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Third Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement

ABSTRACT

This article deals with the problem of third party funding in international commercial and investment arbitration. It analyses the basic concept of third party funding, identifies the main areas of challenge as well as presents recent changes and innovations associated with this concept. The article concentrates on transparency and disclosure requirements, which is, according to us, the major issue that influences further development and use of funding arrangements. The conducted analysis and case study drive us to the conclusion that third party funding is “here to stay” in international arbitration and will progress to the benefit of the arbitral community, but upon a condition of regulated, imposed and observed principle of disclosure.

KEYWORDS

Third Party Funding, TPF, international arbitration, investment arbitration, transparency, disclosure

Introduction

Third party funding (hereinafter: TPF) is not only one of the hot topics¹ of civil litigation and international arbitration but also one of the legal phenomena that is still much hidden under a veil of secrecy. Despite the long-lasting debate on the concept of TPF,² this concept is still hard to define due to a lack of legal regulation and existence of privacy-oriented international practice.

Since TPF is a result of development of international arbitration community, the relevant regulation (national arbitration laws and arbitration rules) has not yet caught up with it.³ In fact, TPF rises a number of specific ethical and procedural issues both in international commercial and investment arbitration. These particular issues include *i.a.* the funders' relationship with parties and counsels in managing the dispute, attorney ethics (attorney-client privilege), allocations of costs and security for costs, transparency and disclosure of the funding arrangements, and finally arbitrators' conflicts of interest.⁴

¹ M. Scherer, A. Goldsmith, *Third Party Funding of International Arbitration Proceedings – A View From Europe: Part 1 – Funders' Perspectives*, "International Business Law Journal" 2012, No 1, pp. 217–218, [online] <https://ssrn.com/abstract=2348737> [accessed: 15.07.2017].

² Compare for example: M. Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, "University of Iowa Legal Studies Research Paper Number" 2011, 11–31, pp. 1268–1338; E. de Brabandere, J. Lepeltak, *Third Party Funding in International Investment Arbitration*, "Grotius Centre Working Paper" 2012, No. 1, pp. 1–19; J. Kalajdzic, P. Cashman, A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, "The American Journal Of Comparative Law" 2013, Vol. 61, pp. 93–148; W. Park, C. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, "The Pennsylvania State University The Dickinson School Of Law, Legal Studies Research Paper" 2014, No. 42, [online] <http://ssrn.com/abstract=2507461> [accessed: 15.07.2017].

³ As was shown in the Queen Mary University of London and White & Case 2015 International Arbitration Survey, *Improvements and Innovations in International Arbitration*, [online] <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>, [accessed: 15.07.2017]. The Survey is analyzed below.

⁴ Prof. W. Park, a member of the International Council for Commercial Arbitration and London's Queen Mary School of Law Task Force on "Third-Party Funding in International Arbitration", during the keynote of 14th Annual ITA-ASIL Conference on Third-Party funding, held in Washington, D.C. on 12 April 2017, identified four "musketeers" of TPF that should be addressed: (i) transparency; (ii) attorney-client privilege, (iii) costs; (iv) and finally "d'Artagnan" issue – the question of definitions – who or what exactly is a third party funder. As to the report from the Conference, see: J. E. Vernon, *Taming the*

Therefore, the main objective of this article is to review the up-to-date knowledge about this concept, particularly in light of recent innovations and changes introduced by the international arbitration community, as well as recent cases where the problem of TPF emerged and was decided. The article consists of three parts. Chapter I seeks to introduce a definition of TPF, examine the legal characteristics of this concept, and identify the pros and cons of its use in practice. Chapter II explains why TPF is important in international arbitration, what challenges it brings and which areas of concern can be identified. Chapter III focuses on the disclosure requirement. In particular, by an in-depth analysis of recent arbitration regulations and case law, it seeks to answer the questions as to what extent the disclosure is important from the perspective of TPF as well as how and why this principle should be implemented in order to strike the balance between the right to privacy and the right to public access in arbitration.

