

CAN THIRD PARTY FUNDING DELIVER JUSTICE IN INTERNATIONAL COMMERCIAL ARBITRATION?

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Abstract

Third party funding arrives at international commercial arbitration without clear guidelines. The recognition and acceptance of its legality is hampered by the omissions of all stakeholder's rights involved in international commercial arbitration. In balancing the funder's contractual rights to gather information under the third party funding agreement and stakeholders' rights to know, the current research examined how non-disclosure of the third party funding agreement would prevent the arbitrators from fulfilling procedural justice required for the integrity of arbitration on their part and impede the opposing party's right to know during the proceedings. The research highlights the issues from the delivery of procedural and substantive justice as well as suggesting legal and jurisprudential grounds in third party funding governance. It also points out that all issues examined will ultimately contribute to the failure in delivering justice in international commercial arbitration if third party funding is left to self-governance.

Keywords

Third party funding, justice, access to justice, international commercial arbitration

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*'We seek fairness, but settle for law.'*¹

I. INTRODUCTION

The delivery of substantive justice relies on the integrity of procedural justice. To bridge the funding gap left by the governmental austerity and allow disputants to have “access to justice” for civil and commercial litigation,² external funding from a third person unconnected with the dispute has become a real choice for disputing parties to take advantage of in order to afford justice. Although this practice was criticised by Lord Denning who spoke ‘purity of justice would be sullied’³ by an unconnected person’s (maintainer) speculation of the result of the law suits purely for his personal gain, in England, such criticism seems to be side-lined by the recent governmental support for alternative funding arrangements suggested in the Jackson Report and the abolishment of champerty and maintenance rules. Following the Jackson Report, a voluntary Code of Conduct for Litigation Funders (The Code)⁴ was introduced in

¹ Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 14

² Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, *Justice for Profit: A comparative analysis of Australian, Canadian and U.S. third party litigation funding*, (2013) 61 *The American Journal of Comparative Law* 93, 97.

³ *Re Trepcia Mines* (No 2) [1963] 1 Ch 199; where Lord Denning stated: ‘The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses...’; Also see, Melanie Willems, *Third Party Funding – A paper for the Society of Construction Arbitrators* 1, available at <https://www.constructionarbitrators.org/sites/default/files/local/browser/documents/SCA%20-%20Third%20Party%20Funding%20Paper.pdf>

⁴ See Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders* (November 2011), available at <http://associationoflitigationfunders.com/wordpress/wp-content/uploads/2012/05/CodeofConductforLitigationFundersNovember2011.pdf>

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November 2011 as a further attempt to set out certain standards of this practice and regulate funder's behaviour.⁵

As a growing phenomenon, third party funding (TPF) agreement involving a “*third person*” in the proceedings by providing financial “*assistance or support to a party to*” the proceedings,⁶ has also found its way into international arbitration⁷ and has its name written all over the wall.⁸ Its rapid development can be evidenced by a survey revealing that 35% of practitioners encountered third party funding at some point in their international arbitration practice,⁹ despite

⁵ Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, (2005) 56 Mercer L. Rev. 649, 650. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), available at <http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fjackson-final-report-140110.pdf>. The Jackson Report reviewing civil litigation costs and their implications for access to justice recommended regulation of third party funding which leads to the promulgation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, this Act does not specifically address the issue of third party funding.

⁶ *Unruh v Seeberger* (2007) 10 HKCFAR 31, [118] (*per* Ribeiro PJ).

⁷ William Kirtley and Koralie Wietzykowski, ‘Should an Arbitral Tribunal Order Security for Costs when an Impecunious Claimant is Relying on Third Party Funding?’ (2013) 30(1) J Int’s Arb. 17, 28; Maxi Scherer, ‘Third-Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?’ in Antonias Dimolitsa and Bernardo M. Cremades Román (eds), *Third-Party Funding in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Volume 10 (Kluwer Law International; 2013) 95. Also see Jason Lyon, ‘Revolution in Progress: Third-Party Funding of American Litigation’, (2010) 58 UCLA Law Review 571; Marco de Morpurgo, ‘A Comparative Legal and Economical Approach to Third-Party Litigation Funding’, (2011) 19 *Cardozo Journal of International and Comparative Law* 343, 348; Rachael Mulheron and Peter Cashman, ‘Third-Party Funding of Litigation: A Changing Landscape’ (2008) 27 Civil Justice Quarterly 312; Maya Steinitz, ‘Whose Claim Is This Anyway? Third-Party Litigation Funding’, (2011) 95 Minnesota Law Review 1268; Aren Goldsmith, M. Scherer and C. Flechet, ‘Third-Party Funding in International Arbitration in Europe: RDAI/IBLJ Roundtable 2012’, (2012) 2 (Part I) International Business Law Journal / Revue de Droit des Affaires Internationales 207; Aren Goldsmith, M. Scherer and C. Flechet, ‘Third-Party Funding in International Arbitration in Europe: RDAI/IBLJ Roundtable 2012’, (2012) 6 (Part II) International Business Law Journal / Revue de Droit des Affaires Internationales 649; Eric De Brabandere and Julia Lepeltak, ‘Third-Party Funding in International Arbitration’, ICSID Rev. 27 (2012) 379; Munir Maniruzzaman, Arbitration – A Menace or Panacea?, *Kluwer Arbitration Blog*, December 29, 2012, available at <http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/> and Jean Kalicki, ‘Third-Party Funding in Arbitration: Innovations and Limits in Self-Regulation’, *Kluwer Arbitration Blog*, March 13, 2012, available at <http://kluwerarbitrationblog.com/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>; Aren Goldsmith and Lorenzo Melchionda, ‘Third-Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)’, (2012) 1 International Business Law Journal 53.

⁸ Victoria Shannon and Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration*, (Kluwer Law International 2012) 3; Steinitz, (n 7) 1275-1276 (2011). Commenting on such a phenomenon, Lord Brennan also states that ‘Litigation funding is here to stay. There is no going back.’ See Lord Brennan, New Center for International Commercial and Investment Arbitration Holds Inaugural Conference, 5 March 2014.

⁹ Victoria Sahani, ‘Judging Third Party Litigation in Funding’ (2016) 63(1) UCLA Law Review 1, 41.

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its development still requires further clarification and regulations.¹⁰ The immaturity of the system was also criticised by the interviewees that the rules and norms of using this method of funding fails to keep up with the economic reality.¹¹

For international investment arbitration, external funding is a particularly popular option due to the high legal costs and the potential rewarding outcomes at stake.¹² After the order given by the *Ticaret* tribunal,¹³ the practice of third party funding in investment arbitration is further clarified with the mandatory disclosure of funding arrangements being required. The justification of this decision was aided by the development in transparency in investment arbitration. Nevertheless, this is not the case in international commercial arbitration as there is no absolute duty of disclosure; furthermore, concerns over third party funding remain strong in commercial arbitration due to the requirements of privity and duties. Despite this, applying legal positivism, attempts to legalise third party funding for arbitration have been noted in the 2015 Hong Kong¹⁴ and 2016 Singaporean judicial consultations. Both major arbitration

¹⁰ Francisco Blavi, 'Towards a Uniform Regulation of Third Party Funding in International Arbitration' (2015) 32 IALR 143, 143

¹¹ Queen Mary School of International Arbitration and White & Case, International Arbitration Survey: Improvements and Innovations International Arbitration (2015) 49; New Center for International Commercial and Investment Arbitration Holds Inaugural Conference, 5 March 2014.

¹² Such as *S & T Oil Equipment and Machinery Ltd. v. Romania* (S&T Oil v. Romania), ICSID Case No. ARB/07/13) funded by Juridica; *Ron Fuchs v. The Republic of Georgia* (Fuchs and Kardassopoulos v. Georgia) (ICSID Case No. ARB/07/15) funded by Allianz Litigation Funding, *Oxus Gold plc v. Republic of Uzbekistan*, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat (*Oxus Gold v. Uzbekistan*) and *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (*Rusoro v. Venezuela*) funded by Calunius Capital, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1 (*Teinver v. Argentina*) funded by Burford, , *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (*ATA v. Jordan*) (ICSID Case No ARB/08/2), Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and *RSM Production Company v. Grenada*, (*RSM v. Grenada*) ICSID Case No. ARB/10/6 , *Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea*, de Ly, Owen and Leboulanger (*Fitzpatrick v. Equatorial Guinea*) (S.D. Tex. 2013)

¹³ *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ISCID Case No ARB/12/6, Procedural Order No 3 (12 June 2015)

¹⁴ http://www.gov.hk/en/theme/bf/consultation/pdf/10119_Consultation_Paper.pdf

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jurisdictions¹⁵ intend to offer a legal basis by the enactment of law to allow third party funding to achieve the access to procedural justice of institution.

