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Recent Developments

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Ethical implications of third-party funding in international arbitration

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ABSTRACT

This article describes the phenomenon of third-party funding with a particular focus on its impact on the arbitral proceedings. After a general description of what third-party funding is and how it works, the article examines the possible implications that third-party funding may have on both the attorney–client relationship and the independence and impartiality of the arbitral tribunal. Since the involvement of a third-party funder may create different situations of conflict of interest for the arbitrators, which in turn may affect the entire arbitral proceedings and the final award, the article suggests that the disclosure of the existence of a third-party funder in arbitration is an essential step to safeguard the fairness and transparency of the arbitral process. A comparison of the advantages and disadvantages of such disclosure is offered, together with a proposal on how such duty to disclose should be articulated. The article concludes with an overview of the current status of the regulation of third-party funding in international arbitration, and with some thoughts about the desirability of a more accurate regulation of this important and constantly increasing phenomenon.

1. INTRODUCTION

The phenomenon of third-party funding (TPF) is not unknown in the context of ordinary litigation, especially in common law countries. Historically, TPF encountered strong opposition, mainly due to the concern that it could encourage frivolous claims. Common law countries usually relied on the ethical doctrines of 'maintenance' and 'champerty' to challenge the validity and enforceability of TPF agreements. Under these doctrines, the act of supporting or promoting another person's lawsuit, with (champerty) or without (maintenance) receiving a portion of any judgment proceeds, was unethical and as such prohibited. This rigid approach has since been abolished by statute in all common law countries, or at least relaxed by courts, and TPF in domestic litigation has been eventually admitted. For instance, TPF in ordinary litigation is now well established and regulated in Australia—which boasts the largest TPF industry, as well as in the UK—which follows closely behind.[1]

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1 Niccolò Landi, *Third Party Funding in International Commercial Arbitration – An Overview*, Austrian Yearbook on International Arbitration 2012 (Kluwer Arbitration, 2012) 85, 89–91. The author adds that

In international arbitration, TPF is a relatively new phenomenon.[2] It is an emerging industry in continuous growth. Two main forces are driving the increased demand for dispute financing in international arbitration. On one hand, the global financial market crisis, which has driven financial institutions to seek new forms of investments, which are easily identifiable in international arbitration because of the large amount of money at stake.[3] On the other hand, the very high costs of international arbitration, which induces either impecunious claimants, or companies that want to maintain sufficient cash flow to continue their regular business while the arbitral proceedings are ongoing,[4] or that simply want to share the risk of the arbitration with a third party, to seek financing to pursue a meritorious claim. In this regard, it should be noted that, despite the fact that most cross-borders commercial contracts contain an arbitration clause, not all the parties involved—especially small and medium-sized companies—have the money to finance such expensive proceedings. It may well be the case that a smaller company has a strong case on the merits, but does not have the financial resources to

in the USA, TPF is not so widespread (some states still apply the doctrines of maintenance and champerty—eg District of Columbia), but the phenomenon is increasing and the potential market is vast. In civil law countries, instead, TPF is generally absent, if not prohibited. The same applies in Asia (except India), where TPF is expressly forbidden. See also Bernardo C Cremades, *Third Party Funding in International Arbitration* (23 September 2011), 3–4, <http://www.cremades.com/en/publications/third-party-funding-in-international-arbitration/> accessed 1 March 2016: 'Traditionally, the participation and investment of third parties in procedural or arbitral claims has been frowned upon. On the continent, the *quota litis* pact is considered unethical. . . . This ethical disapproval was paralleled in the Anglo Saxon world through the legal doctrines of champerty . . . and maintenance. . . . However, in practice . . . there has been a relaxation of these rigid ethical regulations.' Jennifer A Trusz, 'Full Disclosure? Conflicts of interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 Geo L J 1649, 1659–62.

2 Lisa Bench Nieuwveld and Victoria Shannon, *Third-Party Funding in International Arbitration* (Kluwer Law International 2012) 2: 'Jurisprudence, academic literature, and news articles relating to third-party funding in most jurisdictions largely focus on litigation funding, which represents the majority of third-party funding instances worldwide. Third-party funding in the context of international arbitration is usually classified as either a subset or a close cousin of litigation funding. Nevertheless, . . . third-party funding in international arbitration . . . [has] unique attributes.' See Maxi Scherer 'Out in the Open? Third-party Funding in Arbitration', CDR—Commercial Dispute Resolution (26 July 2012), <http://www.cdr-news.com/categories/arbitration-and-adr/out-in-the-open-third-party-funding-in-arbitration> accessed 1 March 2016: 'Although third-party funding has existed regarding litigation proceedings in various forms and in some jurisdictions for a long time, it nowadays attracts growing attention in the context of international arbitration.'

3 See Bench Nieuwveld and Shannon (n 2) 11; see also Selvyn Seidel, 'Third-party Investing in International Arbitration Claims – To Invest or Not To Invest? A Daunting Question', ch 2 of Dossier X of the ICC, *Third Party Funding in International Arbitration*, 25 (ICC Publication No 752E 2013). See also Jean E 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/> accessed 1 March 2016.

4 See Bench Nieuwveld and Shannon (n 2) 11; Selvyn Seidel and Sandra Sherman, '"Corporate governance' Rules are Coming to Third-Party Financing of International Arbitration (and in General)', ch 3 of Dossier X of the ICC, 'Third Party Funding in International Arbitration', 35 (ICC Publication No 752E 2013): 'For the most part, the industry [of TPF] currently serves financially distressed holders of meritorious claims . . . But is also steadily growing to serve claimants that can afford the prosecution but prefer to offload the risk and cash drain . . ..'; Maxi C Scherer, 'Third-party Funding in International Arbitration – Towards Mandatory Disclosure of Funding Agreements?', ch 8 of Dossier X of the ICC, *Third Party Funding in International Arbitration*, 95 (ICC Publication No 752E 2013): 'More and more parties, whether in financial distress or otherwise, are exploring the possibility of using funders . . . to pay for their lawsuits.'

hire top-flight counsel to handle the case, or to finance the arbitral proceedings and any subsequent fund enforcement proceedings. Conversely, a larger company, with deeper financial reserves, can not only hire the best counsel, but also pursue a strategy designed to drag out the process.[5] This imbalance is even more evident in investor-state disputes, where the vast majority of states have greater resources to finance litigation and arbitration than most single claimants. TPF provides a remedy to this problem, by ensuring equal access to arbitration for parties that wish to avail themselves of it, by levelling the playing field, and thus removing 'the risk of a world where only rich claimants are entitled to justice . . . '.[6]

In light of the above, TPF in international arbitration clearly represents a positive phenomenon, in that it attracts investments, and it permits greater access to justice.[7] However, the presence of a third party with a strong interest in the outcome of the case also raises delicate legal and ethical issues, regarding its influence on the attorney–client relationship, and on the independence and impartiality of arbitrators, which in turn may affect the arbitral proceedings. This is the reason why a specific regulation of TPF in international arbitration—currently lacking[8]—at least in the form of a provision, included in all the main arbitral institutions regulations, of a duty to disclose the existence of a third-party funder, would likely be helpful.

