

THE THIRD MAN IN INTERNATIONAL ARBITRATION

Analysis of the Issues & Challenges in Arbitration Funding

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Abstract

The last several years have witnessed a tremendous increase in the participation of third-party funders in international arbitration. The exponential growth rate in the participation of funders in a short time-span in international arbitration has given birth to several concerns—some national and legal, and others international and ethical. The present note aims at analysing the issues and challenges that are being faced by commercial arbitration jurisdictions across the world. It addresses the reasons for such increased participation and discusses in detail the issues and concerns that have been raised by parties and the tribunals with the introduction of a third party and financial assistance into the arbitral process. Further, the note highlights and critically examines the regulatory framework and guidelines that have come into place in the recent past to address these concerns.

INTRODUCTION

It can be stated without a doubt that third party funding (TPF) has become one of the most talked about issues in international arbitration. First used to finance a litigant's claim in a dispute, TPF is now being increasingly resorted to in arbitration to cover the huge expenses a party has to incur. For funders too, TPF is an attractive option given the potential for streamlined procedures and the high value of the claims involved. While the concept is not new, it remains elusive and its legal, procedural and ethical implications are largely unexplored. The issues involved are complex, ranging from funders' relationship with the parties and their counsels to transparency, allocation of costs, conflict of interest and tribunal powers. Different jurisdictions where the practice is beginning to manifest itself are confronted with the onerous task of deciding whether to regulate the same.

The present discussion attempts to delve into the critical issues that are arising with the growth of arbitration funding. The benefits and risks of resorting to such a facility have been looked into. Furthermore, the authors have examined the need of regulating TPF and whether appropriate regulations exist as of today to cater to the plethora of issues.

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EXPLAINING THIRD PARTY FUNDING

It is difficult to reach a consensus on a fixed definition of the term, precisely because of the various forms in which it manifests itself.² Generally speaking, it is the “funding of claims by commercial bodies in return for a share of the proceeds.”³ Such funding, as the term itself connotes, is provided by a third person who is not party to the dispute in question, so as to cover a party’s legal costs pertaining to the arbitrator, lawyer and expert witnesses, amongst other expenses. For the funder, this is another mode of investment the risk in respect of which is determined by the claim of the funded party. Normally, the gains accruing to the funder out of the transaction is fixed at a certain percentage of the damages. However, there could be more complex transactions wherein the funder claims a certain share of equity or enters into a joint venture agreement with the client.⁴

Traditionally, the participation and investment of third parties in litigation was frowned upon due to prevalence of the doctrines of maintenance and champerty.⁵ The doctrines were introduced to prevent the rich and the powerful from perverting the course of justice by financing disputes wherein they had no bona fide interest. Over the years, their significance has been greatly reduced, largely because it is believed that modern courts are less susceptible to the mischief that maintenance and champerty were designed to protect against.⁶ Also, courts now do not automatically make a presumption against such transactions. The tendency is that a funding transaction has to be proved to be against public policy or against

² B. Cremades, *Concluding Remarks*, in DOSSIER X: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 153 (B. Cremades and A. Dimolitsa eds., ICC Publishing S.A., 2013).

³ 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), Judiciary of England and Wales (Aug. 09, 2016, 09:02 AM), <http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf>.

⁴ Munir Maniruzzaman, *Third-Party Funding in International Arbitration- A Menace or a Panacea?*, Kluwer Arbitration Blog (Aug. 26, 2016, 10:08 PM), <http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>.

⁵ Champerty is an ancient concept used to describe an agreement to divide the proceeds from litigation between the owner of a litigated claim and a party having no interest whatsoever in a lawsuit by which the latter helps the litigant to pursue his case as consideration for receiving part of the judgment proceeds. See Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1287-1287 (2010-11).

⁶ Eva Boolieris, *Third Party Funding: The Effect of the Growing Third-Party Funding Industry in International Arbitration on New Zealand*, Victoria University of Wellington (Sept. 21, 11:20 PM), <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4617/thesis.pdf?sequence=2>.

the process of the court. Lord Neuberger of the US Supreme Court explains the current position, thus:

“[T]he public policy rationale regarding maintenance and champerty has turned full circle. Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule of law. Now, it might be said, the exact reverse of the prohibition is justified for the same reason.”⁷

Jurisdictions across the world, therefore, are slowly embracing third party funding. In the discussion that follows, the authors shall examine the benefits and risks that such funding entails, especially in the area of arbitration.