1. Concept of Third Party Funding

TPF originally emerged firstly in civil litigation where it was conceived as a method of financing litigation and hence as a tool to reduce or eliminate the risk associated with potentially unfavorable outcome of the litigation.⁵ The TPF takes place when a third party, external to the parties and not involved in the legal relation between them, agrees to pay for the one party's (usually the claimant) legal fees, such as costs of lawyers, experts, outside counsels, any other costs that may be relevant or needed in the civil litigation in accordance with a stipulated agreement and stipulated budget, in exchange for an agreed return. The funder may additionally agree to pay the opposing party's costs if the funded party is so ordered and provide security for the opponent's costs.⁶ One of the main characteristics is that the

"Mercantile Adventurers": Third Party Funding and Investment Arbitration – A Report from the 14th Annual ITA-ASIL Conference, Kluwer Arbitration Blog 21.04.2017, [online] <http://kluwerarbitrationblog.com/2017/04/21/taming-the-mercantile-adventurers-third-party-funding-and-investment-arbitration-a-report-from-the-14th-annual-ita-asil-conference/> [accessed: 15.07.2017].

⁵ M. de Morpurgo, *A Comparative Legal And Economic Approach To Third-Party Litigation Funding*, "Cardozo Journal Of International & Comparative Law" 2011, Vol. 19, p. 350.

⁶ S. R. Garimella, *Third Party Funding in International Arbitration: Issued and Challenges in Asian Jurisdiction*, "AALCO Journal of International Law" 2014, Vol. 3, Issue 1, p. 48; V. Sahani, *Harmonizing Third-Party Litigation Funding Regulation*, "Cardozo Law Review" 2015, Vol. 36, pp. 860–861; eadem, *Reshaping Third-Party Funding*, "Tulane Law Review" 2017, Vol. 91, No. 3, pp. 415–421.

agreement between a funded party and the funder usually is to be kept in secret. As a result, the doctrinal and legal analysis is greatly reduced and a number of concerns, raised by both practitioners and academics, remain unsolved.

The problems with defining the concept of TPF are, according to W. Park and C. Rogers, that: “economic interests in a party or a dispute can come in many shapes and sizes. Arrangements may be structured as debt instruments, equity instruments, risk-avoidance instruments, or as full transfers of the underlying claims. Some agreements permit or require active participation of the third party funder in key strategic decisions in the case, while other agreements are limited to periodic updates.”⁷ According to these authors: “The terms ‘third-party funder’ and ‘after-the-event-insurer’ refer to any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.”⁸

Nevertheless, given the growing recognition of TPF worldwide, the first regulatory steps were already made. Under Art. 8.1., Section A, Chapter 8 (Investment) of CETA: “Third party funding means any funding provided by a natural or legal 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 either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.”⁹ Similarly Art. 1.2., Section 3, Chapter II Investment of TTIP, stipulates that: “Third Party funding’ means any funding provided by a natural or legal 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.”¹⁰

The proposed definitions suggest that the concept of TPF is broad and can embrace different relations between a party that has a legal claim and

⁷ W. Park, C. Rogers, *op. cit.*, p. 4.

⁸ *Ibidem*, p. 5.

⁹ *The Comprehensive and Economic Trade Agreement (CETA), a free-trade agreement between Canada and the EU, revisited in 2016*, [online] <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> [accessed: 15.07.2017].

¹⁰ Transatlantic Trade and Investment Partnership, currently negotiated trade and investment deal between the US and EU, the information about the process and content of the TTIP is available at: <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> [accessed: 15.07.2017].

a funder that seeks opportunities to invest capital and earn. The main advantage of TPF is granting access to justice for those who could not, due to financial reasons, bear costs of expensive, often unpredictable and lengthy civil proceedings (or international or investment arbitration). In this situation, accepting external financial help may be the only option for the claimant to pursue meritorious claim. Whereas for a funder it is a way of gaining capital. What is more, TPF serves as a risk-management tool by sharing of risk associated with the civil litigation (arbitration) between a party and a funder. It allows for a better stand against unpredictable situations in the litigation. In addition, funders are interested in strong and grounded claims that offer high predictability of refund. They will conduct a due diligence and legal analysis to properly assess the risk of pursuing the case. This can assist the claimant to shape its strategy and prepare a well-grounded claim, which can even be decided on pre-judicial stage through settlement.¹¹