The first section of this article will provide a definition of the phenomenon of TPF and a description of its functioning. The second section will analyse in detail the possible ethical implications of TPF in international arbitration, from both the counsel's perspective and the arbitral tribunal's. The third section will focus on the

5 See Christopher P Bogart, 'Overview of Arbitration Finance', ch 4 of Dossier X of the ICC, *Third Party Funding in International Arbitration*, 52 (ICC Publication No 752E 2013).

6 Ibid 53. See also Yves Derains, 'Foreword' to Dossier X of the ICC, *Third Party Funding in International Arbitration*, 5 (ICC Publication No 752E 2013): 'An impecunious party to an arbitration agreement may be *de facto* deprived of the right of access to justice when it is unable to sustain the costs of the arbitration procedure.' The Author adds: 'In the Pirelli case, for example, the Paris Court of Appeals in November 2011 set aside an ICC award because of the arbitral tribunal's refusal to deal with counterclaims due to the respondent's failure to pay the special deposit applicable to them, on the grounds that this was at odds with the right of access to justice and the principle of equality among the parties. The French *Cour de Cassation* annulled this decision in March 2013 [Cass. Civ. ter, March 28, 2013, n. 392 (11-27.770)] but only because the Court of Appeals had not checked whether the counterclaims were really intertwined with the claimants' claims, admitting that - if such had been the case - the right of access to justice and the principle of equality would actually have been breached.'

7 See Cremades (n 1) 8: '[TPF] is without doubt the market response to the needs of small and medium-sized companies to enable their access to arbitration, and indeed maybe the only way.' See also Derains (n 6) 6: '[T]here is no doubt that third-party funding allows easier access to arbitration for impecunious claimants with meritorious claims, and, as such, represents progress.' As for the potential criticism that TPF may encourage frivolous claims, see section 2.2, where it is explained why the criticism is groundless.

8 Unlike TPF in ordinary litigation, TPF in international arbitration is still not regulated. Even where a regulation of TPF in domestic litigation does exist, these rules cannot always be automatically applied in arbitration. As observed by Bench Nieuwveld and Shannon (n 2) 241, some jurisdictions—such as the UK, some parts of the USA and Hong Kong—consider international arbitration a completely different system from traditional court litigation. Therefore, it is likely that a separate regulation of TPF in international arbitration will develop in these jurisdictions. Some other jurisdictions—such as Australia and Singapore—apply the same rules in both litigation and arbitration, so it is likely that TPF regulation will develop simultaneously. In the remaining jurisdictions—including most of Europe, Asia, the Middle East, and Africa—regulation of the phenomenon of TPF is totally absent, both in court litigation and in arbitration.

duty to disclose the existence of TPF as the only method to prevent the potential negative effects of the phenomenon on the fairness of the arbitration process. The article will finally close with some remarks and proposals.

2. THIRD-PARTY FUNDING

2.1 Definition of TPF in international arbitration

There is no clear and common definition of TPF in international arbitration.[9] In general, TPF is considered a form of investment, granted by means of an agreement between a litigant (either a claimant or a respondent) and a funder unrelated to the proceedings (typically a corporate entity), pursuant to which the funder covers all the litigant's costs, in return for a share in the proceeds if the litigant wins the case or a settlement is reached. If the claim is unsuccessful, instead, the funder is not entitled to receive anything and may still be obliged to cover the costs of the proceedings, including those of the prevailing party.[10] In other words, as observed by commentators, '[n]on-recourse financing, where repayment is contingent on the client's success in the dispute, is the quintessential scenario for third-party funding in international arbitration'.[11]

TPF differs from other forms of financing available in litigation and arbitration. For example, TPF differs from contingency fee arrangements. First, because a different party, namely the third-party funder, and not a party already involved in the litigation such as the lawyer, provides the financing. Secondly, because third-party funders are not providing a service for a fee, rather, they are investing in an asset. Finally, whereas lawyers are governed by ethics rules and bar associations, the TPF industry is largely unregulated.[12] TPF is also distinguished from insurances that cover a party from risks associated with a lawsuit since, third-party funders do not

9 See Scherer (n 4): 'Third-party funding has become one of the "hot topics" in international arbitration. More and more parties, whether or not in financial distress, explore the possibility of using funders to provide the necessary capital to pay for their lawsuit. [. . .] The exact definition of third-party funding, however, remains elusive and its legal and ethical implications in international arbitration are uncertain.' See also Aren Goldsmith and Lorenzo Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask): Part 1' (2012) IBLJ 53, 55: 'There is no universally agreed definition of TPF. Certain authors have defined the concept to include only the predominant claimant-side model. Others have included, within their definition of TPF, respondent-side funding, but excluded various insurance products related to litigation as well as legal fee arrangements.' BM Cremades, *Concluding Remarks* to Dossier X of the ICC, *Third Party Funding in International Arbitration*, 153 (ICC Publication No 752E 2013).

10 Landi (n 1) 85. See also Trusz (n 1) 1653–54: '[TPF is when] an unrelated third party provides monetary support to a party involved in a legal claim; in return, that third party receives a portion of the proceeds resulting from that claim - or nothing, if the claim is unsuccessful'; Derains (n 6) 5; and Susanna Khouri and Kate Hurford, 'Third Party Funding for International Arbitration Claims: Practical Tips', PLC Arbitration, <http://www.imf.com.au/docs/default-source/site-documents/thirdpartyfundingforinternationalarbitrationclaims> accessed 1 March 2016: 'In general terms, third-party funding involves a commercial funder agreeing to pay some or all of the claimant's legal fees and expenses in return for reimbursement of the funder's direct outlays and a share of any sum recovered from the resolution of the claim. . . . If the claim fails, the funder receives nothing and, typically, remains liable for any fees due to the claimant's lawyer, together with any adverse costs that it has agreed to pay and that are incurred during the term of the funding agreement.'

11 Bench Nieuwveld and Shannon (n 2) 7.

12 Trusz (n 1) 1653–54.

merely cover the party's costs up to a certain amount (ie the coverage cap), but they rather try to get a return from the investment. Finally, TPF is different from a loan because funding companies, in contrast to loan providers, do not charge interests, rather they secure a percentage of any amounts awarded or settled on.