BENEFITS AND RISKS

It is not surprising today that arbitration, touted as a cheap and effective mode of resolution of disputes, has turned out to be a costly affair, the fees and other related expenses often running into millions of dollars. It therefore appears to be a feasible option to pass substantial costs to an affluent person under a “win something- lose nothing” framework. This works great for an impecunious party that looks for stability and certainty in costs as well as a level-playing field to pursue its claims. As rightly put by the Court of Appeal in *Arkin v. Borchard Lines Ltd.*,⁸ commercial funding enables one to seek access to justice, a fundamental human right, which one could not otherwise afford. Third funding party, then, facilitates settlement of claims as the opponent knows that the party has the necessary means to pursue the case.⁹ For funders, it serves as an attractive investment avenue given the volatility of financial markets.

There are, on the other hand, significant downsides of arbitration funding. Commercial funders are not much concerned with the merits of a party’s claim; as long as the anticipated return seems fascinating, they will support the claim.¹⁰ In other words, third party funding has tendency to accelerate the number of frivolous claims, causing harassment to the opposite

⁷ D. Neuberger, *From Barratry, Maintenance and Champerty to Litigation Funding*, Harbour Litigation Funding First Annual Lecture 8 May 2013, 20-21 (Sept. 28, 2016, 04:30 PM) <http://adam1cor.files.wordpress.com/2013/05/lord-neuberger-harbour-litigation-lecture-8-may-2013.pdf>.

⁸ *Arkin v. Borchard Lines Ltd.*, [2005] EWCA Civ. 655.

⁹ Sherina Petit and Marion Edge, *Funding Arbitration: An English Perspective*, Norton Rose Fulbright International Arbitration Report 2015 (Sept. 20, 5:05 PM), <http://www.nortonrosefulbright.com/files/funding-arbitration-127899.pdf>.

¹⁰ See *Third-Party Litigation Funding: Tipping the Scales of Justice for Profit*, NAMIC (National Association of Mutual Insurance Companies) State & Policy Affairs Department (Aug. 27, 2016, 3:30 PM), <https://invest4justice.com/wp-content/uploads/2016/01/litigation-funding-23.pdf>.

party. Another concern pointed out by some is with respect to class actions where the funder would naturally demand a commission from all the members of the class concerned, irrespective of whether they are parties to the funding agreement.¹¹ What is even more worrisome is that funders may take advantage of their economic power¹² and insist on imposing unreasonable and unfair terms which are favourable to their interests. Such a situation may, however, be avoided by the party through appropriate advice from its counsel (provided the counsel himself is uninfluenced by the funder) and by drafting a clear funding arrangement.

While the community at large continues to debate at the academic level over whether third party funding should be allowed, the reality remains that it is here to stay. The ICSID tribunal in *Giovanni Alemanni and Others v. The Argentine Republic*¹³ noted, thus:

“[T]he practice is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection”.

Having thus identified that doing away with third party funding is not the option, the issue we ought to address is whether third party funding should be regulated and, if yes, how this is to be done.

NEED FOR REGULATION OF THE FUNDING INDUSTRY

In a keynote address delivered to the Chartered Institute of Arbitrators' International Arbitration Conference, Hon'ble Mr. Sundaresh Menon, the Chief Justice of the Supreme Court of Singapore pointed out some issues that the international community must take cognizance of, one of them being “the growing incidence of third party funding and the participation of funds in international arbitration” and the lack of regulation in the area.¹⁴ In fact, according to the survey conducted by the Queen Mary University of London, School of International Arbitration in association with White & Case LLP (Survey), 71% of the respondents acknowledged that third party funding is one area which requires regulation.¹⁵

¹¹ *Supra* note 5.

¹² Susanna Khouri and Kate Hurford, *Third Party Funding for International Arbitration Claims: Practical Tips*, Practical Law Company (Aug. 10, 2016, 03:00 PM), <https://www.imf.com.au/docs/default-source/site-documents/thirdpartyfundingforinternationalarbitrationclaims>.

¹³ *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8.

¹⁴ Sai Ramani Garimella, *Third Party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions*, 3(1) AALCO Journal of International Law 45, 45 (2014).