Currently, external funding in international commercial arbitration is not offered any clear guidelines. This lands TPF arbitration in controversy¹⁶ which includes conflicts of interest, privity, duty of disclosure, duty of confidentiality and ethical issues; in particular contrasting its private nature against the funding issue from the one experienced in litigation. It has been maintained that the argument for access to justice also applies to international commercial arbitration, hence, allowing for the practice of TPF arbitration. In this article, it is the researcher's intention to examine the issue of third party funding in international commercial arbitration from the perspective of the delivery of justice comprising both legal and moral obligations. The researcher intends to prove that separation of both obligations in third funding arbitration is a false agenda and the delivery of substantive justice in international commercial arbitration relies on the delivery of procedural justice. They are in fact intertwined in the deployment of third party funding to gain access to justice. The hypotheses of the current research are: (1) funder's control and conflicts of interest, rights and duties among all stakeholders will prevent the delivery of justice in international commercial arbitration and (2) there are legal and jurisprudential grounds supporting the arguments that the moral effects of allowing access to justice will rely on the enactment of law as a real method to implement procedural justice in international commercial arbitration. To do so, the researcher will first of all level TPF with maintenance and champerty. Further examination will explore the concept

¹⁵ Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016, available at <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law--amendment--bill-2016.html>

¹⁶ Blavi (n 10) 143.

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of justice by looking at the differences between justice for public and private dispute resolution. This will be followed by the researcher's argument that the relationship in a TPF arbitration is in fact a double triangle figure relationship instead of a single triangle one as claimed. The complications arising from such a relationship will be addressed from the perspectives of conflicts of interest, requirement of privity, duty of disclosure, duty of confidentiality and ethical issues to highlight the needs for regulations on such activities. The conclusion to be drawn is that both moral and legal obligations owed by all stakeholders to arbitration will demand the needs for disclosure of a third party funding agreement and better regulations sanctioning non-compliance.

II. ABOLISHING MAINTENANCE AND CHAMPERTY TO SATISFY THE NEEDS OF ACCESS TO JUSTICE

TPF in arbitration¹⁷ is nothing like obtaining funding based on securing loans from other types of financial assistance such as banks¹⁸ or vulture funds purchasing and pursuing bad debt in their own names.¹⁹ Although bank lending business is based on an elementary credit risk calculation secured by lien rights, some seems to have third party funding levelled with a banking loan.²⁰ In their discussion, they came to the conclusion that TPF, like a purely commercial loan does not need to be disclosed if the financing party received the proceeds of

¹⁷ TFP agreements may take different forms, such as insurance, attorney financing (pro bono, contingency, and conditional fee arrangements, loans, assignment of a claim or classic third-party funding in international arbitration in the form of non-recourse financing with repayment contingent on success. Details can be seen in Shannon, Bench, Nieuwveld (n 8) 5-8.

¹⁸ Hong Kong Consultation (n14) para 67.

¹⁹ Ibid.

²⁰ Laurent Lévy and Regis Bonnan, 'Third-Party Funding Disclosure, Joinder and Impact on Arbitral Proceedings' in Antonias Dimolitsa and Bernardo M. Cremades Román (eds), *Third-Party Funding in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Volume 10 (Kluwer Law International 2013) 82.

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the arbitration as a security. In reality, third party funding offers much more than that. Usually, an extensive probabilistic approach is applied by the funder's specialist litigators, financiers and corporate management consultants who would like to see rewarding returns from their investment by unearthing all relevant information to assist them to make such a lending decision.²¹

TPF allows the funding party to speculate and benefit from the successful outcomes when the funder bears no interest in the dispute. In contrast, a loan arrangement involves a lender providing funding, but being not entitled to a share in any direct recovery in return. The former would fall into the scope of champerty and maintenance. The definitions of maintenance and champerty speak that maintenance as: '[t]he intervention of an extraneous person in a litigation, between parties to a consent, with which the stranger has no concern, if considered apart from artificial circumstances, is repugnant to our sentiments of propriety'²² and champerty as 'an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds.'²³ It was said that, by providing funding to a holder of a claim where the funder held no connection or valid interest in such a claim, the funder's action was viewed as a breach of public policy, hence champerty or maintenance.²⁴ Similarly, the direct financial interest in the outcome of the claim received by the funder in exchange of funding in legal costs would see one carry out champerty.

²¹ Charles Kaplan, 'Third-Party Funding in International Arbitration Issues for Counsel in Dimolitsa and Cremades Román (n 20) 73.

²² William Tapp, *An Inquiry into the Present State of the Laws of Maintenance and Champerty Principally as Affecting Contracts* (V & R Stevens and Sons 1861) 1; reprinted in 2010.

²³ Paul Bond 'Making Champerty work: An invitation to State Action' (2002) 150 U PA L. REV 1297, 1297.

²⁴ *Chitty on Contracts* (31st ed., Sweet & Maxwell Ltd 2012) 16.049-16-054.

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Examining the practice of third party funding against the definitions of maintenance and champerty, it is impossible to deny that third party funding shares a high level of similarity with maintenance and champerty as the funder or financial provider actually is unrelated to the disputes but provides funds either in exchange for a portion of the damages or reserves a direct financial interest in the outcome of the claim should the claim prevail. Consequently, argues the researcher, TPF is indeed a form of maintenance and champerty. Others have argued that TPF should not be considered the same as champerty or maintenance or as unjust contracts²⁵ as TPF should be seen as a tool to allow parties who otherwise would not be able to afford litigation to have access to justice. The TPF receives further support when its gambling nature is side-lined in r 2 the Code²⁶ which expressly acknowledges the nature of investment in allowing the litigant to have access to the funds as ‘being invested ... to enable a Litigant to meet the costs of resolving disputes by litigation or arbitration (including pre-action costs) in return for the Funder’ for a share of proceeds²⁷ or payment from the litigant.’²⁸

Despite the claims that the funder was viewed as “an officious intermeddler” or “an extraneous person” benefitting from the judgement proceeds and third-party funding was viewed as a tool undermining the civil justice system by commercialising the legal practice by moving its profession into an “investment entity”,²⁹ ss 13 and 14 of the Criminal Law Act of 1967

²⁵ Carolyn B. Lamm and Eckhard R. Hellbeck, ‘Third-Party Funding in Investor-State Arbitration Introduction and Overview’ in Dimolitsa and Cremades Román (eds) (n 20) 113; *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 273-274 (S.C. 2000).

²⁶ The Code (n 4).

²⁷ Ibid. r 2(A).

²⁸ Ibid. r 2(B).

²⁹ Jonathan Ames, *Litigation Financing Needs Crackdown*, THE TIMES (London), Dec. 11, 2011, at 66, Discussed in Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, Justice for Profit: A comparative analysis of Australian, Canadian and U.S. third party litigation funding, (2013) 61 The American Journal of Comparative Law, 93, 94. Also see Scherer (n 7) 95.

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abolished both the crimes and torts of maintenance and champerty, the principles only remain enforceable against a contract violating public policy.³⁰ One obvious advantage of such commercial litigation funding arrangements is their facilitation of access to justice through the funds provided by the funder. This is seen as an advantage by enabling the pursuit of meritorious claims that might not otherwise have been pursued for cost reasons, and has prompted more funders or law firms to be engaged in such activities.³¹

In the debates Lord Caswell³² and Lord Neuberger MR³³ highlighted the needs to reconsider the application of the century old principles in the contemporary call for access to justice. They applied a case by case approach in deciding whether the funding ‘would undermine the purity of justice, or would corrupt public justice by taking all aspects of the transaction into consideration.’³⁴ A suggestion³⁵ made by Lord Mustill in *Giles v Thompson*³⁶ indicates that an all-inclusive factors is the more appropriate way to consider whether a funder is indeed a maintainer which wantonly or officiously interfere with the litigation or indeed, ultimately share the profits of vulnerable litigants.³⁷ Such an approach was also applied in *Factorame*³⁸ where the court viewed a recovery of 8% being within a reasonable range for accountant fees. With the funding being provided to allow the funded party to seek access to justice and enjoy

³⁰ Section 14(2) of Criminal Act 1967. Shannon and Bench Nieuwveld (n 8) 40.

³¹ Discussed in Kalajdzic, Cashman and Longmoore (n 29) 100.

³² *Kellar v William* [2004] UKPC 30, [21].

³³ *Sibthorpe & Anor v London Borough of Southwark* [2011] EWCA Civ 25 (25 January 2011) Also see Chitty on Contracts (n 24) 16.049-16-054.

³⁴ *Ibid.* *Sibthorpe & Anor v London Borough of Southwark* [33].

³⁵ [1993] UKHL 2, 13.

³⁶ *Ibid.*

³⁷ *Ibid.* 12

³⁸ *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others.* Case C-213/89.

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the full control of the proceedings, the Court of Appeal's decision to enforce the TPF agreement has been seen as a fairly priced funding option which enormously improves access to justice.³⁹

III. Justice as the Object of Judicial Dispute Resolution

As discussed, third party funding has developed into a phenomenon in the important European and Asian arbitration venues. This practice has been seen as the preferable alternative to legal aid for access to justice⁴⁰ as well as a legal means to collect fees from clients in some jurisdictions.⁴¹ Linking this practice with Rawls's idea of justice, though derived from justice in society, one can see the justice to be accessed on the presumption that everyone acts justly and does his part in upholding just institutions.⁴² Rawls sees justice as fairness:

The guiding idea is that the principles of justice or the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.⁴³

³⁹ Kalajdzic, Cashman and Longmoore (n 29) 93.

