Two's a crowd, three's a party: The coming of age of third-party funding in international arbitration

Omar Puertas Álvarez* / Carlos Ara Triadú / Oriol Valentí i Vidal*** / Ana Fernández Araluce******

Resumen: *En este artículo, los autores exploran el potencial de la financiación por parte de terceros y las oportunidades que presenta en el ámbito del arbitraje internacional. A pesar de tratarse de una industria creciente que ha experimentado un desarrollo significativo estos últimos años, los autores conocen bien los retos que presenta y, por ello, reflexionan en este artículo acerca de las tres principales áreas grises que rodean la financiación por parte de terceros (revelación, conflictos de interés y caución de costas), proporcionando una perspectiva independiente y proponiendo medidas específicas que permitan reforzar el rol de la financiación por parte de terceros en el arbitraje internacional.*

1. INTRODUCTION: A PROBLEM SHARED IS A PROBLEM HALVED

The advent of third-party funding is arguably one of the major breakthroughs in international arbitration in the last decade.[1] However, third-party funders have sparked some controversy within the legal community[2], perhaps due to a

---

* Omar Puertas is a partner at the litigation and arbitration department of Cuatrecasas in Barcelona, where he specializes in international commercial arbitration. From 2002 to 2003, he worked as a secondee at Skadden's New York office. In 2007 he moved to Shanghai to set up and manage Cuatrecasas' first office in Asia, where he stayed as its managing partner until 2019.

** Carlos Ara is a senior associate at the litigation and arbitration department of Cuatrecasas in Barcelona, where he specializes in cross-border restructuring and insolvency (both out-of-court workouts and judicial proceedings). He holds a J.S.M. from Stanford Law School ('13) and a PhD from Universitat Pompeu Fabra ('17), where he also lectures Insolvency Law.

*** Oriol Valentí is a principal associate at the litigation and arbitration department of Cuatrecasas in Barcelona, where he specializes in international commercial arbitration. He holds an LL.M. from Harvard Law School ('17) and is an associate lecturer in alternative dispute resolution at Universitat Pompeu Fabra (UPF) and Instituto de Derecho y Economía (ISDE). In 2018, he worked as a visiting foreign lawyer at WilmerHale's London office.

**** Ana Fernández is an associate at the litigation and arbitration department of Cuatrecasas in Barcelona. She holds a double LL.M. from Universidad Carlos III de Madrid ('18), specializing in Private International Law. She currently collaborates with Universitat Pompeu Fabra (UPF) as coach for the Moot Madrid International Commercial Arbitration Competition.

1 Today, third-party funding is seeing positive support from the legal community in some of the most developed markets in terms of portfolio financing. Australia, United Kingdom, United States, Singapore and Hong Kong are considered third-party funding-friendly jurisdictions. In fact, in a significant shift position, both Singapore and Hong Kong changed their laws in January 2017 to allow third-party funding in international arbitration. Although dissimilarly, both jurisdictions have aimed to ensure that the thid-party industry remains duly regulated (while Singapore has introduced the concept of "qualifying third-party funder", Hong Kong has chosen to create a code of practice setting out the standards with which funders are expected to comply). Meanwhile, in countries like China and Ireland third-party funding is still illegal.

2 Even though, as we have said, third-party funding is broadly accepted in common law jurisdictions, there remain legal uncertainties in some jurisdictions about whether this funding structure conflicts with the doctrine of champerty or maintenance. This has to do with the fact that, throughout much of history, money lending was considered immoral, since it was a shared belief that the process of justice was not to be tainted by business incentives. For example, the Supreme Court of Ireland has held that third-party funding violates this doctrine, whereas Singapore and Hong Kong have both enacted their respective legislations to exclude third-party funding from the doctrine of champerty and maintenance in international arbitration. See *Persona Digital Telephone Ltd. and Signa Wireless Networks Ltd v. The Ministry for Public Enterprise & Ors* [2017] IESC 27, Standard 5A and 5B(2) of the Singapore Civil Law (Amendment) Act No. 2 of 2017 (retrieved from: https://sso.agc.gov.sg/Acts-supp/2-2017/) and Provisions 98K-98M of Hong Kong's Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017 (retrieved from: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf).

mistaken vision of their role, dynamics and potential to promote the development of international arbitration practice. Third-party funders are now gaining ground, not only among parties with limited financial resources, but also among parties with adequate resources that nevertheless turn to external funding for risk management purposes (*i.e*, to monetize contingent assets).

At its core, third-party funding is indeed no more than a risk management tool to hedge uncertainties and costs attached to (usually large-scale) disputes. A party to an arbitration cannot diversify risk nor calibrate its magnitude with the same degree of efficiency as an organization that does nothing but this. Overall, third-party funding provides a capital injection on a non-recourse basis to risk-adverse parties with meritorious claims, thus alleviating short-term financial pressure on them.

By extricating itself from the budgetary hurdles arbitration poses, the funded party avoids getting its fingers burnt and navigates the arbitration in a much more comfortable position. As the saying goes, a problem shared is a problem halved. And yet, transferring the risks and concerns associated with the arbitration to a third party comes at a price.

From a funder's perspective, international arbitration is proving to have an irresistible allure, most certainly due to the prevalence of high-profile cases and high-value claims, the streamlined proceedings, the ability to monitor variables such as the expertise of the decisionmaker (thus, increasing the predictability of the outcome of the dispute) and the high enforceability of arbitral awards.[3]

However, just as pressure for transparency in the arbitral process increases, the perception remains that third-party funding is an industry operating in the shadows.[4] This has triggered a massive influx of legal opinions and commentaries attempting to draw the contours of this thriving industry and approach the legal issues it poses: whether third-party funding is permitted; whether the funder is a party to the dispute; whether third-party funding should be disclosed to the other party and the arbitral tribunal, and if so, to what extent; or whether third-party funding *per se* justifies a security for costs order.

We will deal in this article with these and other conundrums, though we must anticipate that there are no right or wrong answers to any of them. In fact, we may as well give away our personal conclusion before taking the discussion further: even though certain strands of the debate on third-party funding remain unresolved, third-party funding has matured into a fully operational and buoyant industry. Third-party funding is growing steadily, while trying to find its place and gain name recognition in the field of international arbitration, but it will ultimately be up to the international arbitration community to allow third-party funding to ripen fully.

Before delving more deeply into the topic, we would like to make one last preliminary remark. One special category of arbitration cases that has attracted particular attention is investment arbitration. In fact, the most important publicly

3 Nieuweld, Lisa Bench and Sahani, Victoria Shannon, 2017. *Third-Party Funding in International Arbitration*, Kluwer Law International, 2nd edition: p. 12.