2.2 The functioning of TPF in international arbitration

Being an investor, any prospective funder would aim to obtain the highest return on its investment. For this reason, before granting funding, the prospective funder will usually carry out a full and rigorous due diligence analysis of the facts and merits of the claim. The key factors that are generally analysed are as follows: (i) the value of the claim; (ii) the jurisdiction where the claim is to be heard, and where the award will be recognized and enforced; (iii) the probability of reaching a settlement or winning the arbitration; (iv) the quality of the litigant's legal team; (v) the nature and expected duration of the arbitration proceedings; (vi) the arbitral institution's practice and reputation; (vii) the substantive law of the dispute; (viii) the quality and the quantity of the documentary evidence, as well as of the witness evidence; (ix) the financial situation of the counterparty and its capacity to pay; and (x) the legal basis of the claim and the risks associated with any possible counterclaim.[13] Funders do not fund low value cases (it is reported that, usually, they fund only those cases whose value is at least $1 million[14]); nor do they fund a claim if the seat of arbitration is clearly unsuitable (either because it is a corrupt jurisdiction, or inhospitable to TPF), or if the jurisdiction where the award is likely to be enforced is unlikely to accept such enforcement.[15] Funders are also prudent: it is reported that they do not typically invest in a case that has less than 70 per cent probability of success and an expected duration of more than two and a half years.[16] Finally, it is reported that funders would not fund a case if they do not agree with the selection of legal counsels by the party seeking funding.[17] In sum, third-party funders analyse the strengths and weaknesses of the claim in order to assess the attractiveness of the investment and, ultimately, they fund strong cases only. Since 'no serious corporation would finance a claim without being convinced . . . that it has a good chance of success',[18] TPF is rightly considered as a 'weeding mechanism [which] eliminate[s] weaker claims'.[19]

Following a favourable outcome of the due diligence, the contract negotiations between the funder and the claimant begin. Each funding agreement is drafted based on the specific needs of the party seeking financing, taking into account the characteristics of the dispute, the rules of the arbitral proceedings, and the law of the merits of the controversy. Standard provisions found in TPF agreements include: (i) the

13 Landi (n 1) 98.

14 See Maxi Sherer, Aren Goldsmith and Camille Fléchet, 'Third Party Funding in International Arbitration in Europe: Funders' Perspectives' (2012) 2 RDAI 207, 212–13.

15 See eg, Argentina, Russia, and Sub-Saharan Africa. ibid 213. A preference will obviously be given to jurisdiction where the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (so-called 'New York Convention') is in force.

16 ibid 213. See also Seidel (n 3) 25; Cremades (n 9) 154.

17 Sherer, Goldsmith and Fléchet (n 14) 215.

18 Derains (n 6) 5–6.

19 Bench Nieuwveld and Shannon (n 2) 62.

maximum amount the funder will contribute to the legal representation in the case; (ii) the compensation the funder will receive in the case of success (which varies between 15 per cent and 50 per cent of the amount awarded[20]); (iii) the costs that the funder will bear if the case is lost (eg costs of the award enforcement, adverse costs and the winning party's legal fees).[21] A wisely drafted funding agreement will also include: (i) a provision regulating the degree of influence and control a funder may exercise in the arbitral proceedings and on the procedural strategy in general (eg in the decision to settle the dispute);[22] (ii) a method to solve any disagreement that may arise between the funder and the funded party;[23] (iii) the causes whereby the relationship can be terminated; and (iv) a confidentiality clause to protect the information that the funder becomes aware of during the due diligence process and throughout the arbitral proceedings. Whatever the form of the final TPF contract, from that moment on, an additional party will come into play, with all the consequences—both positive and negative—that this may cause.

3. ETHICAL ISSUES RELATED TO THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

The involvement of a third-party funder in arbitration poses complex ethical issues because of the fact that it may create conflicts of interest for attorneys and arbitrators. Indeed, the influence and control exercised by funders may affect the attorney–client (the funded party) relationship, as well as the independence of arbitrators. Confidentiality, evidentiary privileges, and professional independence are the key ethical concerns that TPF puts in question.

Given its critical impact on the arbitration process, the main issue under debate, as discussed in more detail below, is whether the intervention of a funder in international arbitration needs to be disclosed and, if so, the terms on which the funding agreement should be made available.

3.1 Ethical issues from the counsel's perspective

As rightly observed, '*ménages à trois* . . . have never enjoyed a good reputation; on the contrary, they have tended to provoke suspicion'.[24] The same can be said for the relationship between attorney, client, and third-party funder.

20 See Sara Forni, 'Il 'Third Party Funding' nell'arbitrato internazionale', I Contratti, 10/2013 965, 967; Jeremy Winter and Anjuli Patel, *Third-Party Funding in International Arbitration*, Baker & McKenzie LLP, London (14 January 2013) <http://www.bakermckenzie.com/files/Uploads/Documents/KCCI/br_ia_thirdpartyfunding.pdf> accessed 1 March 2016; Khouri and Hurford (n 10); Seidel (n 3) 22: '[F]unders typically look for a return of at least three to one on the capital invested, or 20% to 40% of the recovery, whichever is larger.'

21 See Bench Nieuwveld and Shannon (n 2) 11–12; Sherer, Goldsmith and Fléchet (n 14) 213–14.

22 While some funders act as mere passive investors, others may wish to be involved in the management of the case. These two approaches have been defined as a 'hands-on' and 'hands-off' approach, respectively. Sherer, Goldsmith and Fléchet (n 14) 210–11. In any case, funders would monitor the legal team but not directly instruct them, since all the decisions regarding the case are to be made only by the party and his counsel. ibid 216.

23 These methods may vary between mediation, arbitration, and referral of the issue to the client's counsel for advice. ibid 217.

24 Charles Kaplan, 'Third-party Funding in International Arbitration – Issues for Counsel', ch 6 of Dossier X of the ICC, *Third Party Funding in International Arbitration*, 73 (ICC Publication No 752E 2013).

Generally, a party wishing to start an arbitral proceeding will consult an attorney to understand the likelihood of its claim succeeding. From that moment, an attorney–client relationship is established. If the party is considering TPF (for either financial or tactical reasons), it will normally ask its attorney's opinion in this regard, and the attorney will usually assist the client in the search and selection of a funding corporation, as well as in the negotiation of the funding agreement. As mentioned above (see Section 2.2), before deciding whether to provide funding, the third-party funder will usually undertake a full due diligence of the case based on documents and information made available by the party requesting funding, and by its counsel. It is at this precise moment, when a third party gets involved in the attorney–client relationship, that ethical issues in connection with the existence of TPF may arise from the counsel's perspective.

First, disclosing certain privileged information or documents to the prospective funder during the due diligence process that precedes the conclusion of a funding agreement may raise serious 'confidentiality' issues.[25] Making reference to the ABA Model Rules for the purposes of discussion,[26] the risk is that giving such information to the funder may waive the attorney–client privilege or the attorney work product doctrines.[27] To avoid the consequent risk of the information and documents becoming discoverable, it is advisable that the counsel obtains the client's informed consent before disclosing privileged information and documents. However, it must be noted that every jurisdiction has its own rules governing the lawyers' duty of confidentiality and privilege.[28] Therefore, all the considerations regarding confidentiality must be adjusted to each single case and country. Moreover, given that a specific professional regulation in international arbitration is absent, counsels may be subject to different sets of professional conduct rules:[29] the ethical rules of their own home jurisdiction,

25 See Landi (n 1) 96; Carolyn B Lamm and Eckhard R Hellbeck, *Third-party Funding in Investor-State Arbitration – Introduction and Overview*, ch 9 of Dossier X of the ICC, *Third Party Funding in International Arbitration*, 109 (ICC Publication No 752E 2013): 'A lawyer's duty of confidentiality may be compromised by a third-party funding agreement that calls for the lawyer to disclose certain information'; Aren Goldsmith, 'Third-Party Funding In International Dispute Resolution' (2012) 25 AUT Int'l L Practicum 147, 150–51.