⁴⁰ Davis, W. Kent, 'The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How it Pays its Lawyers?', (1999) 16 Arizona Journal of International & Comparative Law 361, 377.

⁴¹ See *Taylor v. Bemiss*, 110 U.S. 42, 45-46 (1884); *Stanton v. Embrey, Adm'r*, 93 U.S. 548, 557 (1876).

⁴² John Rawls, *A Theory of Justice* (OUP 1971) 8.

⁴³ Ibid. 11.

Reflecting this upon commercial arbitration, Rawls's concepts of justice can be said that (1) the principles of justice or the basic structure of arbitration should be viewed as the object of judicial dispute resolution/arbitration. (2) the principles of justice are the main principles that allow parties the freedom to further their own interest which is based on equality to maintain the institution, and (3) the principles of justice are to be extended to further agreements such as arbitration agreement, appointment agreement and third party funding agreement.

A. Public Justice or Private Justice

Rawls's justice is an overall concept which saw no distinction between private and public justice. With development of alternative dispute resolution, justice sought through private resolution can be seen differently from public justice. When disputing parties resort to judicial dispute resolution, it is commonly understood that parties seek justice with a just resolution. This is especially the case in litigation in an open court. To some extent, the argument of seeking justice may also apply to arbitration. The idea of no distinction between private justice and public justice has long been held when Lord Roskill confirmed the English Parliamentary concerns over public policy by leaving champerty doctrine untouched in its amendment of Criminal Law Act 1967.⁴⁴ In particular, Sir Richard Scott stated that:

Arbitration proceedings are a form of litigation. The *lis* prosecuted in an arbitration will be a *lis* that *could*, had the parties preferred, *have been prosecuted in court*. The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. *I find it quite impossible to discern any difference between court proceedings on the one hand and arbitration proceedings on the other*

⁴⁴ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, 702; s. 14 (2).

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that would cause contingency fee agreements to offend public policy in the former case but not in the latter. In principle and on authority, the law of champerty ought to apply, in my judgment, to arbitration proceedings as it applies to proceedings in court. If it is contrary to public policy to traffic in causes of action without a sufficient interest to sustain the transaction, what does it matter if the cause of action is to be prosecuted in court or in an arbitration? If it is contrary to *public policy* for a lawyer engaged to prosecute a cause of action to agree that if the claim fails he will be paid nothing but that if the claim succeeds he will receive a higher fee than normal, what difference can it make whether the claim is prosecuted in court or in an arbitration?⁴⁵ [Italics added]

Such a view indicates that the prohibition or permission of champerty also extends to arbitration. Nevertheless, such a view must be qualified by parties' other considerations such as privacy, flexibility or neutrality when they choose private justice. These considerations lay down the distinctions between the access to public justice and private justice. The different treatments of access to justice in litigation and arbitration can be observed in Steyn LJ's speech given in *Giles v Thompson*⁴⁶ confining the doctrine of champerty to the public justice. His statement that its extension to consensual arbitration would be a radical and new step indicates that access to private justice and public justice should be treated differently. His view clearly does not agree with the use of public policy for both litigation and arbitration in *Bevan Ashford*. However, his view is shared by Kaplan J who rejected the application of the doctrine of

⁴⁵ *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239, 249, and Melanie Willems, Third Party Funding – A paper for the Society of Construction Arbitrators, page 2; available at <https://www.constructionarbitrators.org/sites/default/files/local/browser/documents/SCA%20-%20Third%20Party%20Funding%20Paper.pdf>

⁴⁶ [1933] 3 All ER 321.

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champerty to arbitration.⁴⁷ The voice demanding to place public justice and private justice on the different footings was further strengthened by the doubts expressed over the application of the century old principles of public policy and its suitability in modern times.

B. Justice Is to Be Extended to Further Agreements by Allowing Parties the Freedom to Further Their Own Interest Based on Equality –Justice, Fairness and Morality

Despite such a divergence, the only justice which can be accepted by all parties is ‘the principles which free and equal persons would assent to under circumstances that are fair’.⁴⁸ Such justice, according to Rawls, ‘cannot be deduced from self-evident premises or conditions on principles. Instead, ‘its justification is a matter of the mutual support of many considerations,’ fitting together into one coherent view.⁴⁹ Although Rawls’s “many considerations” corresponds with Lord Mustill’s “all-inclusive factors”, what is fairness? Does this fairness require morality to support the so-called justice allowing parties the freedom to further their own interest but reaching a balance of the rights? How is the balance of rights struck between stakeholders to commercial arbitration and TPF funders?

Rawls’s emphasis on “the circumstances of justice” may lend a hand to the balance of the stakeholders’ rights to reflect fairness and justice. The background conditions and arrangements determine the necessities are the circumstances of justice.⁵⁰ These circumstances of justice is also reflected in the objective circumstances which make human cooperation both

⁴⁷ *Canonway Consultants Ltd. v Kenworth Engineering Ltd* (1997 ADRLJ 95).

⁴⁸ Rawls (n 42) 13.

⁴⁹ Ibid. 21.

⁵⁰ Ibid.126

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possible and necessary and the subjective circumstances which are the relevant aspects of the subjects of cooperation, that is, of the persons working together.⁵¹ Accordingly, this justice requires human cooperation and an identity of interests ‘since social cooperation makes possible a better life for all than any would have if each were to try to live solely by his own efforts.’ However, conflicts of interest will appear in human pursuit of their ends. Consequently, the circumstances of justice seen by Rawls is not without restrictions. The restrictions are ‘the constraints of the concept of right since they hold for the choice of all ethical principles and not only for those of justice.’⁵² All these relevant conditions allow adjustment of the claims that persons make on their institutions and another.⁵³ Only the stakeholders’ rights are considered and respected as well as duties are performed by them, then justice arrives. This requires compromise.

C. To Balance the Stakeholders’ Rights and Duties

Rawls’s suggestion in that ‘a party is not ready to accept a loss for himself if only others have less as well’⁵⁴ can lay down the grounds for compromise of rights, duties and justice. Such a compromising approach can be observed in Rawls’s speech on “justice can never be fully carried out”. In his own words: ‘Justice is happiness according to virtue. While it is recognised that this ideal can never be fully carried out, it is the appropriate conception of distributive justice, at least as *prime facie* principle, and society should try to realise it as circumstances permit.’⁵⁵ According to Rawls, the balance of the stakeholders’ rights, duties and justice can

⁵¹ Ibid. 126-127

⁵² Ibid. 130

⁵³ Ibid. 131

⁵⁴ Ibid. 143

⁵⁵ Ibid. 310

be achieved⁵⁶ if inequalities in question would make the least advantaged in society materially better off than they would be under strict equality. Applying this to TPF arbitration, one could say that the justice the funded party intends to access will require compromise or re-balance of the rights and duties of all stakeholders to arbitration. Once the stakeholders are willing to re-balance their rights as the circumstances permit, justice sought will be carried out. However, to achieve this, one has to re-consider all-inclusive factors which may affect the re-balance of the stakeholders' rights.

III. WHOSE JUSTICE? – THE FACTORS A MEANINGFUL GOVERNANCE SHOULD CONSIDER

Despite jurisdictions sharing different views on TPF arbitration,⁵⁷ consensually ethical concerns and potential legal prohibitions have been raised.⁵⁸ What really hampers the wide acceptance of TPF is that the third party does not share the common aim with the disputing parties and the tribunal, but in fact assist the funded party⁵⁹ or fund the proceedings in return for a share of the proceeds.⁶⁰ This is further compounded by its lack of legal and ethical standards which are necessary to ensure the delivery of justice in TPF arbitration.

⁵⁶ Ibid.

⁵⁷ For instance, in England, “damages-based agreements” are allowed under ss 44 and 45 of Legal Aid, Sentencing and Punishment of Offenders Act 2012. In France, “no win no fee” arrangement as well as pure contingency fee arrangements are prohibited. Similar prohibitions in the latter case can also be seen in Switzerland, Belgium, Denmark, Finland, Norway, Portugal, Sweden and Spain. Italy has recently allowed pure contingency fees under *Codice Deontologico Forense*, art. 46. Discussed in Shannon and Bench Nieuwveld (n 8) 39; Kaplan (n 21) 71; Daniel Wehrli, ‘Contingency Fees / Pactum de Palmario “Civil Law Approach”’, (2008) 26(2) ASA Bulletin 246-250.

⁵⁸ Shannon and Bench Nieuwveld (n 8) 40-41.

⁵⁹ *Unruh v Seeberger* (n 6).