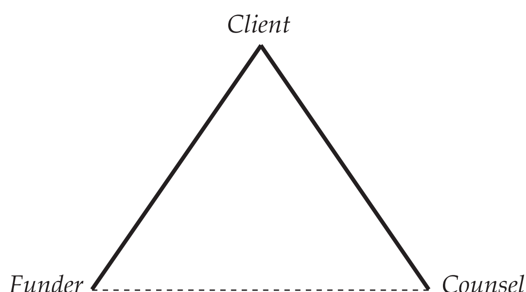
4 Beechey, John. "The Pandora's Box of Third-Party Funding: Some Suggestions for Arbitrators in Light of Recent Developments". In Engelmayer Kalicki, Jean and Abdel Raouf, Mohamed (eds.), 2019. *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Seeries, Volume 20: p. 558.

available decisions on third-party funding have occurred in the field of investor-State disputes. However, the approach adopted here also provides the perspective of international commercial arbitration, since a double-track approach seems more conducive to our analysis and will allow for a higher level of abstraction.[5]

2. THE TRIPARTITE PARADIGM: THE RELATIONSHIP BETWEEN PARTY, COUNSEL AND FUNDER

The relationship in third-party funding arbitration has traditionally been depicted as being an equilateral triangle. When the funder steps in, it breaks the linear client-counsel relationship, creating a triangular funder-client-lawyer dynamic. As discussed in most literature, this triangular paradigm mainly focuses on the relationship client-counsel and client-funder, whereas the relationship funder-counsel remains blurred (for it has comparatively received less attention).

The client-counsel and client-funder boundaries are clear and the realm in which counsel and funder move and exist is conditioned by the terms of their respective agreements with the client. In contrast, there is no legal relationship between counsel and funder, but for their mutual client and their common interest in winning the case.



This twofold structure warrants the question of whether the funder is a party to the arbitration. Although the funder clearly has an economic interest in the outcome of the dispute, it is not a party to the proceedings.[6] All in all, while funders may not be *parties* to arbitration proceedings, they have certainly become *key players* in dispute resolution mechanisms.

The above means that the funder will not be able to (i) control the strategy, settlement or other arbitration-related decision-making; or (ii) direct the settlement of the case for a particular amount nor be able to challenge the settlement agreement that may eventually be entered into by the parties if the settled amount is below the cut-off point agreed in the funding agreement. Accordingly, any failure on the part of the funded party to perform any of its obligations under the funding agreement would

5 See Osmanoglu, Burcu. "Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest", Journal of International Arbitration,Kluwer Law International, Volume 33, Issue 3 (2015), analysing the issue of third-party funding from an international commercial arbitration perspective.

6 Beechey, John. "The Pandora's Box of Third-Party Funding…", *Op. Cit.*, p. 578.

constitute a contractual breach and would give the funder a right to compensation for damages – but would not (and, indeed, could not) affect the arbitral proceeding itself.[7]

If the funder is taking substantial down-side risk, it may want to retain a certain amount of control over critical aspects of the case management (*e.g.*, retain a certain degree of control over the appointment of the arbitrators or the evidentiary process).[8] However, the presence of a third-party funder does not automatically trigger a presumption of control (not least because funders want to deter the application of the common law doctrines of champerty, maintenance or barratry doctrines). In fact, despite current trends opening to third-party funding, some restrictions have been placed on its use.[9] Even though the granting of some level of supervision may make sense under some circumstances, the funder's involvement should ideally be kept to a minimum in order to ensure that the funded party remains in control of its case. This policy of minimum intervention is broadly in line with the fundamental principles supported by some litigation funders' associations.

Of course, every case is different, and so is every funder.[10] Hence, the level of supervision and "ownership" that the funder has over the dispute will depend on the terms of the funding agreement. Nevertheless, it should be noted that most funders take a passive role in the arbitration and knowingly leave the conduct of proceedings to the funded party and its legal team. In fact, there is consensus among third-party funders that they may monitor but not directly instruct the funded party's legal team.[11]

---

7 Funding agreements must handle the concept of termination for fault, whether by the third-party funder or the claimant, For example, material breach by the funded party of its commitment to behave in a commercially rational manner, to follow the reasonable advice of its own lawyers and to disclose all relevant information at all times, will give the third-party funder the right to terminate the agreement and/or claim damages (if proven, unless a liquidated damages provision has been agreed).
In this regard, see Smith, Mick. "Mechanics of Third-Party Funding Agreements: A Funder's Perspective". In Nieuweld, Lisa Bench and Sahani, Victoria Shannon, 2017. Third-Party Funding in International Arbitration, Kluwer Law International, 2nd edition: pp. 21-22. Retrieved from: http://www.calunius.com/media/7098/mechanics%20of%20third-party%20funding%20agreements%20(mick%20smith%20-%202012).pdf

8 Guven, Brooke and Johnson, Lise. "The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement", Columbia Center on Sustainable Investment (CCSI) Paper 2019: pp- 10-11. Retrieved from: http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf

9 Some countries have already taken significant steps in this direction. Hong Kong, for instance, has already addressed the issue of control through its Code of Practice for Third Party Funding of Arbitration, which applies to any funding agreement made on or after 7 December 2018. For further detail, see Standard 2.9 of Hong Kong's Code of Practice for Third Party Funding of Arbitration ("*The funding agreement shall set out clearly: (1) that the third party funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration to the third party funder except to the extent permitted by law; (2) that the third party funder will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties; and (3) that the third party funder will not seek to influence the arbitration body and any arbitral institution involved.*"). Retrieved from: https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf

10 Cases and, accordingly, funders' mindset, may vary greatly depending on a range of factors: whether it is an investment or commercial arbitration, whether the funded party is the claimant or the respondent, risk tolerance, prospects of success on the merits, predictability of award outcome, etc.

11 Scherer, Maxi; Goldsmith, Aren and Fléchet, Camille. "Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", Queen Mary University of London, Legal Studies Research Paper No. 164/2013: p. 216. Retrieved from: https://ssrn.com/abstract=2348737

The industry of third-party funding has evolved to address the needs of a growing market without losing sight of the economics of dispute resolution. Indeed, in less than a decade, the industry of third-party funding has (i) triggered a shift towards a new model;[12] (ii) attracted new competitors into the market; and (iii) prompted funders to refine the products they offer, thus leading to an increased diversification and sophistication of their operations.[13]

Nevertheless, third-party funders (and their appetite for high-profile cases) have inspired positive changes in the market. Third-party funding results in or attracts higher quality cases and spurs the establishment of precedent and the development of law.[14] But, oddly enough, the emergence of third-party funders may as well lead to increased settled outcomes.[15] This is because third-party funders always assume a lower recovery than the claim's headline amount and may in fact reward early recovery.

