New Vision University

Comparative Private and International Law

Master Thesis

Confidentiality and Conflicts of Interest in Third-Party Funded Arbitration

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Abbreviations & Acronyms

ALF - **A**ssociation of **L**itigation **F**unders

ABA - **A**merican **B**ar **A**ssociation

CETA - **C**omprehensive **E**conomic and **T**rade **A**greement

CFA - **C**onditional – **F**ee **A**greement

IBA - **I**nternational **B**ar **A**ssociation

ICSID – **I**nternational **C**entre for **S**ettlement of **I**nvestment **D**isputes

ICC – **I**nternational **C**hamber of **C**ommerce

SIAC - **S**ingapore **I**nternational **A**rbitration **C**entre

TPF – **T**hird-**P**arty **F**unding

Introduction

Third-party funding (hereinafter referred to as TPF) is on a central stage in the international commercial and investment arbitration market.[1] It is an increasing phenomenon due to the high costs of the arbitration proceedings. TPF is a method of financing, which can reduce or eliminate the risk associated with a potentially unfavorable outcome of the proceedings.[2] It also promotes access to justice by giving the parties an opportunity to be part of the game and win a good case.[3] But, along with its attractive essence, TPF has troublesome aspects which need to be specified and discussed.

This paper provides an overview of the problematic aspects of the TPF such as conflicts of interests and the relations between the confidentiality and disclosure requirement during the arbitration proceedings. By discussion of many interrelated aspects, it will be examined how disclosure of the TPF can prevent future complications and conflicts of interest between the participants of the proceedings.

The paper is divided into three chapters. The first chapter gives a general overview of the TPF and its contractual basis. The chapter gives a short explanation of the Funding Agreement and also, emphasizes the importance of the TPF in relation to the access to justice. Herewith, it is briefly discussed the case where TPF is excluded according to the arbitration agreement and its possible consecutive outcome.

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[1] "Chapter 2: Overview of Dispute Funding", ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force in Third-Party Funding in International Arbitration, ICCA Reports Series, Volume 4 (© International Council For Commercial Arbitration; International Council for Commercial Arbitration 2018) p. 18.

[2] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 1, p.65.

[3] Khushboo Hashu Shahdadpuri, "Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory', in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal, (© Singapore International Arbitration Centre (in co-operation with Kluwer Law International); Kluwer Law International 2016, Volume 12 Issue 2) p. 81.

The second chapter relates to the procedural consideration of TPF and confidentiality. It overviews the third-party funder's (hereinafter referred to as Funder) status during the arbitration proceedings and explains to what extent the Funder can be considered as a party. Also, the paper concerns the issues related to the different perspectives of the Funder and opposing party regarding confidentiality during the arbitration proceedings.

The third chapter concerns the impact of the TPF on the arbitration proceedings, namely, what kind of conflicts of interest may arise and how it can be avoided by early disclosure of the TPF/name of the Funder. Also, it will be examined what is the disclosure obligation and issues regarding establishing thereof and what kind of disclosure requirements exist under various legal acts and instruments. In addition, it will be discussed disclosure requirements under the ICSID case law.

The conclusion summarizes paper and the main points of the TPF as well as separates the importance to avoid the conflicts of interest and the role of the disclosure in it. Herewith, the paper finally concludes which should be prevailed, the confidentiality request of the Funder or the obligation of the funded party (hereinafter referred to as Funded) to disclose the funding fact and/or the name of the Funder.

1. General overview and purpose of the Third Party Funding

Nowadays, TPF institute is one of the top-discussed issues in international arbitration.[4] It is also referred to as "alternative litigation finance".[5] TPF is widely used in international commercial arbitration, as well as in investment arbitration. It is a financing instrument when an entity, the Funder is not a party to the dispute, but finances one of the party's

[4] Didier Matray and Sigrid van Rompaey, "An introduction to third-party funding", in Annet van Hooft and jean Francois Tossens (eds), b-Arbitra | Belgian Review of Arbitration, (Wolters Kluwer 2017, Volume 2017 Issue 1) p. 175.

[5] Carolyn B. Lamm and Eckhard R. Hellbeck, "Chapter 9. Third-Party Funding in investor state Arbitration introduction and Overview", in Bernardo M. Cremadez Sanz-Pastor and Antonias Dimolitsa (eds), Third-Party Funding in international Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (© Kluwer Law international; International Chamber of Commerce (ICC) 2013) p. 101.

arbitration fees.[6] One of the most important typical features of the TPF is that it involves entity, with no previous interest in the arbitration dispute and mostly on a "non-recourse" basis, which means, that if the case is unsuccessful, Funder has no recourse against the Funded.[7]

In England and Wales, in January 2014 A voluntary Code of Conduct for Litigation Funders was published by the ALF.[8] The term "litigation funding" includes arbitration dispute and even more, the definition is quite similar to TPF definition: "Litigation funding is where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant."[9] TPF is based on a contract (hereinafter referred to as Funding Agreement) between a Funder, who has no previous interest in the arbitration process and a Funded, who is the party of the arbitration.[10]

This institute in commercial arbitration could be considered as an "after the event" (ATE) investment.[11] The popularity of this kind of dispute financing method is due to the high costs of the arbitration.[12] The Funder invests in the arbitration proceedings and hoping to

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[6] "Chapter 1: Introduction to Third-Party Funding", in Lisa Bench Nieuwveld and Victoria Shanon Sahani, Third-Party Funding in International Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2017) p. 1.

[7] "Chapter 2: Overview of Dispute Funding", ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force in Third-Party Funding in International Arbitration, ICCA Reports Series, Volume 4 (© International Council For Commercial Arbitration; International Council for Commercial Arbitration 2018) p. 18.

[8] "Chapter 3: Definitions', ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, ICCA Reports Series, Volume 4 (© International Council for Commercial Arbitration; International Council for Commercial Arbitration 2018) p. 60.
For definition see: <http://associationoflitigationfunders.com/litigation-finance/> [accessed: 18 January 2019].

[9] See supra note 8.

[10] Willem H.van Boom "Third-Party Financing in International Investment Arbitration" Erasmus School of Law, Rotterdam, the Netherlands, December 2011 p. 25.

[11] See supra note 10.

[12] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p. 3.

make a profit, from the total compensation granted to the party which he financially supported, provided that the case is successful.[13] If the claim fails, Funder will receive no compensation, but still will be liable for the arbitration fees.[14] A similar mechanism is CFA between a claimant and a lawyer (where this is allowed by law).[15] TPF is a variation of the "no – win no - fee" approach, where the person providing the funds is not the lawyer but a third party.[16]

Who can be a Funder? The entity, supplying the financial support mostly is the client's law firm, attorney, an insurance company or an outside institution, like a corporation bank or other financial institution.[17] Some financial institutions even specialize in TPF, while others invest in arbitration claims as part of the financial investments.[18] Not surprisingly, before investing the money, Funder will investigate and examine all facts, including the chances to obtain a favorable award.[19] That is because this kind of investment can create a substantial benefit, but at the same time, it produces a substantial risk as well.[20]

Article 8.1 of the CETA, an agreement between Canada and the European Union and its member states provides that: "third party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of

[13] See supra note 12.
[14] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p. 5.
[15] Willem H.van Boom "Third-Party Financing in International Investment Arbitration" Erasmus School of Law, Rotterdam, the Netherlands, December 2011 p. 26.
[16] Edouard Bertrand, "Brave New World of Arbitration: Third-Party Funding, The, 29 ASA BULL. 607 (2011) HeinOnline, p. 609.
[17] "Chapter 1: Introduction to Third-Party Funding", in Lisa Bench Nieuwveld and Victoria Shanon Sahani, Third-Party Funding in International Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer La International 2017) p. 3.
[18] See supra note 17.
[19] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p. 5.
[20] See supra note 19.

the dispute."[21] As it is clear, the CETA defines "a non-for-profit funder by focusing on whether the funder expects repayment for the capital it advances to the funded party rather than focusing on what other motivations the funder might have besides profit."[22] It means that the motivation for Funder could be endless, from the expectation of profit to "grant or donation".[23]

It is obvious that TPF suggests a different kind of financing method from other traditional financing sources. After the funding, Funder's interests and expectations become explicit and they (Funder and Funded) together seek to achieve the favorable outcome of the arbitration process.

1.1. Contractual basis for TPF – disputes and claims as subjects of contractual agreements

As it is already mentioned above, TPF is based on a Funding Agreement between a Funder and a Funded.[24] Different countries (which already acknowledged TPF as a part of their legislation) have a different definition of the Funding Agreement. The general definition of Funding Agreement according to the Singapore Civil Law Act is: "a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-Party Funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled."[25] It should be noted, that Singapore has

[21] CETA, article 8.1 <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> [accessed: 8 February 2019]. And "Chapter 3: Definitions', ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, ICCA Reports Series, Volume 4 (© International Council for Commercial Arbitration; International Council for Commercial Arbitration 2018) pp. 61-62.

[22] "Chapter 3: Definitions', ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, ICCA Reports Series, Volume 4 (© International Council for Commercial Arbitration; International Council for Commercial Arbitration 2018) p.62.

[23] See supra note 22.

[24] Willem H.van Boom "Third-Party Financing in International Investment Arbitration" Erasmus School of Law, Rotterdam, the Netherlands, December 2011 p. 25.