26 American Bar Association (ABA) *Model Rules of Professional Conducts*, adopted by the ABA House of Delegates in 1983. Even if each State regulates the conduct of the lawyers licensed in its territory by its own ethical rules, reference is made to this set of ethical rules and standards because they serve as models for the ethics rules of most states (to date, California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct).

27 ABA Model Rules 1.6 and Fed R Civ P 26. See Laurent Lévy and Régis Bonnan, 'Third-party Funding – Disclosure, Joinder and Impact on Arbitral Proceedings', ch 7 of Dossier X of the ICC, *Third Party Funding in International Arbitration*, 90 (ICC Publication No 752E 2013).

28 In France, for instance, lawyers are not allowed to release confidential information regarding client matters under any circumstances, even with the client's authorization. In such jurisdictions, the lawyer can only advise the client and then it is up to the client to choose to disclose certain information to a prospective third-party funder. Kaplan (n 24) 74.

29 See Lamm and Hellbeck (n 25) 114: 'International arbitration brings together lawyers from different jurisdictions with different, sometimes conflicting, ethical rules. . . . [L]awyers generally continue to be bound by their respective "home" rules when it comes to their professional obligations.' See also Bernardo M Cremades, 'Third Party Litigation Funding: Investing in Arbitration' in MA Fernàndez-Ballesteros and D Arias (eds) (2012) Spain Arb Rev 155, 183: 'Confidentiality and privilege are of paramount importance in the United States, but they are less important in the context of international

those of the arbitral seat, or those of the place where the hearings take place. The potential for confusion increases when the counsel is admitted to practice in multiple jurisdictions that have conflicting rules and norms, in addition to the fact that rules and norms developed for domestic judicial litigation may be inappropriate for international arbitral proceedings.[30]

Secondly, during arbitration proceedings involving TPF, 'conflicts of interest' may arise if the funder meddles in the attorney–client relationship. Since the funder has a significant economic interest in the outcome of the arbitration, it may attempt to influence the attorney (who is paid by the funder) in fundamental strategic decisions about how the case is managed.[31] The issue of control over the case is particularly important when it comes to negotiating a settlement agreement. The funded party's attorney may consider a settlement agreement as his client's best option, whereas the funder may consider it more worthwhile to proceed with the arbitration, or vice-versa.[32] A similar issue may arise when it comes to appointing an arbitrator when each party is entitled to select one arbitrator. The funder may want to have a say in the choice, but solely the litigant and its attorney should make this crucial decision.[33] In general, conflicts may arise in respect of all the strategic decisions to be taken by the attorney.[34] It is the counsel's duty to be able to maintain independence and objectivity, providing impartial and unbiased advice, despite there being a third-party funder.[35]

In summation, due to the existence of TPF, confidentiality as a duty towards the client during the due diligence process, and conflicts of interest during the arbitral proceedings may well become problematic from a counsel's perspective. Given the absence of a precise ethical system of reference to assess all the potential ethical issues faced by an attorney in international arbitration involving TPF, the best solution may be to expressly regulate them in the funding agreement.[36]

3.2 Ethical issues from the arbitral tribunal's perspective

Arbitral rules uniformly require arbitrators to be impartial and independent at the time of accepting an appointment, and throughout the entire course of the arbitration proceedings. For this purpose, all arbitration rules[37] require arbitrators to

arbitration, where the common law privileges do not usually apply (or at least they are not given the importance as in local litigation or arbitration in common law fora).'

30 This is the reason why the International Bar Association adopted the 'Guidelines on Party Representation in International Arbitration' on 25 May 2013, which offer a useful guide for counsel acting in international arbitration, even if the preamble to those rules expressly specifies that they 'are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation ... [Nor] to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies'.

31 Landi (n 1) 99.

32 ibid 100.

33 ibid 101.

34 ABA Model Rule 1.2(a).

35 See also Lamm and Hellbeck (n 25) 109: 'The lawyer should ... ensure that he or she is providing advice that is best for the client, not the third-party funder who is in control of the lawyer's compensation.'

36 See Khouri and Hurford (n 10).

37 Trusz (n 1) 1666–67: 'Under the UNCITRAL Rules, the arbitrator must disclose circumstances "likely to give rise to justifiable doubts" about the arbitrator's independence. The LCIA Rules likewise provide that

disclose any situation that might create an impression of possible conflict, and in the most severe cases of conflict of interest, even to decline, or refuse to continue, an appointment. The independence of arbitrators is extremely important and a conflict of interest could disrupt the arbitral proceedings or cause the annulment of the final award, forcing the parties to start the arbitration proceedings anew.

The presence of a third-party funder may create different conflicts of interest affecting the independence and impartiality of arbitrators. A classic example is when an attorney acts as counsel in a funded case (maintaining regular contact with, and being paid by, the funder) and as an arbitrator in another arbitral case in which the claimant is funded by the same funder.[38] In other words, in arbitration A1, X is counsel of a claimant funded by funder F, and in another unrelated arbitration A2, where one of the parties is funded by the same funder F, X is the presiding arbitrator. The fact that X's fees in A1 are paid by F and that X is likely to have significant contact with F on the basis of the funding agreement, makes it inappropriate for X to sit as an arbitrator in A2, because X is unlikely to be impartial and independent *vis-à-vis* the claimant in A2.[39]

Using the IBA Guidelines on Conflicts of Interest in International Arbitration (the 'IBA Guidelines')[40] as a parameter—given their general acceptance within the international arbitration community—it is possible to identify other conflicts triggered by the existence of TPF. For instance, assuming that, when a third-party funder provides funding for the arbitration, it becomes an 'affiliate' of the claimant due to the control that the funder may exercise over the party's dispute,[41] the third-party

> the arbitrator shall disclose circumstances "likely to give rise to any justified doubts" about his independence. The ICDR Rules require disclosure of "any circumstance likely to give rise to justifiable doubts." . . . Under the IBA Guidelines . . . the arbitrator must disclose circumstances that "may, in the eyes of the parties, give rise to doubts" about the arbitrator's independence. The ICC Rules similarly require disclosure of "any facts or circumstances that might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties".'

