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THIRD-PARTY FUNDING – IN SEARCH OF A DEFINITION

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I. INTRODUCTION

In June 2015, an arbitral tribunal chaired by Professor Julian Lew ordered the claimant to confirm whether its claim was being funded by a "third-party funder." If so, the claimant was required to advise the tribunal and the respondent of the name and details of the funder and the nature of the arrangements, including whether, and to what extent, the funder would "share in any successes that the claimants could achieve in that arbitration."[1]

Whom exactly did the arbitral tribunal have in mind when making such an order? More precisely, what was envisaged with such an order? We can even go a little further and ask: with whom or what was the tribunal concerned with when making the order? We are obviously not concerned with making a reconstruction of the decision maker's state of mind, but rather ascertaining what the possible realities of the subject matter of the order may have been. Indeed, the questions to be addressed are as such: who are the third-party funders and what is the nature of the third-party funding? Though this article will indeed address these questions soon, it may first be interesting to consider the concerns of the arbitral tribunal, which undoubtedly exist.

The respondent had initially raised the argument that, in accordance with the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, it was necessary to check whether there were "conflicts with those involved in the arbitration, including in particular the arbitrator."[2] The tribunal later acknowledged this argument by expressing its concern about "the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder. In this respect the

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[1] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3, ¶ 13 (June 12, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4350.pdf (ordering the claimant to "confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, shall advise Respondent and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration").

[2] *Id*. at 1.

Tribunal considers that transparency as to the existence of a third-party funder is important in cases like this."[3] The arbitral tribunal also considered a second argument raised by the respondent: given the claimant's track record, the respondent was "considering making an application for security of costs because of its concern that a third-party funder may elect to withdraw at any time and […] may be able to evade a costs award in the event of an adverse decision."[4] Though the basis of such an application was unclear to the tribunal, it nevertheless showed sympathy "to the respondent's concern that if it is successful in this arbitration and a costs order is made in its favour, claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration."[5]

It is also worth noting that the respondent had raised another concern—which ultimately the tribunal did not have to address—about the "actual owners of the claims in this arbitration."[6] This question arose when the existence of a third-party funder to whom the claim had allegedly (or, better said, imaginatively) been assigned became apparent. Thus, in just a single case we can spot three of the different issues that have been generating so much public debate surrounding the third-party funding industry: conflicts of interests, security for costs, and ownership of the claim.[7] This observation appears straightforward and rather simple, yet an intriguing element is missing: which definition should be resorted to when ascertaining who and what a third-party would be? Further, in answering that question, what relevance (if any) should be given to the different concerns at stake?

As such, concerns surrounding decisions related to third-party funding provoke discussion. This note addresses that discussion and endeavours to elaborate on the definitional aspects of third-party funding. In doing so, we will first of all address the situations arising from potential conflicts of interest.

II. A DEFINITION FOR CONFLICTS OF INTEREST

An order to disclose the existence and further details of a third-party funding aims at avoiding any conflict of interest of the members of the tribunal and seeks to protect the integrity of the tribunal and the arbitral proceeding itself. The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration provide a formula that aims to bring clarity to deciding "who" a third-party funder is and "what" constitutes third-party funding:

> …any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct

[3] *See id.* at 2.
[4] *Id*
[5] *Id.* at 3.
[6] *Id.*at 1.
[7] Concerning the issue of the "*claim's ownership,*" *see* Jean-Christophe Honlet, *Recent Decisions on Third-Party Funding in Investment Arbitration*, 30 ICSID REV. 699 (2015). *See also* JONAS VON GOELER, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE, 225-51 (2016).

> economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.[8]

These guidelines were in fact considered in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, however this *explanation* may not be sufficiently accurate to cover every possible situation of the existing financial models. Bearing in mind that the standard seems to apply to "legal entities" only, one needs not a great deal of imagination to think of several examples where this *explanation* might fall short of accuracy.

For example, we may find entities providing funds to a party in a dispute because they have a political agenda to do so, as in the case of the Bloomberg Foundation and its "Campaign for Tobacco-Free Kids". In the investment arbitration brought by Phillip Morris against the Uruguayan government, the Bloomberg Foundation agreed to provide the respondent with external financial support.[9] This is a case of so-called "philanthropic" funding because, to the best of our knowledge, the Bloomberg Foundation holds no economic interest in the award nor holds any "*duty to indemnify a party*" even less so. It may, however, be that a member of the arbitral tribunal in that case is doing counselling work for that Foundation, or a partner in his law firm might have been appointed as arbitrator to an unrelated case brought by the Bloomberg Foundation, to name but a few instances in which a conflict of interest situation might occur.

A second example of an "economic interest free" funding would be the Gawker case[10], likely qualified as a kind of "vindictive" litigation. In this case, the billionaire capitalist Peter Thiel was targeted as having bankrolled "Hulk Hogan" in his lawsuit against Gawker Media, in a claim that "Hogan" brought on account of the sex-tape scandal involving him and a friend's wife.[11] However**,** Peter Thiel's had no pecuniary interest in the case and was seeking to destroy the Gawker media outlet. This revenge went back to the time when Gawker was persistently publishing rumours involving Peter Thiel's companies.[12] It is true that this case does not come from the arbitration realm, nor are motivations such as those existing in the two cases cited above common. They do, however, serve the purpose of illustrating how a third-party may be providing financial assistance to

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[8] INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, 14-15 (2014), https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918.

[9] *See Government of Uruguay Taps Foley Hoag for Representation in International Arbitration Brought by Philip Morris to Overturn Country's Tobacco Regulations*, FOLEY HOAG LLP (Oct. 8, 2010), http://www.foleyhoag.com/news-and-events/news/2010/october/uruguay-taps-foley-hoag-for-representation.

[10] Bollea v. Gawker Media, LLC 1325 F.2d 913 (M.D.Fla. 2012).

[11] *Id.* at 1327.

[12] *See* Ryan Mac, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan's Lawsuits against Gawker*, Forbes Online, https://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/#7b777a058d14, last accessed on 17 October 2017.

one of the parties in a dispute, albeit with no economic interest in the final decision, yet still producing situations that may give rise to conflicts of interest.

At this point, further considerations are justified where the conflated phenomenon of third-party funding and the IBA Guidelines are concerned. In doing so, we assume that the IBA Guidelines on Conflicts of Interests are somehow the "*source*" which the vast majority of scholars, commentators and, in particular, decision-makers resort to when addressing the issue of conflicts of interests. Though the scope of this note does not allow us to go into too much detail, we may in any event summarise some short thoughts. The starting point is, of course, "Standard 6" of the Guidelines, which deals with the issue of "relationships" of the arbitrator.[13] It begins by considering the "identity" of the arbitrator and his or her law firm, and that the relevance of such identity must be considered in each individual case. Standard 6 further provides that:

> The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure. [14]

It then moves to the section where third-party funding has surfaced, stating that:

> If 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.[15]

As we have seen above, the explanation of this standard regarding the third-party funding phenomenon rests on the assumption that third-party funders (and insurers) may have "a direct economic interest in or a duty to indemnify a party for, the award to be rendered in the arbitration",[16] therefore falling short of capturing several situations.