On the other hand, TPF has also several disadvantages in particular: a successful claimant has to pay a significant proportion of his or her recoveries to the funder as a remuneration for funding the litigation (arbitration); claimant may to a certain extent lose autonomy in favour of the funding party (in particular when considering settlement) since it may reserve the right of approval of the settlement; claimant may bear substantial costs when packaging the case for presentation to a funder. These costs will be wasted if the application for funding is unsuccessful.¹²

Another unresolved issue relates to the allocation of costs of the litigation. Taking into account that the funder does not appear as a party in the litigation it is questionable if the costs that the opposing party (usually the respondent) bears can be demanded directly from the funder in the event of the adverse costs order.¹³

¹¹ C. R. Flake, *In Domestic Arbitration: Champerty or Social Utility?*, "Dispute Resolution Journal" 2015, Vol. 2 (70), pp. 115–117.

¹² E. de Brabandere, J. Lepeltak, *op. cit.*, pp. 8–9; C. R. Flake, *op. cit.*, pp. 117–119.

¹³ D. Galagan, P. Živković, *If They Finance Your Claim, Will They Pay Me If I Win: Implications Of Third Party Funding On Adverse Costs Awards In International Arbitration*, "European Scientific Journal" 2015, (Special Edition), [online] <https://ssrn.com/abstract=2604048> [accessed: 15.07.2017]; S. Brekoulakis, *The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report*, Kluwer Arbitration Blog 18.02.2016, [online] <http://kluwerarbitrationblog.com/2016/02/18/the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-applications-the-icca-queen-mary-task-force-report/> [accessed: 15.07.2017].

2. Importance of Third Party Funding in International Arbitration

TPF has been widely used in both international commercial and investment arbitration, however, due to confidentiality principle still in force in commercial arbitration and to some extent compromised in investment arbitration, this concept raises a number of concerns and challenges.¹⁴ According to Queen Mary and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, the respondents are generally of the opinion that it should be mandatory in international arbitration for claimants to disclose the fact of using TPF and the identity of the funder, but without revealing the content of the funding agreement.¹⁵ In the Survey, the respondents were asked which aspect of the use of TPF should be subject to mandatory disclosure by the claimants. They showed widespread support for disclosure of the use of TPF (76%) and the identity of the funder (63%). The interviewees commented that the resulting transparency would help check for conflicts of interest and provide the tribunal with context as to the financial position of the parties. By contrast, 71% of the respondents felt that mandatory disclosure of the full terms of the funding arrangements was undesirable. Some interviewees, who took the minority view, asserted that the full terms should be disclosed in order to reveal the extent of the influence that the funders may have on the funded party. Others, who were opposed to the proposition, commented that such disclosure would be irrelevant to the effective management of the arbitral process.¹⁶

Taking into account the Survey results, to better address the identified and perceived concerns, International Council for Commercial Arbitration (ICCA) and Queen Mary University in London jointly created a Task Force on Third-Party Funding in International Arbitration in 2014. The Task Force is supposed to systematically study and make recommendations regarding the procedures, ethics, and related policy issues on TPF in international arbitration. The Task Force is comprised of representatives drawn from all rele-

¹⁴ Comapre J. von Goeler, *Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings*, Kluwer Arbitration Blog 21.07.2016, [online] <http://kluwarbitrationblog.com/2016/07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/> [accessed: 15.07.2017].

¹⁵ *Queen Mary and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, [online] <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>, [accessed: 15.07.2017].