Third-party funding is gaining momentum, but how the industry works still remains a bit of an enigma. Non-recourse financing where repayment is contingent on the client's success in the dispute is the archetypical scenario for third-party funding.[16] However, funders are uniquely positioned to handle and mitigate the financial risks associated with its venture and they do so by creating a portfolio of cases. By investing in multiple cases at once, the funder decreases the aggregate risk of its portfolio and drives down funding fees, which usually comprise its costs plus an uplift on the money invested.[17] Nevertheless, the internal risks inherent in each individual case -in particular, the quintessential risk in any arbitration matter, the risk of losing the case- remain.[18] Overall, "bundling claims" provides a safety net for the funder's own systemic risk, and, if anything, enables the funder to absorb losses more easily.

Arbitration is not about bread-and-butter legal cases and trifling amounts. In fact, the amounts at stake in arbitration generally, and in investment arbitration more particularly, are substantial.[19] Accordingly, even if a portion of the prospects will be

---

12 With hindsight, it is clear that the third-party funding industry has undergone a seismic change in recent years: from litigation to arbitration funding and from single case to portfolio financing. These changes, aimed at diversifying risk and reducing prices, have shaped an increasingly sophisticated third-party funding market, with fierce competition and an appetite for high-profile arbitrations and a clear inclination for investor-state disputes.

13 Dos Santos, Caroline. "Third-Party Funding in International Arbitration: A Wolf in Sheep's Clothing?". ASA Bulletin, Kluwer Law International, Volume 35, Issue 4 (December 2017): p. 928. Retrieved from: https://www.lalive.law/data/publications/Caroline_Dos_Santos_Offprint.pdf

14 Obviously, funds have no interest in funding hopeless cases or unmeritorious claims.

15 In this regard, see Chen, Daniel L. "Can Markets Stimulate Rights? On the Alienability of Legal Claims", RAND Journal of Economics, 46(1), Spring 2015: pp. 23-26. Retrieved from: http://users.nber.org/~dlchen/papers/Can_Markets_Stimulate_Rights_RAND.pdf
Though in the field of litigation, Daniel L. Chen's study on the current state of affairs of the industry of third-party funding in Australia leads to the counterintuitive prediction that funders prefer cases with novel issues, and settled outcomes are positively correlated with their involvement.

16 Nieuweld, Lisa Bench and Sahani, Victoria Shannon, 2017. "Third-Party Funding…", *Op. Cit.*,p. 7.

17 It can reasonably be expected that high-risk cases will be offset against low-risk cases.

18 Dispute resolution systemic risks, behavioral risks and regulatory risks are the reasons why the outcome of a case is uncertain. In this regard, see Sahani, Victoria Shannon. "Reshaping Third-Party Funding", *Op. Cit.*, pp. 423-424.

19 Henriques, Duarte Gorjão. "Third-Party Funding: A Protected Investment". Spain Arbitration Review, Wolters Kluwer Spain, Issue 30 (2017): p. 124.

shared with the funder, it is better, by and large, to recover something than nothing at all.

However, to whom much is given, much will be required. The funder will use its leverage both prior to funding (due diligence and exclusivity period followed by a negotiation phase) and after the funding agreement is reached (monitoring phase). It should be made clear that clients seeking external funding will all have similar experiences, regardless of whether they sit as claimants or respondents in the arbitral proceedings.[20]

First, during the due diligence and exclusivity period, clients will have to endure the funder's scrutiny, who will attempt to ferret out the naked truth about its prospective client's case.[21] As sophisticated investors, funders have both detachment and financial incentives to engage in an independent and fine-tuned assessment.[22] Thus, the funder will leave no stone unturned and will invest considerable time, money and efforts into performing a thorough legal and financial analysis of the prospective portfolio in order to decide whether to finance it or not.[23]

Indeed, before making its final decision, the funder must be well positioned to offer a preliminary case assessment in terms of strengths and weaknesses of the claim or defense, likelihood of success on the merits and ability to recover from the assets of the losing party, duration or others. Therefore, in deciding whether to fund a case, funders assess its legal, practical and sometimes even political variables to determine risks, likelihood of success and potential rate of return.[24] For that purpose, if the case is in early stages, demands on the prospective client's legal counsel can be considerable, whereas in a late stage investment, where the case is advanced and the funder can have full sight of the case documents, the workload and inquiries will be significantly reduced.[25] This said, issues of confidentiality can clearly arise and should be duly taken into account prior to the due diligence period.[26]

---

20 Nieuweld, Lisa Bench and Sahani, Victoria Shannon, 2017. "Third-Party Funding…", *Op. Cit.*, p. 2.

21 It is important to keep in mind that the funder takes on the risk of loss, because it will typically receive nothing if the case is lost.

22 Rodgers, Catherine A. "Gamblers, Loan Sharks & Third-Party Funders", Penn State Law Research Paper No. 51-2013: p. 12. Retrieved from: https://ssrn.com/abstract=2345962

23 Sahani, Victoria Shannon. "The Impact of Third-Party Funders on the Parties They Decline to Finance". Kluwer Arbitration Blog (July 2015). Retrieved from: http://arbitrationblog.kluwerarbitration.com/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/

24 Rodgers, Catherine A. "Gamblers, Loan Sharks…", *Op. Cit.*, p.12.

25 Smith, Mick. "Mechanics of Third-Party Funding…", *Op. Cit.*, : p. 34.

26 Another issue posed by third-party funding involves whether a party's sharing of confidential information with the funder may endanger privilege in the underlying proceeding. Neither the funded party nor its counsel want funders' access to such confidential information to be treated as a waiver of attorney-client privilege. Accordingly, the third-party funder and the prospective client will typically execute some form of confidentiality or non-disclosure agreement, with a view to safeguarding legal privilege on shared materials and avoiding an improper use of confidential information.
Further, the "common interest" doctrine (customary in common law systems and generally viewed as an exception to the rule that disclosure of priviledged documents to a third-party constitutes a waiver of privilege) may be invoked in this regard, since it protects documents diclosed to a third-party (the funder) who has a common interest. This doctrine does not serve the purpose of broadening the applicability of attorney-client privilege, but rather preserves and protects an already existing privilege between the funded party and its counsel, that could otherwise be seen as waived by disclosure to the third-party funder.

Second, funder and client will then engage in negotiations over the terms of the funding agreement, the economics of which are typically pre-agreed in a term sheet subject to a satisfactory due diligence.

A well-prepared funding agreement should include special bespoke clauses to safeguard both parties' interests. The financial terms -namely *Budget and Maximum Investment* and *Adverse Costs and Security for Costs*- are the first (and key) points to be agreed upon when negotiating the funding agreement.[27] In fact, because of the need to reach a meeting of minds on the numbers, the preliminary budget and third-party funder core terms may be agreed early in the process, and most likely long before the due diligence period has concluded.[28]

As for the standard terms in the market, suffice it to say that the price for arbitration portfolio financing varies from one funder to another (based on its cost of capital and the ability to offer a product that diversifies the risk), as does the structure of the funder's proposed terms. Some funders may be expensive, some others may be willing to offer services cheaper than other market players. Either way, the cost of arbitration portfolio financing, irrespective of pricing and rates, is often referred to as "three times", meaning that, if the dispute is resolved successfully, with an arbitral award in favor of the funded party, the funder expects to receive a return of at least three times of its investment,[29] coupled with a minimum internal rate of return ("IRR") to take account of longer duration than expected.