38 Landi (n 1) 102.

39 Scherer (n 4) 58.

40 First issued on 22 May 2004 by the Council of the International Bar Association, and recently revised by a distinguished Committee of experts, in light of issues that have received attention in international arbitration practice since 2004 (including, TPF). The most recent version of these guidelines was adopted by resolution of the IBA Council on 23 October 2014. The IBA Guidelines on Conflicts of Interest in International Arbitration supplement the arbitral rules by providing seven general standards (Part I) and lists of specific situations that may give rise to questions about an arbitrator's independence and impartiality (Part II). The specific situations giving rise to a conflict of interest listed in the IBA Guidelines are divided into three categories: Red, Orange, and Green lists, each indicating the level of concern associated with certain circumstances, and the consequent advisable action for the arbitrator. The Red List contains situations that 'definitely' give rise to justifiable doubts as to the arbitrator's impartiality and independence from a reasonable third person's point of view: the situations described under the 'non-waivable Red List' are so severe that their disclosure cannot cure the conflict of interests thus requiring the arbitrator to decline the appointment; the situations included in the 'waivable Red List', instead, are serious, but not as severe. The arbitrator must therefore disclose them and may serve as arbitrator despite the conflict of interest, but only if all parties expressly agree. The Orange List contains situations that 'may' give rise to justifiable doubts as to the arbitrator's impartiality and independence from the parties' point of view; the arbitrator thus has the duty to disclose them, and may serve as arbitrator if the parties do not raise an express objection. Finally, the Green List contains situations where 'no' appearance of, and no actual, conflicts of interests exist from an objective point of view; consequently, the arbitrator does not even have the duty to disclose them.

41 The assumption is made by Trusz (n 1) 1670. The Black Law Dictionary defines 'affiliate' as '[a] corporation that is related to another corporation by shareholdings or *other means of control*' (emphasis added).

funder's relationship with an arbitrator may become relevant in the following circumstances enumerated in the IBA Guidelines, namely if:

i. the arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties (eg a privately held third-party funding corporation) (IBA Guidelines, part II, situation 2.2.1); or
ii. the arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties (eg a third-party funding corporation, perhaps because the third-party funder is providing funding to a client of the arbitrator's law firm on another case[42]) (IBA Guidelines, part II, situation 2.3.6).

In these two cases (included in the so-called 'waivable Red List' of the IBA Guidelines), a serious conflict of interest arises, which may be waived only if all parties are aware of the situation and expressly permit the arbitrator to continue serving on the arbitral tribunal despite the conflict. Likewise, consider the circumstances where:

i. the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties (eg the same third-party funding corporation) (IBA Guidelines, part II, situation 3.1.3);
ii. the arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties (eg a third-party funding corporation), in an unrelated matter without the involvement of the arbitrator (IBA Guidelines, part II, situation 3.1.4); and
iii. the arbitrator has a material holding in one of the parties, or an affiliate of one of the parties (eg a publicly listed third-party funding corporation) (IBA Guidelines, part II, situation 3.5.1).

In these three cases (included in the so-called 'Orange List' of the IBA Guidelines), justifiable doubts as to the arbitrator's impartiality and independence may arise in the parties' eyes. Therefore, the arbitrator has the duty to disclose these situations to the parties and, only if the parties do not raise an express objection, may continue serving as arbitrator. Conversely, whether the assumption on the affiliate nature of a third-party funder is rejected,[43] in determining whether or not an arbitrator has a conflict based on TPF, the threshold is whether or not the same has a

42 See Landi (n 1) 102, footnote no 90: 'Another potential conflict of interest, or perceived conflict of interest, could arise between a funder and one of the arbitrators appointed to arbitrate a dispute, for example, where the arbitrator is a partner of a law firm with which the funder has a relationship.' Derains (n 6) 5–6: 'Can an arbitrator act in a case where the claimant is financed by the same third-party funder who is also financing a different claimant in another case in which a partner of the law firm of the arbitrator is acting as that claimant's counsel?'

43 See Bogart (n 5) 54: '[F]unders are by definition not affiliates under prevailing law in any common law country of which we are aware and fall outside the definition of affiliate under the IBA Guidelines.' See also Lévy and Bonnan (n 27) 85.

'significant financial interest' in the outcome of the arbitration (IBA Guidelines, part II, situation 1.3). This may occur when the arbitrator is also the funder, and when the arbitrator is paid (even indirectly) by the funder. This situation is described in the IBA Guidelines at point 2.3.6 (a funder is funding an action before the arbitrator and simultaneously funding a separate matter in which the arbitrator's firm is counsel). However, by rejecting the assumption of the affiliate nature of a third-party funder, this situation would be excluded, because under the IBA Guidelines, only the parties and their affiliates can determine the existence of such a conflict.

The debate has been solved from the source by the recent amendment to the General Standard No. 6 of the IBA Guidelines on Conflicts of Interest,[44] which now specifically states that '[i]f one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party' (GS No. 6(b)). As explained in the same Guidelines, since third-party funders in relation to the dispute may have a direct economic interest in the outcome of the arbitration, this standard specifies third-party funders be equated to the parties for the purposes of a conflict of interest check. This represents a very important step towards the acknowledgment of the impact that TPF may have on arbitral proceedings, and a first attempt to give specific regulation of the phenomenon, in order to ensure transparency and fairness throughout the arbitral proceedings.

In conclusion, TPF may cause a conflict of interest with an appointed arbitrator when: (i) the arbitrator holds shares in a third-party funding corporation, (ii) there is a relationship between the funder and the arbitrator's law firm, or (iii) the same third-party funder has indirectly made multiple appointments. However, if the arbitrator is unaware that a party is being funded by a third-party, how can he disclose any prior or current involvement with third-party funders? As long as the funding relationship is not disclosed, the independence of arbitrators might be at risk, with all the consequences that this may cause. If a conflict is discovered, the arbitrator can be disqualified (if proceedings are ongoing) and the award set aside (if proceedings are concluded). Consequently, 'it is necessary for the arbitral tribunal to be informed about the existence of third-party funding agreement from the outset'.[45]

4. DISCLOSURE OF THE THIRD-PARTY FUNDING RELATIONSHIP

4.1 Pros and cons of disclosure

Whether and to what extent the existence of TPF agreements should be disclosed in international arbitration proceedings is one of the most hotly debated issues today. None of the arbitration rules that apply to commercial and investment arbitration impose an obligation to declare the existence of TPF. However, as touched upon at the end of the previous paragraph, disclosing the existence of a TPF relationship is

44 Introduced on 23 October 2014. See n 40.

45 Scherer (n 4) 58. See also Trusz (n 1) 1672: 'Third-party funding implicates several situations enumerated in the . . . IBA Guidelines. These situations can only be resolved by disclosure of the fact that a party has received third-party funding.'

the way to go. To understand this point, it may be useful to go through what are the advantages and disadvantages of disclosing the existence of a TPF relationship.