¹⁶ *Ibidem*, pp. 46–48.

vant stakeholders, including arbitration practitioners, funders, government representatives and academics.¹⁷

The Task Force on Third-Party Funding prepared a working draft report presented, for discussion purposes, at the 14th Annual ITA-ASIL Conference on Third-Party funding, held in Washington, D.C. on 12 April 2017. In light of the Report, the following issues should be addressed:

- 1) transparency, without which the legitimacy of the arbitral process could be undermined;
- 2) privilege (while in the U.K. and the U.S. common interest privilege would likely cover a claimant and funder working together on a case, this may well not be the case in civil law jurisdictions);
- 3) costs (to what extent should the existence of TPF be taken into account in allocating costs in an increasingly “loser pays” legal environment? Should it be a factor when considering whether to grant an order on security for costs?) and
- 4) definitions (who or what exactly is a third party funder?)¹⁸

Both the Survey and the Task Force report underline the importance of regulating TPF for harmonized development of arbitration and integrity of the arbitration proceedings. In fact, some of the leading jurisdictions have already introduced relevant legislation. For example, as discussed in detail below, Hong Kong and Singapore have recently amended their legislation in order to create the legal framework for using TPF in arbitration and related proceedings.¹⁹

3. Disclosure of Third Party Funding in International Arbitration

The existence of TPF faces two major issues with respect to the disclosure. First of all, should the parties disclose the existence of TPF and/or identity

¹⁷ The Task Force is co-chaired by ICCA Governing Board Member William Park and Catherine Rogers, the Professor of Regulation, Ethics and the Rule of Law at Queen Mary, and Professor of Law and International Affairs at Penn State Law, and Professor Stavros Brekoulakis, Professor of Commercial Law and International Arbitration at Queen Mary. Lise Boseman, Executive Director of ICCA, will serve ex officio, see: ICCA – International Council for Commercial Arbitration, [online] http://www.arbitration-icca.org/projects/Third_Party_Funding.html [accessed: 15.07.2017].

¹⁸ J. E. Vernon, op. cit.

¹⁹ In Singapore TPF is regulated by Civil Law (Third-Party Funding) Regulations 2017 (Regulation to Civil Law Act of 1999), that come into operation on 1 March 2017; whereas in Hong Kong the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 was introduced on 11 January 2017.

of a funder, and if so – when and on what basis? Secondly, should the parties disclose the terms and nature of a funding arrangement, and if so – when, on what basis, and under which terms? Currently, the parties are not obliged to reveal the involvement of a funder in a dispute. Therefore, the presence of the funder and the nature of its relationships with the attorneys and the parties in an international arbitration case is often unknown. Moreover, the funders generally require that their involvement is not revealed and use confidentiality agreements to prevent the disclosure.²⁰

The reasons why the disclosure of TPF may be necessary include the arbitrators' impartiality requirement, the potential conflicts of interest, and the transparency, the latter especially in the investment treaty arbitration. Even if the funders are not the parties to an arbitral dispute, they still participate to certain extent in various stages of an arbitration. Thus, one of the potential sources of conflict is repetitious appointment in cases involving the same TPF, since generally the frequency of repeated appointments is seen as a concern for arbitrator's independence and impartiality.²¹ Undisclosed ties may give rise to grounds for removal of the arbitrator or challenge to the arbitral award.²² Early disclosure of the presence of TPF is therefore worthwhile as a means of eliminating the costly and adverse consequences.

The recently revised IBA Guidelines on Conflicts of Interest in International Arbitration (October 2014) addressed concerns regarding participa-

²⁰ M. Scherer, A. Goldsmith, *op. cit.*, pp. 217–218. Discussing TPF disclosure obligations in the context of potential arbitrator impartiality issues, the funders baseline preference for non-disclosure of funding arrangements was coupled with a suspicion that disclosure could adversely influence an arbitral tribunal.

²¹ E. de Brabandere, *'Mercantile Adventurers'? The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, "Grotius Centre Working Paper" 2016, No. 059-IEL, "Leiden Law School Research Paper", p. 11, [online] <https://ssrn.com/abstract=2846996> [accessed: 15.07.2017], where this phenomenon is addressed as a 'repeat arbitrators'. Author also identifies the 'issue conflicts' situation where an arbitrator may be tempted to decide an issue in a way that could benefit a position adopted by that same arbitrator acting as counsel in another investment dispute. See also: V. Sahani, *Harmonizing...*, *op. cit.*, pp. 903–904.