Last, once the funding agreement has been signed, the monitoring phase begins. Although there is a concern that the mere presence of the funder may be disruptive and damaging to the fabric of international arbitration practice, for it encourages fear of conflicts of interest and has spurred a heated debate on transparency in international arbitration, in practice funders do not often trespass that threshold. A properly drafted funding agreement should define the boundaries of the funder's role and involvement.[30] As a rule, funders do not encroach on the client's strategy nor inquire beyond what is strictly necessary.[31]

Most funders are passive investors and take the view that all arbitration-related decisions must remain entirely with the client. In other words, funders do not control the client's choice of legal counsel, arbitration strategy or whether and when to settle

---

See as well the IBA Rules on the Taking of Evidence in International Arbitration (2010), Articles 9(2)(b) and 9(3) and Principles B.1-B.4 of the "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration", The ICCA Reports No. 4, April 2018: p. 14. Retrieved from: https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf

27 Other non-financial relevant terms would include *inter alia* the funder's termination rights, which may include the funder's right to withdraw its financial support or its obligation to maintain it during a certain periof of time.

28 Smith, Mick. "Mechanics of Third-Party Funding Agreements…", *Op. Cit.*, pp. 26-27.

29 Smith, Mick. "Mechanics of Third-Party Funding Agreements: A Funder's Perspective". In Nieuweld, Lisa Bench and Sahani, Victoria Shannon, 2017. "Third-Party Funding…", *Op. Cit.*, p. 28.

30 Ideally, the funder will not interfere with the independence of the legal counsels' work nor influence the funded party's defense and settlement strategies. The funder should only be permitted, if at all, to exercise very limited power over case and make reasonable inquiries to the funded party.

31 This view is supported by prominent funders like Burford Capital, Omni Bridgeway, Parabellum Capital LLC or Lake Whillans, among others.

a case.[32] While the funder may have a legitimate opinion on each of these matters, ultimately it is for the client to decide.[33]

3. DISCLOSURE AND CONFLICTS OF INTEREST: WHEN SPILLING THE BEANS IS PART OF THE GAME

At present, despite there being no *general* rule -neither in commercial arbitration nor in investment arbitration- providing for the mandatory disclosure of information pertaining to a third-party funding agreement,[34] there is an unquestionable trend towards an increased disclosure of third-party agreements.

Indeed, the ICC has recently published its 2021 Arbitration Rules, which will come into force on 1 January 2021. The 2021 Rules introduce a significant new provision into Article 11 (General Provisions). Reflecting the growing participation of third-party funders in international arbitration, a new Article 11(7) requires each party to promptly disclose "*the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*." The stated purpose of this requirement is to assist arbitrators in complying with their duties of disclosure pertaining to independence and impartiality. This provision is new to the ICC Rules, but reflects the ICC's existing approach to conflicts of interest and mirrors the growing interest in increasing transparency in the arbitral process.

Likewise, other arbitration institutions have recently incorporated similar provisions in their rules, such as the CIAM Arbitration Rules (Article 23), published in 2020; the HKIAC Administered Arbitration Rules (Article 44.1), published in 2018; and the SIAC Investment Rules (Article 24.1), published in 2017. The SCC recommends (but does not oblige) to reveal the existence and identity of the funder.[35]

However, truth is that national laws either (a) remain silent on this issue or, at best, (b) encourage but do not require disclosure of a party's funding arrangements, save for Hong Kong and Singapore, whose requirement for systematic disclosure of funding agreements remain fairly unique.[36]

---

32 By contrast, as we have anticipated, it would make sense for the funder to retain a certain degree of control over the appointment of arbitrators or the evidentiary process. In fact, in order to limit the funder's control, the funding agreement will lay down the specific powers of the funder and the issues that will be resolved with its participation.

33 See Cutrona, Danielle. "Control, disclosure, privilege, champerty and other legal finance ethics questions". Burford Capital Blog, July 2019. Retrieved from: https://www.burfordcapital.com/insights/insights-container/control-disclosure-privilege-champerty-and-other-legal-finance-ethics-questions-answered/
Cohen, Joel E. and Epstein, Ken. "Portfolio Litigation Funding and its Use by Insolvent States". LexisNexis. Retrieved from: https://omnibridgeway.com/docs/default-source/about-us/team/portfolio-litigation-funding-and-its-use-by-insolvent-estates.pdf?sfvrsn=86359fd2_2

34 Beechey, John. "The Pandora's Box of Third-Party Funding…", Op. Cit., p. 573.

35 SCC Policy Disclosure of Third Parties with an interest in the outcome of the dispute (September 11, 2019).

36 Both Singapore and Hong Kong impose stringent standards of disclosure on the parties to the arbitration. With respect to Singapore, its recent amendments to the Legal Profession Act and the Professional Conduct Rules 2015 applicable to legal practitioners and law firms, impose requirements to disclose the existence of third-party funders. In this regard, see provisions 49A and 49B of Singapore's Professional Conduct Rules 2015 and article 11 of the Guidance Note issued by the Law Society of Singapore supplementing those amendments. On the other hand, Hong Kong's legislation is similar to that of Singapore with respect to its requirements for disclosure of third-party funding. Under Hong Kong's Arbitration and Mediation Legisla-

Accordingly, unless the arbitral proceedings are governed by the above mentioned arbitration rules, or the laws of Hong Kong or Singapore apply as *lex arbitri*, the arbitral tribunal may not even know that third-party funding exists, let alone the identity of the funder.[37] While there is still ample scope for change in this regard,[38] there is also a need to put this debate into perspective.

Third-party funding opens the doors to endless debates over the need (or lack thereof) to disclose the existence and identity of the third-party funder or even the terms of the funding agreement itself. However, far from being a theoretical debate, the answer to this question has significant practical consequences in terms of preserving the legitimacy and integrity of the arbitral process and avoiding potential challenge to awards on the grounds of bias.

Following a conservative approach, almost any liaison -no matter how subtle or remote- between the funder and an arbitrator has the potential to give rise to an appearance of conflict of interest and, as such, should be deemed a disclosable matter. Yet, for the sake of brevity, we shall refer to the classic example where a lawyer acts as counsel in a funded case, and that same lawyer is subsequently approached to serve as an arbitrator in another case where one of the parties receives its litigation funding from the same funder.[39] Meanwhile, the conflicted arbitrator may or may not learn about the involvement of the funder,[40] which, absent disclosure from the funded party, translates into (i) the relationship between the funder and the arbitrator being invisible, and (ii) the arbitral tribunal being kept in the dark about the existence of the third-party funding.