[25] "Chapter 3: Definitions', ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, ICCA Reports Series, Volume 4 (© International Council for Commercial Arbitration; International Council for Commercial Arbitration 2018) p. 57. "Civil Law Act" Singapore (Chapter 43) 5B (10). <https://sso.agc.gov.sg/Act/CLA1909> [accessed: 20 January 2019].

recently amended its law and allowed TPF in relation to dispute resolution proceedings.[26] A typical Funding Agreement would regulate methods for calculating the maximum amount of money the Funder will contribute, the portion of the return that the Funder would receive upon success and the maximum adverse costs award that the Funder would pay if the case is lost.[27] These calculations are based on a variety of factors.[28] "It can be based on the initial investment made by the Funder, which after the award is rendered, will be multiplied by a certain number".[29] Also, it is common for Funding Agreement to connect the Funder's return to the duration of the case, it means that the Funder's return is lower if the case settles early or rises throughout the proceedings.[30]

The content of the TPF and the subject of the Funding Agreement is best expressed by the following language: "…disputes and claims are financial assets, capable of being bought, sold, securitized, collaterized, and the subject of contractual agreements…"[31] Considering that, it goes without saying that arbitration is related to huge expenses, nevertheless, as a general rule the subject matter of the dispute itself encompasses huge amount of financial resources and therefore in case of the favorable outcome, one of the parties receive serious amount of compensation which makes a dispute profitable financial assets, which could be sold.

The relationship between Funder and Funded is crystallized in a Funding Agreement and it should include all rights and obligations of both parties, "the Funding Agreement should

[26] See supra note 25, p. 56.
[27] "Chapter 1: Introduction to Third-Party Funding", in Lisa Bench Nieuwveld and Victoria Shanon Sahani, Third-Party Funding in International Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2017) p. 12.
[28] See supra note 27.
[29] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p. 5.
[30] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p. 27.
[31] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 609.

equally establish the causes whereby the relationship can be terminated".[32] Therefore, a dispute resolution clause is a common feature in many Funding Agreements, which enables a Funder to exercise reasonable termination rights and at the same time protects the Funded from an unreasonable decision by the Funder to cease funding.[33]

1.2. Potential interest of the party to exclude the possibility of TPF and subsequent denial of access to justice

Perhaps the most important argument made in support of litigation funding, including TPF, is that it promotes access to justice.[34] In the arbitration context, promotion of access to justice means that "international arbitration should not be justice for the rich only".[35] TPF gives parties an opportunity to be part of the game and win a good case, moreover, it helps them to reach "goal of fair and even–handed arbitral justice".[36] TPF may support access to justice for basically two groups of parties.[37] The first group consists of those who financially cannot afford to evolve in the arbitration proceedings.[38] Especially, during the investment arbitration proceeding, TPF gives investors become accessible and they are a more equal position with respect to the State.[39] A "losing" foreign investor may have an obligation to pay for the opposing party's cost and it may have a radical impact on the

[32] Bernardo M. Cremades "Third Party Funding in International Arbitration" 23 September 2011 p.6. <https://www.cremades.com/pics/contenido/File634523783352588756.pdf> [accessed: 20 January 2019].
[33] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p. 32-33.
[34] "Chapter 3: Litigation Funding in International Arbitration", in Jonas von Goeler Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35 (© Kluwer Law International; Kluwer Law International 2016) p. 82.
[35] See supra note 34, p. 83.
[36] Khushboo Hashu Shahdadpuri, "Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory', in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal, (© Singapore International Arbitration Centre (in co-operation with Kluwer Law International); Kluwer Law International 2016, Volume 12 Issue 2) p. 81.
[37] See supra note 36, p. 82.
[38] See supra note 37.
[39] Grotius Centre Working Paper Series "Third Party Funding in International Investment arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lepeltak Student Research Fellow (2011 – 2012) Grotius Centre Working Paper №2012/1, p.7.

future economic and financial stability of the company.[40] But, it should also be noted that States are often being funded by third parties.[41]

The members of the second group are financially able to afford arbitration but want to refrain to take the risks associated with doing so.[42] For these parties TPF offers a way to share risk, therefore facilitating access to justice.[43] For example, the claimant may never have been involved in the international arbitration process before and because of this may doubt how reasonable is to pay significant adverse costs and unforeseen expenses for the business capital.[44] TPF may balance this risk and maintain business stability.[45] At the same time, it should be considered that "litigation funding is … not a general panacea to offset rising costs of litigation and resulting access to justice concerns."[46]

As it is discussed above, TPF promotes access to justice. But what happens when an arbitration agreement of the disputing parties specifies that no TPF is allowed in case of arbitration dispute and the party has to gain the finances from other sources (for instance, the bank loan)? Does this mean a subsequent denial/limitation of access to justice? If it is not arguable that TPF promotes access and restoration of justice, then exclusion of TPF in arbitration agreement could be considered as a limitation of the right. Moreover, as it is already noted, the Funders may have various motivation for funding and not only the financial interests, including donation, just like in the ICSID Proceedings instituted by "*Philipp Morris and others against Uruguay*", where The Bloomberg Foundation and the

[40] See supra note 39.
[41] See supra note 40.
[42] "Chapter 3: Litigation Funding in International Arbitration", in Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35 (© Kluwer Law International; Kluwer Law International 2016) p. 83.
[43] See supra note 42.
[44] See supra note 43.
[45] See supra note 44, p. 84.
[46] "Chapter 3: Litigation Funding in International Arbitration", in Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35 (© Kluwer Law International; Kluwer Law International 2016) p. 84. As stated in Waterhouse v. Contractors Bonding Limited, Supreme Court of New Zealand, Judgment of 20 September 2013, [2013] NZSC 89, para. 41. See also Hodges, Peysner & Nurse, Litigation Funding, 103 ('commercial funding for individual small cases will be highly unlikely to be available'); Kalajdzic, Cashman & Longmoore, 61 Am. J. Comp. L. (2013) 93, 142 ('[t]he commodification of litigation therefore does nothing to increase access to justice for litigants with human rights, civil rights or other public law based claims').

"Campaign for Tobacco-Free Kids" programme decided to financially help the Uruguayan Government in the Proceedings.[47] Taking into account all these facts, this particular clause about the excluding of TPF may be considered as an unfair restriction of the right to the party and maybe even become invalid if an opposing party disputes the validity of the clause.

2. Procedural Consideration of the TPF and their impact on confidentiality of the proceedings

In the following chapter, it will be discussed whether the Funder becomes a party to the arbitration proceedings, if so, to what extent the Funder can be considered as a party, as well as issues related to the different perspectives of the Funder and opposing party regarding the confidentiality during the arbitration proceedings.

2.1. Funder as a party to the arbitration proceedings

Along with its attractive essence, TPF has some problematic aspects which need to be specified and discussed.

The first issue which may come to mind when analyzing a TPF is the extent to which the Funder becomes a party to the arbitration proceedings.[48] If it will be discussed in a strictly legal sense, it does not, firstly, because the Funder does not implement the rights and obligations of the Funded during the arbitration proceedings.[49] Also, if the Funded loses the case and becomes a target of a counter-claim, the Funder will not be liable for the counter-claim. [50] But, in an economic view, as it is discussed above, the Funder acquires an interest in the outcome of the case.[51] But, what happens when depending on the terms agreed in the Funding Agreement, the Funder may be granted to have some kind of

[47] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p. 6. See ICSID Case No. ARB/10/7.
[48] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.
[49] See supra note 48.
[50] See supra note 49.
[51] See supra note 50.

control over the manner in which the case is managed by the party's lawyers or may even have some influence on the choice of the arbitrator appointed by the party.[52] Considering all these facts, the Funder could be considered at least as a quasi-party.[53] Taking this into account, it may be assumed that the opposing party is in fact confronted with not one but with two parties,[54] *Funder and Funded vs opposing party*. This is due to the fact that Funder and Funded have the same interest and even more, frequently they elaborate the arbitration action strategy together. Financing the dispute is anyway a strong weapon and the Funder, in any case, has some control mechanism to observe and interfere in proceedings.

The issues related to the control over proceedings by the Funder, the obligation of the Funded to disclose the TPF fact, the terms of the Funding Agreement and/or the name of the Funder and also, what consequence may have an unauthorized interference in the arbitration proceedings by someone who is not a party to the arbitration proceedings[55] will be discussed later.

2.2. Confidentiality of the arbitration proceedings

Only a few national laws regulate confidentiality in arbitration since some countries have adopted the UNCITRAL MODEL LAW whose drafters determined that: "confidentiality may be left to the agreement of the parties or the arbitration rules chosen by the parties."[56] It is parties' discretion to make the arbitration process confidential, thus arbitral tribunal does not have the power to do so without parties' request/agreement.[57] To strengthen this argument, for instance, in article 22(3) of the ICC Arbitration Rules it is stated that: "upon the request of any party, the arbitral tribunal may make orders concerning the

[52] See supra note 51.
[53] See supra note 52.
[54] See supra note 53.
[55] See supra note 54, pp. 610-611.
[56] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle pp. 80-81 para. 214 <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019] as stated in Report of the Secretary General on Possible Features of a Model Law in International Commercial Arbitration, UN Doc. A.CN.9/207, para. 17, in XII Y.B. UNCITRAL 75, 90 (1981).
[57] See supra note 56, p. 81, and para. 215.

confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."[58]

As to Arbitration proceedings which are subject to confidentiality, all information is to be treated as confidential and it should be communicated only to the arbitral tribunal and the parties to the case.[59] "The opponent of the funded party could thus rightfully not only object to the transfer of any information not publicity available to a person which is not a party to the arbitration, but also condition the production of any such information to an undertaking of the funded party that no information will be transferred to the funder."[60] This is a general principle that there could be some circumstances that proceeding information could be used by the Funder against the opposing party and/or for his/her own benefit. [61] For example, the opponent may also fear that any information communicated during the arbitration proceedings could be used against in the other lawsuits/arbitrations or another problematic situation, where a Funded would be financed by a competitor of the opposing party.[62]

The opposing party's fear could be legitimate and not reasonable, because anyone, who may have some access to the information, might use it for his/her own benefit in the future. To avoid above-mentioned, the Funder should confirm his/her participation in the process, protect the confidentiality and take all necessary measures not to abuse the proceeding.