On the one hand, by considering that a third-party funder is a person or entity having a "direct economic interest" in the award, it does not capture cases such as *Gawker* or Bloomberg Foundation. Further, it does not cover cases of funding provided by parent companies or affiliates, holding an indirect economic interest in the award (but not a controlling influence), and much less banks and financial institutions bankrolling parties in their day-to-day business (or even providing recourse funding to a claim), that do not hold any kind of control over the funded

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[13] *See* INT'L BAR ASS'N, *supra* note 8.
[14] *Id*. at 13.
[15] *Id*. at 13.
[16] *Id*. at 13.

party. On the other hand, by addressing parties that are "legal entities," it falls short of encompassing individuals that bring claims, for instance against host states, which is a situation not so unusual as it would appear at first glance. More to the point, when specifically addressing the third-party funders, the criterion seems to rest on the "direct economic interest" only, foregoing the "controlling influence." However, many business models related to the third-party funding industry should be covered by this standard, as they possess the potential to raise doubts as to the impartiality and independence of the decision maker.

We may conclude that the definition of third-party funding contained in the IBA Guidelines is limited. In principle, some cases that fall outside the scope of the IBA definitional provision ought to have been covered. Notwithstanding, what really should matter—and what raises concerns—is whether there exists an individual or legal entity providing funds in a manner:

> [W]hich, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence . . . [and whether those doubts] . . . are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.[17]

Because the perception of the "sensibility" of the independence and impartiality of the arbitrator toward an external funding is so broad, one cannot address the concerns related to the third-party funding industry without resorting to a proportionally extensive definition. In other words, what is lacking where conflict of interest in third-party funding is concerned is a catch-all provision, so wide that every possible conflict of interest is analysed, not through the consideration of the existence of an external funding, but rather by considering a situation where the arbitrator may, from the point of view of a reasonable person, be influenced by other factors.

This consideration will render the definitional provision of Standard 6 almost useless and any definition of third-party funding, for the purposes of conflicts of interest, might be practically impossible to draw. The alternative, as suggested, is the consideration of a definition so wide that it covers every possible situation where a funding by an external party will produce "reasonable doubts" that the arbitrator may be influenced by external factors. This was precisely the result of the recent Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration;[18] in particular, we can point to No. 20 which states that:

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[17] *Id*. at 5.

[18] *See* INT'L COURT OF ARBITRATION, NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION (2017), https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration.

> Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should in particular, but not limited to, pay attention to the following circumstances: . . . The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or *a personal interest of any nature in the outcome of the dispute.*[19]

We have so far addressed the impact of concerns relating to "*conflicts of interest*" in the task to find a proper definition of third-party funding, so let us now turn to the other concerns.

III. A DEFINITION: COSTS AND SECURITY FOR COSTS

Virtually every reader will be aware of the now (in)famous case of *RSM v Santa Lucia*.[20] By now, Gavan Griffith's words have travelled around the globe and third-party funding might now be described as a "business venture" led by "mercantile adventurers" that embrace the "gambler's Nirvana: Heads I win, and Tails I do not lose."[21] Let us forget about some of the particulars of the RSM case, as it contains extraordinary contours related to its record of non-compliance with costs orders in the past. The main point in this situation is that, in his assenting opinion, Gavan Griffith considered that the existence of a third-party funder entailed the presumption of impecuniosity and, thus, this impecuniosity led to an order for security for costs. Whilst some disputes arise as to whether the presumption of impecuniosity should lie on the claimant (in this particular case, on "*RSM*"), or rather on the respondent, and whether this presumption must be posited every time one of the parties is receiving financial support from a third-party funder, we may resume the initial question: for these purposes, who are third-party funders and what is third-party funding?

Assuming that a presumption of impecuniosity could, or should, be drawn each time a third-party funder provides financial support to a case—which is highly disputable and, in our view, the wrong conclusion—could the definition contained in the IBA Guidelines be applicable? To put it differently, is it to be presumed that each time a third-party funder holds a "*direct economic interest*" in the award to be made in favour of one party, the latter must be "*impecunious*"? What about a definition of third-party funding that dispenses with the "*direct*

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[19] *Id*. at 5 (emphasis added).

[20] *See* RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs Incorporating Assenting Reasons of Gavan Griffith (Aug. 13, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3318.pdf.

[21] *Id*. at ¶ 12–14.

economic interest" factor, for instance in the case of subsidiaries providing financing support to parent companies, or in the Bloomberg Foundation case? Is a party funded by those entities presumed impecunious?

Let us now touch upon a connected issue, which is that of cost orders. Under English law, a court judge is able to make third-party cost orders.[22] It was in *Arkin v Borchard Lines Ltd.* that the court judge stated: "[w]here . . . the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs."[23] Similarly, during the now famous Excalibur case in 2014, the court judge ordered the external funder to pay the costs of the proceedings.[24] The Excalibur decision was confirmed on the 18th of November 2016 by the Court of Appeal, with Lord Justice Tomlinson holding that: "[a] litigant may find himself liable to pay indemnity costs on account of the conduct of those whom he has chosen to engage – e.g. lawyers, or experts [who] may themselves have been chosen by the lawyers, or witnesses… The position of the funder is directly analogous."[25] Again, these cases arose in the context of litigation before court judges who hold the power to order third parties to pay the costs of the proceedings. However, in the context of a possible extension of the arbitration clause to third-party funders – therefore extending the jurisdiction of the arbitral tribunal – this scenario may well be replicated in the arbitration setting.

This is perhaps not as bold a proposition as it appears, as the financing structure in the *Crystallex* case may show.[26] Tenor Capital invested in a complex financing structure, involving the arbitration Crystallex brought against Venezuela for the expropriation of the *Las Cristinas* mining. The funder financed the current operational activity of the Crystallex company, channelled funds exclusively attached to the financing of the claim against Venezuela[27] and appointed members to Crystallex's board of directors. Other aspects are also worth noting: the period of the loan (of $36 million) was based on "Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award."[28] The loans were to be used to "(i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of

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[22] *See* Senior Courts Act 1981, c. 54, https://www.legislation.gov.uk/ukpga/1981/54/contents; *see also Civil* Procedure Rules 1998, § 45.2, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#rule45.2.

[23] Arkin v Borchard Lines Ltd. [2005] EWCA (Civ) 655, [2005] CP Rep 39.

[24] *See* Excalibur Ventures LLC v Texas Keystone Inc. [2014] EWHC (Comm) 3436.

[25] *See id.*; *see also* Abu-Ghazaleh v. Chaul, 36 So.3d 691 (Fla. Dist. Ct. App. 2009).

[26] Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016).

[27] Crystallex (Re), 2012 CanLII 2012 O.N.C.A. 404, (Can. Ont. C.A.) (referred to by the Canadian Court as the "*pot of gold*").

[28] *See id*. at 11.

the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time."[29] In return, Crystallex would pay Tenor "a $1 million commitment fee, $35 million of the loan amount would bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually" and Tenor would "receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced."[30]

Finally, "Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly: (a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor."[31]

The extension of the arbitration clause has already been thoroughly analysed by others.[32] Generally speaking, the extension of the arbitration clause to third parties has been admitted when some kind of connection between the parties and the whole agreement may be observed. Such connections will be inter alia the "involvement in the negotiations, execution, performance or termination of the agreement, thus forming a community of interests with respect to the business transaction."[33] What better example than Crystallex could be put forward to demonstrate a direct and rather intense involvement of a third party in the legal relationship underlying the arbitration and in the arbitration itself?