Ideally, with a view to avoiding a potential conflict of interest going unnoticed, the funded party and/or its legal counsel should, on their own initiative, disclose the existence of a third-party funding agreement and the identity of the funder to the arbitrators and the arbitral institution.[41] The skeptical and disenchanted argue

tion (Third Party Funding) (Amendment) Ordinance 2017, the funded party must give written notice of the fact that a funding agreement has been made "on or before the commencement of the arbitration" or, as the case may be, "within 15 days after the funding agreement is made".

37 Massini, Kelsie. "Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs". Yearbook on Arbitration and Mediation, Volume 7, Article 25: p. 329. Retrieved from: https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1047&context=arbitrationlawreview

38 Review of the ICSID Rules is now underway and the proposed changes would create a new duty to disclose the existence of any third-party funding by filing a notice upon registration of the Request for Arbitration, or immediately upon concluding the third-party funding agreement after registration (Rule 14). See "Proposals for Amendment of the ICSID Rules: Working Paper #4": p. 38. Retrieved from: https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf

39 Beechey, John. "The Pandora's Box of Third-Party Funding…", Op. Cit., pp. 570-571.

40 The arbitrator may become aware of the involvement of the funder directly (usually through his law firm when performing his duty to check for any potential conflict of interest) or indirectly (in light of a disclosure by one of the parties).

41 See Principle A.1 of the "Report of the ICCA-Queen Mary Task Force…", Op. Cit., p. 14. Timings vary greatly between different institutions and arbitration rules. Whereas the ICC simply requires each party to "promptly" disclose the existence of a third-party funder, the Code of Best Practices in Arbitration of the Spanish Arbitration Club (CBBPP) elaborates on the issue of disclosure and takes it one step further by requiring the funded party to "inform the arbitrators and the counterparty no later than in its statement of claim, and provide the identity of the funder" (Article 154) or "within a reasonable period" if the funding occurs after the filing of the statement of claim (Article 155). Further, the CBBPP's ambitious approach towards transparency is enshrined in Article 156: "The arbitrators may request said party to provide any additional information that may be relevant. In complying with this obligation, the requested party may suppress the confidential details and, in particular the financial conditions of the transaction."

that there is no incentive whatsoever for parties to come clean about their funding arrangements, least of all for funders. In fact, it is not uncommon for parties to procrastinate on their duty to disclose and withhold the existence and identity of the third-party funder for as long as possible.

While the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration require disclosure of a funder's involvement in the arbitration, it is important to remember that, despite being widely accepted, they are purely voluntary and thus, will only be applicable if the parties "opt in" by referencing them in the arbitration agreement or if the arbitral tribunal decides to apply them.[42]

Under the motto "out of sight, out of mind", practitioners reluctant to raise the standards of disclosure and other stakeholders in international arbitration suggest that broad financial disclosures may lead to (a) the disqualification of capable arbitrators with tenuous connections, and (b) burdensome and time-consuming disclosure procedures.[43] In the absence of disclosure, this argument goes, the participation of the funder would remain unknown and unknowable and an arbitrator cannot be biased by unknown information. Thus, ironically enough, the impression of bias would indeed vanish if the arbitrator was left in the dark about the involvement of the funder. This begs the question: is ignorance bliss? Generally speaking, ignorance is not a desirable state of mind in arbitration.

Overall, the argument that an arbitrator who knows nothing is far more likely to act righteously than an arbitrator who is hindered by the "received wisdom" must be rejected. Even if unknown at the initial stages, the existence of the funding agreement may be discovered later and later discovery of a third-party funder whose links with an arbitrator should have been disclosed may require that the arbitrator step down or

---

42 Pursuant to Standard 6(B) of the IBA Guidelines on Conflicts of Interest (2014), a person with a "direct economic interest in … the award" may be considered to bear the identity of a party for the purposes of determining a conflict of interest with the arbitrator. Funders are considered to have a "direct economic interest in the award" as described in the Explanation to General Standard 6: "Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party."
Moreover, under Standard 7(A), "A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the group of companies, or an individual having controlling influence on the party in the arbitration) or between the arbitrator and any person or entity with a direct economic interest in, or duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity".
It is generally assumed that the IBA Guidelines on Conflicts of interest are somehow the "source" which the vast majority of scholars and practitioners resort to when addressing the issue of conflicts of interest. The IBA Guidelines do, in fact, provide a formula that aims to bring clarity to deciding "who" a third-party funder is and "what" constitutes third-party funding. However, despite the issue of third-party funding being in full swing, the IBA Guidelines remain silent on the timings and extent of third-party funding disclosure. Nevertheless, the IBA Guidelines' value lies precisely in the fact that they have been the starting point and inspitation for arbitral instutions that have dared to address the issue of third-party funding directly (Singapore, Hong Kong, the Spanish Arbitration Club or the ICC, all of which have already been or will be mentioned). In this regard, see Henriques, Duarte G. "Third-Party Funding – In Search of a Definition", The American Review of International Arbitration (ARIA), Vol. 28, No. 4 (2018). Retrieved from: https://www.bch.pt/ARIA_DefiningTPF.pdf.

43 Bogart, Christopher. "Litigation finance disclosure: Transparency or Tactics?". Burford Capital Blog, August 2017. Retrieved from: https://www.burfordcapital.com/insights/insights-container/litigation-finance-disclosure-transparency-or-tactics/

risk rendering an award that may be set aside or refused recognition and enforcement as a result of the conflict.[44]

Nevertheless, at a time when pressure is increasing at all levels for transparency in the arbitral process, suggesting that disclosure of the existence of funding agreements is broadly unnecessary is out of the question. While international arbitration does not necessarily create a higher risk of conflict of interest than any other litigation proceeding, undisclosed conflicts of interest in the field of international arbitration, if unveiled, will have far-fetching implications for the development of the arbitration proceedings (e.g., challenges to the conflicted arbitrator's appointment, applications for disclosure of the funding arrangement or even annulment of the award). These unsavory consequences are, to a large extent, avoidable and militate in favor of disclosure as a matter of course at the earliest possible opportunity: either during the arbitrator selection process, in the filing of the request for arbitration or at the initiation of funding if after the constitution of the arbitral tribunal.[45]

That being said, the question is: how far should disclosure go in order to strike the balance between remaining completely silent and laying bare the intricacies of the funded party's choice of funding strategy?