2.2.1. The Funder's perspective on confidentiality

Protecting the confidentiality of the proceedings is a legitimate demand, but it also makes difficult for the Funder to exercise meaningful control over the proceedings, as long as it

[58] See supra note 57 and ICC Arbitration Rules, article 22(3). <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_22> [accessed: 25 January 2019].
[59] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", The, 29 ASA BULL. 607 (2011) HeinOnline, p.612.
[60] For used citation see supra note 59.
[61] See supra note 60.
[62] See supra note 61.

does not abuse and/or interfere with the process.[63] On the other hand, if TPF is accepted as a legitimate way to finance the dispute during the arbitration proceedings, then it also should be accepted that the Funder may have access to some information.[64] To the question, whether Funders, in international arbitration, are bound by a duty of confidentiality, can be answered in two different ways.[65] First, if the Funder is to be considered as a part of the Funded, then the Funder will be in principle held to the same duty of confidentiality as the parties.[66] Second, the Funders may be treated like any other third party in the arbitration process and they will be bound by a duty of confidentiality, only if they sign an agreement of confidentiality.[67]

Generally, it is recommended that arbitral tribunal asks the Funder to sign a confidentiality agreement to avoid later complications.[68] However, before requesting the signature, arbitral tribunal needs to be informed that the TPF, in fact, has occurred. Taking into account the fact that a disclosure obligation does not exist for TPF agreements, the arbitral tribunal will most often not be aware of the fact that one of the parties is being funded.[69] This being said, the efforts of the tribunal does not absolve the parties from their respective obligations, in other words, the primary responsibility of provision of the information on TPF shall lie with the Funded which, acting in good faith, should disclose the fact that is funded by the third party.

Sometimes, Funders are beyond confidentiality and because of this, some future misunderstandings may arise. What happens when according to the Funding Agreement, the Funded is bound by the duty of confidentiality and is not authorized to disclose the

[63] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", The, 29 ASA BULL. 607 (2011) HeinOnline, p.612.
[64] See supra note 63.
[65] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 81, para. 217. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].
[66] See supra note 65.
[67] See supra note 66.
[68] See supra note 67.
[69] See supra note 68, para. 218.

fact of TPF and/or the name of the Funder? Funders often prefer to enjoy confidentiality, while another party and/or arbitrators, not being aware of the existence of a TPF at all, finds himself in an unfavorable situation.[70]

The issue regarding which should be prevailed, the confidentiality request of the Funder or the obligation of the Funded to disclose the funding fact and/or the name of the Funder will be discussed below.

3. The impact of the TPF on the arbitration proceedings and obligation of disclosure

In the following chapter, it will be examined the impact of the TPF on the arbitration proceedings, concretely, what kind of conflicts of interest may arise and how it can be avoided by disclosure. Also, it will be explained what is the disclosure obligation, what kind of disclosure requirements exist under various legal acts and instruments, how disclosure can avoid conflicts of interest and what kind of issues may arise when establishing the disclosure obligation. In addition, it will be discussed disclosure requirements under the ICSID case law.

3.1. Disclosure requirements under various legal acts and instruments

There are no generally accepted rules or practice in international arbitration to oblige the party to disclose the existence of TPF.[71] In, fact, more than 75% of the respondents in the Queen Mary 2015 International Arbitration Survey were in favor of mandatory disclosure of the TPF, but there are no special provisions about TPF in either national arbitration laws or international arbitrational rules.[72]

The recent amendments in Singapore's conduct rules for lawyers and also, the amendment to the Arbitration Ordinance in Hong Kong are important exceptions, as far as, they both

[70] See supra note 69, p.82, para.218.
[71] Nicolas Costabile and Anthony Lynch, "Applicable Law in Arbitrations Involving Third-Party Funding Agreements", Spain Arbitration Review | Revista del Club Espanol del Arbitraje, (© Club Espanol del Arbitraje; Wolters Kluwer Espana 2017, Volume 2017 Issue 30) P.174, para.28.
[72] See supra note 71, para. 27.

require funded parties to disclose to their counterparties and to the tribunal the existence of TPF and the name of the Funder.[73] In Singapore, this has been resolutely addressed by amendments to the Legal Profession (Professional Conduct) Rules 2015 ("Professional Conduct Rules"), which now require parties to disclose any TPF fact to the court or arbitral tribunal, they are obliged to disclose not only the existence of the Funder but also the name and address of the Funder.[74] Such disclosure should be made either at the date of commencement of dispute resolution proceedings or as soon as possible after the concluded of the Funding Agreement.[75] Article 49 A. (1) states: "When conducting any dispute resolution proceedings before a court or tribunal, a legal practitioner must disclose to the court or tribunal, and to every other party to those proceedings – (a) the existence of any third-party funding contract related to the costs of those proceedings; and (b) the identity and address of any Third-Party Funder involved in funding the costs of those proceedings."[76]

Mandatory disclosure requirement of any person or entity which may have some direct economic interest or influence on the arbitration proceeding is the part of the IBA's Guidelines on Conflict of Interest, General Standard 7 (a) requires that: "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 same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

[73] See supra note 72, para. 29.
[74] Transnational Notes "Third-Party Funding in Singapore: The quest for an Ethics Code in International Arbitration, 8 March 2018, Chapter II. See blog < https://blogs.law.nyu.edu/transnational/2018/03/third-party-funding-in-singapore-the-quest-for-an-ethics-code-in-international-arbitration/> [accessed: February 20 2019].
[75] See supra note 74.
[76] Legal Profession Act (Chapter 161) Legal Profession (Professional Conduct) Rules 2015 part 5A, Article 49A. (1). < https://sso.agc.gov.sg/SL/LPA1966-S706-2015#pr49-> [accessed: 20 February 2019].

The party shall do so on its own initiative at the earliest opportunity."[77] The issues regarding IBA Guidelines influence on TPF will be discussed later.

In December 2015, the ICC Commission on Arbitration issued a Report entitled "Decisions on Costs in International Arbitration" that determined some guidance to arbitrators regarding TPF.[78] The report does not suggest the mandatory disclosure of the existence and identity of the Funder, but instead provides as follows: "The tribunal might also consider discussing with the parties, at the outset of the arbitration or during the proceedings (typically at the first case management meeting), other aspects of cost management, including…sensitive matters, such as whether there are third-party funding and…whether the identity of the third-party funder (which could be relevant to possible conflicts of interest) should be disclosed."[79]

The Secretariat of the ICC Court of Arbitration adopted a definition of the TPF, which is more closely resemble the IBA Guidelines. In its *note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of arbitration*, the ICC Court gives arbitrators the guidance in Paragraph 24: "Relationships between arbitrators, as well as relationship with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case."[80] This instruction would seem to imply arbitrators have a duty to investigate the existence of TPF in an arbitration.[81]

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[77] Didier Matray and Sigrid van Rompaey, "An introduction to third-party funding", in Annet van Hooft and Jean Francois Tossens (eds), b-Arbitra | Belgian Review of Arbitration, (Wolters Kluwer 2017, Volume 2017 Issue 1) p. 185, para. 38; IBA's Guidelines on Conflict of Interest, General Standard 7 (a) <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> [accessed: 10 February 2019].

[78] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p.99.

[79] See supra note 78 and ICC Commission Report "Decisions on costs in International Arbitration" Offprint from ICC Dispute Resolution Bulletin 2015, Issue 2, Chapter IV, p.7. <https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf> [accessed: 15 February 2019].

[80] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p.100. and "Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of arbitration" (2016)

Among the few existing regulations, the CETA agreement (which is already mentioned above), strictly requires disclosure in its Article 8.26: "Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder."[82]

The TPF in arbitration faces two major issues with regard to the disclosure.[83] First of all, about the parties obligation on disclose the existence of TPF and/or the name of the Funder – when and on what basis is the party obliged to disclose information about TPF; and secondly, when and on what basis should the parties disclose the terms and content of the Funding Agreement.[84] For now, the parties are not obliged to reveal the involvement of the Funder in a dispute and moreover, the Funders often require that their involvement is not revealed and use confidentiality in their favor.[85]

3.2. Potential conflicts of interest in the arbitration proceedings

The reasons for the disclosure necessity include the arbitrators' impartiality requirement, the conflicts of interest and transparency.[86] Even if it is counted that the Funders are not the parties to arbitral proceedings, they still participate in various stages of arbitration and have an interest in the outcome.[87] For instance, the existence of TPF may prolong the settlement of the dispute and even more, may "artificially inflate" the scope of the dispute,

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<https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-formschecklists/> [accessed: 15 February 2019]

[81] See supra note 80.