¹⁵ *2015 Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary University of London and White & Case, 3 (Aug. 13, 2016, 07:40 PM), <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

These concerns are, indeed, genuine. An unregulated funding system may give rise to a number of problems such as unreasonable profiteering by funders, undue influence in crucial matters such as selection of arbitrators and funding of frivolous cases. Care must, however, be taken that the industry is not controlled by heavy regulation. Steinitz has argued that third party funding has gained momentum primarily because of a “de facto absence of professional regulations that enables funders and attorneys to operate outside of the disciplinary reach of bar associations.”¹⁶ Some scholars even hold the view that soft law instruments are the only reasonable option.¹⁷ The said proposition finds support of majority of the respondents in the aforementioned Survey who perceive that such instruments not only supplement the existing laws, but also provide guidance where little or none exists.¹⁸ The authors believe that the degree of success of guidelines and soft law instruments would largely determine whether or not binding rules are required.

The international community is witnessing a slow yet continuous development of soft-law rules to cater to the funding issue. The Code of Conduct for Litigation Funders, 2011 (updated in 2014) is one popular instrument applicable to funders who are members of the Association of Litigation Funders of England & Wales. Though dealing with litigation funding, it could safely be extended to funding in arbitration.¹⁹ The Code *inter alia* prohibits a funder to influence the litigant’s solicitor to cede control over the dispute.²⁰ Such funder is required to ensure confidentiality of all information pertaining to the dispute. The Litigation Funding Agreement (LFA) entered into between the funder and the litigant shall state whether (and if so how) the funder may provide input to the litigant’s decisions in respect of the settlement.²¹ Furthermore, the funder cannot arbitrarily terminate the LFA unless certain specific circumstances arise. Thus, the funder should have a reasonable belief that the dispute is no longer commercially viable, or that there has been a material breach of the LFA by the litigant.²² Although membership to the Association is optional, it is believed by some that

¹⁶ Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1278 (2010-11).

¹⁷ Cremades, *Third Party Litigation Funding: Investing n Arbitration*, 8(4) Transnational Dispute Management 1, 40 (2011).

¹⁸ *Supra* note 14.

¹⁹ Jean Kalicki, *Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (I)*, Kluwer Arbitration Blog (Sept. 25, 2016, 11:05 AM), <http://kluwerarbitrationblog.com/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>.

²⁰ *Code of Conduct for Litigation Funders*, Association of Litigation Funders of England and Wales, ¶ 7 (Sept. 19, 2016, 08:00 PM), <http://associationoflitigationfunders.com/wp-content/uploads/2014/02/CodeofConductforLitigationFundersNovember20111.pdf>.

²¹ *Id.* at ¶ 9.

²² *Id.*

solicitors would advise their clients to enter into agreements only with the member funders. While this may be true, there are some clearly visible problems with the Code. For instance, besides its non-binding nature, the Code does not deal elaborately with the relationship between the solicitor and the funder, something which is necessary to ensure that these actors do not collude to maximise their own profits out of the dispute in hand.²³ Another issue that has been brought to light is that the Code makes it optional for the parties to provide for liability of the funder to meet any liability for adverse costs. In other words, this provision fails to protect a defendant from a frivolous action initiated at the instance of the litigant, which claim might not have been pursued but for the funding.

While examining these developments, one cannot lose sight of the fact that the domestic law of the seat would inevitably come into picture and that its mandatory rules would govern the arbitral process as well as the participants therein. There may be significant risks involved as a consequence. If the funded party wins the case, the respondent may apply to the domestic court for setting aside the award on the ground that the arbitration funding is against public policy; or it could be that a jurisdiction that is intolerant to third party funding may not entertain a funder's claim against the funded party in case of breach of their arrangement. Singapore, for instance, generally prohibits third party funding by virtue of the doctrines of maintenance and champerty.²⁴ Dealing with the question whether the said doctrines would govern an arbitration funding, the Singapore Court of Appeal in *Otech Pakistan Pvt Ltd. v. Clough Engineering Ltd.*²⁵ has ruled that the same public policy rules should be applied to all dispute resolution mechanisms, including arbitration. Although there are voices espousing third party funding, courts are of the view that any reform in the area is the task of the legislature which would also draw parameters in order to regulate the extent to which such arrangements would be permitted.²⁶ On the other hand, countries like Australia and the UK have seen growing acceptance to funding arrangements.²⁷ Despite the applicability of maintenance and champerty, third party funding would be upheld by courts subject to factors

²³ Jean Kalicki, Amy Endicott and Natalia Giraldo, *Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (II)*, Kluwer Arbitration Blog (Sept. 25, 2016, 11:30 AM), <http://kluwerarbitrationblog.com/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/?print=pdf>.