We take the conservative view that disclosure must provide adequate information for arbitrators, parties, institutions and appointing authorities to assess potential conflicts of interest but should not go beyond acknowledging that funding is in place and revealing the identity of the funder. This same approach has been adopted by other institutions and rules like the new ICC Arbitration Rules 2021 or the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.[46]

Requiring parties to disclose the terms of their funding agreement is, generally speaking, entirely unnecessary since it does not allow for stricter scrutiny or avoidance of conflict of interest. Disclosure of the name of the funder to the arbitrators, however, is essential to maintaining the integrity and independence of decisionmakers.[47]

---

44 See "Chapter 4: Disclosure and Conflicts of Interest" in "Report of the ICCA-Queen Mary Task Force…", Op. Cit., pp. 112-114.

45 See "Chapter 4: Disclosure and Conflicts of Interest" in "Report of the ICCA-Queen Mary Task Force…", Op. Cit., pp. 110-111.

46 See "Chapter 4: Disclosure and Conflicts of Interest" in "Report of the ICCA-Queen Mary Task Force…", Op. Cit., p. 83.

47 Shannon, Victoria A. "Harmonizing Third-Party Litigation Funding Regulation", 36 Cardozo Law Review 861 (February 2015): p. 904. Retrieved from: https://ssrn.com/abstract=2419686
Cases dealing with issues of disclosure may be divided into two groups. On the one hand, cases where the tribunal has only ordered disclosure of the identity of the funder for the purposes of determining whether there are conflicts of interest; see, inter alia, South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia (PCA Case No. 2013-15) and EuroGas Inc and Belmont Resources Inc v. Slovak Republic (ICSID Case No. ARB/14/14). The majority of cases fall within this first category. On the other hand, cases where the tribunal has ordered the party to disclose further details of the funding agreement; see inter alia Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. V. Turkmenistan (ICSID Case No. ARB/12/6), Tennant Energy LLC v. Canada (PCA Case No. 2018-54) and Dirk Herzig v. Turkmenistan (ICSID Case No. ARB/18/35). These are rather exceptional cases, where the arbitral tribunals have required disclosure of the terms of the funding agreements for purposes different than assessing conflicts of interest (e.g., respondent's security for costs' request or conflict between the party and its funder).
In addition to these cases, there is another investment arbitration case worth mentioning for the sake of completeness in this analysis. In Oxus Gold v. Republic of Uzbekistan, an UNCITRAL tribunal articulated the traditional view that third-party funding has no impact on the merits of the arbitration proceeding: "It is undisputed that Claimant is being assisted by a third-party

However, disclosure of the terms of the funding agreement occurs at times, albeit to a lesser extent, since (i) arbitrators are rarely so ambitious in terms of scope of disclosure; (ii) accommodating a more expansive approach to disclosure is still a work in progress for most arbitral institutions; and (iii) based on straightforward common sense, absent exceptional circumstances, no other information except the existence and identity of the funder can be reasonably required for the purpose of analyzing conflicts of interest.

4. HIT AND RUN STRATEGIES OR THE "GAMBLER'S NIRVANA": SECURITY FOR COSTS AND THIRD-PARTY FUNDING

A further uniquely divisive issue in the field of third-party funding in international arbitration is whether the fact that a party is funded must affect the arbitral tribunal's decision on security for costs.[48] This is particularly so where the funder acts as a fair-weather friend, that is, it funds the claim and reaps the benefits (if any) but does not commit to paying an eventual adverse costs order,[49] potentially exposing the respondent party to what is commonly described as an "*arbitral hit-and-run*" situation.

Arbitral tribunals have indeed referred to the peculiar (yet undesirable) "hit-and-run" situation as the "gambler's nirvana": if the claim is successful, the funder wins; if a costs award is rendered against the funded party, the funder walks away with no responsibility for adverse costs.[50]

However, this concern portrays an overly simplistic assumption that third-party funding is relied upon only or primarily by impecunious parties. The preconceived (and biased) idea that whenever a party does not use its own funds to pursue arbitration there is a "potential for abuse" is fundamentally flawed, for it does not provide an accurate picture of the dynamics and rationale behind third-party funding. As noted in Section 2 above, third-party funding is increasingly a tool of choice, not of necessity.[51] In fact, some of the world's largest and soundest companies are particularly concerned about the costs of arbitration and their opportunity cost and, thus, are increasingly drawing on professional funders for risk management purposes.

Against this background, even though there are very few definite rules or guiding principles that tribunals may rely on when deciding whether to award security for

---

funder in this arbitration proceeding. The Arbitral Tribunal has mentioned this fact in its Procedural Order Nos. 6 and 7. However, this fact has no impact on this arbitration proceeding" (UNCITRAL Final Award, 17 December 2015).

48 Brekoulakis, Stavros and Rogers, Catherine. "Third-Party Financing in ISDS. A Framework for Understanding Practice and Policy", Academic Forum on ISDS Concept Paper 2019/13 (October 2019): p. 15. Retrieved from: https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/13-rogers-brekoulakis-tpf-isds-af-13-2019-version-2.pdf

49 Brewin, Sarah. "Security for Costs: IISD Best Practices Series – October 2018", International Institute for Sustainable Development (October 2018): p. 2. Retrieved from: https://www.iisd.org/system/files/publications/security-for-costs-best-practices-en.pdf Nevertheless, it should be noted that funders typically will not comit to paying adverse costs. Rather, it is standard practice in the market to resort to ATE insurance in order to cover the risks of an eventual adverse costs order.

50 See RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs of 13 August 2014: "Such a business plan for a related professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose" (paragraph 13).

51 Bogart, Christopher P. "Third-Party Financing in International Arbitration", b-Arbitra | Belgian Review of Arbitration, Wolters Kluwer, Volume 2017, Issue 2: p. 323.

costs,[52] it is perhaps unsurprising that ICSID tribunals tend to adopt a stricter test than the funded claimant's impecuniosity to order security for costs.[53]

One of the main purposes of security for costs orders is to deter frivolous claims and make prevailing respondents whole at the end of a case.[54] Nevertheless, aside from the "cause célèbre" of *RSM Production Corporation v. Saint Lucia*[55] and the decisions that followed suit,[56] an overwhelming majority of decisions have endorsed the conservative approach that security for costs should be granted with the "*greatest reluctance*",[57] and we take the view that "bare assertions" on the claimant's impecuniosity should be rendered of no evidentiary value, even in cases involving third-party funding.

Moreover, this exceptionally high threshold flows as a matter of course from the traditional (and in our opinion, most sensible) view that tribunals must exercise self-

---

52 Most jurisdictions and rules of arbitration do not treat security for costs any different than other interim and conservatory measures. See "Chapter 6: Costs and Security for Costs" in "Report of the ICCA-Queen Mary Task Force…", Op. Cit., pp. 163-183. As an exception to this, see the English Arbitration Act (1996), section 38(3); the LCIA Arbitration Rules, article 25(2); the SCC Rules, article 38; and the VIAC Rules of Arbitration, article 33(6); all of which contain specific provisions on security for costs.