If postulated at the appropriate procedural time, and if the applicable set of rules (legal and institutional) allows the joinder of third parties, a case such as Tenor / Crystallex could lead to a situation where the funder could have become responsible for costs and even for any indemnity based damages award. The consideration of such a result could also be replicated in the context of some jurisdictional objections that have been raised in the investment arbitration setting,

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[29] *Id*. at 11.

[30] *Id*. at 12.

[31] *Id.* at 12.

[32] BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 8 (Kluwer Law International 2005).

[33] *See* Duerte G. Henriques, *The Extension of Arbitration Agreements: A "Glimpse" of Connectivity*, 32 ASA Bulletin 12 (2014). In this respect, the Peruvian Arbitration Act contains a very interesting example of a law expressly admitting the extension of the arbitration clause building on the theoretical basis developed by scholars, commentators and case law: "*El convenio arbitral se extiende a aquellos cuyo consentimiento de someterse a arbitraje, según la buena fe, se determina por su participación activa y de manera determinante en la negociación, celebración, ejecución o terminación del contrato que comprende el convenio arbitral o al que el convenio esté relacionado. Se extiende también a quienes pretendan derivar derechos o beneficios del contrato, según sus términos*" (Art. 14 of Law Decree No. 1071 of July 190, 2008).

concerning the question of the "claim's ownership".[34] Since we are now addressing the definition of third-party funding from the perspective of the concerns attached to this phenomenon, after looking at the Crystallex case we would easily concede in suggesting a definition where the "control" of the claim and even the possible "extension of the arbitration clause" would be erected as requisites for there to exist such a financing structure. Accordingly, we could suggest a definition such as, for instance:

> Third-party funding is an agreement whereby a natural or legal entity provides financing resources to a party, in such terms that will allow or entail the extension to the funder of the arbitration clause, and having a retribution such as the repayment or a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.[35]

Yet, if such a definition were to be applied within the context of the issues related to conflicts of interest, the outcome would certainly be an extremely narrowed criterion. Only few would meet the definitional threshold. Conversely, a definition such as the one set forth in the IBA Guidelines would be extremely broad to address the concerns related to costs and security for costs. Thus, a possible approach to provide for a definition of third-party funding would be to adopt not only one, but rather several definitions, depending on the issues at stake (that is, one definition for conflicts of interests and one other completely different definition for the purposes of the security of costs and costs allocations). In any event, let us look now at another issue related to the third-party funding.

IV. THIRD-PARTY FUNDING AND PRIVILEGE

Another very important area where the definitional task may prove to be an intricate matter to deal with is where the exception of privilege (or confidentiality) arises in international arbitration. When a funder makes a decision of investment, it has access to a large scale of documents and other evidence. It not only assesses all the evidence and documents, but also makes an analysis of the strengths and weaknesses of the case, produces internal memoranda and discusses the case with the funded party and its counsel. The opponent might well be tempted to ask the tribunal to order the funded party to produce those documents and materials. The temptation can be even greater if the opponent has received a decision of "non-investment" by the potential funder.

In some jurisdictions, it will be hard to argue the exception of disclosure (or confidentiality) as it might be provided in their procedural rules that the parties and even third-parties have the duty to cooperate with the court (and also with the arbitral tribunal) in the truth-finding task. Other jurisdictions, however, expressly

[34] *See* Jean-Christophe Honlet, *Recent Decisions on Third-party Funding in Investment Arbitration*, 30 ICSID Rev. 699 (2015).

[35] (emphasis added).

allow the application of the disclosure exception on the "common interest" or privileged information doctrines. Those are the cases of the common-law jurisdictions such as the U.S. and the U.K.. In any event, even in those jurisdictions there are exceptions to the application of those doctrines. For instance, in *Leader Techs. Inc. v Facebook, Inc.*[36] the court judge considered that the attorney-client privilege is waived if privileged materials are disclosed to third parties. The court judge thus concluded that the information that had been exchanged between Leader and its potential funder was not covered by the attorney-client privilege exception, and the "common interest" doctrine would not apply because a funding agreement had eventually not been concluded.[37] The heated debate that followed this decision did not produce a clear picture as to the meaning of "common interest", particularly as to the need of existing a common identical interest or a mere common commercial interest.

Conversely, in *Devon IT, Inc. v IBM Corp.*[38] the court judge considered not only the existence of a non-disclosure agreement, but more importantly the existence of a "shared common interest in litigation strategy" to be sufficient grounds to apply the privileged information exception. The court further considered that:

> Burford and Devon now have a common interest in the successful outcome of the litigation which otherwise Devon may not have been able to pursue without the financial assistance of Burford.[39]

Hence, the question that arises is whether any third-party funding structure would be sufficient grounds to uphold the "privilege" exception. To put differently, if third-party funding structures produce a "common interest" between funder and funded party, what must third-party funding be? Would the definition of the IBA Guidelines be sufficient to find a common interest?

V. THE COMPLEXITY OF FINDING A PROPER DEFINITION

The examples provided above show how hard the task of finding a comprehensive and structured definition may be. Other reasons for this complexity may be found in the launch paper of the "ICCA – Queen Mary Task Force on Third-Party Funding",[40] where William 'Rusty' W. Park and Catherine A. Rogers noted a "significant disagreement about the exact nature of third-party funding" among the members of the Task Force. Consistent with these views is

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[36] Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376 (D. Del. 2010).

[37] *See id.* at 376-77.

[38] Devon IT, Inc. v. IBM Corp., No. CIV.A.10-2899, 2012 WL 4748160, at *1 (E.D. Pa. Sept. 27, 2012).

[39] *Id*. at *1 n.1.

[40] *See* William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, Austrian Yearbook on International Arbitration 113, 116 (2015).

the dissenting opinion of Edward Nottingham in *RSM v Santa Lucia*: "[…] indeed, how is third-party funding defined? Would an insurance contract under which a State financed the defence of a case fit the definition?"[41]

To make things even worse, the notion or definition of third-party funding may be found in a vast array of legal instruments and doctrinal works dedicated to this business model. With no intent to exhaust the list, we may provide a few examples. For instance, Article 2 of the European Union-Vietnam Free Trade Agreement states that:

> "Third-party funding" means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.[42]

The European Union's proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership (TTIP), and the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) contain verbatim provisions as to the definition of third-party funding. A further example may be found in Art. 2 of the Code of Conduct of the Association of Litigation Funders of England and Wales, which sets forth that:

> A litigation funder has access to funds immediately within its control, including within a corporate parent or subsidiary; or acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary […] to fund the resolution of disputes […] in return the Funder […] receives a share of the proceeds if the claim is successful (as defined in the LFA); and (2.6) does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.[43]

Scholars and commentators have also provided different definitions. For instance, Catherine Rogers defines third-party funding as:

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[41] *See* RSM Production Corporation v Saint Lucia, ICSID Case No. ARB/12/10, Award, ¶19 (Aug. 12, 2014) (Notthingham, dissenting).

[42] *See* Free Trade Agreement, Eur. Union-Viet., ch. 8, sec. 2, art. 2, Jan. 2016.

[43] *See* The Code of Conduct for Litigation Funders, Article 2 (January 2014), http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf, last accessed on 14 January 2017.