⁶⁰ Lord Justice Jackson, “Third Party Funding or Litigation Funding” (Speech delivered at the Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, The Royal Courts of Justice, 2011).

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Although Affaki correctly pointed out that the recommendations on TPF in the Jackson Review⁶¹ are far from the stringent regulation that applies to other finance providers such as commercial banks.⁶² His views are that the TPF ‘is really a financing business carrying its own, not objective, rules, risks and limits.’⁶³ Consequently, a meaningful governance of TPF recognising the avoidance of conflicts of interest is essential to address the imbalance bargaining powers⁶⁴ of the stakeholders and potential practical and ethical issues to ensure that third party funding remains a method allowing victims to have access to justice,⁶⁵ rather than a method allowing financiers to extract settlement from the other party through vexatious cases.⁶⁶ To do so, it becomes essential to examine the relationship in a TPF agreement from the perspectives of contractual rights and duties, duty of independence and impartiality and duty of confidentiality to ascertain whose justice TPF arbitration serves.

A. Re-write the Relationship in TPF Arbitration

The operation of commercial arbitration between the disputing parties is based on privity which allows the control to be exercised by the actual parties to the arbitration agreement. It is said that ‘the parties own the dispute and should be able to control the details of their disputing process.’⁶⁷ However, privity can be under threat with the funder’s commercial interest in the

⁶¹ Jackson Review of Civil Litigation Costs (n 5).

⁶² Bachir Georges Affaki, ‘A Financing is a Financing is a Financing...’ in Dimolitsa and Cremades Román (eds) (n 20) 13.

⁶³ Ibid. 11.

⁶⁴ Christopher P. Bogart, ‘Overview of Arbitration Finance’ in Dimolitsa and Cremades Román (eds) (n 20) 51

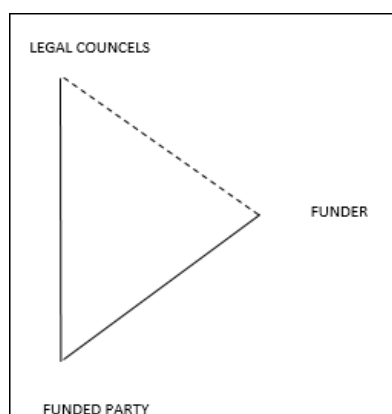
⁶⁵ Affaki (n 62) 10. In the context of investment arbitration, *Bernardus Henricus Funnekotter et al. v. Republic of Zimbabwe*, ICSID case no. ARB/05/6 (allegedly expropriated farmers funded by a charity) and *Philip Morris et al. v. Uruguay*, ICSID case no. ARB/10/7 (a US charity combating teenage smoking financing Uruguay in its defence against an alleged expropriation claim filed by Philip Morris).

⁶⁶ Affaki (n 62) 10.

⁶⁷ Edward Brunet, ‘The Core Values of Arbitration’ in Edward Brunet, Richard E Speidel, Jean R Sternlight, Stephen J Ware (eds) *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 3. *This is a pre-copyedited, author-produced version of an article accepted for publication in International Arbitration Law Review following peer review. The definitive published version H-L Yu, “Can third party funding deliver justice in international commercial arbitration?”, (2017) 20(1) Int. A.L.R. 2017, pp. 20-34 is available online on Westlaw UK or from Thomson Reuters DocDel service*

outcome of the dispute.

The relationship in third party funding arbitration has always been described as an equilateral triangle.⁶⁸ (See Diagram 1) This triangle mainly focuses on the relationships between the client-attorney, client-funder and attorney and the funder as discussed in most literature. The emphasis on the relationship between the client and attorney is usually placed on the issue of the attorney's duty towards their client. For the one between the client and funder, the issues is usually emphasized on the level of control which may or may not be exercised by the funder, i.e. hands-on or hands-off approaches.⁶⁹ Between the funder and attorney, the relationship is described as a dotted line, as the attorney's professional and ethical obligations towards the client prevent the possibility of a solid line which can only be based on privity.⁷⁰



(Diagram 1)

However, a detailed examination of the operation of third party funding reveals that the described equilateral triangle figure does not represent the actual relationship of the

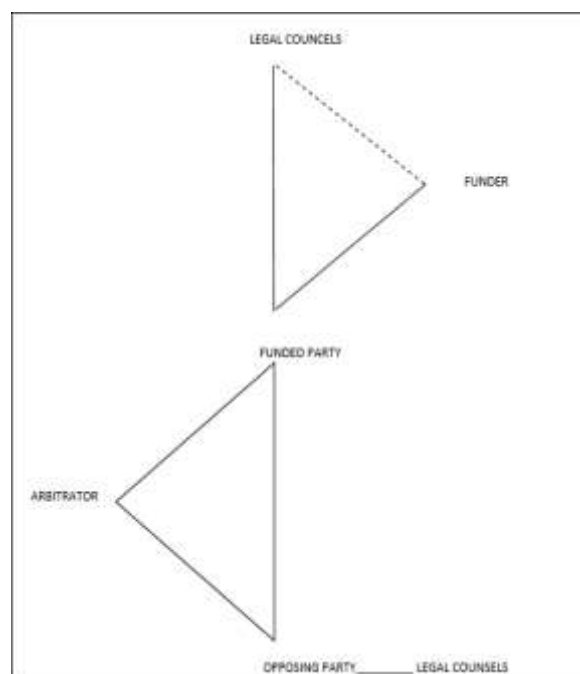
⁶⁸ Shannon and Bench Nieuwveld (n 8) 9.

⁶⁹ Scherer, Goldsmith and Fléchet (n7) 210

⁷⁰ The Code (n 4) r 7(b). It provides that undue influence exercised by the funder causing the litigant counsels to breach professional duties are prohibited.

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stakeholders where arbitrator and opposing party are omitted. In a third party funding arbitration, the funder, the funded party, the opposing party, the legal counsels and the arbitrators essentially form a double triangle figure. (See Diagram 2) The role played by the arbitrators are significant in terms of goalkeeping the procedural justice of arbitration by ensuring the integrity of arbitration. Yet, the tribunal's goalkeeping function would rely on the delivery of procedural justice carried out through different players in arbitration; mainly the funder and the disputing parties.



(Diagram 2)

In particular, apart from a contractual relationship with the funded party, the funder has to ensure the ethical interactions between the TPF and the arbitration process to be delivered. Such ethical duties observed in the process cover those with the legal counsel, the opposing party and the funded party respectively. This ethical element is substantially linked with the level of funder's control and must be addressed from the ethical and contractual perspectives.

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B. Procedural Justice Being Delivered by the Disputing Parties - Issue of Privity

In respect of the procedural justice being delivered by the disputing parties, the parties have to ensure that the TPF agreement does not interfere with the requirement of privity in an arbitration agreement which represents the parties' mutual consensus in terms of the contents⁷¹ and the jurisdiction which the actual disputing parties are subject to. It is commonly agreed that arbitration agreement exists between the disputing parties and not to be extended to a third party. However, funder's potential involvement in arbitration, especially in the case where the legal counsel is the financier, sparks the debate of whether a third party should be included as a party to the arbitration agreement and hold them responsible for the result of arbitration.

Most holding a negative answer to the question above have argued that the funder is unlikely to have any role in the negotiation and performance of the contract, which is arbitration agreement. This is because funder's involvement only starts when one disputing party seeks external funding. Furthermore, the funder's interest lies in making a profit⁷² from the result of the arbitration, not the performance of the contract or arbitration agreement.⁷³ As the arbitration is a product of consensual instruments based on commercial predictability, Born placed his emphasis on the parties' intention in terms of the question of whether the parties intended that a non-signatory be bound by and benefit from the arbitration clause.⁷⁴

⁷¹ The New York Convention 1958, art V(1)(a).

⁷² Percy Winfield, 'History of Maintenance and Champerty' (1919) 35 Law Q Rev, 50, 57-68. This article outlines the profit making and investment origins of champerty.

⁷³ Lévy and Bonnan (n 20) 83. However, a solute conclusion would be reached if the funder adopts a hand-on approach and exercises influence over the proceeding.

⁷⁴ Gary Born, International Commercial Arbitration, (Kluwer Law International, 2nd edn 2014) 1190.

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The impact “parties’ intention for a non-signatory” having on the opposing party’s right to access to justice is also observed by Cremades. He highlighted that the lack of correspondence / disclosure of the TPF agreement to the opposing party occasionally could ‘imply a breach of the procedural good faith with which the parties should conduct themselves.’⁷⁵ Such a potential breach of procedural justice creates the opposing party’s rights to know. The opposing party’s rights to know can also be argued from the perspective of funder’s rights to terminate the funding agreement. With the link between access to justice and third party funding seems to lean more towards the funded party’s right, the opposing party’s rights to procedural justice can be overlooked and negatively impacted upon. Ignorance of such rights will breach the parties’ general duty in participating arbitration proceedings in good faith imposed upon by most of arbitration laws⁷⁶ and arbitration rules.⁷⁷

Furthermore, considering the fact that most arbitration agreement is drafted before the dispute arising, the language used in the agreement rarely contemplates the participation or inclusion of a funder. The only way to allow the funder to enjoy or bear the result of arbitration is to allow the funder to become a joiner in the arbitration proceedings or require the funder to take up the ultimate financial responsibility. In doing so, the funder will be able to legally influence the arbitration proceedings. However, in the former case the disclosure of the TPF agreement has to be made to the opposing party in order to obtain his consent. In the absence of such a

⁷⁵ Bernardo Cremades, ‘Third Party Funding in International Arbitration’, 23 September 2011, p. 7, available at <http://www.cremades.com/en/publications/third-party-funding-in-international-arbitration/>. See also Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 216.