[82] See supra note 81, CETA agreement, article 8.26. <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> [accessed: 8 February 2019].

[83] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 3, p. 69.

[84] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 3, pp. 69-70.

[85] See supra note 84, p. 70.

[86] See supra note 85.

[87] See supra note 86.

because of the Funder's purely financial interests in the litigation.[88] The Funder's influence on the proceedings may result in an "abuse of process".[89]

Disclosure is a pre-requisite to ensure that conflicts of interest are timely and duly identified and avoided, which is essential for the legitimacy of the arbitration proceedings.[90] However, such a disclosure obligation is difficult to establish or/and implement and the most often it depends on a Funded party's good faith and fairness.[91] Mandatory disclosure is problematic in particular when TPF is defined as "any financial solution offered to a party regarding the funding of proceedings in a given case".[92] Such type of broad definition would cover not only TPF but also other types of funding and therefore, mandatory disclosure would be a controversial issue.[93] The question is why TPF agreements should be subject to mandatory disclosure requirements and what types of conflicts of interest may arise during the arbitration proceedings.[94]

In TPF industry, potential conflicts of interest may arise: a) as part of the "three–cornered relationship"[95] - between the Funded, Funded party's lawyer and the Funder; b) with respect to the appointed arbitrator(s); [96]

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[88] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p.8.

[89] See supra note 88.

[90] Maxi Scherer, "Chapter 8. Third-Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?", in Bernardo M. Cremadez Sanz-Pastor and Antonias Dimolitsa (eds), Third-Party Funding in International Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (© Kluwer Law International; International Chamber of Commerce (ICC) 2013) p. 97.

[91] See supra note 90, p.98.

[92] See supra note 91.

[93] See supra note 92.

[94] See supra note 93.

[95] For used term see Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 55, para. 139. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf>
[accessed: 15 February 2019].

[96] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle pp. 54-55, para. 139. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf>
[accessed: 15 February 2019].

3.2.1. Potential conflicts of interest of the "three-cornered relationship" – the ethical dilemma[97]

A typical Funding Agreement, as it is already mentioned, is concluded between a client and the Funder, but notwithstanding, it cannot be qualified simply as a bilateral relationship due to the presence of the client's lawyer, and this kind of "three-cornered relationship" can give rise to numerous conflicts of interest.[98] As it is already mentioned, the main predicament with TPF is the Funder's additional interest in the proceedings, which is to make the largest possible return on his/her investment, since the Funder does not have any other interest besides their goal to make a profit.[99] Because of this, Funders want to protect their investments by exercising some control over the proceedings.[100] The claimant's lawyer may be asked to provide regular reports due to the Funder's monitor progress of the claim and to ensure fulfill with claimant's obligations under the Funding Agreement.[101]

TPF entities can be divided into two groups: a) the ones that a "hands-off" approach; and b) the ones that have a "hands-on" approach.[102] The "hands-off" approach occurs when the Funder takes no control over the claim and "hands-on" approach is when the financing entity offers support for the case, but decisions still to be taken by the client and his/her counsel.[103] The influence of the Funder on the claim development depends on the Funding Agreement between the Funder and the claimant, considering the private and

[97] Universiteit Leiden "Leiden Law Blog" "Third party Litigations funds and the Lawyer's ethics" posted on September 28, 2018 by Suarez Bohorquez and Lena Stoll. <https://leidenlawblog.nl/articles/third-party-litigations-funds-and-the-lawyers-ethics> [accessed: 15 February 2019].

[98] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 55 para. 140. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019]

[99] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 55 para.143. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019]

[100] See supra note 99.

[101] See supra note 100, p. 56 and para. 144.

[102] See supra note 101, para. 145.

[103] See supra note 102, pp. 56-57, and para. 145.

contractual nature of arbitration "the funding agreement between the client and the third-party funder is an arm's length transaction and does not involve a fiduciary relationship – in contrast to the lawyer-client relationship – the client may legitimately bestow rights on the third-party funder, including the right to discharge counsel and make strategic decisions about the course of the litigation."[104]

This "three-cornered relationship" raises its own issues, for instance, whether the existence of the litigation funding (including TPF), hinders performance of the lawyers' fiduciary and professional obligations towards the Funded and this includes, whether the lawyer can exercise independent judgment or to give an advice to the Funded party freely, where this advice may harm the Funder's interest.[105] The conflicts of interest for the claimant's attorney may also arise where that attorney has contracted directly with the funding company and these contractual duties are independent of the lawyer's professional duties to the claimant and even more, because, mostly, the Funders and lawyers are repeat players in the litigation market, it can happen that relationship among them will be developed over time.[106] Because of this, sometimes it is doubtful, whose interests are protected by claimant's lawyer and whose interests should be protected.

The lawyer should serve the best interests of the client, independently and without conflicts of interest.[107]According to the IBA "Principles on Conduct for the Legal Profession", almost all of the ten ethical principles are listed, including, "Independence", "Conflict of Interest" and "Clients' interests".[108] The 1.2 explanatory note of the IBA "Principles on Conduct for the Legal Profession" states that: "Independence requires that a

[104] See supra note 103, p. 57, and para.146.
[105] IMF (Australia) LTD Wayne Attrill "Ethical Issues in Litigation Funding" 16 February 2009, p. 9. <https://www.imf.com.au/docs/default-source/site-documents/ethical-issues-paper-imf09---globalaw-conference> [accessed: 11 February 2019].
[106] "Selling Lawsuits, Buying Trouble Third-Party Litigation Funding in the United States" released by the U.S. Chamber Institute for Legal Reform, October 2009, p.8. <https://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf> [accessed: 11 February 2019].
[107] Universiteit Leiden, Leiden Law Blog "Third Party Litigations funds and the lawyer's ethics", posted on September 28, 2018 by Suarez Bohorquez and Lena Stoll. <https://leidenlawblog.nl/articles/third-party-litigations-funds-and-the-lawyers-ethics> [accessed: 15 February 2019].
[108] See supra note 107.

lawyer act for a client in the absence of improper conflicting self-interest, undue external influences or any concern which may interfere with a client's best interest or the lawyer's professional judgment."[109] From here, it is cleared that, the lawyer acting for the claimant remains at all times the claimant's lawyer and owes duties and responsibilities only to the claimant (client).[110]

However, TPF may interfere with the attorney-client relationship because of the control over their relationship and the following is a good example of a possible conflict of interest: in theory, when the claimant's lawyer has to give the client candid advice on the virtues and vices of the funding proposal, it is totally possible that claimant's lawyer acts in his/her own interest and suggests funding, notwithstanding the strength of the claim at hand because of the simple fact that TPF can guarantee payment for the lawyer.[111] The ABA notes that lawyers may not disclose confidential information to the TPF supplier without client's prior consent, also they (lawyers) should warn clients about all risks regarding TPF and not receive any fees or otherwise benefit as a result of referring the client the TPF supplier.[112]

As it is already mentioned, TPF investors will always be interested in the direction of the lawsuit to ensure that it is being managed in a way to protect their investment.[113] This arguably creates a complication between the TPF investor's interest in instructing, "that the party make certain strategic decisions that best serve the investor's goals, and the

[109] IBA "Principles on Conduct for the Legal Profession" p. 12. <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> [accessed: 10 February 2019].

[110] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 57, para. 147. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019]

[111] See supra note 110, pp. 57-58, and para.147.

[112] "Report on the Ethical Implications of Third-Party Litigation Funding" Submitted by the Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association April 16, 2013. pp. 5-6. <https://www.benthamimf.com/docs/default-source/default-document-library/nys-bar---opinion-of-ethical-implications-04-16-13.pdf?sfvrsn=2> [accessed: 12 February 2019].

[113] See supra note 112, pp.9-10.

party's or lawyer for the party's exercise of independent judgment."[114] The investor may expect to participate in the management of the case or for instance, recommends counsel with which he has a present or past relationship.[115] To deal with this kind of possible interjection in litigation management, some states have issued ethics opinions, for example, a South Carolina opinion requires the lawyer to inform the Funder that client implements the control of all aspects of litigation.[116]

However, there is adequate concern that "an attorney's primary loyalty will as a practical matter, rest with the person or entity who pays him", considering that the Funder is the lawyer's paymaster and even more, very often the lawyer is selected by the Funder.[117] It is not arguable that the Funder always retains the "power of the purse" and this power is the most pressing in situations where the Funder has the right to choose the lawyer.[118]

The following is the one more example of a possible conflict of interest that may occur in case of TPF. Namely, the situation where parties go into settlement negotiations, the Funder and the Funded might have divergent interest in this matters.[119] The Funder may discourage the feasibility of a possible settlement by the parties if it does not meet the Funder's interest and expectation or maybe, the Funder might favor an early and cheap settlement to enhance his/her cash flow, where the Funded might prefer to continue proceedings and not to giving in so easily and negotiate a more interesting settlement.[120] The situation is harder when the lawyer is appointed by the Funder and his/her best interest is protected by the lawyer, instead of the client.[121]

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[114] See supra note 113, p. 10.
[115] See supra note 114.
[116] See supra note 115.
[117] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 58, para. 148. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].
[118] See supra note 117.
[119] See supra note 118, p.60 and para. 151.
[120] See supra note 119.
[121] See supra note 120.