> […] the financing of an arbitration by a party who has no pre-existing interest in the dispute, usually on the basis that, if the funded party is successful in the dispute, the funder will be paid out of the proceeds of any amounts recovered as a consequence of the dispute, often as a percentage of the recovered amount.[44]

Yves Derains[45] and Victoria Shannon,[46] amongst many others, follow the same pattern of identifying the common structure of third-party funding as a model of financing a claim by an external unconnected party to that claim, against a percentage of the proceeds, a success fee, or a combination of the two. The aim of this note is not to draw a complete picture of the existing definitions, let alone a scientifically elaborated definition of third-party funding, but rather to lay down a few remarks that will enable further elaboration on the topic and will possibly help in finding a proper definition. In doing so, it may turn viable to posit a few criteria that will necessarily lead to exclude some forms of financing disputes from the scope of the modern third-party funding business model. In any event, all of this must be seen only as a work in progress and does not pretend to exhaust the study and discussion of this subject matter.

On the other hand, we are not concerned in making a historic reconstruction of the financing of claims industry, and even less so to affirm which form of financing is prevalent in the market.[47] As a matter of fact, we will be concentrated on the modern models of financing provided by entities external to claims, which are considered in several recent decisions made by arbitral tribunals, and are under scrutiny by scholars and commentators across the globe. Lastly, an important note must be made here: this article does not aim to classify the third-party funding from a legal view point. Indeed, we do not intend to provide an answer to questions such as: is third-party funding a "partnership", a "joint-venture", or a "gaming or wagering" (jeu et pari) contract? Is it a different type of contract, or is it rather a "tertius genus"? The scope of this article will not allow us to delve deeply into this and therefore, we must leave that task for another occasion.

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[44] *See* CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION Ch. 5 (Oxford University Press 2014).

[45] *See* Yves Derains, *Foreword to* BERNARDO M. CREMADES & ANTONIAS DIMOLITSA, *THIRD-PARTY IN INTERNATIONAL ARBITRATION* (ICC DOSSIER), 5 (Bernardo M. Cremades & Antonias Dimolitsa eds.) (2013).

[46] *See* VICTORIA SHANNON & LISA B. NIEUWVELD, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, (Kluwer Law International 2012), at 3; *see also* Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1275-1276 (2011).

[47] For instance, James Clanchy reports that "*Freight, Demurrage and Defence (FD&D) Clubs*" have been "*major funders of claims in international arbitration for more than 125 years*", in blog post *Third-party Funding in Arbitration: The First 125 years* (May 17, 2016), http://blogs.lexisnexis.co.uk/dr/third-party-funding-in-arbitration-the-first-125-years/ (last visited Nov. 5 2017).

VI. THE DEFINITIONAL TASK: DO WE NEED TO DEFINE?

When embracing the task of defining third-party funding, there are a few initial disquietudes that arise. First, why do we need to define? Secondly, should we define "who" or rather "what"? Finally, how should we define? These are questions that we will endeavour to answer in the next sections. We assume that the subject-matter of the definition is a business model of the "real life" named "third-party funding". This assumption prompts the question: is it really necessary to define or conceptualize this business model? On one hand, this need will arguably only arise if its "notion" lacks legal certainty and if its application in real life does not warrant equality of criteria (and, therefore, if it has been producing different outcomes to particular similar cases). In other words, definition is needed if reasons of legal certainty and equality of process require doing so. One can hardly deny the existence of third-party funding as a fact of the real life,[48] and much less the references to it in rules, case law and legal practice. Therefore, the next question is whether this notion of third-party funding has been (and is being) treated equally in all cases and, consequently, whether legal certainty is needed in this respect. We assume that the examples provided above demonstrate that lack of legal certainty.

However, other reasons will justify the need for a definition. Indeed, adjacent to these lines runs an anticipated notion of need for regulation – whether this "regulation" will assume the vest of legal rules, codes of ethics, guidelines or mere recommendations is yet to be concluded. We should entertain no doubts with regard to the fact that the industry of financing litigation and arbitration has been seeing a real burst in the past few years, giving rise to a modern model of financing disputes. Along with this phenomenon, a host of concerns (ethical, economic, legal, cultural and the like) have arisen, some of which with political and public dimensions. Arguably, the service of justice may not be "commoditised" so easily and this particular "market" should not be an unregulated "no man's land". After all, at its various levels, justice in general and more particularly in arbitration is subject to numerous layers of regulation. Why shouldn't third-party funding be regulated, at least to level the playing field? The above is the line of reasoning commonly used in public debates and commentary works. It will not be discussed here in detail, but merely observed as a token of the central issue: one cannot pretend to regulate without defining. Finally, the issues noted above show that a particular (social, economic, cultural, etc.) archetype of the real life raises several kinds of concerns which perforce the intervention of the regulator in order to achieve one or more goals, such as the mere regulation of that

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[48] This observation is not so misplaced as it might initially be thought because there are some players in the market, namely third-party funders, that simply deny the existence of third-party funding and prefer to speak about vague notions of "*litigation finance*" or even "*alternative finance*" as a means of working around the hindrances they face when confronted with recent decisions.

archetype, its submission to a tax regime, or even its prohibition. Hence, the definition would be paramount to such kinds of intervention.

VII. METHODOLOGICAL MISCONCEPTION?

Before moving to the next steps, one should point out one kind of (arguably) methodological misconception. As a matter of fact, we often witness the confusion between the "players" (the "actors") and the activity consisting of third-party funding, in terms of using indiscriminately one or the other, or even both at the same time and in the same context. Consistent with this approach is another confusion, which is also often seen, consisting of extrapolating the definition of "third-party funding" from the activity(ies) carried out by a "third-party funder" labelled as such, thus excluding from that definition third-party funding carried out by entities not labelled as "third-party funders." Another similar misconception that is often seen results when the concept of a "third-party funder" is extrapolated from the activities typically associated with "third-party funding", thus excluding from the notion of "third-party funder" those entities that carry out other activities (such as equity investments) different from the pure "third-party funding", even though they actually carry out "third-party funding" as well.

Furthermore and alternatively, instead of allowing the extrapolation towards a definition, these misconceptions have given ground to posit the inexistence of third-party funders and third-party funding as such. It may now seem superfluous and even foolish to pretend that a third-party funder is a non-existent entity, and that third-party funding is a non-existing activity. It doesn't seem to be arguable either that such a conclusion arises from the fact that numerous players in the banking and financial industry, which are not labelled as "third-party funders", do precisely what is described by scholars and commentators as "third-party funding." Neither seems to be reasonable to press to that conclusion on account of the fact that the players typically named as "third-party funders" do much more than what is usually assigned to "third-party funding".

These conclusions are manifestly flawed and obviously stem from a "self-definition" approach. They rely on the assumption that "third-party funding" is what (and only what) "third-party funders" do, and that a "third-party funder" is who (and only who) carries out an activity labelled as "third-party funding". Moreover, they are grounded on a "personification" of an activity, that is, that the notion of "third-party funding" may only exist where a "third-party funder" carries out an activity classified as "third-party funding". Evidently, "third-party funding" is not all that "third-party funders" do, because "third-party funders" are allowed to pursue many activities other than "third-party funding" and numerous entities, other than those labelled (or "self-labelled") traditionally as "third-party funders", do "third-party funding" as well. These considerations perforce immediately that the "image" of an entity carrying out a particular activity should be left outside the equation implicated in this task.

Indeed, the crucial task resides in defining a specific activity ("what"), rather than focusing on the entity "who" might undertake such activity. Once finished

the task of defining "what" third-party funding is, determining "who" third-party funders are will be self-evident. The tricky task is, therefore, to define a particular activity – a particular business model of "third-party funding". Once we successfully accomplish that task, we might readily concede that "third-party funders" are those entities carrying out the activity of "third-party funding", even though they are allowed to pursue other totally unrelated business.