⁷⁶ Scottish English arbitration Acts, and Lévy and Bonnan (n 20) 80

⁷⁷ Arts 22, 37(5) and 41 of the ICC Rules of Arbitration (2012). Steinitz (n 7) 1336. Also see *Hamilton v Al Fayed* (No2) [2003] QB 1175, 1194 *Fairview Donut Inc. v TDL Group Corp* 2012 ONSC 1252 (Ontario Supreme Court) *This is a pre-copyedited, author-produced version of an article accepted for publication in International Arbitration Law Review following peer review. The definitive published version H-L Yu, “Can third party funding deliver justice in international commercial arbitration?”, (2017) 20(1) Int. A.L.R. 2017, pp. 20-34 is available online on Westlaw UK or from Thomson Reuters DocDel service*

consent following the notification to the opposing party, the opposing party's right to procedural justice would be severely impaired if the funder were allowed to control the proceedings. In the latter case, funders would have to be willing to remove the commonly used exit clause in TPF agreement to allow them to bear the financial responsibility or enjoy the financial fruit. Some even argue against the presumption of funder becoming a joinder or the funder's open participation in the proceedings. Accordingly, all of these have to be seen as 'its intent to assist the funded party and its lawyers and, at most, help to demonstrate its desire to control or influence the proceedings (but not its intent to be bound by the contract's arbitration clause, save perhaps in exceptional circumstances).'⁷⁸

C. The Non- Delivery of Procedural Justice with Funder's Influence

As funders in TPF arbitration does not have privity to the arbitration agreement, they are not supposed to act as the disputing parties or on behalf of the disputing parties. The requirement of privity in terms of procedural justice can be demonstrated in the issue of jurisdiction, determining whom the actual party the opposing party is fighting against. Under the requirements of privity and jurisdiction in international commercial arbitration, it is essential to keep the financier and the role they play separate from that of the funded party who is a direct party.

⁷⁸ Lévy and Bonnan, (n 20) 84

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The very risk of funder's influence in arbitration proceedings is well explained by Lévy and Bonnan. In their interpretation of art 3(3)(b) of the IBA Rules of the Taking of Evidence,⁷⁹ they explained funding legal proceedings should not constitute a circumstance that is directly or sufficiently relevant to the case or material to its outcome. This is because 'third-party funding should have no impact on the merits of the case.'⁸⁰ At the same time, nevertheless, they also said that, in reality, '[t]his assertion does not mean that the third-party funding agreement will not influence the funded party's conduct in the arbitration. Neither does it mean that third-party funding will be irrelevant for the determination and allocation of the arbitration costs.'⁸¹

Funder's influence over the proceedings including coerced settlement discussions and decision-making,⁸² will further complicate and exacerbate ethical and conflict of interest problems.⁸³ Consequently, unless the hands-off approach is applied by the funders, one finds it difficult to eliminate the links between funder's influence over funded party's conduct, determination or allocation of the arbitration costs and the merits of the outcomes. Suppose the funder successfully dismisses the opposing party's most crucial piece of evidence with the significant resources invested in doing so, in what way is one able to disconnect the link between the merit of the disputes and the influence exercised by the funder?

⁷⁹ The IBA Rules on the Taking of Evidence in International Arbitration (2010), art 3(3)(b): "A Request to Produce shall contain ... a statement as to how the Documents requested are relevant to the case and material to its outcome..."

⁸⁰ Lévy and Bonnan (n 20) 79

⁸¹ Ibid.

⁸² Kalajdzic, Cashman and Longmoore (n 29) 104. Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, Costs and Funding of Civil Litigation: a Comparative Study November 2009, Legal Research Paper Series Paper No 55/2009 December 2009 Electronic copy available at <http://ssrn.com/abstract=1511714>, page 42

⁸³ Kalajdzic, Cashman and Longmoore (n 29) 104.

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1. Disagreement between funder and funded party

To ensure their investment will receive the maximum return, the funders may attempt to influence the proceedings indirectly by advising the funded party, shaping the claims or by raising parallel proceedings.⁸⁴ In disagreement, they may attempt to force the funded party to change the course of proceedings on the basis of a TPF agreement. A negative view on such practice was expressed on the ground that a desire possessed by a non-privity party to the arbitration to intervene in the proceedings can cause ‘numerous procedural issues and unnecessary complications whenever the funder and funded party disagreed on an argument, motion or other procedural decision.’⁸⁵ Not surprisingly, it was suggested that in the case of disagreement, the tribunal ‘could (and probably should) proceed on the basis that the funder is a third-party whose requests do not have to be examined at all.’⁸⁶ This suggestion dismissed the funders’ claims in any legal rights to directly or indirectly intervene in the proceedings. Taking privity seriously, one would expect such a conclusion. While privity links the disputing parties to the arbitration process, a funder would find no legal basis to influence the proceedings which can impact the rights of the other party to the arbitration agreement.

2. The relationship between funder and legal counsels shall remain as a dotted line to ensure procedural justice

⁸⁴ Lévy and Bonnan, (n 20) 89

⁸⁵ Ibid.

⁸⁶ Ibid.

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The determination of who the actual party is will rely on the level of control a funder wishes to exercise to influence the process, the funded party or the legal counsels. In an attorney–client relationship, most jurisdictions require the client to retain control and management of the case as such control is based on the contractual relationship between the client and the attorney. This relationship should not be affected by the existence of funding agreement which is viewed as a separate agreement.⁸⁷

Saying that, the funder’s influence varies from case to case. It can range from funder’s significant control of the process to ensure his investment return,⁸⁸ approval of filing or settlements, authority over the selection of counsels or appointment of expert witness. Over and above the previous discussions on the actual parties, taking the special relationship between counsel-client and counsel’s fiducial duty towards the clients into consideration, the clients should have an absolute power to determine such matters.⁸⁹ Clearly, a TPF agreement should not overtake the appointment relationship between the counsel and the client. Nevertheless, would the potential interference from the funder *de facto* force the clients to compromise the counsel- client relationship, especially those ethical concerns,⁹⁰ encompass confidentiality, scope of disclosure and the independence and objectivity of counsel? Furthermore, would the client’s financial commitments and the funder’s right to terminate under the TPF agreement circumvent the client’s ability to reach a settlement?⁹¹ Ultimately, would the funded party

⁸⁷ Shannon and Bench Nieuwveld (n 8) 9; See Fulbrook Management LLC, *Investing in Commercial Claims Nutshell Primer* 9-10 (2d. ed.), Mar. 3, 2011, , paper given at the Fordham Law School Roundtable on Third-Party Funding of International Arbitration Claims: The Newest “New New Thing” (New York, June 15, 2011); Raconteur, *Legal Efficiency*, 7-9; Steinitz (n 7) 1324-1325; Richmond (n 5) 651-652, 659-664.

⁸⁸ *Abu-Ghazaleh v. Chaul* 36 So. 3d.691, 693 (Fla. Dist. App. 2009).

⁸⁹ American Bar Association Commission on Ethics 20/20 p. 22.

⁹⁰ American Bar Association Commission on Ethics 20/20 p. 13-15, 30.

⁹¹ Lamm and Hellbeck (n 5) 108

require the funder's consent before proceedings or settlement can be carried out? This is especially the case if a previous or continuing relationship exists between the counsel and the third-party funder.

Following the analysis, despite the existence of the funding agreement, the client should act independently from the funder in the capacity of an actual party, as if he were self-funded. To ensure the dotted line in the upper triangle between the funder and legal counsels remains as it is, one has to ensure the control element is removed from the funder so that the funding relationship similarly represents the one between a bank or other financial institution and the funded party. Although Seidel at Fulbrook argues for the relaxation of controlling factors in arbitration,⁹² such an argument is in fact contradictory to the requirement of privity as the ultimate decision should rest with the funded party. The issue of privity not only has an impact on the delivery of procedural justice through an arbitration agreement but can also be extended to other concerns over placing the opposing party in a disadvantageous position, such as the parties' duty of confidentiality and the tribunal's duty of independence and impartiality which are essential to the integrity of procedural justice. Therefore, it calls for the need for disclosure of TPF agreement on basis of conflicts between funder's control and his contractual rights to protect the investments and maximize the expected value of claims.