²⁴ Kabir Singh, Sam Luttrell and Elan Krishna, *Third-Party Funding and Arbitration Law Making: The Race for Regulation in the Asia-Pacific*, Kluwer Arbitration Blog (Aug. 21, 2016, 9:33 PM), <http://kluwerarbitrationblog.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the-asia-pacific/>.

²⁵ *Otech Pakistan Pvt Ltd. v. Clough Engineering Ltd.*, [2007] 1 SLR (R) 989.

²⁶ *The Law Society of Singapore v. Kurubalan s/o Manickam Rengaraju*, [2013] SGHC 135.

²⁷ LISA NIEUWVELD AND VICTORIA SHANNON, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 95 (Kluwer Law International 2012).

such as whether the funder exercised excessive control over the proceedings, or tampered with the evidence so as to make the damages greater than what they are, or was regulated by a professional body.²⁸

A perusal of the domestic regulations on third party funding, wherever they exist, shows lack of general consensus in the area, making it difficult to apply them at the global level. It is, however, believed that countries are slowly embracing the concept or at least engaging in deliberations with different market participants to come to a conclusion. One apt example comes from Hong Kong, a major arbitration centre, where the Law Reform Commission issued a Consultation Paper in October 2015 inviting comments from the general public on the possible regulations in this respect. On its part, it recommended amendment to the existing regulations to permit third party funding in arbitration subject to clear ethical and financial standards addressing issues pertaining to capital adequacy, conflict of interest, confidentiality, control of arbitration by funders, termination of funding, and so on.²⁹

ETHICAL CONCERNS AND DISCLOSURE REQUIREMENTS

The absence of precedence and the novelty of third-party funding in international commercial arbitration has- given the involvement of parties belonging to several jurisdictions- led to a plethora of ethical and procedural concerns globally. The attempt to address these concerns has led to several attempts at the initiation of regulation in the more sophisticated third-party funding jurisdictions across the globe. However, there has been a lack of consensus on the standards of regulation. This debate on disclosure requirements stems from the conflicting interests of the opposite party, the funded party and the third party funder. Further, the less developed arbitration jurisdictions of the world are still in the process of comprehending what third-party funding means to the arbitration system and are how the increasing concerns need to be addressed.

The existence of TPF agreements between a party to the arbitration and a third party raise concerns about the nature and degree of influence of funders in the management of the dispute; of attorney-client privilege; of conflicts of interest for tribunals and those of allocations of costs and security for costs.

²⁸ *Id.* at 101-102.

²⁹ *Consultation Paper on Third Party Funding for Arbitration*, Law Reform Commission of Hong Kong, 129-135 (Sept. 09, 2016, 6:25 PM), http://www.gov.hk/en/theme/bf/consultation/pdf/10119_Consultation_Paper.pdf.

The primary issue that therefore needs to be addressed by the regulators and legislators of the world is that of transparency and disclosure of the funding arrangements. The disclosure or non-disclosure of such an agreement may have an impact on the arbitral proceedings since an arbitral award is based solely on the factual findings of each dispute referred to the tribunal. Therefore, it becomes imperative to determine whether there is *always* a need for such disclosure, and if not, then under what circumstances and to what extent, is such disclosure required to be made. Further, this also raises the question of to whom such disclosure should be made- whether disclosure must be made to the arbitrator only or only to the parties to the arbitration or both.

Representatives of the third-party funding companies have not been in favour of an extensive disclosure of the terms and conditions of such agreements as in many respects it is imperative for them to maintain confidentiality for reasons such as the sensitive nature of information, or matters involved may be concerned with the economics of the deal. In their view no question of mandatory disclosure should arise and only in some exceptional situations should such disclosure be made in good faith in order to ensure procedural impartiality and in light of other ethical concerns that may arise. Further, such disclosure should be limited and not extensive and detailed.³⁰ Disclosure requirements, however, vary with different ethical concerns that may need to be addressed.