The possible solutions to avoid "three-cornered relationship" conflicts of interest are: a) drafting the Funding Agreement that settles with possible conflicts of interest and b) having a disclosure obligation.[122]

Regarding the drafting the Funding Agreement, which deals the possible conflicts of interest it should be noted that, "the agreement should expressly recognize that the lawyer who has the conduct of the claim owes his/her professional and fiduciary duties to the claimant and that, in the event of a conflict of interest between the claimant and the funder, the lawyer may continue to act solely for the claimant, even if the funder's interests are adversely affected by him or her doing so."[123] As it is clear it is crucial to have a well-drafted Funding Agreement, which deals with this kind of issues and so, a possible deadlock situation can be avoided.[124]

The second method, namely disclosure obligation can prevent future conflicts of interest, especially when the Funder intervenes significantly in the proceedings.[125] This would allow the arbitrators to define and, sometimes preponderant, what kind of conflicts of interest may arise, also, what role and influence may have the Funder over the proceedings.[126] What if, in the arbitration proceeding both parties are financed by the same Funder? If the Funding Agreement or at least the identity of the Funder is not disclosed, such conflicts of interest will not be made public and the legitimacy of the proceedings will be in danger.[127] Issues regarding disclosure obligation will be discussed extensively in the following chapters.

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[122] See supra note 121, p. 61 and para. 155.
[123] See supra note 122, p. 62 and para. 157. See also, W. Attrill, "Ethical Issues in Litigation Funding", IMF 16 February 2009 17.
[124] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 62, para. 159. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].
[125] See supra note 124, p. 62 and para. 160.
[126] See supra note 125, pp. 62-63 and para. 160.
[127] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p.17.

In the next sub-chapter, will be discussed what kind of conflicts of interests may arise between the Funder and the arbitrator(s) and how it can restrict arbitrator's independence and impartiality.

3.2.2. Potential conflicts of interest between the Funder and the arbitrator(s) – independence and impartiality

Recently, there was a debate about whether it was possible for Funders or other types of funding arrangements to create conflicts of interest for arbitrators.[128] Also, it had been argued that TPF could not raise potential conflicts of interest because it is one of the possible forms of dispute financing or supporting.[129] Many claimed, that there was no reason to treat TPF as a subject to special regulations, because it was similar to corporate loan taken out for purposes or for instance, money borrowed from a family member in case of ad hoc and therefore, "unknown conflicts of interest cannot be a basis for an effective challenge to an arbitrator or an award."[130]

However, TPF should be differentiated from other sources of financing because of its characteristics.[131] As it is already discussed above, when the Funder financing the dispute, has his/her own interests and expectations regarding the invested sum.[132] For instance, regarding insurance, TPF is not insurance, it is an investment, and the Funder takes a monetary interest in the case, contingent on the outcome.[133] Therefore, the Funding Agreement is not an insurance contract.[134] It means that the Funder is involved in the arbitration proceedings at least as a third party or quasi-party, who may have some

[128] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p. 85.
[129] See supra note 128.
[130] See supra note 129, pp. 85-86.
[131] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.
[132] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p.5.
[133] Willem H.van Boom "Third-Party Financing in International Investment Arbitration" Erasmus School of Law, Rotterdam, the Netherlands, December 2011 p. 29.
[134] See supra note 133.

influence on the arbitration proceedings.[135] That is why information on the existence of this specific funding mechanism should be mandatorily disclosed.[136]

A conflict of interest relating to the Funder may be initially unknown, but appeared later during the arbitration proceedings, "with the result being removal of an arbitrator or an effective challenge to the award that costs the parties and the funder waste time and money."[137] Even if conflicts of interest is unknown at the initial stages, the existence of the Funding Agreement may appear later and a number of circumstances can create a possibility of disclosure, for instance: if a dispute arises between the Funder and Funded or between law firm and the funder; if financing is suspended that require explanations from a party about their financial situation.[138] An arbitrator may suffer the embarrassment, his/her integrity may become suspicious and even more, the legitimacy of international arbitration may generally suffer.[139]

Nowadays, the prevailing consensus in the international arbitration society is that the existence of TPF may cause conflicts of interest for arbitrators, and the identity of the Funder(s) should be disclosed.[140] When an arbitrator is considered for appointment, he should be aware who the Funder is and a party making a request of the arbitration process, before an arbitral institution, should disclose the names of the person or persons funding the case, so the arbitrator can define whether or not there is a danger of conflicts of interest.[141] If the Funder is the owner of the several entities, the names of the entities should be disclosed as well and that would include the key employees of the fund and the

[135] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.
[136] See supra note 135.
[137] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p. 87.
[138] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p.113.
[139] See supra note 138.
[140] See supra note 139, p. 87.
[141] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 611.

persons who have actually invested in the fund.[142] Problems related to the disclosure may arise if the Funder refrains to expose his/her identity and sometimes, even Funded is not aware who is standing behind the entity providing the financial assistance.[143] Under this circumstances, the opposing party could claim that non-disclosure of the TPF Funder would make impossible to implement the control over proceedings, as well as this would make the independence and impartiality of the arbitrators questionable.[144]

The independence and impartiality of the arbitrators are generally, the fundamental principle of the commercial arbitration, as well as in investment treaty arbitration.[145] Article 14(1) of the ICSID Convention determines the basic principle in respect of the independence and impartiality of arbitrators: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[146] For instance, 12(1) of the UNCITRAL Arbitration Rules determines the possibility to challenge any arbitrator "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[147]

It is not arguable that rules about independence and impartiality of arbitrators, which are established regarding the parties to the dispute, should apply also to the Funder, notwithstanding the fact that he is not a disputing party, because of his/her role and economic interest in the proceedings.[148] Generally, the requirement of the independence

[142] See supra note 141.
[143] See supra note 142.
[144] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p.611.
[145] Grotius Centre Working Paper 2016/059-EIL Eric De Brabandere "Mercantile Adventures"? The disclosure of the Third-Party Funding in Investment Treaty Arbitration", in Willem van Boom (ed.), litigation, costs, funding and behavior-implications for the law (Abingdon: Routledge, 2017) p.9.
[146] See supra note 145 and ICSID Convention article 14(1).
[147] Grotius Centre Working Paper 2016/059-EIL Eric De Brabandere "Mercantile Adventures"? The disclosure of the Third-Party Funding in Investment Treaty Arbitration", in Willem van Boom (ed.), litigation, costs, funding and behavior-implications for the law (Abingdon: Routledge, 2017) p.10 and UNICTRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) article 12(1).
[148] Grotius Centre Working Paper 2016/059-EIL Eric De Brabandere "Mercantile Adventures"? The disclosure of the Third-Party Funding in Investment Treaty Arbitration", in Willem van Boom (ed.), litigation, costs, funding and behavior-implications for the law (Abingdon: Routledge, 2017) p. 12.

and impartiality of the arbitrators, including in investment treaty arbitration, in view of the specific challenges of "repeat arbitrators" and "issue conflicts" exists to ensure the legitimacy of the arbitral procedure and to avoid any kind of partiality.[149] "Repeat arbitrators" occurs when arbitrators are appointed by the same party or the same law firm in different disputes.[150] Considering the repetitive appointments by the one party, the arbitrator could be considered as no longer independent or impartial because of some kind of financial dependence to the appointing party.[151] This concern generally applies only to the parties or to the law firms representing the parties, but if the Funder has a certain weight in the choice of arbitrators, this issue may apply to them as well.[152] The legitimacy of the procedure principally targets the absence of any relationship or any ties between the parties and the arbitrators, this also should extend to the Funder because of the possible impact, he/she may have on the procedure and the nomination of arbitrators.[153]

The following is an example of potential conflicts of interest in order to better realize the complications that TPF might cause regarding the independence and impartiality of arbitrators.[154] For example, a conflict situation may arise where a person acts as an arbitrator in a case in which the party is funded by the same Funder who had also financed a claimant in another case in which the same arbitrator acted as a claimant's counsel.[155] It is not arguable that the same Funder's involvement in two cases with the same arbitrator does not suite well with respect to the impartiality and independence, also consequently cause the conflict of interests.[156]

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[149] See supra note 148.
[150] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011 - 2012) Grotius Centre Working Paper № 2012/1 p. 17.
[151] See supra note 150.
[152] See supra note 151.
[153] See supra note 152.
[154] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p.64, para. 167. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].
[155] See supra note 154.
[156] See supra note 155, pp. 64-65, and para.167.