⁹² Selwyn Seidel, 'Third-Party Investing in International Arbitration Claims to Invest or Not to Invest? A Daunting Question' in Dimolitsa and Cremades Román (n 20) 22. Nevertheless, there are some contrary or differing arguments. See, e.g., Anthony Sebok, 'Control Issues: Litigation Investment, Insurance Law, and Double Standards', (2013) Cardozo Legal Studies Research Paper No. 394, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271762

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IV. THE DELIVERY OF PROCEDURAL JUSTICE THROUGH THE DUTY OF DISCLOSURE

Although the QMW survey indicates that 76% of practitioners supports mandatory disclosure of an agreement, 71 % of those surveyed are against the full disclosure of the TPF agreements.⁹³ While the debates remain a question of whether and to what extent a TPF agreement should be disclosed, it has been argued that the disclosure of the identity of the parties to the TPF agreement has its significance in terms of the integrity of arbitration process to avoid potential conflicts of interest between all parties. Accordingly, conflicts can be easily avoided by ‘checking the potential conflict of interest of judges and arbitrators’ and this ‘is a compelling reason to require that the client at least discloses the identity of the funder to the decision maker in the case.’⁹⁴ Moreover, the lack of duty of disclosure of the TPF agreement can cause the breach of the requirements imposed upon arbitrators requiring them to be financially independent and mentally impartial in the process.⁹⁵ Regarding the extent of disclosure, the researcher would argue for a full disclosure to offer the opposing party an opportunity to evaluate the potential outcomes by reviewing their possible strategies, as well as allow the tribunal to maintain procedural justice by assessing the needs for ordering security for costs.

A. Duty of Independence and Impartiality vs. Arbitrator’s Rights to Know

Although the activities of the arbitrator’s firm being involved with the funder may not

⁹³ Queen Mary School & White and Case Survey (n 11) 52

⁹⁴ Sahani (n 9) 903.

⁹⁵ Jonas von Goeler, Third Party Funding in International Arbitration and Its Impact on Procedure (Kluwer Law International 2016) 253; also see Gary Born, International Commercial Arbitration, (Kluwer Law International, 2nd edn 2014) 1779 and chapter 12 for the general discussion on the selection of arbitrators and standard of independence and impartiality as well as 1461-1462 for the issue of non-signatory parties to the arbitration agreement.

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necessarily constitute a source of conflicts, arbitrators should be given an opportunity to avoid such a possibility in order to maintain the justifiable procedural justice. This argument corresponds with Standard 7 of the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration 2014 (the IBA Guidelines) which imposes on the party the duty of notification of ‘of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual *having a controlling influence* on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.’⁹⁶ [Italics added]

Goeler views the IBA Guideline as nothing more than a reminder,⁹⁷ yet the Guideline is widely consulted by arbitrators, hence, provides a reasonable justification for the need of disclosure. Yeoh comments that potentially a slippery slope for arbitration would appear if disclosure requirement of TPF agreements is not created.⁹⁸ With the duty to unearth any sources of conflicts affecting the independence and impartiality of the tribunal as provided in Standard 7(d) of the IBA Guidelines, arbitrators are also required to actively make reasonable enquiries if the party fails to disclose. Similar provision can also be observed in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration.⁹⁹

⁹⁶ IBA Guidelines 2014, Standard 7(a).

⁹⁷ Goeler (n 95) 253

⁹⁸ Derric Yeoh, ‘Third Party Funding in International Arbitration: A Slippery Slope in Levelling the Playing Field’ (2016) 33(1) Journal of International Arbitration 115, 120.

⁹⁹ The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 22 Feb 2016. Aren Goldsmith and Lorenzo Melchionda, ‘The ICC’s Guidance Note on Disclosure and Third Party Funding: A Step in the Right Direction’ (2012) 1(1) Int’l Bus. L.J. 221

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In reality, without funded party's voluntary forthcoming information, arbitrators may not be able to fulfil such a duty. Arbitrator's "distinct desire"¹⁰⁰ to know whether a funder is involved in an arbitration he sits on is noted by Seidel who says:

In arbitrations, this question has particularly pertinent in the early stages, when conflict questions exist as to who the arbitrators are. Here, as a threshold issue, arbitrators have shown a distinct desire to know whether there is a funder involved. This may relate to whether the arbitrator is in a conflict situation. If an undetected conflict surfaces later, this could abort the entire proceeding. The question therefore impacts not only the arbitrators but also the parties. The impact could be catastrophic.¹⁰¹

Corresponding with arbitrators' duty of disclosure,¹⁰² arbitrators should also have a right to know about the existence and extent of the TPF agreement. On the one hand, to satisfy the arbitration procedural justice, the identity of the funder is essential to arbitrators' declaration of independence and impartiality. On the other hand, to satisfy the arbitration procedural justice for the opposing party, arbitrators should have a right to know the extent of the TPF agreement in order to decide on the matters of interim measures.

1. Undesirable effects on non-disclosure - challenges on the tribunal's composition and non-satisfaction of justice through enforcement

¹⁰⁰ Seidel (n 92) p22

¹⁰¹ Ibid.

¹⁰² Most institutional arbitration rules require duty of impartiality and independence, Art 12 (1) of the UNCITRAL Model Law, Art 11 of the ICC Arbitration Rules 2012, Art 11 of the UNCITRAL Arbitration Rules 2013, and Grounds for challenge Art 12 of the UNCITRAL Arbitration Rules 2013.

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Failure on the tribunal's ability in disclosing the conflicts of interest between the tribunal and the funder or parties may jeopardise arbitration proceedings and lead to the setting aside of the award under Art V(1)(d) of the New York Convention 1958. In particular, arbitration rules, law or the General Standard 7(d) of the IBA Guidelines require the arbitrators to search proactively for potential conflicts of interest. As the composition of the tribunal may be called into doubt due to the impacts of TPF agreement, for the benefits of both parties, including the funder, it is reasonable for the tribunal and the opposing party to exercise their right to know to ascertain the existence and extent of the agreement. Equally, it would not be unreasonable for the arbitrators who suspect the existence of such an arrangement to require the funded parties to disclose the level of involvement of the funder and the agreement itself. The imposition of the duty of disclosure of TPF agreement will provide a solution to an arbitrator's inability to meet their duties under the IBA Guidelines or arbitration laws, as well as remedy the precarious gap between arbitrator's duty to ensure the non-existence of conflicts of interest¹⁰³ and the lack of funded party's voluntary disclosure.¹⁰⁴

Aided with funder's resources it does not mean that the funded party will always win the case. Therefore, to allow the non-disclosure of TPF agreement and have an award made on such a basis is an irresponsible approach to both disputing parties. The case for disclosure of the TPF agreement is further made in terms of satisfying the award when the funded party became unable to pay the opposing party. As Kirtley and Wietzykowski point out: '[w]here a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with

¹⁰³ LCIA Arbitration Rules, art 5.3

¹⁰⁴ Burcu Osmanoglu, 'Third Part Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' (2015) 32(3) Journal of International Arbitration 325, 326.

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the funding of a third party, then a strong *prima facie* case for security of costs exists.’¹⁰⁵ This is especially the case where the tribunal applies the English rule of “the costs follow the event”. In some jurisdictions, the opposing party that obtains a judgment against a funded party may be able to collect the awarded amount from the third-party funder as *Arkin v. Borchard Lines, Ltd. No. 2*¹⁰⁶ illustrates. This is to ensure that better justice is served by offering the opposing party a right to recover his entitlement from ‘the professional funder whose intervention had permitted the continuation of a claim that had proved to be without merit’¹⁰⁷ as well as provide support to those who propose a policy of disclosure of TPF agreement to arbitral tribunals.¹⁰⁸

The enforcement may not be an issue in investment arbitration due to its unique enforcement system, however it may cause problems in investment arbitration carried out under the UNCITRAL Arbitration Rules and general international commercial arbitration. Such situations can be readily remedied if the agreement is revealed to the tribunal and the opposing party is allowed to assess its associated risk, in terms of request for security for costs and litigation strategies to satisfy procedural justice requirements as discussed.¹⁰⁹

B. Duty of Confidentiality vs. Stakeholders’ Right to Know – Control Factor

¹⁰⁵ Kirtley and Wietzykowski (n 7) 28; Scherer, Goldsmith and Fléchet (n 7) 215.

¹⁰⁶ [2005] EWCA Civ. 655

¹⁰⁷ Ibid.

¹⁰⁸ Lamm and Hellbeck (n 5) 112

¹⁰⁹ The Code, Rule 7 requires the funders to meet their financial obligation to pay for the debts due. However, under r 8, express provision in the TPF agreement is required extend the obligations to adverse costs, costs insurance, security for costs and other financial liability.

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Contrary to international investment arbitration which requires transparency under the ICSID or the UNCITRAL arbitration frameworks,¹¹⁰ the issue of confidentiality in international commercial arbitration remains jurisdiction based.¹¹¹ Without a universal duty of confidentiality being confirmed on a global scale, whether confidentiality can be viewed as an attribute of arbitration in terms of third party funding remains debatable as well as difficult to identify direct jurisprudence to support such a duty under the contemporary “legal positivism”.