²² See: W. Park, C. Rogers, *op. cit.*, p. 6, indicating the factors that contribute to the concerns about potential conflicts of interests, as the increase in the number of cases involving TPF, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, as well as close relations among elite law firms and leading arbitrators.

tion of the funder in arbitration.²³ General Standard 6(b) clarifies 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, the award to be rendered in the arbitration, may be considered to bear the identity of such party. Given the fact that the funder may have a direct economic interest in the award, as such it may be considered to be an equivalent of the party. Moreover, under General Standard 7(a) the parties are required to disclose, on their own initiative at the earliest opportunity, any relationship with the arbitrator. The duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party, has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.²⁴ The 2014 IBA Guidelines for Conflicts of Interest were the vital milestone towards transparency, as the first rules that directly address TPF. However, it is only soft law and, as the arbitral community is underlying – there has been no reported practice on their application to TPF so far.²⁵

Some authors also state that the broad rule 6(2) of the ICSID Convention Arbitration Rules, requiring the arbitrator to declare past and present professional, business and other relationships (if any) with the parties and any other circumstance that might cause arbitrator's reliability for independent judgment to be questioned by a party, does provide for the disclosure of relationships with the funder. However, as in the case of IBA Guidelines, such an obligation naturally requires knowledge of the funding arrangement.²⁶

Such an approach was followed by the arbitral institutions, again with the aim to pursue overarching strategy to enhance the transparency and

²³ As to the outline of the key changes in the revised IBA Guidelines on Conflicts of Interest in International Arbitration see: K. Moyeed, C. Montgomery, N. Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interest*, Kluwer Arbitration Blog 29.01.2015, [online] <http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/> [accessed: 15.07.2017].

²⁴ IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on Thursday 23 October 2014, Explanation to General Standard 6(b) and 7(a), pp. 14–15; [online] https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#collapseOne [accessed: 15.07.2017].

²⁵ See *i.a.* M. N. Iliescu, *A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact*, Kluwer Arbitration Blog 2.05.2016; [online] <http://kluwerarbitrationblog.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact/> [accessed: 15.07.2017].

²⁶ E. de Brabandere, *op. cit.*, p. 13.

predictability of the arbitration process. In February 2016, the ICC adopted the Guidance Note for the disclosure of conflicts by arbitrators, as a part of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration. Under the general duty of all arbitrators to act at all times in an impartial and independent manner, arbitrators should in each case consider disclosing relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.²⁷ Although important, the approach adopted by ICC is imperfect. Not only does it not require mandatory disclosure of TPF, but most importantly it does not impose the disclosure obligation on the parties. When the party has not disclosed the existence of the funding agreement, the arbitrator will not be able to evaluate the potential relationship with the funder that might in turn endanger the integrity of the arbitral process.

In that context, a path taken by Singapore International Arbitration Centre (SIAC) in recently released Investment Arbitration Rules, offering a specialized set of procedures for the conduct of international investment arbitration,²⁸ is worth noting. Under Art. 24(I), the Tribunal shall have the power to order the disclosure of the existence of a party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability. The Rules give the tribunal far-reaching legitimacy to order disclosure, the scope of which is wide, covering not only the fact of TPF, but also the identity of the funder, as well as details as to the funding arrangements. The last information that might be demanded, regarding the TPF's exposure to costs, touches upon highly controversial is-

²⁷ Guidance Note for the disclosure of conflicts by arbitrators was adopted unanimously by the Bureau of the Court on 12.02.2016, incorporated into the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1.03.2017, p. 6, point 24; [online] <https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/> [accessed: 15.07.2017]. As to the critical analysis of the ICC Guidance Note, see: A. Goldsmith, L. Melchionda, *The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction*, Kluwer Arbitration Blog 14.03.2016; [online] <http://kluwerarbitrationblog.com/2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding-a-step-in-the-right-direction/> [accessed: 17.07.2017].