VIII. DEFINING "WHAT"?

We argued above that there is something out there to define. What is, then, to define? We do know, without hesitation, of the existence of a particular business model: a financing of litigation/arbitration from an external entity to the underlying dispute. The market shows us that there are many forms for providing funds and there are several ways for the funder to be reimbursed. The funder may have diversified motivations to channel the funds, not all coincident or reconcilable with one another in each and every case: some may have the perspective of a pure investor, while others may have institutional reasons (such as funding an affiliate), or may aim a strategic commercial target (such as funding a third company to eliminate a competitor), or even "philanthropic" goals (such as funding a dispute to fight a particular industry, such as the tobacco industry). As we have seen above, "vindictive" goals may also stand in the equation. Finally, the funded party may have different motivations in resorting to funding external from the dispute: some will do so for absolute impecuniosity and some will opt for external capital due to cash flow or other internal structure reasons. All that – again – without any concern for exhausting the list.

In any event, a particular business model has been created and has been (and is being) developed for several years now. Thus, we may easily conclude that this model is presently a social, financial and even cultural-political "archetype". This is the "reality" subject to this analysis and to a definition.

IX. HOW TO DEFINE?

An author once wrote that "for the most part we do not first see, and then define, we define first and then see."[49] However, the definition method discussed here is anchored precisely in the first proposition of the statement: we first see, and then we define. Thus, the method may seem simple at this point. We should concentrate on the facts of the real life – that is, the social, economic and financial model we presently observe (the "archetype") – and then perceive what its characteristics are. For instance, from those facts of the real life, we should ascertain its cause (that is, its social and economic function), their purposes, the

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[49] WALTER LIPMANN, PUBLIC OPINION, 81 (1961). He goes on to say that "*in the great blooming, buzzing confusion of the outer world we pick out what our culture has already defined for us, and we tend to perceive that which we have picked out in the form stereotyped for us by our culture.*"

name given by the parties ("nomem juris"), the remuneration of one party (the funder) and the form the funding assumes, the subject matter of the agreement and even the formalities associated with it. After gathering all those (and possible other) characteristics, we should ascertain what the common notes of those facts are. From those facts, we can endeavour to build a legal (arche)type, a legal model, or, to be more concrete, a legal definition.

The method that we will endeavour to develop is similar to the dialectic judicial reasoning necessary for applying the law to the facts related to a particular dispute. In the very same way that judicial reasoning reaches a particular conclusion from the collection of established facts as to the framing of those facts into a particular legal rule, we will endeavour to arrive at a legal conclusion from the collection of the facts of the real life. In other words, from a collection of factual elements we may be allowed to frame them into a legal rule or a legal type, the only difference being that in the judicial reasoning we already have the legal rule to apply and with this proposed method we will need to create the legal type (and ultimately a legal rule).

These lines highlight the importance of an empirical fact-finding phase, which is vital to provide us with the ingredients to reach our goal. This work will provide the "indications" (or "indices") of the type to be investigated in the field. Without prejudice to a more thorough investigation in this respect, we may work with several experiences that have become public during the past several years. The elaborations that will follow below obviously rely on the assumption of the accuracy of those examples.

X. A POSSIBLE METHOD

Speaking from a strictly methodological point of view, the construction of a type will entail the need for an inductive process of merger between the particles that are common within a plurality of individuals. [50] In this endeavour, we may resort to the theory of the "Fuzzy Sets" developed by Lofti Zadeh,[51] which allows us to use a gradated selection process rather than a purely binary method of inclusion or exclusion. In this sense, we may set aside a method that will merely produce a positive or negative outcome (the assessment produces only results of "1" or "0"). This is the reasoning underlying the propositions stated above as to the effect of requiring a perfect match between what third-party funders "do" and what third-party funding "is".

Instead, we will resort to an approach that will be adapted to the fluid nature of the boundaries of the facts of the real life, allowing a gradation and the adaptability of the judgement of interconnection between each factual case and the type. In this sense, we may arrive at a result where we spot the very core of the reality, and at the same time we may have regard (or disregard) to peripheral

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[50] *See* PEDRO PAIS DE VASCONCELOS' *CONTRATOS ATÍPICOS*, 28, 37, 39, 45, 113 (1995); s*ee also* RUI PINTO DUARTE, *TIPICIDADE E ATIPICIDADE DOS CONTRATOS*, 71 (2000).

[51] Lofti Zadeh, *Fuzzy Sets*, 8 *Information and Control* 338 (1965).

elements of that reality. In fact, the "types" assemble elements that are common and elements that are uncommon to several cases, which are thus conglomerated around a criterion essential to that reality. This approach will allow us conclude for a reality that is "typically" something. In this sense, a "type" is a "fuzzy set". This method also requires the existence of particles/elements that are likely capable of individualising the "type". We may call it "notes", or rather "keys", which is an analogy reminiscent to the musical environment that will illustrate the idea perfectly. Indeed, let us take the example of a particular script of a musical composition, say the "Ode to Joy".

We all know that its script is composed of thousands of musical keys, and we can read all those keys in the script. We do not need, however, to hear all of the keys of that script to conclude immediately that it is the "Ode to Joy" that is being played. For some, it just suffices the very first key or the first set of four keys. This phenomenon happens not only because the listener might be a music expert, but also and foremost because at some point, we might be listening to the "typical" notes or keys of the "Ode to Joy". We recognize it, in some cases, almost by pure instinct. The music interpreter may add or delete some keys to the original music script but, in any event, as long as the "typical" keys are there, we may still conclude that we are listening to that masterpiece of music.

The same applies to the approach of the definition or "typification" of third-party funding: all we need is to listen to the "typical" keys. The question that now follows is to ascertain whether or not we should always require the existence of the same (and only the same) "keys" to conclude for that definition. This question is related to a matter of "extent" versus "comprehension" of a particular "type" because there is in this topic a rule of logical proportionality between extent and comprehension. That logical rule is relatively simple to draw: the more extent, the less comprehension, and vice-versa. In other words, the more keys/notes we require to grasp a "type", the fewer realities will be encompassed by such "type". Consequently, the question is: do we need to "hear" all the same keys of the original script or do we need just a few – the typical ones?

The former approach is the binary method referred to above. According to this approach, the relevant test is only a conclusion of a "perfect match" ("yes or no"), thus producing a "classificatory definition". Hence, this method produces results such as denying the existence of "third-party funding", just because the same "keys" are not always present in the actual financing business model. By contrast, the latter allows a gradated analytical process, and it is capable of encompassing many more of the facts of the real life. Instead of producing a classification, this approach leads to a "description" and achieves its goal by granting a general significance (a "meaning") to the facts of the real life.

These considerations drive us to the next questions: what are, then, the "typical" keys to the third-party funding definition? May we add or subtract some keys and nonetheless still have that definition?

XI. ELEMENTS OR KEYS OF A TYPE

In order to proceed with the next part of this short investigation, we need to determine what categories of "notes" or "keys" are to be found. As pointed out above, the keys may be related to several general categories. The first will be the "key" pertaining to the legal cause (according to the modern conceptions of the law of contracts of the "civil law", the legal cause is the economic and social function of a contract). For instance, the social and economic function (cause) of a sale and purchase agreement is the transfer of ownership of a particular item from one party (seller) to another (buyer).