The first and most common criticism that is being moved against disclosure of the existence of TPF relationships is that the manner in which a party chooses to fund its claim is a private matter.[46] The observation is certainly legitimate, but a very basic question arises: who is going to benefit from this? And, especially, at what cost? If we take a closer look at the issue, there is no concrete reason to keep the existence of a TPF agreement confidential other than the unilateral interest of the third-party funder not to disclose which kind of investments it has made, or of the funded party not to disclose its financial distress. These may be sensible reasons, but they must be weighed against the potential negative effects of a lack of disclosure. As described in the previous paragraph, a TPF relationship may generate different situations of conflicts of interest with the arbitrators, which may lead to a biased arbitral tribunal and to a voidable award. Indeed, an arbitrator serving on the arbitral tribunal who appears not to be independent can be challenged and disqualified at any time. The arbitration would then have to start anew with a newly appointed arbitrator.[47] If the arbitrator is found not to be independent after the award is issued, national courts can annul, or deny recognition and enforcement of the award.[48] It is obvious that the sacrifice is not worth it. Disclosing the existence of a TPF relationship allows the prevention of possible conflicts of interest and thus the ability to ensure the arbitrators' impartiality and independence, which is objectively more important than any subjective reasons of confidentiality that may drive either the funder or the funded party.

One could argue that, regardless of this point, confidentiality provisions contained in the funding agreement itself may prevent disclosing the existence of a third-party funder.[49] However, even if this may well be true, an arbitral tribunal's order would easily supersede such contractual provision.

Those who criticize and object to the disclosure of the existence of TPF also argue that revealing the terms of the funding agreement may give the opposing party a tactical advantage, allowing it to know or predict the amount the funded parties would settle for.[50] Aside from the fact that, for the purpose of avoiding potential conflicts of interest, there is no need to disclose the exact terms of a TPF agreement, in actuality, disclosing the existence of a third-party funder may level the playing field in the settlement negotiation, and it may encourage earlier settlement of the dispute. If

46 See Cremades (n 9) 155: 'Many lawyers and arbitrators will categorically point out that it's nobody business who finances the claimant or respondent in an arbitral proceedings.'

47 See Seidel (n 3) 22: 'If an undetected conflict surfaces later, this could abort the entire proceedings. . . . The impact could be catastrophic.' See also Goldsmith (n 25) 152: '[T]he failure to provide for full disclosure upfront could increase the risk of costly disruptions at a later stage, including where the revelations result in recusal.'

48 Trusz (n 1) 1668–69, stating that there are different grounds that potentially implicate arbitrator independence, on the basis of which a national court could deny recognition and enforcement of an award. For instance, making reference to the New York Convention, a national court could deny recognition and enforcement to the award because it is 'contrary to public policy' (Art V(2)(b)), because the party was 'unable to present his case' (Art V(1)(b)), or because the composition of the arbitral tribunal or the arbitral proceedings was 'not in accordance with the law of the country where the arbitration took place' (Art V(1)(d)). See also Lévy and Bonnan (n 27) 86.

49 See Lévy and Bonnan (n 27) 79.

50 ibid 79.

a party becomes aware that its counterparty receives continual financial support from a third-party funder to pursue the claim, it may prefer to settle early, instead of going through time-consuming and costly arbitral proceedings. Also, disclosure of the existence of a TPF agreement, especially by an impecunious claimant, would certainly rebalance the bargaining power as the financially stronger party could attempt to leverage its financial strength, as it happened in the famous case, *Oxus Gold PLC v Republic of Uzbekistan et alia*, where the claimant made a voluntary public disclosure upfront (by means of a press release) of the existence of a funding agreement in an arbitration against a state pursuant to a bilateral investment treaty.

Finally, another major concern usually raised is that disclosing the existence of a TPF agreement may adversely affect the arbitral decision on 'costs for the arbitration'[51] and, in particular, on 'security for costs'.[52] With reference to the 'costs of arbitration' in general, in at least three investment arbitrations the opposing parties argued that a TPF relationship should have had an effect on the costs.[53] For instance, in *Kardassopoulos v Republic of Georgia*, Georgia alleged, *inter alia*, 'that the Claimants' legal costs [were] excessive and because the Claimants' costs ha[d] been borne in part by a third-party investor it [was] questionable whether such costs [were] properly recoverable'. However, the tribunal disagreed with this position, and 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'. In fact, the tribunal found it 'difficult to see why in this case a third party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery'. With specific reference to 'security for costs',[54] instead, it is undeniable that the existence of a third-party funder

51 In international arbitration, the allocation of liability for costs is usually left to the arbitral tribunal's discretion (unless the parties' agreement or the relevant arbitration rules applicable to the case provide otherwise) and the rule under which the costs follow the event (namely that the costs are all to be paid by the losing party), is not universally accepted. Nonetheless, arbitral tribunals often allow the prevailing party to recover costs from the losing party.

52 See Jean E 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-innovation-and-limits-in-self-regulation-part-2-of-2/> accessed 1 March 2016.

53 See *ATA Construction v Jordan*, ICSID Case No ARB/08/02, Order Taking Note of the Discontinuance of the Proceeding, s 34 (11 July 2011); *RSM v Grenada*, ICSID Case No ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, s 48 (28 April 2011); *Kardassopoulos v Georgia*, ICSID Case Nos ARB/05/18, ARB/07/15, Award, s 691 (3 March 2010).

54 Security for costs is a special kind of interim measure that can be requested by parties to international arbitration proceedings, and granted by the arbitral tribunal, without intervention of local courts. It consists of an order that requires the claimant to provide security in a certain amount (typically through a bank guarantee or a payment into an escrow account) in order to preserve the respondent's ability to recover its legal costs should the claims be dismissed and such costs awarded. Despite growing international consensus favouring arbitral tribunals' power to order security for costs, there is no clear harmonized test regarding the factual grounds on which security for costs should be awarded, and Arbitral Tribunal enjoy great discretion in making this decision. Generally, the requesting party must show that, *prima facie*, its case will succeed on the merits, and that the other party is impecunious. Arbitral Tribunal tend to grant such measure only in exceptional cases and circumstances.

The effectiveness of the measure lies in the sanction resulting from a party's failure to comply with the order: if the party fails to set up the security ordered, the tribunal usually has the power to stay the arbitral proceedings or to dismiss the claimant's action.

may have a weight in the decision, because it often means that a party does not have the funds to finance the case by itself, and therefore there is the risk that it will be unable to pay the future adverse costs. Consequently, the opposing party often files an application for a security for costs at the beginning of the arbitral proceedings, based on the existence of a TPF relationship. However, TPF is not the only factor that an arbitral tribunal should take into account when deciding whether or not granting such a measure.[55] First, the funder may have agreed in advance to bear also the adverse costs. Second, the use of TPF may be a strategic choice by a perfectly financially sound company, which simply wishes to maintain cash flow for its habitual activity during the arbitration proceedings, or just share the risk of the arbitration with a third party. In both these cases, the funded party will have every interest in disclosing such information regarding its TPF relationship. Third, and above all, allowing a party to obtain security for costs based on the mere existence of a funding agreement would create inequity with respect to claimants using other forms of funding to which the parties may resort, and it would also encourage parties to systematically apply for security for costs, with proceedings consequently being delayed. This approach was confirmed in the ICSID case *Guaracachi v Bolivia* (ICSID, 2013), where the tribunal clearly stated that the mere existence of third-party funding is insufficient to grant security for costs, 'regardless of whether the funder is liable for costs or not'.[56] Even in the well-known case *RSM v St. Lucia*[57] (ICSID, 2013), the decision granting security for costs was not based only on the existence of a TPF agreement, but rather, also on the claimant's proven history of non-payments in prior ICSD cases and its admitted lack of any other financial resources.[58] These factors as a whole made the arbitral tribunal decide that an order for security for costs was appropriate. Hence, the concern that disclosing the existence of a TPF agreement may in itself lead the arbitral tribunal to impose security for costs on the funded party is groundless. Other factors will be taken into account, and only if the requirements of necessity and urgency are met, then the arbitral tribunal will issue an order for security for costs. A full disclosure of the TPF relationship will rather allow the arbitral

