adverse costs;
- (b) pay any premium (including insurance premium tax) to obtain costs insurance;
- (c) provide security for costs;
- (d) meet any other financial liability.

9. The LFA shall state whether (and if so how) the Funder may:

- (a) provide input to the Litigant's decisions in relation to settlements;
- (b) terminate the LFA in the event that the Funder:
 - (iii) reasonably ceases to be satisfied about the merits of the dispute;
 - (iii) reasonably believes that the dispute is no longer commercially viable; or
 - (iii) reasonably believes that there has been a material breach of the LFA by the Litigant.

10. The LFA shall not establish a discretionary right for a Funder to terminate a LFA in the absence of the circumstances described in clause 9(b).

11. If the LFA does give the Funder any of the rights described in clause 9 the LFA shall provide that:

- (a) if the Funder terminates the LFA, the Funder shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 9(b)(iii);
- (b) if there is a dispute between the Funder and the Litigant about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.

This code is to be read in conjunction with the Articles and Rules of the Association of Litigation Funders of England & Wales, which are available for inspection at: <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc>

NEDERLANDSE SAMENVATTING VAN DE MASTERPROEF CONFORM ARTIKEL 3.2.3 VAN HET REGLEMENT MASTERPROEF