The second is the goal intended by the parties. In the case of the purchase and sale contract, the goal of the seller is one thing only: to dispose ownership over the item or asset for a sum. The goal of the buyer might not be the same in every stance: some may wish to buy an asset for re-sale; others may wish to purchase a property to reside there; other for renting; etc. A third key is the denomination ("nomem juris") that is given by the parties, which seems to be self-evident. In this example, it is the "purchase and sale agreement". The fourth is the object of the agreement: in our example, the object of a purchase and sale agreement is a thing (an item or an asset, real estate or otherwise; a "Sache" according to German terminology). The fifth is the counterpart of remuneration. In the purchase and sale agreement, there are two respective counterparts: on one hand, the transfer of property to an item or asset and, on the other, payment of a sum.

The configuration (that is, the layout) of the operation, the formalities adopted and the standing of the parties to agree, are keys associated with a sixth category. In the majority of cases (of a purchase and sale agreement) the parties opt for standard terms and conditions and follow a pattern. Likewise, the usual parties are the owners and buyers, but in many cases representation by power-of-attorney is admitted or imposed by judicial order (i.e. selling of assets of a company in liquidation). Last but not least, the "signification"/ meaning of the type is the characteristic that gives a sense to the particular legal operation. This key is the element that gives a criterion to the configuration of a type. It is its characterizing and differentiating factor. This key endeavours to ask two fundamental questions: what is the general outlook (significance) of a "type"? Why does this "type" deserve or require legal protection or regulation? This key, as we will see, is of particular relevance in the definition of third-party funding.

XII. FINDING THE TYPE OF THIRD-PARTY FUNDING

Research into literature, case law, regulation and anecdotal evidence[52] shows us several keys to build the type of third-party funding. We will endeavour to elaborate on these keys according to the generic classification referred to above.

[52] It is worth noting that most works that have been done on the topic of third-party funding rely on experiences reported as "anecdotal". This shortcoming would not exist if the players of this business – both funders and funded parties – were not so keen to

(i) Social and economic function (cause). The model of third-party funding that may be observed is undoubtedly the funding of a party to a dispute, providing that party with the financial means to pursue a claim or defence. The key element is, therefore, the provision of financial assistance for a party to a dispute. This key will mean that other ways of supporting a claim – for instance, the filing of "amicus" briefs or "pro bono" defences – would not qualify as third-party funding.

(ii) The model of third-party funding affords many goals/intents, which necessarily differ from one party to the other. When we seek the intent or goal, we endeavour to answer the question: "why does a party resort to third-party funding and why does a third-party funder provide financial assistance?" The goals of a funder range from pure profitable investment (with aleatory results), to complying with legal obligations for providing financial assistance (for instance, legal obligations of a parent company towards its subsidiaries, in the very same vein a parent must provide financial support to a claim pursued by his impecunious sons – whether these cases are related to "third-parties" is a different question. Again, "philanthropic", "vindictive" and other kinds of "interest-driven agendas" may be put forward. Further, it is also possible to think that a funder may be providing funds to a "test case" for future disputes, or even to compel future legislative initiatives. As regards to the funded party, their goals may vary from pure impecuniosity to considerations of managing cash flow.

(iii) The designation ("nomem juris") seems a fairly easy topic to cover: litigation or arbitration funding agreement or just funding agreement are common titles. However, we must admit that cases such as "philanthropic" funding, or funding structures among companies of the same economic group (to name but a few), may be in want of an express designation, but nevertheless keep the essential character of a provision of funds amounting to third-party funding. This will mean that a *name* may bear no significance.

(iv) The object of the agreement for providing financial assistance to a claim or a defence of a claim is the claim itself and the funds to provide to the assisted party.

(v) The counterparty or remuneration admits variations: the most common form of retribution is a percentage of the proceeds (between 30% and 50%) or a multiple calculated over the amount of the investment made by the funder (the "1/3 rule"), but it may also be the transfer of property of some assets subject to specific performance or even repayment of funds with interest. Cases such as those of a "philanthropic" nature have no remuneration, but if other elements exist in the financing structure there would be no reason to exclude them from the definition of third-party funding, provided that the concerns attached therein justify such inclusion.

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preserve the secrecy that covers all transactions in this area. Just as a matter of a side note, we believe that this secrecy is not beneficial to this business, and contributes tremendously to the reluctance and distrust that the industry of third-party funding is regarded with in numerous economic and legal circles.

(vi) As for the layout of the business, this topic is underpinned by considerations of private autonomy. Considering that the activity of third-party funding, as far as we know, is not yet subject to regulation– except possibly applicable regulation as to the licensing of the activity itself – the general principles of the law of contracts apply to their full extent. Therefore, there are a variety of solutions tailored by and between the parties, which may be considered as "standard" but not a strict indication of "type".

(vii) The formalities of the funding agreement are similar in virtually every operation: generally, the funding agreements observe a written formality; they are drafted as a formal written agreement. In any event, we are not aware of any legal requirement as to the formality of the funding agreement and this element does not play a crucial part in the process. In other words, we still may have a third-party funding model even if no written agreement has been concluded between funder and funded party.

(viii) In respect to the parties (or to the standing of the parties), there is a very important key to highlight. In most commentaries, the third-party funding operation is framed as a bilateral relationship (funder and funded) and often the role of a "third party" in the process is forgotten. That "third party" is the attorney of the funded party. The channelling of funds is generally subject to the intervention of the attorney. The attorney is the primary source of the needs for financing a claim and more often than not the agent to negotiate with the funder. The investment of the funder depends on the invoices of the attorney, and the performance of the latter is always monitored.[53] The payment of the funder's interests in the proceeds is often done through the attorney and the latter usually signs priority agreements. However, it is understandable that ethical considerations applicable to the attorney intervene in this analysis. Indeed, ethical regulations in some jurisdictions do not allow the attorney to sign the agreement entered into between the funder and the funded party (France and Belgium being two of such jurisdictions). As such, this feature will vary from one jurisdiction to the other, and therefore this may not be qualified as having a fundamental character.

(ix) The funding is provided by a party that is external to the legal relationship in dispute. If the party is not "external", then it is or was already a real party and the issue of third-party funding "as is" does not arise, or never did. Because attorneys working on a contingent or conditional fees basis are not an "external party", in the sense that they act as proxies of their clients and they may be called as a legitimate "alter ego" of the parties, they do not qualify as "third-party" funders. By the same token, claimants appearing on behalf of a right-holder (such as are the cases of subrogation by insurers and the like, mutual insurance associations – protection and indemnity clubs – and others acting on behalf of the party owning a claim) are not "third-parties", albeit providers of funds to a claim.

[53] Interestingly, there is anecdotal evidence that shows that a low level of the attorney's invoicing is indicative of a poor performance or less careful intervention of the attorney, thus raising a flag to the third-party funder.

The reference to the "underlying legal relationship in dispute" aims to address the following element: if there is a party to a contract or to any other kind of legal relationship in dispute, such party might be qualified as holder of a standing of its own (in the dispute), and although being a provider of funds, it is not a "third-party funder" merely because it is providing for the financial needs of "something" that, at least partially, is of its own.

Let us use the example of a construction contract and a dispute brought by the contractor against the subcontractor, under the same contract that was also concluded with the owner. Let us assume that a joinder of the owner would have been possible in the arbitration case. If the owner is financing the contractor in any way – for instance, by keeping the invoices timely paid in spite of the fact that the works were not completed – is the owner "third-party funding" the contractor? Very unlikely, we would have to conclude.