²⁸ Investment Arbitration Rules of the Singapore International Arbitration Centre, 1st Edition, 1.01.2017. The Rules shall apply by agreement in disputes involving a State, State-controlled entity or intergovernmental organization, whether arising out of a contract, treaty, statute or other instrument.

sue, namely whether, and if so, to what extent, the funder may be liable for the successful adverse party's costs. It is postulated that since the funder exercises great control over the claimant's behavior in the arbitration proceedings, often directing the course of the proceedings, the adverse costs award should have an effect on the funder. However, currently there is no relevant court or arbitral practice to support this position.²⁹ This is due to the basic principle of arbitration proceedings – consent. Since arbitration cannot extend its effect to the third parties, an arbitral award only binds the parties to the arbitration proceedings. The impossibility of an arbitral tribunal to make an adverse costs award against the funder,³⁰ might eventuate the successful respondent not being able to recover the legal costs neither from the indigent claimant nor from the funder.³¹

Recognizing the need for more effective regulation of TPF in international commercial and investment arbitration, the issue of disclosure was also recently incorporated into free trade agreements. The CETA, revisited in 2016, cited above, includes a provision requiring the disputing party benefiting from TPF to disclose to the other disputing party and to the tribunal the name and address of the third party funder. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded after the submission of a claim, as soon as the agreement is concluded.³² The same provision is included in the TTIP.³³

Both in Hong Kong and Singapore, the national law prescribes disclosure requirements in relation to TPF. In Hong Kong the disclosure requires written notice by the funded party to the arbitral tribunal and other parties in

²⁹ See: *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Assenting reasons of Gavan Griffith to decision on Saint Lucia's Request for Security for Costs, 13.08.2014, points 12–14, where the position of TPF in the arbitration proceedings that in fact only shares in the rewards of success, and risks no more than spent costs in the event of a failure, was compared to "a gambler's Nirvana: Heads I win, and Tails I do not lose." See also: E. de Brabandere, *op. cit.*, p. 18.

³⁰ See: Art. 38(4) of ICC Rules of Arbitration (as of 1 March 2017), stating that the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. The same provision, allowing the tribunal to order the costs only against the parties to the proceedings, might be found also in i.a. Art. 42 of UNCITRAL Arbitration Rules, Rule 35 of the SIAC Arbitration Rules (as of 1 August 2016).

³¹ Thorough analysis of the third party funder's liability for the adverse costs awards, see: P. Živković, D. Galagan, *op. cit.*

³² CETA, Chapter 8 (Investment), Section A, Art. 8.26.

³³ TTIP, Chapter II (Investment), Section 3, Art. 8, the negotiations on the investment chapter were finalized in November 2015.

the arbitration of the fact the TPF agreement has been made, and the name of the funder, upon commencement of the arbitration, or if the agreement was entered after the commencement, within 15 days of the agreement.³⁴ Whereas in Singapore it is the legal practitioner, which conducts any dispute resolution proceedings before a court or tribunal, who must disclose to the court or tribunal, and to every other party to those proceedings the existence of any TPF contract related to the costs of those proceedings, and the identity and address of any funder involved in funding the costs. The disclosure must be made at the date of commencement of the dispute resolution proceedings where the funding contract is entered into before the date of commencement of those proceedings, or as soon as practicable after the funding contract is entered into where the contract is entered after the date of commencement of the dispute resolution proceedings.³⁵

In line with those developments towards greater transparency and integrity of arbitral proceedings, the importance of disclosure of TPF was also underlined in recent investment arbitration cases. Starting point was the case *Teinver S.A., et al v. Argentine Republic*.³⁶ Referring to newspaper publications, in which it was reported that the alleged majority shareholder of some of the Claimants had transferred part of its ICSID claim to the U.S. investment fund in exchange for a contribution to pay the costs arising in the proceedings, the respondent requested that the ICSID Tribunal required the Claimants to provide all available information regarding the matter and the content of the agreement that was signed with said investment fund, and to also submit all related documentation. The Claimants, on the other hand, stressed that they had no obligation to disclose any agreements with the third parties regarding the funding of costs in this proceeding, and that