Conflict of Interest

In arbitration it is common practice that the arbitrators are often selected by the parties. If due to the existence of a TPF agreement, the impartiality of the arbitrator is affected, this gives rise to potential conflicts of interest.³¹ The main predicament with TPF is the addition of a different interest in the proceedings. It is fair to make an assumption that most funders usually do not have an interest in the substantive issues of the proceedings. Their main interest lies in the favourable outcome of the proceedings which shall enable them to make a profit.³² In such a scenario, there is an inherent risk that parties might bequeath the control of the arbitral proceedings to the funders who want to protect their investments by being

³⁰ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1 (Decision on Jurisdiction, December 21, 2012) ¶ 239-259.

³¹ JONAS VON GOELER, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE* 35 (Kluwer Law International 2016).

³² M. Scherer, *Third-Party Funding in International Arbitration: Towards Mandatory Disclosure of Funding Agreements?*, in *DOSSIER X: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 95 (B. Cremades and A. Dimolitsa eds., ICC Publishing S.A., 2013).

involved in the management of the case and thus exercising some control over the proceedings.³³ It is thus crucial to have a properly drafted funding agreement, which deals with these issues. In doing so, one can avoid a possible deadlock situation if a conflict of interest occurs.

The second method to avoid conflicts of interest is a disclosure obligation. If the funder intervenes significantly in the proceedings, and if this involvement causes concern with respect to potential conflicts of interest, the funding agreement should automatically be disclosed to the arbitrators.³⁴ Non-disclosure in such a circumstance is a legitimate ethical concern and would lead to adversely affect the proceeding and as a consequence the arbitral award. The problems that can arise – both at the stage of concluding the funding agreement and the stage of the arbitration proceedings as such – are usually the result of a conflict between: (i) the client's interest (*i.e.* achieving the most favourable outcome); (ii) the attorneys interest (*i.e.* receiving payment for hourly fees); and (iii) the funder's interest (*i.e.* achieve the biggest return on investment).³⁵ Thus, the threshold to trigger the disclosure requirement by parties must be the existence of potential conflict of interest.

Procedural Impropriety

One of the emerging concerns in relation to TPF agreements is that the sudden change on financial status of one of the parties may adversely affect the arbitration. On entering into a TPF agreement, it has been alleged, there is a possibility that an impecunious client becomes the better capitalized party. This would allow the party to engage in excessive litigation, therefore abusing the arbitral process due to their financial potency and/or the control potentially exercised by the funder. However, in our view, such generalization about behavioural dynamics cannot be made. In both litigation and arbitration, it is quite common for one party to have more financial wherewithal than the other, and this in itself should not raise concerns of procedural equality. It would therefore be a misconception to assume that funded parties are more likely to adopt an excessive litigation strategy. Further, it seems at least as plausible that the involvement of a litigation funder, an outside financial entity whose

³³ *Supra* note 26, at 9-11.

³⁴ M. Scherer, A. Goldsmith and C. Fléchet, *Le financement par les tiers des procédures d'arbitrage international – une vue d'Europe Seconde partie: le débat juridique / Third Party Funding of International Arbitration Proceedings – A view from Europe Part II: The Legal Debate*, 6 *International Business Law Journal* 653 (2012).

³⁵ C. Lamm and E. Hellbeck, *Third-party Funding in Investor-state Arbitration*, in *DOSSIER X: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 107 (B. Cremades and A. Dimolitsa eds., ICC Publishing S.A., 2013).

aim is to optimize return from investment, will yield the opposite effects – efficiency gains through specialized cost control and rationalization of procedural steps.³⁶ Put simply, neither funders nor funded parties are keen to spend more money on litigation than need be just because they could. Therefore, a change in the financial status of the third-party funding is not a sufficient reason for raising concerns or making disclosure mandatory

Security for Costs

While most arbitral rules and laws allow tribunals to order security for costs to be paid, there is no set standard, guideline or requirement of fulfilment of any particular set of conditions with regard to such order. Further, due to the consensual nature of arbitration and since an alteration in the position of the financial position of a business person is a foreseeable commercial risk, such an award is less common by arbitrators as compared to its frequency in litigation.