(x) The "*meaning*" of third-party funding is the general significance of the operation. We have pointed out above that this key is probably the most important one to define a particular legal type. This key is aimed at answering two fundamental questions: what is this reality that we label as "*third-party funding*"? Why do we (does the law) care about it?

From the funded party point of view, the "*funding*" is exactly a financial resource. Justified by either the lack of financial means or just by managing cash flow concerns (or event other causes), it is a financing of a party's claim. From the perspective of the funder, it generally assumes the exclusive character of a pure investment. This investment is made in a claim (or host of claims in the case of portfolio financing). The circumstance that we are speaking about an "*investment in a claim*" is not blurred by the fact that other than monetary profits may be envisaged by the funder. The cases of philanthropic funding, funding of "*test cases*", funding to compel legislative initiatives, payment of subsidiaries responsibilities, and the like, although do not have a conspicuous monetized profitable return attach to it, still fit into the notion of "*investment*" that has been made by the funder. What may be different in those cases is the "*remuneration*" that the funder expects to receive. Conversely, there are cases where an investment is made as part of a larger contractual framework. Indeed, there are cases of private equity, hedge funds, loans, and the like entered into with a claimant, where the claim (or claims) are taken into account only to assess the chances of repayment. These claims are seen merely as a part of the debtor's assets or as particular aspect of the economic activity of the funded party. For this reason, those cases would not be enough *per se* to conclude for a "*key*" and therefore would not fit squarely into the necessary requisite of a third-party funding definition. Accordingly, the reality that we have been analysing is an investment specifically made in a claim or host of claims.

As regards to the second part of this "*key*"(why do we, or the law care about it?), the rationale might not be so undisputable. It first starts from the easily conceivable assumption that the industry of third-party funding is unregulated. That is, as far as we know, third-funding has not been addressed before as an "*entity*" that needs to be perceived, analysed and subject to legal *modulation*.

Nonetheless, it is difficult to avoid raising eyebrows when we first hear of it, and it is far less easy to ignore numerous statements and reflexions mirroring concerns (most of them are justifiable) voiced by different players of the legal community, especially within the investment arbitration community. Indeed, third-party funding raises concerns inasmuch as it unveils the interference and control of a "*third party*" over a lawsuit or arbitration. Intertwined with this concern, one may also find the claim that third-party funding may lead to abuse of process, especially in the context of investment disputes. Thus, a key to search for might be the power over, and entitlement to control, the claim. This element calls for a further elaboration.

XIII. THE RELEVANCE OF CONTROL

Because it may provide the ultimate meaning for this business model, the control exerted over a claim may be the pivotal key to the definition of third-party funding, around which all the other keys revolve. This key has somehow been forgotten in all definitions and all other analyses of this legal phenomenon, but its importance will certainly be apparent just for being pointed out.

Let us use the example of Crystallex, which reflects comprehensively all the aspects that we have been speaking about. What better example could we use to illustrate the "interference" relevant for the purposes of third-party funding? True enough, there was a pure financing (subject to repayment with interest), but there was also a financing of a claim relevant for the definition of third-party funding. More importantly, there was a true interference of the funder in the business activity of the funded party, and, moreover, in the arbitration claim. If we look exclusively at the loan aspects of the agreement, we would be forced to conclude that there is no "third-party funding": the duty to repay the loan was not exclusively dependent on the outcome of the claim and there was a part of the loan channelled to other purposes than the arbitration claim exclusively. However, what stronger interference could we ever imagine? The control, however, is exerted not only in the Crystallex fashion, but may appear in "many shapes and forms".

It is commonly claimed amongst funders that they do not control the case. They further add to this statement the prohibition in some jurisdictions (Australia and Hong Kong to name a couple), of exercising such control. However, reality shows us otherwise, and Jonas von Goeler's words seem appropriate:

> when some major litigation funders emphasise in their webpages that they do not control cases, perhaps what they mean is that such express contractual rights to veto specific decisions tend to be absent. However, to what degree a litigation funder will be able to exercise control over the conduct of a claim is not only determined by the existence or not of express veto rights over key decisions. This will also depend on the

> funder's termination rights and, not least, on the configuration of the litigation funder's case monitoring […][54]

As a matter of fact, the control over the case starts to surface at its very beginning, where the funder makes the funding dependent on the assessment of the case and sets forth a host of fundamental conditions to enter into such contract. Then, by virtue of the contract, the funder is allowed to exercise its creeping power: the due diligence and assessment of the case crawl into the monitoring of the case, then to a more rigorous oversight, and finally to a process of scrutinising and approving fundamental strategic decisions.

These crucial decisions may well start from the choice of the legal team (this, of course, is not the case where the third party funder is *brought* by the law firm itself). The options then seem obvious: either the funder chooses or at least approves the legal team – in whom it relies and trusts – or no funding will be channelled to the funded party. This is perfectly understandable. If the procedure has not yet been initiated, the control of the funder may also extend to the choice of the decision-maker. It has been said that when the case is already on-going and the arbitrator has already been appointed, this will not be a crucial condition for the funding agreement, although one cannot reasonably understand why a third-party funder would bring funds to a case that is being decided by an individual in whom it does not trust, or whose track-record it knows to be less than recommendable. If the choice has not yet been made, it would be surprising for the third-party funder not to – at the very least – have a say in the selection of the arbitrator. This could even be a negligent decision from the third-party funder.

Consistently, even if the word of the funder is limited to an opinion on the selection of the arbitrator – or to mere assent regarding the choice that might have been made at the time of the execution of the financing – a certain degree of control is exercised by the funder. This springs to mind as almost redundant. The third-party funder's creeping control of the case is also shown through case budgeting management measures and through case monitoring activities. Indeed, the common funding structures are not performed through a one-shot provision of funds or even through an unaccountable line of financing, but rather through the payment of legal and arbitrators' fees, and other expenses (such as expenses with experts and other evidentiary costs) on a case-by-case basis. That is, the funder will pay after scrutinising and assessing every invoice sent by the funded party or its legal team. The common structure, although admitting variations, consists of paying the legal fees note of the party's counsel, and so forth, and not providing funds to the funded party as if it were a common banking line of credit. Therefore, the funder will assess the adequacy and appropriateness of each and every payment it must make.

Consistently, the funder may exert its "termination rights" if the payments it is required to provide indicate that the case is being led in a manner with which the

[54] JONAS VON GOELER, THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION, 35 (2016).

funder is not in agreement or otherwise disapproves of. As such, the mere monitoring of a case might be just the first step in an effective and actual control. Whenever combined with other features – such as the right to terminate the contract, which, to some extent, may be done under discretionary powers – then we may well question the assertion that the third-party funder does not hold control of the case. Therefore, we may well question whether the typical and common funding structure is confined to a mere monitoring of the case. In any event, this facility accorded to the funder is the "minus" of the third-party funder's powers.

Indeed, the control over the case is also shown in numerous other strategic decisions related to the conducting of the claim, or even where the settlement of the case is being discussed. As a matter of fact, there are strategic decisions (settlement, waivers, disposal over the claim, changes in legal teams, actual conduct of the case in memorials, oral pleadings, and so forth) where the influence and control of the funder often surfaces. Often, this influence is shown at the moment where the party intends to settle the case and the funder decides to carry on or, conversely, where the funder thinks that a settlement is appropriate but the funded party decides otherwise.