55 See William Kirtley and Koralie Wietrzykowsky, 'Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?' (2013) J Int Arb 17, 29: 'While it seems appropriate for third-party funding to be considered as an element when assessing the claimant's ability to pay, it would be unfair to single out the presence of third-party funding as a sufficient condition for granting security for costs.'

56 UNCITRAL, PCA Case No 2011-17.

57 *RSM Production Corporation v St. Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014).

58 See ss 77–83. In fact, the assenting opinion rendered by the arbitrator Gavan Griffith is more radical with regard to TPF. Since third-party funders enjoy the inequitable position of benefiting from any award in their favour, but avoiding responsibility for a contrary award, Mr Griffith suggested that States should automatically be able to obtain orders for security for costs against claimants who avail themselves of TPF, unless the claimant can demonstrate that they have the means to pay any possible costs order. In other words, he proposed reversing the burden of proof on request for security for costs in case of TPF, requiring the funded party to prove to have the money to pay the adverse costs, otherwise security should always be granted by tribunals. The harsh comments expressed by Mr Griffith on TPF in arbitration cost him a challenge for bias, even if eventually dismissed (the motion to disqualify Mr Griffith as arbitrator was filed by RSM on 10 September 2014, and it was dismissed by decision dated 23 October 2014).

tribunal to properly assess all the circumstances of the case, and the real need of ordering security for costs.

In summary, the rationale behind the need to disclose the existence of a TPF relationship in arbitration (ie identify any possible conflict of interest) appears to clearly outweigh any possible downsides or criticisms. Accordingly, it does not surprise that most commentators are of the view that disclosing TPF agreements is the best solution,[59] and that it should become standard practice—if not even mandatory—in international arbitration.[60]

4.2 The need for regulation: scope and modalities of disclosure

As the duty of disclosure of TPF in international arbitration is not currently regulated, arbitral institutions and international conventions can play a very important role.[61] In order to define the scope and modalities in which such a duty should be articulated, the following questions should be answered: 'what' exactly should be disclosed—the mere existence of the funding agreement or the terms of agreement itself? 'When' should it be disclosed—at the early stage of arbitration or later into the process? 'To whom' should it be disclosed—only to the arbitral tribunal or to all parties? And 'by whom'—the funded party or the arbitrators?

With reference to the scope of disclosure, I believe that, in order to detect potential conflicts of interest, there is no need to disclose all the terms and conditions of a TPF agreement, but it is sufficient to reveal the identity of the funder. The problem is that funders are generally reluctant to allow their clients to disclose their involvement. However, an arbitral institution's express rule, or a specific order by the arbitral tribunal itself, would overcome any non-disclosure obligation imposed on the funded

59 See Cremades (n 1), who opines that the duty of disclosure arises from the general procedural duty of good faith in arbitration. See also, even if with specific reference to investment arbitrations, Antonio Crivellaro, *Third-party Funding and "mass" Claims in investment Arbitrations*, ch 11 of Dossier X of the ICC, *Third party Funding in International Arbitration*, 148–49 (ICC Publication No 752E 2013): 'In my understanding, disclosure of third-party funding should be made mandatory in investment arbitrations. . . . Transparency of third-party funding before the tribunal and all parties involved is also a guarantee of due process. . . . In my view, there is a procedural good faith obligation that requires the party concerned to disclose third-party funding . . . [also in order to check] whether there is a conflict of interest. . . ..' See also Seidel (n 3) 22 (ICC Publication No 752E 2013): '[A]rbitrators have shown a distinct desire to know whether there is a funder involved'; Goldsmith (n 25) 152–53: 'While disclosure and analysis at the outset may entail additional costs and create delays as the parties debate the significance of any disclosures made, the loss of a member of the tribunal during the course of the proceedings (particularly, at a late stage) may create even greater costs and delay for the parties.' *Contra* Lévy and Bonnan (n 27) 82: '[G]eneralizing an obligation to disclose all third-party funding agreements . . . would almost certainly be time-consuming and would probably also be unnecessary.'

60 Mandatory disclosure of TPF relationships is already required in the national courts of Australia, home to the largest and most robust TPF industry in the world. See Victoria Shannon, 'Recent Developments in Third-Party Funding' (2013) J Int'l Arb 443, 444.

61 Landi (n 1) 102–3. See also A Crivellaro (n 59) 149: '[T]hird-party funding should not only be disclosed but should also be regulated through soft-law instruments providing guidance on these matters that parties or tribunals might voluntarily adopt as binding in individual cases. The International Bar Association and other important arbitration institutions would be perfectly suited to promoting the necessary regulation.' Catherine Kessedjian, *Good Governance of Third Party Funding*, Columbia FDI Perspectives (No 130, 15 September 2014), 1: 'Governance administered by arbitration institutions would be the best tool to address third party funding.'

party by virtue of a confidentiality clause in the funding agreement. Therefore, 'funders have to anticipate their possible exposure in arbitral proceedings even where the funding agreement provides for a confidentiality clause'.[62]

As for the timing of disclosure, the sooner the better, especially considering the aim of preventing conflicts of interest that could affect the arbitral proceedings and the final award. Therefore, a TPF relationship should be disclosed at the outset of the arbitral proceedings or, if the need for financing arises at a later stage, at the first available occasion.

Without any doubt, disclosure should be made to the arbitral tribunal, but—to ensure the fairness of the arbitral proceeding in general—also to all the parties involved in the arbitration. There seems no valid reason to reach a different conclusion; rather, in light of the possible drive to settle the dispute, it seems preferable that the opposing party is made aware of the existence of a TPF agreement.