In practice, a key aspect against which the requirement for such a deposit made is the financial situation of the parties. In international commercial arbitration, before awarding security for costs, as practice stands today, the Tribunal takes into consideration the unforeseeable or material alteration in the financial status of the party in question, before awarding such costs.³⁷ The underlying rationale is that a claimant who knew or through exercise of diligence, ought to have known of the impecunious financial situation of the claimant while agreeing to submit future disputes to arbitration should not be able to obtain security for its costs. Thus security for costs is granted only in exceptional circumstances.³⁸

The presence of the TPF agreement may therefore be an indicator of the party's financial status, however, independently it cannot be treated as an indicator that the party, on its own, is impecunious.³⁹ Further, the existence of a TPF agreement cannot be used to shift the burden of proof that lies on the applicant for securing such security for costs.

³⁶ *Supra* note 30, at 144.

³⁷ XXX INC., *incoporee dans une ile des Caraibes v. YYY., S.A., incoporee dans un pays d'Amérique latine*, ICC Case No. 1591/FM, Procedural Order No. 2 of May 29, 2009, 28 *ASA Bull.* (2010) 71, 75; ICC Case No. 10032, Procedural Order of 9 November 1999, ¶ 45.

³⁸ ICCA QMUL Task Force on TPF in International Arbitration Sub-committee on Security for Costs and Costs, November 1, 2015, 15 (Sept. 27, 2016, 11.00 PM), http://www.arbitration-icca.org/media/6/09700416080661/tpf_taskforce_security_for_costs_and_costs_draft_report_november_2015.pdf.

³⁹ *Id.* at 17.

While deciding on disclosure requirements, the arbitrator must take into consideration the terms of the TPF agreement. Factors such as the right to terminate the contract by investor require disclosure before such costs are awarded. The arbitrator must look into the right of the investor to withdraw investment from the arbitration in the instance that an adverse cost needs to be borne and that therefore the prospects of profiting from the investment are bleak.⁴⁰ Further, the lack of or presence of contractual liability in the event that security for costs need to be paid by the party must be taken into consideration. Therefore the tribunal may order the disclosure of the existence of an agreement as well as the terms of the agreement before granting such security for cost applications.

Regulations on Disclosure

In light of the debate around the need and extent for disclosure of the existence of TPF agreements, a significant development in the international landscape is the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration. General Standard 6(b) and its Explanation make it clear that third party funders, that is, persons or entities that contribute funds or other material support to the prosecution or defence of the case and that have direct economic interest in the award to be rendered in the arbitration, may be considered to bear the identity of the funding party.⁴¹ The Guidelines further make it obligatory for a party to disclose to the arbitrator and the other party information about its relationship, direct or indirect, with the arbitrator. The duty to disclose has been extended also to relationships with persons and entities having direct economic interest in the arbitral award, such as third party funders.⁴² The UNCITRAL Arbitration Rules likewise mandate that the arbitrator must disclose all circumstances "*likely to give rise to justifiable doubts as to his or her impartiality or independence.*"⁴³ Therefore, in theory, arbitrators have to disclose the pertinent information regarding the TPF relationship if one of the parties is receiving funding. As the rules of procedure stand today, the fact that a party to an arbitration proceeding has obtained such funding is not the threshold to trigger disclosure. However, when such funding touches upon specific procedural issues which would adversely affect the process of arbitration, disclosure of third-party funding agreement should be made.

⁴⁰ *RSM Production Corporaton v. Saint Lucia*, ICSID Case No. ARB/12/10, ¶ 68.

⁴¹ IBA Guidelines on Conflicts of Interest in International Arbitration, gen. std. 6 (2014).

⁴² *Id.* gen. std. 7.

⁴³ UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Dec. 06, 2010), art. 11.

CONCLUSION

Notwithstanding the complexities involved in a third party funding transaction, the authors submit that the practice is here to stay. Seen in this light, the authors emphasise that the issues raised on account of the interaction of third party funding with international commercial arbitration need to be addressed effectively and coherently to protect the interests of not only the actors involved but also the process in general. Piecemeal approach towards regulation of arbitration funding will not serve the purpose. Along with international institutions, nations should recognize that a wholesome approach is necessary so that the growth of the arbitration industry is not compromised and yet there are sufficient safeguards to prevent abuse of this facility.