³⁴ However, in Hong Kong failure to disclose does not render the person liable to judicial or other proceedings, but may be taken into account by any court or tribunal if it is relevant. See also: G. Laughton, *Third Party Funding in International Commercial Arbitration Hong Kong and Singapore*, Lexlogy 27.03.2017, [online] <http://www.lexology.com/library/detail.aspx?g=b87941df-279c-4731-982d-2133f814307a> [accessed: 15.07.2017]; S. Jhangiani, R. Coldwell, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?*, Kluwer Law Blog 30.11.2016, [online] <http://kluwer-arbitrationblog.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/> [accessed: 15.07.2017].

³⁵ In Singapore, these additional requirements as to the form and time of the disclosure are provided in the Art. 49A of the Legal Profession (Professional Conduct) Rules 2015, as amended on 1 March 2017.

³⁶ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1.

Respondent failed to argue the necessity or relevance of its request.³⁷ The Tribunal had rejected Respondent's request at this early stage as it did not consider the currently available information on record as sufficient. However, the Tribunal added that it did not preclude reconsidering a similar request in the future once the main pleadings had been filed.³⁸ The modest reasoning provided by the Tribunal on that point did not involve the potential for conflicts of interest.

This approach has changed in the later case *Guaracachi America, Inc. et al v. The Plurinational State of Bolivia*.³⁹ The Respondent requested the production of funding agreement and further documentation in order to evaluate a security for costs request and to confirm that there were no conflicts of interest for the arbitration on account of the funder, whose identity remains unknown. The Claimants objected, arguing that Bolivia has not demonstrated what the conflict of interest would be.⁴⁰ The UNCITRAL Tribunal decided not to order the production of the agreement or any further documentation. The Tribunal shared the view that the Respondent has failed to specify what the conflict of interest created by the agreement would be. In any case, the applicable provisions governing conflicts of interest do not foresee the production of documents (as requested by the Respondent) by the parties, but rather disclosure by the arbitrators upon becoming aware of circumstances that could create a conflict of interest. However, since the identity of the funder has become known (due to the Respondent's request for security for costs), in order to remove any doubt, the members of the Tribunal declared that they have no relationship with the funder, and are not aware of any circumstance that could give rise to justifiable doubts as to their impartiality and independence on account of the financing of the Claimants' claims.⁴¹ Although the request for the production of documents was dismissed, the Tribunal still gave careful consideration to the integrity of the arbitration proceedings.

³⁷ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 24–25.

³⁸ *Ibidem*, para. 26.

³⁹ *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011–2017 (international investment agreement case), [online] <https://www.italaw.com/cases/518> [accessed: 15.07.2017].

⁴⁰ *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011–2017, Procedural Order No. 13, 21 February 2013, para. 6–7.

⁴¹ *Ibidem*, para. 8–9.

In the case *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, the ICSID Tribunal made a step forward.⁴² The Respondent requested disclosure of the identity and nature of the involvement of third-party funder(s) for the Claimants in the arbitration proceedings, arguing that this was necessary to ensure there were no conflicts of interest, and that such a disclosure may be relevant to a potential security for costs application. The Tribunal ordered the Claimants to confirm whether their claims are being funded by a third-party funder, and, if so, to reveal to the Respondent and the Tribunal the name(s) and details of the third-party funder(s), as well as 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 the Claimants may achieve in this arbitration.⁴³ The Tribunal underlined that the disclosure of funder's identity will first and foremost ensure independence and impartiality of arbitrators. In that aspect, the Tribunal invoked its general power to preserve the integrity of the arbitral process and the good faith of the proceedings. While, when it comes to the full disclosure of the nature of the arrangements concluded with the funder, this was vital for the Tribunal to establish the grounds for an intended request for security for costs.⁴⁴

Finally, in the case *South American Silver Limited v. Bolivia*,⁴⁵ the Respondent requested disclosure of the name of the funder on the basis that it was necessary to ensure the integrity of the arbitration and ensure the Tribunal's independence and impartiality. The Respondent also requested the terms of the funding agreement in order to determine whether the arbitration claims had been assigned, and whether the funder had committed to pay for an adverse costs order.⁴⁶ The UNCITRAL Tribunal ordered that there is a basis for ordering the disclosure of the name of the funder, but it did not find grounds to order the disclosure of the agreement entered into with the

⁴² *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6.