However, the issue arising from confidentiality should be analysed from two levels. One concerns the disputes and proceedings and the other one is related to the confidentiality provisions of TPF agreement. The discussion on the latter case should focus on the balance between the stakeholders’ rights to know and the confidentiality duties arising from arbitration agreements and TPF agreements respectively. In the former case, private nature of arbitration is an attraction in the eyes of the parties.¹¹² Such a characteristic has made arbitration a particularly fertile area for the clash between the disputing parties’ duty of confidentiality and the funder’s need to access confidential information of the disputes and proceedings, in order to apply the extensive probabilistic approach in assessing its funding options.¹¹³ Yet, such a view could only be partially agreed upon as the duty of confidentiality is not a universal duty as the research has shown.¹¹⁴

¹¹⁰ See the detailed discussion in Hong-Lin Yu and Belen Guipponi, ‘The Pandora Box Effects under the UNCITRAL Transparency Rules’ (2016) *Journal of Business Law* 347-37

¹¹¹ See the survey and discussion carried out in H Yu, ‘Duty of confidentiality -Myth or reality?’ (2012) 31(2) *Civil Justice Quarterly*, 68-88.

¹¹² John Savage and Emmanuel Gaillard, *International Commercial Arbitration* (Kluwer Law International, 1999) 773.

¹¹³ Selwyn Seidel and Sandra Sherman, ““Corporate Governance” Rules Are Coming to Third Party Financing of International Arbitration (and in General) July 8, 2013”” in Dimolitsa and Cremades Román (eds) (n 20) 40.

¹¹⁴ Yu (n 111).

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1. Counsels' potential breach of duty of confidentiality

The duty of confidentiality over confidential information and proceedings, in the jurisdictions where duty of confidentiality is to be observed, can arise not only from the relationship between the funder and funded parties as well as between the counsels and the funder. In terms of the relationship between the counsels and the funder, lawyers in most jurisdictions are not allowed to release confidential information regarding client matters under any circumstances, even with the client's authorization.¹¹⁵ However this obligation does not prevent the funding party from receiving counsel's indirect release of information via the funded party/client, and revealing beyond the current case. Consequently, in the absence of a statutory duty upon the funder, the potential risk of revelation of confidential information to be used in related court or arbitration proceedings may occur, especially in the cases of concurrent or recurrent funded parties or funders as highlighted.

In the case where a statutory duty exists, currently only parties, arbitrators or third parties, such as witnesses, attending the proceedings are subject to this duty.¹¹⁶ Furthermore, apart from a voluntary waiver of privilege by disputing parties, any information given or provided to the third-party funder can cause a breach of the duty of confidentiality that the funded party owed to the opposing party. Besides, if this information is identifiable, the production of such information can be ordered according to the IBA Rules on the Taking of Evidence.¹¹⁷ In other words, any information subject to lawyer's duty of confidentiality but disclosed to the funder

¹¹⁵ Règlement Intérieur National, art. 2.1; Cass. 1ère civ., 6 April 2005, n° 00-19.245. Discussed in Kaplan (n 21) 74.

¹¹⁶ Scottish Arbitration Rules, r. 26.

¹¹⁷ The IBA Rules, articles 3.1(a)(i) and (ii), 3.10 and 9.2(b) and (g) provides arbitrators a wide measure of discretion in deciding whether to order production of a document.

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can be subject to the risk of being fully discoverable. Furthermore, such documents may be used by the funder against the party it had previously funded if a dispute erupts between them.¹¹⁸ As discussed, the counsel's duty of confidentiality may be similarly affected by the TPF agreement if there is a previous or concurrent appointment by the funder as counsel is supposed to have his client's, not funder's, interest at heart.¹¹⁹

2. Potential breach of the duty of confidentiality through the funder's probabilistic approach

Although the funder is usually subject to the contractual confidentiality or non-disclosure agreement¹²⁰ reached between the funder and the funded party,¹²¹ such confidentiality is due to non-disclosure of the TPF agreement and should not be confused with the disputing parties' duty of confidentiality arising from arbitration proceedings analysed above. Those confidentiality agreements or non-disclosure agreements incorporated in some of the TPF contracts are to protect funders against future disclosure requests or liability for costs, frequently, with a governing law that is favourable in that respect.

As some commentators explained, before committing itself to provide funds, the funder may exercise due diligence and his right to know under the TPF agreement by requiring extensive information and materials to be provided by the client and his lawyers in the forms of an initial

¹¹⁸ *S & T Oil Equipment & Machinery, Ltd, Et Al., v Juridica Investments Limited, Et Al.*, Civil Action No. H-11-0542. United States District Court, S.D. Texas, Houston Division. April 25, 2011 and the LCIA arbitration, Baiju Vasani, 'Third Party Funding Snapshots: United States' Global Arbitration Review News 30 March 2012, available at <http://www.globalarbitrationreview.com/journal/article/30381/third-party-funding-snapshots-united-states>

¹¹⁹ Lamm and Hellbeck (n 5) 109.

¹²⁰ The Code, r. 6.

¹²¹ The Code, r. 5.

package of information and a “conditional litigation funding agreement” or a combination of internal assessment and external assessment.¹²² With such a gathering of information, the arbitration proceedings are liable to the potential breach of confidence in the funder’s exercise of probabilistic approach in obtaining the identification of key confidential elements, such as the parties, the disputes, costs of bringing the claim, the theory for damages and the likely recovery or settlements.

In the absence of clear guidelines, some funders agree that the parties’ agreement as to confidentiality should prevail as the parties’ agreement forms the key element in an arbitration case. Others claim that such a matter should be left to the arbitral institutions¹²³ to deal with the non-disclosure of confidential information.¹²⁴ Some even search for an answer from the Code which requires the funder to observe confidentiality of all information and documentation relating to the dispute to the extent that the law permits.¹²⁵ However, regardless which view a funder takes, it is worth noting that, undeniably, funder’s practice of right to know can infringe the duty of confidentiality the funded party owes to the opposing party during the information gathering.

V. CONCLUSION

A. Link between Denial of Access to Justice and Non-Disclosure of TPF Agreement

¹²² Scherer, Goldsmith and Fléchet (n 7) 215.

¹²³ The LCIA Arbitration Rules 2014, Art 30.

¹²⁴ Scherer Goldsmith and Fléchet (n 7) 217.

¹²⁵ The Code, r. 5.

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The denial of access to justice is viewed as both natural and legal wrongs by both legal positivism and moral philosophers. However, access to justice should not be done at the expenses of the integrity of arbitration proceedings. Although Goldsmith and Melchionda argue against the perspective of having every single TPF agreement scrutinized in order to maintain the efficiency of arbitration,¹²⁶ the need to maintain the integrity of the arbitration proceeding¹²⁷ was stressed in an investment arbitration when the tribunal exercised its own “inherent powers” to order the disclosure of the TPF agreement.¹²⁸ Based on all the concerns examined in this research, the researcher argues that the concept of “inherent powers” should be followed in international commercial arbitration as the failure to address these concerns may lead to a challenge of the awards. Consequently, a presumption that there is no requirement of disclosure in international commercial arbitration must now be questioned, especially when both objective and subjective justice is at stake.¹²⁹

Apart from linking the needs for disclosure of TPF agreement with access to justice from the funded party’s perspective, this issue should also be assessed from the impact between non-disclosure of the TPF agreement and the potential denial of access to justice on the opposing party. As discussed, the non-disclosure of the identity of the funders will not allow the tribunal to fulfil its independence and impartiality declaration. This possibility will also deny the opposing party the justice he deserves. With the non-disclosure of the extent of the TPF agreement, the opposing party will suffer procedural injustice with his inability to know who he is up against, to plan his course of actions and to predict the funded party’s settlement value.

¹²⁶ Goldsmith and Melchionda (n 7) 225.

¹²⁷ *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (n13) para 9.

¹²⁸ Ibid. para 6.

¹²⁹ Burcu Osmanoglu, ‘Third Part Funding in International Commercial Arbitration and Arbitrator Conflict of Interest’ (2015) 32(3) *Journal of International Arbitration* 325, 326.

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Furthermore, his access to justice would be denied due to his inability to present the case to his best interest. Accordingly, it is clear that non-disclosure of TPF agreement will have undesirable impacts on the integrity of the arbitration proceedings and defeat its very purpose in seeking access to justice.

Disclosure can be carried out by the funder and the funded party voluntarily or by means of compulsory disclosure through legalisation as England intends to achieve. Nevertheless, voluntary disclosure without sanctions may encounter some difficulties of its own¹³⁰ as well as finding it impossible to reconcile with the confidential provisions incorporated in the funding agreement.¹³¹ For the alternative of statutory disclosure, the immediate question is whether the enactment of law on third party funding is both legally and morally correct.¹³² To be correct in law and morality, the need for enactment of legislation has to prevail stakeholder's personal interests. To allow the state to override one's personal interests, there must be a balanced proportionality of the rights and interests of the parties, the funders, the tribunals and justice. If it is proportionate to balance the funded party's right to access to justice, the rights of the opposing party to their rights to know and the rights of the tribunal to exercise authority without compromising their integrity against the funder's rights to receive the fruit of his investment,¹³³ then the enactment of such a law would be appropriate to ensure the integrity of an institution.