Furthermore, it is possible that the Funder has the power to appoint the arbitrator and the Funder may appoint the arbitrators with whom it had prior commercial relationships and contacts.[157] It is indisputable that such situations could increase the doubts with respect to the arbitrators' independence and impartiality, which are fundamental principles of the arbitration process.[158]

3.3. Issues with establishing a disclosure obligation

A general principle that the existence and identity of the Funders should be disclosed raises separate issues about who bears the burden of such disclosure, to whom this disclosure should be made, under what conditions and what information should be disclosed.[159] Because the Funders usually do not consider as a part of the arbitration proceedings, they cannot be directly compelled by an arbitral tribunal to disclose their participation.[160] Most often disclosure is effectuated through the parties on their own initiative or based on a request by an arbitrator or on order by the tribunal.[161]

As it is already mentioned, the obligation of disclosure is determined in General Standard 7(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration, which obliged the parties to disclose the name of the "any person or entity with direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration."[162] The Explanation to General Standard 7(a) states that "disclosure for such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure…has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as

[157] See supra note 156, p.65 para. 168.
[158] See supra note 157.
[159] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p.110.
[160] See supra note 159.
[161] See supra note 160.
[162] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p.110 and IBA Guidelines General Standard 7 (a). <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> [accessed: 10 February 2019].

an entity providing funding for the arbitration…"[163] General Standard 7(b) of IBA states that: "The party shall [make required disclosure] on its own initiative at the earliest opportunity."[164] Additionally, General Standard 7(c) states: "In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide any relevant information available to it."[165] It is a controversial issue, whether IBA General Standard 7's obligations apply on the TPF or not.[166] It is not arguable that the Funder really has a direct economic interest in arbitration as well as in final outcome and considering this fact, the disclosure requirement of IBA General Standard 7 could be concerned the TPF.[167]

Regarding the disclosure obligation, there are arguments that the presence and identity of the Funder would only need to be disclosed in certain circumstances, for instance, if the Funder might have a material relationship with an arbitrator, which might give rise conflicts of interest.[168] But, the opposite argument could be following: to check the previous or existing relationship between the arbitrators and the Funder and to prevent future complications, funding fact, as well as the name of the Funder, need to be disclosed.[169] Also, it should be added that, if a party is only obliged to disclose the presence and identity of the Funder, when the Funder had some kind of relationship with the arbitrators, that is disclosable, then it means that all interpretation of what constitutes a disclosable relationship or a possible conflicts of interest rests with the Funder, which might be irrational.[170] Additionally, "as von Goeler summarizes, rules governing publicity traded companies may also oblige disclosures: "Importantly, the presence of a third-party funder may need to be disclosed for reasons *not linked to the arbitration proceedings*, namely to comply with public disclosure requirements imposed upon listed companies,

[163] See supra note 162 and IBA Guidelines General Standard 7(a) Explanation, p.16.
[164] See supra note 163 and IBA Guidelines General Standard 7 (b).
[165] See supra note 164 and IBA Guidelines General Standard 7 (c).
[166] See supra note 165, p. 111.
[167] See supra note 166.
[168] See supra note 167.
[169] See supra note 168.
[170] See supra note 169, pp. 111-112.

and following disputes between the parties to the funding agreement ending up in state courts."[171]

In practice, the disclosure obligation will be challenging to establish and implement because of the several issues.[172] As explained above, one could go for a broad definition of TPF, such as any financial mechanism offered to a party and it may cover all kinds of funding such, for example, a loan or lawyer's contingency fee.[173] The definition of TPF will be narrow by adding certain requirements, for instance, the Funder has to be a third party to the proceedings, or the Funder is enjoyed to a percentage of the award and/or a cost multiple.[174]

Further questions still remain as to the modalities of such a disclosure obligation, namely, what kind of information should be disclosed – only the existence of a TPF or the content of the Funding Agreement and to whom it should be disclosed – to only the arbitral tribunal or to all the parties involved in the arbitration?[175] Funders are often disagreed to disclose the terms of the Funding Agreement, especially, considering that, currently practice shows that the Funders prefers to stay confidential and not to disclose their identity.[176] But, what if, for example, depending on the Funding Agreement the structure of the compensation of the Funder, connects the quantity of the sum to the duration of the case and it may cause the artificial prolongation of the process;[177] or when according to the Funding Agreement, the Funder is granted to have some control over the proceedings

[171] See supra note 170, p. 113 as stated in J.VON Goeler "Third-Party Funding in International Arbitration and its Impact on Procedure (Kluwer 2016) p. 127.
[172] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 82, para. 219. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].
[173] See supra note 172.
[174] See supra note 173, para. 220.
[175] See supra note 174, p. 83, para 222.
[176] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 83, para. 222. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].
[177] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p.27.

or some influence on the choice of arbitrator.[178] The opposing party and/or arbitrators have the right to be aware of these terms of the Funding Agreement because this particular clauses could have an important influence on the arbitration proceedings.[179]

In that context, SIAC released Investment Arbitration Rules, its article 24(l) determines that: "order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability;"[180] SIAC Rules requires to disclose the name of the Funder as well as the details of the funding arrangements, but the controversial issue is, whether, and if so, to what extent the Funder may be liable the successful adverse party's cost.[181] It is supported that, since the Funder exercises control over the proceedings, the adverse costs award should have an effect on the Funder.[182] Since, arbitration cannot extend its effect to the Funders, accordingly, an arbitral award only binds the parties to the dispute.[183] However, nowadays, there is no relevant court or arbitral practice to support this position and it might eventuate the successful respondent not being able to recover the legal costs neither from the claimant and nor from the Funder.[184]

The Funding Agreement may be voluntarily disclosed by the Funded, as it was in the investment arbitration case *Oxus Gold PLC v. Republic of Uzbekistan* regulated under the

[178] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p. 17.
[179] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.
[180] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 3, p. 72; and SIAC Investment Arbitration Rules, 1st edition 1 January 2017, article 24(l).
[181] See supra note 180.
[182] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 3, p.73.
[183] See supra note 182.
[184] See supra note 183.

UNCITRAL Arbitration Rules, where the arbitral tribunal concluded that TPF fact had no impact on the arbitration proceedings.[185]

Arguments against disclosure, which include the prolonging of arbitration proceedings and giving the opposing party a tactical advantage, but at the same time, they have to be weighed against the potential negative effects of the non-disclosure.[186] "Disclosure is generally favored given its salutary effects on resolving conflicts of interest at the outset, and the loss of confidentiality is deemed to be outweighed by the potentially "catastrophic" effects that belated disclosure can otherwise have – not only on the proceedings but at the enforcement stage as well."[187] Critics of disclosure also argue that raising the issue is "unnecessary and counter-productive" and accordingly, a reasonable balance should be struck between the default position that the Funding Agreement is a private matter between the Funder and the Funded, and the need for reasonable arguments to justify disclosure.[188] The main issue is to find an ideal balance between the need for disclosure and the need for confidentiality.[189] Generally, it needs to be accepted that disclosure of the existence of the funding arrangement, as opposed to the terms of the agreement is sufficient.[190]

In Cremades'[191] view parties have an interest in disclosing the existence of the Funders in order to comply with the "procedural good faith with which parties should conduct

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[185] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011 - 2012) Grotius Centre Working Paper № 2012/1 p. 16; see *Oxus Gold PLC v. Republic of Uzbekistan* case final award of 17 December 2015: <https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf>

[186] Transnational Notes "Third-Party Funding in Singapore: The quest for an Ethics Code in International Arbitration, 8 March 2018, Chapter II. See blog < https://blogs.law.nyu.edu/transnational/2018/03/third-party-funding-in-singapore-the-quest-for-an-ethics-code-in-international-arbitration/> [accessed: February 20 2019].

[187] Transnational Notes "Third-Party Funding in Singapore: The quest for an Ethics Code in International Arbitration, 8 March 2018, Chapter II. See blog < https://blogs.law.nyu.edu/transnational/2018/03/third-party-funding-in-singapore-the-quest-for-an-ethics-code-in-international-arbitration/> [accessed: February 20 2019].

[188] See supra note 187.

[189] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 53, para. 132. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].

[190] See supra note 189.

[191] Law Firm B. Cremades & Asociados

themselves."[192] Parties are bound by an obligation of good faith when participating in the process and this obligation is based on a principle *pacta sunt servanda*.[193] Different positions exists relating to the disclosure obligation, some agree that parties are generally not bound by any disclosure obligation and tribunals have no general responsibility to raise the issue ex officio and some suggests that the involvement of the Funder should be obligatory disclosed, even more, the arbitration proceedings should be prevented from being governed by an ambiguous strategy of an invisible authority.[194] This last concern might be successfully applied to the investment treaty arbitration, as well as to commercial arbitration. Emmanuel Gaillard, one of the most influential international arbitrators, strictly claims that in order to evaluate future conflicts of interest and to increase the level of transparency, funding should be disclosed.[195]

The arbitral rules should require a party to disclose the fact that it is being funded by a third party, this duty should apply to both the claimant and the respondent.[196] By imposing the mandatory duty to disclose, the Funders may release the Funded party from a confidentiality provision in a Funding Agreement, because it would be pointless, but it goes without saying that, such information would be kept confidential by the arbitral tribunal itself, because the structure of arbitration is designed with a view of confidentiality and by disclosing, the Funder can be secure in his/her knowledge that only the arbitrators will learn of the funding relationship.[197] Upon notice by a party of the TPF, the arbitral tribunal should conduct an automatic conflicts check and they (arbitrators) are required to disclose information and all possible issue which can give raise the

[192] Burcu Osmanoglu, "Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest", Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2015, Volume 32 Issue 3) p. 340.
[193] See supra note 192.
[194] Burcu Osmanoglu, "Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest", Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2015, Volume 32 Issue 3) p. 340.
[195] See supra note 194, pp. 340-341.
[196] Jennifer A. Trusz "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", 101 Geo L.J. 2013, 1675. < https://georgetownlawjournal.org/articles/111/full-disclosure-conflicts-of/pdf> [accessed: 21 February 2019].
[197] See supra note 196.

conflicts of interest, herewith, they should operate "to keep all the information private. The arbitral rules should also stipulate the guarantee that the existence of the third-party funding should not have any influence on the outcome of the award."[198]