⁴³ *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015, para. 13.

⁴⁴ The case was commented on in E. de Brabandere, *op. cit.*, pp. 13–14 and p. 20, where the Author states that this case is remarkable, since it preempts a future request for security for costs, and requests full disclosure of TPF in order to enable the Tribunal to properly address that future request.

⁴⁵ *South American Silver Limited v. Bolivia*, UNCITRAL, PCA Case No. 2013-15; [online] <https://www.italaw.com/cases/2121> [accessed: 15.07.2017].

⁴⁶ *South American Silver Limited v. Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 69–70.

funder. The latter was rejected because exceptional circumstances required to order security for costs were not present. The Tribunal explained that the mere existence of the funder was not sufficient to order it. Therefore, it was not relevant to determine whether the funder would assume (or not) an eventual costs award in favor of Bolivia.⁴⁷

To summarize, the recent case law suggests that investment arbitration tribunals started to underline the importance of disclosing the identity of the funder, emphasizing the transparency and integrity of the arbitration as well as independence of arbitrators. However, there seems to be a consensus in the arbitration community as to the lack of obligation to disclose the terms of the funding agreement, unless the specifics of the particular case provide for that, especially as to the requests for the security for costs. Generally, the details of the funding arrangements are irrelevant and unnecessary to establish possible conflicts of interest. It is also stressed that the funding arrangement is a private agreement, unrelated to the merits of the underlying dispute, hence its full disclosure should only be demanded in exceptional circumstances, as a last resort.⁴⁸

Conclusions

TPF has steadily grown into the arbitration realm and definitely is here to stay. According to some anecdotal reports two-thirds of ICSID cases filed in 2013 implicated claimants which relayed on resources from a major funder on the market.⁴⁹ This shows the scale of the TPF phenomenon, that shall be adequately regulated and put into the legal frames in the interest of the arbitration practice, its users and arbitral institutions.

First and foremost, the existing regime of fragmentary regulation is inadequate to ensure the fundamental principle of integrity of the arbitration process and impartiality of the arbitrators. Conflicts of interest involving

⁴⁷ Ibidem, para. 80–81, 84.

⁴⁸ V. Sahani, *Harmonizing...*, op. cit., p. 904. See also: A. Goldsmith, L. Melchionda, op. cit., where the Authors state that disclosing the identity of any funder associated with a claim does not mean requiring disclosure of the terms of funding, which should be considered only upon a demonstration that such additional information is necessary and relevant. Abstract invocations of transparency interests would not suffice. See also the judgment of the Tribunal in the case *South American Silver Limited v. Bolivia* (described above).

⁴⁹ Although no reliable statistics were gathered, the estimation was made by the Task Force on the basis of information provided by major funder, see: W. Park, A. Rogers, op. cit., p. 3.

funders could be prevented and resolved only by the adoption of both broad definition of TPF arrangements and disclosure requirement. The recent legislative steps taken by Hong Kong and Singapore are noteworthy, since they effectively complement the IBA Guidelines, some of the arbitration rules and international treaties that also recognized the importance of the obligation to disclose the use of funding agreements.⁵⁰ However, in order to secure a greater efficiency, the obligation should be imposed on the funders, the parties and/or the counsels, since its imposition only on the arbitrators might be hampered by the lack of knowledge of the third party funder's involvement. Finally, as to the scope of the disclosure, it is reasonable to argue that disclosing the full identity of a funder is sufficient to meet the objective of transparency and integrity of the arbitration proceedings.

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