53 Brekoulakis, Stavros and Rogers, Catherine. "Third-Party Financing in ISDS…", Op. Cit., p. 17.

54 Brekoulakis, Stavros and Rogers, Catherine. "Third-Party Financing in ISDS…", Op. Cit., p. 22.

55 The much-quoted ICSID case RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) remains a historic milestone, because it was the first time ever in investment treaty arbitration that an ICSID tribunal addressed the impact of third-party funding on security for costs requests. The arbitral tribunal ordered the claimant to pay security for costs in the amount of USD 750,000 in the form of an irrevocable bank guarantee. The tribunal's ratio decidendi for doing so was that the claimant's track-record of not paying costs: "Contrary to the situation in previous ICSID cases where tribunals have denied the application for security for costs…the circumstances of the present case are different. In particular Claimant's consistent procedural history in other ICSID and non-ICSID proceedings provide compelling grounds for granting Respondent's request." (paragraph 82). However, in an often-cited obiter dictum, the tribunal also contemplated the third-party funding factor and considered that the involvement of a third-party funder could not alleviate the concerns that the claimant will again default on costs payment, particularly since the funder's responsibility for adverse costs was uncertain: "the admitted third party funding further supports the Tribunal's concern that the Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award." (paragraph 83).

56 Manuel García Armas et. al. v. Bolivarian Republic of Venezuela (PCA Case No. 2016-08) and Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan (ICSID Case No. ARB/18/35). In both cases, the arbitral tribunals considered that the existence of third-party funding did not constitute per se a definitive proof of the party's impecuniosity or insolvency. However, that event coupled with other significant and exceptional circumstances justified an order on security for costs.

57 Kirtley, William and Wietrzykowski, koralie. "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?", 30 Journal of International Arbitration (2013): p. 19. Retrieved from: https://www.international-arbitration-attorney.com/wp-content/uploads/2018/09/international-arbitration-attorney-com-joia-30-1_william-kirtley-koralie-wietrzykowski.pdf
In this regard, see the following investment arbitration cases dismissing security for costs requests (listed in chronological order): Libananco Holdings Co. Limited v. Republic of Turkey (ICSID Case No. ARB 06/8), Decision on Preliminary Issues of 23 June 2008; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana (ICSID Case No. ARB/07/24), Procedural Order No. 3 of June 24 2009; Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia (PCA Case No. 2011-17), Procedural Order No. 13 of 11 March 2013; EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14), Decision on Provisional Measures of 23 June 2015; and South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia (PCA Case No. 2013-15), Procedural Order No. 10 of 11 January 2016.

restraint when dealing with extraordinary interim measures like security for costs requests, to ensure that the claimant's access to justice is not hampered.[58]

As regularly held by ICSID tribunals in investment treaty arbitration, it should only be in the most extreme case -one in which an essential interest of either party stood in danger of irreparable damage or where abuse, serious misconduct or other bad faith element has been evidenced on either side's conduct- that the possibility of granting security for costs should be entertained at all.[59] Generally speaking, the burden of proof lies in the party seeking security for costs. In fact, there is no reason to reverse the burden of proof in the presence of a third-party funder.[60] However, once the requesting party has discharged its burden of proof, the onus is on the funded party to explain why an order for security for costs is unwarranted.

The quintessential example of evil intent justifying a security for costs order involves a claimant that, immediately before launching its claim, takes deliberate action to shield itself against potential liability for adverse costs by concealing assets, thereby artificially acting as a special purpose vehicle to collect money if the case is won and avoid paying costs if the case is eventually lost.

However, recourse to third-party funding does not, as such, constitute exceptional or extreme circumstances nor bad faith or abuse. Tribunals may use the existence of the third-party funder as a factor in determining security for costs, but the existence of a funding agreement should not in itself automatically trigger an order for security for costs.[61] Conversely, the existence of third-party funding does not warrant that the prevailing funded party should be able to collect the costs of its external financing as more costs of the proceedings.

In commercial arbitration, the point of departure is the parties' agreement to arbitrate, which sets the bar for a party's legitimate expectations in recovering costs. One sensible approach when faced with the issue of security for costs requests would be to ask whether the prospect of the claimant honoring a potential adverse costs award has substantially and unforeseeably deteriorated since the conclusion of the

58 Sharma, Umika. "Third-Party Funding in Investment Arbitration: Time to Change Double Standards Employed for Awarding Security for Costs?", Kluwer Arbitration Blog (July 2018): p. 2. Retrieved from: http://arbitrationblog.kluwerarbitration.com/2018/07/29/third-party-funding-investment-arbitration-time-change-double-standards-employed-awarding-security-costs/

59 Von Goeler, Jonas. Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35, Kluwer Law International (2016): p. 351. In this regard, see Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No. ARB/09/17), Decision on El Salvador's Application for Security for Costs dated September 20, 2012: "As the guardian of the integrity of the proceeding, the Committee may, in the appropriate situation, use its inherent powers to order security for costs. However, the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced." (paragraph 45). See as well Libananco Holdings Co. Limited v. Republic of Turkey (ICSID Case No. ARB 06/8), Decision on Preliminary Issues of 23 June 2008, paragraph 57.

60 Von Goeler, Jonas. "Third-Party Funding in International Arbitration…", Op. Cit., p. 354 In this regard, see Burimi SRL and Eagle Games SH.A v. Republic of Albania (ICSID Case No. ARB/11/18), Procedural Order No. 2 on Procedural Measures Concerning Security for Costs: "The Tribunal would not shy away from ordering security for costs for the first time, had the Respondent established that the circumstances of this case required the requested relief. Based on the facts presented, howerver, the Tribunal does not find compelling reasons to depart from the previous rulings of ICSID tribunals denying security for costs requested" (paragraph 41).

61 Massini, Kelsie. "Risk Versus Reward…", Op. Cit., p. 337.

arbitration agreement.[62] That being said, we take the view that the conclusion of a funding agreement should not suffice to evidence a material and unforeseeable deterioration of the claimant's finances. Once again, the lack of a uniform approach and casuistic nature of security for costs applications (which is all the more obvious in commercial arbitration) open the door to commercial arbitration tribunals assessing broader fairness considerations in a rather unsystematic way.[63]

There are compelling arguments as to why the existence of a third-party funder should not be considered when assessing an application for security for costs.

First, taking into account third-party funding at such an early stage of the proceedings could turn out to be disproportionately detrimental to the claimant,[64] as it might have a ripple effect and simply stifle its claim altogether. In fact, in some cases, the arbitral tribunal's discretionary power to order security for costs can unduly restrict access to justice. A blatant example would be when the claimant's financial difficulties are indeed attributable to the acts and omissions of the other party and therefore, recourse to third-party funding is the only line of action the claimant can follow in order to bring forward a meritorious claim.[65]

Second, should third-party funding agreements become a decisive factor, this would encourage respondents to systematically apply for security for costs, thus delaying the procedure and increasing the risk of stifling plainly meritorious claims if the third-party funder does not agree to pay on behalf of the claimant.[66]

---

62 Brekoulakis, Stavros and Von Goeler, Jonas. "Chapter I: The Arbitration Agreement and Arbitrability, It's all about the Money: The Impact of Third-Party Funding on Costs Awards and Security for Costs in International Arbitration", Austrian Yearkbook on International Arbitration, Volume 2017: pp. 14-15.