3.4. Disclosure requirements under the ICSID case law

Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd tsi. V. Turkmenistan,[199] an ICSID case is an example of a tribunal ordering a Claimant to disclose both – the identity of the Funder and the terms of the Funding Agreement.[200] In doing so, the arbitral tribunal invoked its "inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the process."[201] In April 2014, Turkmenistan had requested the tribunal to order the Claimant to disclose whether it had a financial support by the Funder as well as the terms of the Funding Agreement, which tribunal refused and listed the reasons in Procedural Order No. 2 (23 June 2014) on what basis the tribunal could order disclosure of the TPF:[202] "a. To avoid a conflict of interest for the arbitrator as a result of the third party funder; b. For transparency and to identify the true party to the case;…e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives."[203]

One year later, Turkmenistan renewed its request for disclosure based on a demand to ensure that there were no conflicts of interests with the arbitrators or counsel during the proceedings and also, enacted General Standard 7(a) and the Explanation to General Standard 7(a) of the IBA Guidelines.[204] On, this account in Procedural Order No. 3, the

[198] See supra note 197, 1676, and Burcu Osmanoglu, "Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest", Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2015, Volume 32 Issue 3) p.347.
[199] *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd tsi. V. Turkmenistan*, ICSID Case No. ARB/12/6.
[200] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p. 107.
[201] See supra note 200.
[202] See supra note 201.
[203] ICSID Case No. ARB/12/6 and Decision on Respondent's Objection to Jurisdiction under Article VII (2).
[204] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p.107.

tribunal decided to grant Turkmenistan's repeated request:[205] "The Tribunal has decided that Claimants should disclose whether their claims in the arbitration are being funded by a third-party/parties, and, if so, the names and details of the third-party funder(s) and the terms of that funding. The Tribunal's decision is based on the following factors. First, the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third party funder. In this respect, the Tribunal considers that transparency as to the existence of a third-party funder is important in cases like this…There are two additional factors which the Tribunal considers support the conclusion it has reached. Claimants have not denied that there is a third-party funder for the claims in this arbitration. It would have been straight forward to do so, just as they denied having assigned any of their rights to another party…"[206] As it is obvious, Tribunal decided to order disclosure not only the existence or name of the Funder but also, the terms of the funding, which in turn includes the terms of the Funding Agreement. However, it should be noted that the tribunal did not specify in its procedural order which of the terms of the Funding Agreement were required to disclose and which could stay confidential.[207]

In *EuroGas Inc and Belmont Ressources Inc v Slovak Republic,* the ordered the Claimant to disclose the identity of the Funder to check the arbitrator conflicts of interest but did not require to disclose the terms of the Funding Agreement.[208] In this case, the Claimant voluntary disclosed the TPF fact but did not disclose the identity of the Funder until ordered to do so by the tribunal.[209] "By letter of 23 January 2015, the Respondent had requested that "Claimants specify the identity of their third-party funder for the purposes

[205] See supra note 204.
[206] *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd tsi. V. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No.3.
[207] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p.108.
[208] International Council For Commercial Arbitration "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018. The ICCA Reports NO.4. p. 106 and "Independence and impartiality: Third-Party Funding in international Investment Arbitration" by Sara Pedroso, Leiden University Law School Advanced LL.M. in Public International Law, 28 February 2017, p.9.
[209] See supra note 208.

of determining whether there is any conflict of interests."[210] "During the hearing, the Tribunal informed the Parties of its decision that the Claimants should disclose the identity of the third-party funder, and that the third-party funder would have the normal obligations of confidentiality."[211] "By letter of 23 March 2015, as instructed, the Claimants disclosed the name of the funder…"[212]

Later, in case *Guaracachi America, Inc. et al v. The Plurinational State of Bolivia* the Respondent requested the production of Funding Agreement and further documentation in order to evaluate security for costs request and "to confirm that no conflict of interest exists for the present arbitration on account of "The Funder", whose identity is still unknown."[213] The Claimant objected, arguing that Bolivia has not demonstrated what kind of conflict of interest would be during the proceedings.[214] The UNCITRAL Tribunal decided not to grant the Respondent's request and shared the view that Respondent had not specified what the conflict of interest would be, and "In any case, the applicable provisions governing conflicts of interest in the present proceedings… do not foresee the production of document by the Parties, but rather disclosure by the arbitrators upon becoming aware of circumstances that could create a conflict of interest."[215]

However, the identity of the Funder has become known (due to the Respondent's request for security for costs) and in order to remove any doubt, the members of the Tribunal

[210] *EuroGas Inc and Belmont Ressources Inc v Slovak Republic,* ICSID case ARB/14/14 Award.
[211] See supra note 210.
[212] See supra note 211.
[213] *Guaracachi America, Inc. et al v. The Plurinational State of Bolivia* PCA Case No. 2011-17 Award and Procedural Order No. 13.
[214] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 3, p. 75.
[215] *Guaracachi America, Inc. et al v. The Plurinational State of Bolivia* PCA Case No. 2011-17 Award and Procedural Order No. 13.

declared that they have no relationship with the Funder and there was no reason for doubts regarding arbitrators' independence and impartiality.[216]

But, still, the Respondent's request was dismissed for the reason that Respondent did not specify what kind of conflicts of interest would arise. This argument is controversial because even Funded party cannot be in a position to foresee the potential conflicts of interest; having this in mind the opposing party is not in any way able or liable to be aware of the possible conflicts of interest. The Funded Party is obliged to disclose the TPF without opposing party's request and if not so, the opposing party as well as the arbitrators, will not be able to find out on the existence of some complications.

Conclusion

TPF suggests a different kind of financing method from other traditional financing sources and it should be differentiated from them because of its characteristics.[217] When the Funder financing the dispute, has his/her own monetary interests and expectations regarding the invested sum.[218] Because of it, TPF investors will always be interested in the direction of the lawsuit to ensure that it is being managed in a way to protect their investment.[219] They often want to exercise some control over the proceedings and thereof conflicts of interest may arise. The Funder is involved in the arbitration proceedings at least as a third party or quasi-party, who may have some influence on the arbitration proceedings.[220] Funders often prefer to enjoy confidentiality, while another party and/or

[216] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Chapter 3, p. 75.
[217] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.
[218] Grotius Centre Working Paper Series "Third Party Funding in International Investment Arbitration" by Dr. Eric De Brabandere Associate Professor of International Law and Julia Lapeltak Student research Fellow (2011-2012) Grotius Centre Working Paper № 2012/1 p.5.
[219] "Report on the Ethical Implications of Third-Party Litigation Funding" Submitted by the Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association April 16, 2013. pp. 9-10. <https://www.benthamimf.com/docs/default-source/default-document-library/nys-bar---opinion-of-ethical-implications-04-16-13.pdf?sfvrsn=2> [accessed: 12 February 2019].
[220] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.

arbitrators are not being aware of the existence of a TPF at all, because of it some future misunderstandings may arise.[221]

Generally, arbitral tribunal asks the Funder to sign a confidentiality agreement to avoid later complications,[222] but before requesting of the signature, arbitral tribunal needs to be informed that the TPF, in fact, has occurred. The arbitral tribunal will most often not be aware of the fact that one of the parties is being funded and non-disclosure of the TPF/Funder would make the independence and impartiality of the arbitrators questionable.[223] The same problem may arise between "three-cornered relationships" when it is not obvious whose interests are protected by claimant's lawyer - the interests of the claimant or interests of the paymaster (Funder).

Disclosure is a pre-requisite to ensure that conflicts of interest are duly identified and avoided, which is essential for the legitimacy of the arbitration proceedings.[224] The primary responsibility of provision of the information on TPF shall lie with the Funded, which, acting in good faith, should disclose the fact that is funded by the third party. The question is, which should be prevailed, the confidentiality request of the Funder or the obligation of the Funded to disclose the funding fact and/or the name of the Funder? The most important is to find an ideal balance between the need for disclosure and the need for confidentiality.[225] Arguments against disclosure or the Funder's demand to stay confidential need to be weighed against the potential negative effects of the non-

[221] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 82, para. 218. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].

[222] See supra note 221.

[223] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p.611.

[224] Maxi Scherer, "Chapter 8. Third-Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?", in Bernardo M. Cremadez Sanz-Pastor and Antonias Dimolitsa (eds), Third-Party Funding in International Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (© Kluwer Law International; International Chamber of Commerce (ICC) 2013) p. 97.

[225] Faculty of Law Ghent University Academic year 2013-2014 "Third-Party Funding in international Commercial Arbitration" Master's thesis in the "Master of Laws" program submitted by Thibaut de Boulle p. 53, para. 132. <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf> [accessed: 15 February 2019].

disclosure.[226] Nowadays, the prevailing consensus in the international arbitration society is that the existence of TPF and/or non-disclosure may cause conflicts of interest and the identity of the Funder(s) should be disclosed.[227] The reasons for the disclosure include, but not limited to, the arbitrator's independence and impartiality and conflicts of interest. That is why information on the existence of this specific funding mechanism should be mandatorily disclosed.[228] The disclosure, at any rate, should be made by the Funded on his/her own initiative. The disclosure requirements already exist under various legal acts and instruments, which are significant and widely discussed in the paper.