Finally, the duty of disclosure could be provided for in the regulations of the arbitral institutions, and the parties be required to disclose the existence of a TPF relationship in their first arbitral submission (or at the earliest opportunity, if the party decides to resort to TPF at a later stage of the arbitral proceedings). Imposing the duty of disclosure on the parties would be consistent with the general obligation on parties to international arbitration to disclose any fact that may be relevant to the valid constitution of the arbitral tribunal.[63] Some commentators propose that a duty to disclose any relationship with third-party funders should be imposed also on the arbitrators, requiring them to make such a disclosure in their statement of impartiality and independence.[64] Similarly, if the arbitral tribunal becomes aware of, or has reason to suspect the existence of, a TPF relationship, it should raise the issue *ex officio*, and the arbitral institution itself should automatically carry out a complete conflict check.[65] The viability of these proposals seems dubious. Requiring arbitrators to disclose all existing direct and indirect connections to funders may be unrealistic and unduly onerous, especially for arbitrators from large law firms.[66] Likewise, the arbitral institution may not have all the information necessary to carry out investigations on potential conflicts of interests among arbitrators and third-party funders, and thus

62 Sherer, Goldsmith and Fléchet (n 14) 218.

63 See General Standard 7(a) of IBA Guidelines on Conflicts of Interest in International Arbitration of 22 May 2004, not amended by the new version on 23 October 2014, which reads: 'A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or *between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration*. The party shall do so on its own initiative at the earliest opportunity' (emphasis added).

64 Trusz (n 1) 1673. See also Lévy and Bonnan (n 27) 85: '[T]he current trend seems to promote extensive disclosures on the part of *arbitrators* who may be under an obligation to search proactively for conflicts' (emphasis added); Goldsmith (n 25) 153 and footnote 54 therein, where the author refers to the proposals of the distinguished arbitrator, Professor Albert Jan van den Berg, namely: (i) always require disclosure by the parties of their funding; (ii) the so-called 'reverse conflict check', in which the arbitrator discloses ties to the parties and the funders; and (iii) require the funded party to ensure that no conflict exists throughout the proceedings.

65 Trusz (n 1) 1677. See Lévy and Bonnan (n 27) 85.

66 Goldsmith (n 25) 153.

complete the check. Another option proposed by commentators is to 'ask the parties and members of the tribunal to submit lists of funders, with whom any relationship believed to warrant disclosure exists, to a neutral third party . . . commissioned with responsibility for identifying any potential conflicts'.[67] Again, this approach does not seem easily practicable. Besides the fact that it is not so evident that an acceptable third-party, willing to assume this responsibility (and consequent liability) could be found, this option would undoubtedly delay the constitution of the arbitral tribunal.[68]

In conclusion, having 'the funded party' disclose the 'identity' of a TPF agreement 'to all the parties' involved 'at the outset' (or at the earliest opportunity) of the arbitration proceedings seems the best way to articulate a duty of disclosure in arbitration. Such a tailored duty of disclosure could be incorporated in the major arbitral institutions' regulations.[69] International arbitration providers and professional organizations are already beginning to address the issue of funder participation in international arbitration. In fact, in 2014, the International Council for Commercial Arbitration (ICCA), in conjunction with Queen Mary University of London, created a TPF Task Force—made up of a select group of arbitration practitioners, funders, government representatives, and academics—with the intent to study the phenomenon and devise a set of guidelines and rules for the practice.[70] Also the International Chamber of Commerce (ICC) has been giving increasing attention to TPF in International Arbitration, as confirmed by the publishing of a Dossier entirely dedicated to the phenomenon.[71] In addition, the International Bar Association (IBA) has recently amended the IBA Guidelines on Conflicts in order to include express reference to the TPF phenomenon as a potential source of conflict for arbitrators.[72] Nevertheless, to date, none of the major arbitral institutions' regulations has included a specific provision requiring the parties to arbitration to disclose the existence of a third-party funder.

67 ibid 153.

68 ibid 153.

69 As for *ad hoc* arbitration, any duty to disclose will probably depend on its acceptance by the arbitral tribunal, which will impose it on the parties on a case-by-case basis.

70 See <http://www.arbitration-icca.org/projects/Third_Party_Funding.html> accessed 1 March 2016. At the beginning, the ICCA-Queen Mary Task Force on TPF in International Arbitration grappled with the issue of how to define TPF in a meaningful way that was neither overinclusive nor underinclusive of various types of TPF arrangements (a task that had proven to be quite a challenge). Afterwards, the Task Force met in Miami on 6 April 2014, where a number of specific issues had been identified (eg disclosure, conflicts, costs, and impact on investment arbitration) and a correspondent number of sub-committees to tackle these issues had been created. On 12 February 2015, the Task Force met again in London. The meeting reviewed draft reports from the subcommittees on costs and security for costs, on TPF best practices, on investment arbitration and conflict of interests for arbitrators. It was decided that a new subcommittee would be set up to look into the issue of disclosure of TPF agreements in particular. Another meeting took place on 9 March 2015, in Frankfurt, where an update on progress made was given, and a mock hearing showcasing issues arising in connection with TPF arrangements was held. The last meeting of the ICCA-Queen Mary Task Force on TPF in International Arbitration took place in New York on 3 February 2016.

71 See <http://www.iccwbo.org/News/Articles/2013/New-ICC-institute-dossier-tackles-third-party-funding-in-international-arbitration/> accessed 1 March 2016.

72 See section 3.2.

5. CONCLUSIONS

TPF in international arbitration is a new and booming financing business, mainly driven by the large amounts of money typically at stake, which differs from other forms of financing normally available in litigation and arbitration, such as contingency fee arrangements, insurances, and loans. TPF in international arbitration represents a positive phenomenon for a number of reasons: it allows greater access to justice for litigants that would otherwise have no way of defending their rights; it implies a double assessment of the likelihood of the claim succeeding (by the counsel and by the potential funder) that leads to only the meritorious claims gaining funding; and it levels the playing field among the parties, especially in the earlier stage when settlement is considered. However, TPF may also create situations of potential conflicts of interest, from both the counsel's and the arbitral tribunal's perspective, which affect the attorney–client relationship, the independence of arbitrators, and especially, the arbitral proceedings and its outcome. If a conflict of interest is discovered, the arbitrator can be disqualified, the award set aside, and the entire arbitral proceedings will need to be started all over again. In order to avoid such devastating effects, disclosure is the first and essential step. To this end, the major arbitral institutions can play an important role by inserting provisions in their rules that deal with the disclosure of the involvement of a funder in the arbitration in order to safeguard the fairness of the proceedings. Remarkably, the International Bar Association has recently amended its existing guidelines on Conflicts of Interest in International Arbitration to take into account the dynamics of TPF, and to address the new potential situations of conflict that TPF creates. With the amendment of the General Standard No. 6, in fact, third-party funders are now equated to the parties for the purposes of a conflict of interest check, since it was clear that they might have a direct economic interest in the outcome of the arbitration. This represents significant progress towards the acknowledgment of the impact that TPF may have on arbitral proceedings, of the issues that it may pose, and a first attempt to give specific regulation of the phenomenon, in order to ensure transparency and fairness throughout the arbitral proceedings. But a more accurate regulation of such an important and exponentially increasing phenomenon in international arbitration would probably be desirable, at least in the form of a clear provision, included in all the main arbitral institutions regulations, of a duty to disclose the existence of a third-party funder. The question is: who is going to take the lead?