¹³⁰ Lévy and Bonnan (n 20) 79.

¹³¹ Alison Ross, 'The Dynamics of Third-Party Funding', (2012) 7(1) Global Arbitration Review 19.

¹³² Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, revised edition, 1996) 214.

¹³³ Scherer, 'Third Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?' (n 7) 96 and Jennifer Trusz, 'Full Disclosure? Conflicts of Interest Arising from Third Party Funding in International Commercial Arbitration (2012) 101 Geo. LJ 1649, 1665

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A compromise in re-balancing the rights can only be achieved if a party is ready to accept a loss for himself when others incur loss as well, as Rawls has argued.¹³⁴

Reflecting on the integrity of arbitration, the researcher is of the view that, in the absence of voluntary disclosure by the funded party and the funders, the need for statutory disclosure prevails the stakeholders' interest. This view is based on the following grounds. Firstly, an ability of an institution to deliver both procedural and substantive justice is vested in its integrity. Secondly, the individual focus on the contractual rights and duties of the third parties, the disputing parties or the tribunal will eventually lead to the breakdown of the system. Thirdly, the parties and funders owe a moral duty to the tribunal, the integrity of composition of the tribunal and the institution arbitration itself to ensure the delivery of justice the disputing parties try to have access to. Fourthly, to avoid the breakdown of the system, the justification of the legal rights and duties of all stakeholders involved in third party funding in commercial arbitration have to be balanced correlatively and collectively. Finally, to balance stakeholders' rights and duties correlatively and collectively requires the use coercion to ensure that the stakeholders' rights are safeguarded by the compliance of duty. Consequently, the funded party would owe the tribunal both a moral and a contractual duty to supply the information to allow the tribunal to declare its integrity in judging the disputes. The knowledge of the TPF agreement will allow the tribunal to fulfil this contractual duty and the opposing party to have access to justice. Similarly, a moral duty should also be observed by the funder for the very same reason.

¹³⁴ Rawls (n 42) 143.

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B. ‘Nothing Is Ever Settled until It Is Settled Right.’¹³⁵

Returning to Rawls’s views on justice,¹³⁶ one sees that a third party funding without disclosure to the tribunal would compromise the integrity of arbitration as an institution which leads to imperfect justice as the correctness of the result cannot be guaranteed. Rawls’s pure procedural justice is to be delivered by a fair procedure which produces the correct result. This does not apply to third party funding arbitration since the lack of independent criterion may lead to the breach of art V of the New York Convention, ultimately, an incorrect result. The reading of art V suggests that commercial arbitration requires procedural correctness leading to a just outcome. A just outcome has to be measured against an independent substantive test of justice to allow the correct result of arbitration to be delivered by satisfying the relevant independent substantive standards. Rawls’s views on the correlative substantive and procedural justice¹³⁷ is also present in international commercial arbitration which demands the correct procedural justice to be followed to ensure the correct substantive justice. The correlative nature of both kinds of justice¹³⁸ are demonstrated in their ability to exemplify certain values, both the procedure and the outcome, which are supported by equality and impartiality of an institution.¹³⁹

Consequently, allowing commercial funders to actively influence the procedures, including settlement discussions and decision-making, will not achieve both procedural and substantive

¹³⁵ Vladimir Balas, Review of Awards in Peter Muchlinski, Frederico Ortino, Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1126.

¹³⁶ Rawls (n 42) 74-77.

¹³⁷ Rawls, ‘Reply to Habermas’ in *Political Liberalism*, 372, 421-427.

¹³⁸ Ibid. 421.

¹³⁹ Ibid. 422.

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justice due to the likely conflicts of interest¹⁴⁰ which may ultimately deny the justice parties sought. It is claimed that ‘[o]pen and equal access to arbitration for parties that want to make use of it – not just in theory but also in practice – is a fundamental characteristic of any meaningful legal system.’¹⁴¹ The need to access to justice is similar in both public and private justice for the disputing party, who may suffer injustice due to the lack of funding to ‘unlock the often substantial value they have tied up in unresolved claims and because it allows them to proceed with arbitrations while retaining control of their exposure to loss.’¹⁴² However, such a need should not be limited to the funded parties but all stakeholders of the process. Hence the timing, contents and rationale of the disclosure of a TPF agreement to the tribunal and the opposing party have to be considered against all stakeholders who require the information to perform their legal or moral duty.

Seeing justice as fairness,¹⁴³ all stakeholders to a TPF arbitration shall be given an equal opportunity to consider whether the desired justice and fairness could be delivered with the funder acting as a wirepuller as well as whether the performance of their duty and legal interests would be carried out fairly if the TPF agreement is not subject to disclosure. The current research has shown otherwise on the grounds that conflicts of interest cannot be avoided, infringement to stakeholders’ rights to know and their inability to perform their duties can occur, a successful challenge to the award may become a real possibility, the privity requirement would be breached and undue influence exercised can negatively impact the integrity of an institution. All these lead to the denial of access to justice and justice on its own.

¹⁴⁰ Kalajdzic, Cashman and Longmoore (n 29) 104.

¹⁴¹ Bogart (n 64) 51.

¹⁴² Ibid; Trusz, (n 133) 1672.

¹⁴³ Rawls (n 42) 515.

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C. Need for Rules of the Game – Questions of Statutory or Self-Regulation and Enforcing Bodies

The need for governance on TPF has become evident after *Oxus Gold v. Uzbekistan*¹⁴⁴ which has been seen as a wake-up call for investment arbitration.¹⁴⁵ Moving into commercial arbitration, the need is particularly acute to avoid placing the funded party in a much more vulnerable position with potential “stock price manipulation” and/or “insider trading.”¹⁴⁶ Seidel and Sherman spoke of the need for regulation but in the most modest form:

In fact, since international arbitration has its own specific rules, including those of confidentiality which can create a tension with corporate governance rules, international arbitration might well be a pacesetter in the development of rules in this area. Further, the arbitration area, because of its relative newness in the commercial funding environment and openness to rule making and guideline setting, coupled with its being a dispute area which is predicated on the fact that the contract between the parties should govern the relationship with only modest influence from courts and court-established public policy, provides a relatively clean slate to build a solid infrastructure and a rich field to develop wise rules.¹⁴⁷

Lord Justice Jackson is of the opinion that ‘there should be some form of restriction upon the activities of third-party funders’¹⁴⁸ His recommendations include (1) a voluntary code be

¹⁴⁴ *Oxus Gold plc v. Republic of Uzbekistan* (n 12).

¹⁴⁵ Seidel and Sherman (n 113) 32

¹⁴⁶ Ibid. 34

¹⁴⁷ Ibid. 33

¹⁴⁸ *Review of Civil Litigation Costs: Final Report* (Norwich: The Stationary Office, 2009) 119.

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developed for the funders to subscribe to; (2) at a later point, to revisit whether the FSA ought to create statutory regulation over third-party funders; and (3) third-party funders should have some liability exposure for the full adverse costs, “subject to the discretion of the judge.”¹⁴⁹ Ogus is also in favour of a soft-law approach such as the Code as it demonstrates the industry’s initiative to improve services signalling quality to the market as well as warding off ‘more intrusive government regulation, preserve market autonomy, and may even be anti-competitive by raising the bar for newcomers.’¹⁵⁰

To reach a universal consensus on the enforcement of a general and mandatory obligation to disclose third-party funding agreements may be a long way ahead. However, the consensus is that TPF needs governance. The researcher would argue that in the case of TPF, the Code may be relevant but of little value as its compliance relies on the funders’ voluntary disclosure which is obstructed by the confidentiality agreement in TPF agreements. A Code without sanction cannot guarantee the delivery of justice, especially the justice all stakeholders and institutions are entitled to. For this reason, the self-regulated rules such as the Code pushes this issue back to where the debates started. Although suggestions of incorporation into the institutional rules¹⁵¹ may be seen as a partial solution from the contractual perspective, the examination of interaction between justice and commercial arbitration in the current research proves that there are indeed legal and jurisprudential grounds for states to be involved in setting disclosure requirements for the TPF agreement. Doing so would ensure the access to procedural justice,

¹⁴⁹ Ibid. 124.

¹⁵⁰ A.I. Ogus, ‘Rethinking Self-Regulation’ (1995) 15 Oxford Journal of Legal Studies 97, 97; Willem H. van Boom, ‘Third-Party Financing in International Investment Arbitration’, p.57, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114

¹⁵¹ Scherer (n 7) 99.

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the integrity of arbitration institution and non-denial of procedural and substantive justice to all stakeholders in TPF arbitration.