63 This current perspective allows tribunals to capture the nuances of the particular case, but, against standard practice, it also encourages disclosure of the terms of the funding agreement in order to evaluate whether security for costs would be justified. Accordingly, since the legal test applied varies from one case to another, it is extremely difficult to generalize about how third-party funding impacts a tribunal's decision to order security payment. In addition, confidentiality of proceedings and awards in commercial arbitration further contributes to this asymmetry.

64 In fact, if final awards on costs against unsuccessful claimants disregard third-party funding as a factor in their assessment, it is only logical that third-party funding should not be a decisive factor at the earlier stage of determining security for costs. See, in this regard, for example, ICSID sister cases Ioamis Kardassopoulos & Ron Fuchs v. Republic of Georgia (ICSID Cases No. ARB/05/18 and ARB/07/15), Award rendered on March 3, 2010, and RSM Production Corp. v. Grenada (ICSID Case No. ARB/05/14), Order of the Committee Discontinuing the Proceeding and Decision on Costs dated April 28, 2011, all of which, when dealing with costs in the final award, have ruled that making third-party funding part of the equation when determining costs at the final stage of the proceedings would turn out to be detrimental to the prevailing funded party, by reducing the amount it could potentially recover.

65 See EuroGas Inc. And Belmont Resourced Inc. v. Slovak Republic (ICSID Case No. ARB/14/14), Procedural Order No. 3 of June 13, 2015. In this case, as opposed to the underlying reasoning behind the tribunal's decision in RSM Production Corporation v. Saint Lucia, the tribunal pointed out that the respondent had failed to establish that the claimants had defaulted on their payments in those or in other arbitration proceedings and denied the requested provisional measure of security for costs by making it clear that "financial difficulties and third-party funding -which has become a common practice- do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs" (paragraph 123).

66 Kirtley, William and Wietrzykowski, koralie. "Should an Arbitral Tribunal Order Security for Costs…", Op. Cit., pp. 21-22.

Last, parties benefiting from third-party funding would be in a worse position than parties using other sort of funding arrangements, which is rather inequitable[67] considering that the benefits of third-party funding far outweigh any fear of (a) an increase in frivolous claims (which, in any case, are unattractive to any funder); or (b) default on adverse cost payment obligations (which, in any case, may happen regardless of the existence of a funder). At the end of the day, third-party funding is no different than any other financial arrangement that a party may enter into with a "conventional" financial institution. If the latter is not considered a cause for concern regarding security for costs, there is no compelling reason to treat the former differently.

Overall, the fact that a party has entered into a third-party funding agreement does not provide sufficient grounds to order that party to grant security for costs,[68] especially since some funders may be prepared to meet liability for adverse costs.[69]

This remains as a case-by-case determination. If the arbitral tribunal wishes to consider broader fairness concerns in its assessment,[70] it may do so, but this should under no circumstances be misused to breed resentment against third-party funding and parties financially supported by professional funders.[71]

5. **CONCLUSION**

In addition to trends within the field of arbitration, market forces have also contributed to increase both demand for and interest in portfolio financing. Market activity is indeed now primarily focused on monetization of large claim portfolios held by premium listed corporations.[72] Thus, it comes as no surprise that several jurisdictions and arbitral institutions now allow, regulate and even encourage third-party funding. In fact, expectations are that the arbitral community will continue to embrace third-party funding and the industry will grow exponentially in the coming years.

Despite international arbitration being in full swing, its costs continue to escalate,[73] thus placing a substantial financial burden on the parties involved. Within this

67 Kirtley, William and Wietrzykowski, koralie. "Should an Arbitral Tribunal Order Security for Costs…", Op. Cit., pp. 21-22.

68 Von Goeler, Jonas. "Third-Party Funding in International Arbitration…", Op. Cit., p. 365.

69 In this regard, see the Code of Conduct (2018 revised version) of the Association of Litigation Funders of England and Wales (ALF Code): https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf
With regard to the funder's commitment in relation to costs, the ALF Code provides that the funding agreement shall state whether the funder is liable to the funded party to "meet any liability for adverse costs that results from a settlement accepted by the Funded Party; pay any premium (including insurance premium tax) to obtain adverse costs insurance; provide security for costs; and meet any other financial liability" (Articles 10.1 to 10.4 of the ALF Code).

70 For example, whether, in the presence of an arbitration funding agreement, it could be potentially unfair for the respondent to proceed with the arbitration without security for costs.

71 Von Goeler, Jonas. "Third-Party Funding in International Arbitration…", Op. Cit., p. 366.

72 In this regard, see Wesolowski, Antonio. "Chapter 18: Spain". In Perrin, Leslie. The Third Party Litigation Funding Law Review: Third Edition, Law Business Research (December 2019): p. 189. Retrieved from: https://thelawreviews.co.uk//digital_assets/d7db7ca7-7471-48d0-a10e-8b15a22b6a46/Third-Party-Litigation-Funding-3rd-edition.pdf

73 Parties are required to bear the fees of arbitrators, the administrative costs of the arbitral institution and the costs for the venue, along with attorney's fees and expert witness fees, which are usually as well very expensive.

framework, some of the most commonly cited benefits of third-party funding are said to be increased access to justice, costs and risk management and enhanced efficiency. Interestingly, third-party funders, with their appetite for high-profile, often act as filters of unmeritorious claims. In fact, in assessing claims, funders, who are free from the partisan interests that can cloud lawyers' assessment of the same claim, can bring a remarkable level of sophistication and precision.

However, at a time when the industry of third-party funding is on the rise, the role of funders is also a matter of open debate. We have opted to cover in this article three major grey areas which surround third-party funding: disclosure, conflicts of interests and security for costs.

Experience has shown that an obligation on the part of the funded party to disclose that it is funded and by whom ought to become the rule rather than the exception. If compliant with the most stringent disclosure standards, third-party funding does not threaten the integrity of the arbitral process nor dilute the fundamental principles that inspire the practice of international arbitration. For this very reason, the existence of third-party funding should not automatically trigger an order for security for costs, which we take the view should be granted with the "greatest reluctance".

The international arbitration community is essentially relying on attorneys, arbitrators and, most importantly, funders, to act ethically on their own. While ethical behavior may be second nature for most of them, arbitral institutions and tribunals must continue to create guidelines and develop consistent criteria to harness the potential of third-party funding and seize the opportunities it offers in the field of international arbitration.