By imposing the mandatory duty to disclose, the Funders may release the Funded from a confidentiality provision in a Funding Agreement, because it would be pointless, but it goes without saying that, such information would be kept confidential by the arbitral tribunal itself.[229]

Finally, it is reasonable to conclude that, disclosing the full identity of the Funder is sufficient to meet the transparency and integrity of the arbitration proceedings.[230]

Bibliography

[226] Transnational Notes "Third-Party Funding in Singapore: The quest for an Ethics Code in International Arbitration, 8 March 2018, Chapter II. See blog < https://blogs.law.nyu.edu/transnational/2018/03/third-party-funding-in-singapore-the-quest-for-an-ethics-code-in-international-arbitration/> [accessed: February 20 2019].
[227] International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4 p.87.
[228] Edouard Bertrand, "Brave new world of Arbitration: Third-Party Funding", the, 29 ASA BULL. 607 (2011) HeinOnline, p. 610.
[229] Jennifer A. Trusz "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", 101 Geo L.J. 2013, 1675. < https://georgetownlawjournal.org/articles/111/full-disclosure-conflicts-of/pdf> [accessed: 21 February 2019].
[230] Dominik Horodyski, Maria Kierska, Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" p. 78.

Books

International Council For Commercial Arbitration "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration" April 2018 The ICCA Reports No. 4.

Nieuwveld Lisa Bench, Shanon Victoria, "Third-Party Funding in International Arbitration" (Kluwer Law International 2012).

Van Boom Willem H. "Third-Party Financing in International Investment Arbitration" Erasmus School of Law, Rotterdam, the Netherlands, December 2011.

Publications & Academic Works

Asoskov A.V., Muranov A.I., Khodykin R.M., "New Horizons of International Arbitration", Association of Private International and Comparative Law Studies, Issue 4, 2018.

Attrill Wayne IMF (Australia) LTD "Ethical Issues in Litigation Funding" 16 February 2009, [Available: <https://www.imf.com.au/docs/default-source/site-documents/ethical-issues-paper-imf09---globalaw-conference>].

Beisner John, Miller Jessica, Rubin Gary, "Selling Lawsuits, Buying Trouble Third-Party Litigation Funding in the United States", U.S. Chamber Institute for Legal Reform October 2009.
[Available:
<https://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf>]

Bertrand Edouard, “Brave New World of Arbitration: Third-Party Funding, The, 29 ASA BULL. 607 HeinOnline (2011).

Cremades Bernardo M. “Third Party Funding in International Arbitration” 23 September 2011.
[Available: <https://www.cremades.com/pics/contenido/File634523783352588756.pdf>].

Costabile Nicolas, Lynch Anthony, “Applicable Law in Arbitrations Involving Third-Party Funding Agreements”, Spain Arbitration Review | Revista del Club Espanol del Arbitraje, (© Club Espanol del Arbitraje; Wolters Kluwer Espana 2017, Volume 2017 Issue 30).

De Brabandere Eric, “Mercantile Adventures”? The disclosure of the Third-Party Funding in Investment Treaty Arbitration”, in Willem van Boom (ed.), Grotius Centre Working Paper 2016/059-EIL, litigation, costs, funding and behavior-implications for the law (Abingdon: Routledge, 2017).

De Boulle Thibaut “Third-Party Funding in international Commercial Arbitration” Master’s thesis in the “Master of Laws” program, Faculty of Law Ghent University Academic year 2013-2014 [Available: <https://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf>].

Dr. De Brabandere Eric, Lapeltak Julia, Grotius Centre Working Paper Series “Third Party Funding in International Investment Arbitration” (2011-2012) Grotius Centre Working Paper № 2012/1.

Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association "Report on the Ethical Implications of Third-Party Litigation Funding" April 16, 2013. [Available: <https://www.benthamimf.com/docs/default-source/default-document-library/nys-bar---opinion-of-ethical-implications-04-16-13.pdf?sfvrsn=2>].

Hederer Christian, "Third-Party Funding in International Investment Arbitration-Economic Analysis and Regulatory Options", University of Ottawa, Faculty of Law Working Paper, December 2016.

Horodyski Dominik, Kierska Maria "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a focus on Disclosure Requirement" Jagiellonian University in Krakow Faculty of Law and Administration Chair of Private Economic Law.

ICCA-QMUL Task Force on TPF in International Arbitration Subcommittee on Security for Costs and Costs (Draft Report) 5 October 2015.

Joubin-Bret Anna, "Spotlight on Third-Party Funding in investor-State Arbitration", 16 J. World investment & Trade 727 (2015) HeinOnline.

Lamm Carolyn B., Hellbeck Eckhard R., "Chapter 9. Third-Party Funding in investor state Arbitration introduction and Overview", in Bernardo M. Cremadez Sanz-Pastor and Antonias Dimolitsa (eds), Third-Party Funding in international Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (© Kluwer Law international; International Chamber of Commerce (ICC) 2013).

Matray Didier, Van Rompaey Sigrid, “An introduction to third-party funding”, in Annet van Hooft and jean Francois Tossens (eds), b-Arbitra | Belgian Review of Arbitration, (Wolters Kluwer 2017, Volume 2017 Issue 1).

Nieuwveld Lisa Bench, Sahani Victoria Shanon, “Chapter 1: Introduction to Third-Party Funding”, in Third-Party Funding in International Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2017).

Osmanoglu Burcu, “Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest”, Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2015, Volume 32 Issue 3).

Pedroso Sara “Independence and impartiality: Third-Party Funding in international Investment Arbitration”, Leiden University Law School Advanced LL.M. in Public International Law, 28 February 2017.

Report of the Secretary General on Possible Features of a Model Law in International Commercial Arbitration, UN Doc. A.CN.9/207.

Sahani Victoria Shannon, “Judging Third-Party Funding”, 63 UCLA L. Rev. 388 (2016) HeinOnline.

Shanon Victoria, “Recent Developments in Third-Party Funding”, Journal of International Arbitration 30, no.4 (2013), published by Kluwer Law International.

Shahdadpuri Khushboo Hashu, “Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory’, in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal, (© Singapore International Arbitration Centre (in co-

operation with Kluwer Law International); Kluwer Law International 2016, Volume 12 Issue 2).

Scherer Maxi "Chapter 8. Third-Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?", in Bernardo M. Cremadez Sanz-Pastor and Antonias Dimolitsa (eds), Third-Party Funding in International Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (© Kluwer Law International; International Chamber of Commerce (ICC) 2013).

Scherer M., Goldsmith A., Flechet C., Third Party Funding in International Arbitration in Europe: Part 1-Funders' Perspectives", Queen Mary University of London, School of Law Legal Studies Research Paper No. 164/2013.

Steinitz Maya, Matthews Joseph, "Contingent Fees and Third Party Funding in Investment Arbitration Disputes", University of Iowa Legal Studies Research Paper, December 2012.

Trusz Jennifer A. "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", 101 Geo L.J. 2013. [Available: <https://georgetownlawjournal.org/articles/111/full-disclosure-conflicts-of/pdf>].

Von Goeler Jonas "Chapter 3: Litigation Funding in International Arbitration", Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35 (© Kluwer Law International; Kluwer Law International 2016).

Von Goeler J. "Third-Party Funding in International Arbitration and its Impact on Procedure" (Kluwer 2016).

Legal Acts and Instruments

Association of Litigation Funders "Code for Conduct for Litigation Funders" (January 2014).

"Comprehensive economic and trade agreement between Canada and the European Union and its member states" (CETA).

Hong Kong Arbitration Ordinances.

ICSID Convention.

IBA "Guidelines on Conflicts of Interest in International Arbitration" (2014).

IBA "International Principles on Conduct for the Legal Profession" (2011).

ICC Court of Arbitration - "Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of arbitration".

ICC Arbitration Rules.

ICC Commission Report "Decisions on costs in International Arbitration" Offprint from ICC Dispute Resolution Bulletin 2015, Issue 2.

Singapore "Legal Profession Act" (Chapter 161) (1st June 2009).

Singapore "Civil Law Act" (Chapter 43) (1st August 1999).

SIAC Investment Arbitration Rules (1st edition 1 January 2017).

UNICTRAL Arbitration Rules.

Blogs

Bohorquez Oscar Suarez, Stoll Lena, Universiteit Leiden, "Leiden Law Blog" "Third party Litigations funds and the Lawyer's ethics" posted on September 28, 2018. [Available: <https://leidenlawblog.nl/articles/third-party-litigations-funds-and-the-lawyers-ethics>].

Choo Ian, Transnational Notes "Third-Party Funding in Singapore: The quest for an Ethics Code in International Arbitration", 8 March 2018, [Available: <https://blogs.law.nyu.edu/transnational/2018/03/third-party-funding-in-singapore-the-quest-for-an-ethics-code-in-international-arbitration/>].

Cases

EuroGas Inc and Belmont Ressources Inc v Slovak Republic, ICSID case ARB/14/14.

Guaracachi America, Inc. et al v. The Plurinational State of Bolivia PCA Case No. 2011-17.

Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd tsi. V. Turkmenistan, ICSID Case No. ARB/12/6.

Oxus Gold PLC v. Republic of Uzbekistan, UNCITRAL.

Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.

Waterhouse v. Contractors Bonding Limited, Supreme Court of New Zealand, [2013] NZSC 89.

Statement of Originality

This statement certifies that the work and intellectual content contained in this thesis are the product of my own work. The work contained in this thesis has not been previously submitted for a degree or diploma at any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due references are made.

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