Last, the termination rights may be brought to the table. By having termination rights the funder will exert a form of control because the funded party's decision may be influenced or even constrained by the threat that the funder will exercise its rights to terminate the contract and/or potentially claim the repayment of funds on grounds of a breach of the contract. The common contractual provisions related to the termination of the funding agreement are usually aligned with the Code of Conduct for Litigation Funders of the Association of Litigation Funders of England and Wales. This Code contains a provision related to a funders termination rights. According to this provision, the funder is entitled to terminate the contract if it "reasonably ceases to be satisfied about the merits of the dispute", or "reasonably believes that the dispute is no longer commercially viable", or "reasonably believes that there has been a material breach" of the contract.[55] With a reasonable degree of certainty, this provision covers every possible situation where the funder is not satisfied with how the case is being conducted, the strategy, the legal team, and so forth.

As a mere illustration of these notions, it is easily conceivable to look at a news report about a malpractice of the law firm of the funded party as a reason to believe that the dispute no longer has merit or that it is no longer commercially viable. By the same token, a change in law firms may also render the dispute commercially inviable or be a reason to disbelieve in the merits of the case. The same could be said about a change of arbitrators or a challenge to the arbitrator appointed by the party. The termination rights, by themselves, are not indispensable in defining third-party funding, but they will unquestionably play a

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[55] ASS'N OF LITIG. FUNDERS, CODE OF CONDUCT FOR LITIGATION FUNDERS 4 (2016), http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF-1.pdf.

vital role in grasping the degree of control necessary to provide a definition based on this notion.

XIV. ELASTIC NATURE OF CONTROL

To be sure, control over the case, which appears in many shapes and forms, is a feature that seems to be typical of third-party funding in the way it is currently and commonly observed. The circumstance that control has various shapes and forms may be expressed in other words: the control may be more or less intense, and therefore may be shown in a compressed manner at a minimum level, or in an expanded way at a maximum stage. The elastic nature of the control will be useful when addressing the various types of issues involved in third-party funding. For instance, given the broad criteria used to address the matter of conflict of interests (which require a catch-all provision that should even dispense with the notion of third-party funding), a simple feebly control, if any at all, should be enough. In this regard, we may well question whether cases such as the Bloomberg Foundation do not contain a faint form of control, if not for other circumstances, because the mere provision of funds may entail a certain degree of public and political accountability.[56] In any event, as we have seen above, for the purposes of assessing conflict of interests, the control over the claim may be dispensed with and that is the reason why we can still observe a third-party funding phenomenon in that case, notwithstanding the control of the case is practically invisible.

On the other end of the spectrum, when addressing the issue of whether the funder should be liable for costs, an extreme degree of control should be required. The intensity of such control would in practice amount to a situation where the extension of the arbitration clause to third entities would be admissible (for instance, the *Crystallex* case).[57]

XV. SUGGESTED TYPICAL KEYS FOR DEFINING THIRD-PARTY FUNDING

According to the above referred, we might suggest that the definition of third-party funding involves the consideration of the following keys:

- Third-party funding is an agreement to fund a specific claim or defence of a natural or legal party;
- By a natural or legal entity;
- Who is a party external to the underlying legal relationship in dispute;

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56 *See Government of Uruguay Taps Foley Hoag for Representation in International Arbitration Brought by Philip Morris to Overturn Country's Tobacco Regulations*, FOLEY HOAG LLP (Oct. 8, 2010), http://www.foleyhoag.com/news-and-events/news/2010/october/uruguay-taps-foley-hoag-for-representation.

57 Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016).

- According to which the funder will be entitled to perceive an advantage (monetary or otherwise) linked to the award;
- In a non-recourse way, that is, if the claim fails, the funded party is not obliged to compensate or repay the funder's investment;
- Where admissible by local ethical regulation, the attorney of the funded party will intervene in the agreement as the primary beneficiary of the funding,[58] trust of the proceeds, or otherwise involved in the whole model;
- And according the funder a right to monitor, intervene in or control the dispute.

The consideration of each of these features (especially the degree of control) will of course depend on the particular circumstances of the case, as it is quite fact-dependent. Be it as it may, we may still conclude for the existence of a third-party funding structure notwithstanding that structure might be in want of a particular feature. In any event, a "concern based" perspective must be adopted: the consideration of the elastic notion of third-party funding will allow to adapt the particular definition according to the concerns that are under scrutiny.

As initially noted, this definition is a mere suggestion and must be seen as a work in progress. A fact-finding phase might be needed to confirm the elements typical to this modern business model, and others that might surface (or might have already surfaced) in the market. In our point of view, the control of, or the intervention in, a case seems to be the fundamental feature that addresses the concerns that have been raised about the third-party funding industry. This ultimately provides a frame to the suspicions that have been levelled against this business model: whatever affords control raises concerns; whatever does not provide control does not (or should not) raise concerns.

XVI. CONCLUSION

Ensuring the integrity of arbitral proceedings is of the utmost importance, and it is precisely because of this duty that third-party funding has come under scrutiny. It is crucial to ascertain whether or not any aspect of third-party funding can create conflicts of interest which have the potential to jeopardize the virtue of the arbitral tribunal. It is therefore important to construct a definition that identifies just who constitutes a third-party funder, and what the nature of third-party funding is, as we have endeavored to do throughout this article. Though progress was made upon the introduction of the IBA Guidelines, as we have seen they fall short of encapsulating all possible scenarios of the existing financial models. The requirement of a direct economic interest, or a duty to indemnify a party, isolated cases such as that of the Bloomberg Foundation and *Gawker*.[59] Both are absent of pecuniary interests. This gives rise to further consideration of

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[58] In the sense that the counsel will be one of the persons involved in the agreement that is going to perceive the funds.

[59] Bollea v. Gawker Media, LLC 1325 F.2d 913 (M.D.Fla. 2012).

the motivations of third-party funders to invest in a dispute – from philanthropic to politically driven, to name only two.

Difficulties with defining third-party funding stem from disagreement about its exact nature, which is due in part to the numerous definitions scattered across legal instruments and doctrinal works. This elicits the question: do we need to define? As the industry of financing disputes flourishes, the lack of legal certainty surrounding this area further emphasizes the need for regulation and therefore for definition. Indeed, without definition, how can we possibly aspire to achieve regulation? As previously declared, what is to be regulated must first be defined. When it comes to the process of definition, initially we must discard any methodological misconceptions that may surface. There should be no rigid checklist of features that need to be satisfied for qualification: a third-party funder may also partake in activities outside the scope of third-party funding, and vice versa. Accordingly, it is more important to focus on "what" rather than "who" and, as we have discovered, "what" can be a number of things. The legal "type" is derived from the collection of the facts of the real life. In the pursuit of an appropriate definitional method, we can adapt the gradated selection process from the "*Fuzzy Sets*" theory, a non-binary method that allows for essential fluidity. Once we have established the "*type*", we must look to the essential keys that are to be found. Categories given include the key pertaining to the legal cause and the counterpart of remuneration.

We may conclude that the key pivotal to the definition of third-party funding is the control a funder exerts over the claim, and all other keys orbit around this central key. Though many funders insist that they do not control the cases, and are legally unable to do so in certain jurisdictions, this may not always be true. The intensity of such control may differ: its elastic nature ranges from a funder's power to monitor the case, terminate the agreement, or select an arbitrator, to a situation where the arbitration clause may be extended to third entities. Taking this in consideration, it is possible to draw a certain amount of keys that will help in producing an elastic definition of third-party funding, the verification of which will depend on the circumstances of the case. It is a task manifestly fact-dependent.