Int J Semiot Law (2021) 34:341–356
https://doi.org/10.1007/s11196-019-09635-2

Third Party Funding in Arbitration: Questions and Justifications

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Published online: 24 June 2019

Abstract
Utility of third party funding is an undeniable fact, especially where a party is under financial strain, yet its increased usage in private arbitration has given rise to a number of substantive and procedural issues. In view of this, the present paper attempts to map the growing utility or otherwise of the mechanism of third party funding, and analyses its various nuances and legal sustainability within the framework of international arbitration. Further, an attempt is made to analyse the ways and means of ameliorating the utility of third party funding and for enhancing its acceptance in the global arbitration community.

Keywords Law · Arbitration · Litigation · Funding · Party

1 Introduction

In the global arbitration community, Third Party Funding (hereinafter referred to as TPF) has carved a distinct place for itself, and has been growing steadily for the past few years, across several legal jurisdictions. The proliferation of TPF parallels the globalization of international commerce, with the latter witnessing the frequent

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use of international arbitration for resolving commercial disputes. Although the phenomenon is presented as a new feature, yet, the same has been used for long, in one way or other, in commercial litigations [24].[1] It was originally devised as a means of assistance for the companies or undertakings which were struggling to sustain their claims in arbitration or litigation. International arbitration involving high-value claims have provided a fertile ground for utilization of TPF. Utility of TPF is an undeniable fact, especially where a party is under financial strain, yet its increased usage in private arbitration has given rise to a number of substantive and procedural issues. In view of this, the present paper attempts to map the growing utility or otherwise of the mechanism of TPF, and analyses its various nuances and legal sustainability within the framework of international arbitration. Further, an attempt is made to analyse the ways and means of ameliorating the utility of TPF and for enhancing its acceptance in the global arbitration community.

2 The Concept of Third Party Funding

TPF,[2] as the name itself suggests, involves a third party (unconnected with the dispute) in an arbitration, who, typically provides funds to a party to the dispute in consideration of an agreed return. It thus operates as a legally enforceable contract wherein the funded party undertakes to 'satisfy' in cash or kind the third party–the funder. Commonly, such an arrangement covers the legal fees and expenses incurred by a party. Additionally, the funding party may agree for paying the costs incurred by the opposite party if so commissioned by the party seeking such extra funding.

The rationale of TPF is based on financial necessity of a party seeking fund to sponsor their meritorious claims. The consideration for the funding agency necessarily includes a percentage of the compensation-award granted in the arbitration. The third party funder thus only invests in the financing of proceedings, and has no role whatsoever in the substantive issues of the dispute. The funder has the hopes of getting good pecuniary return once the dispute is settled or award made.

In recent years, in view of increased number of TPF, institutions which are prepared to fund arbitration have also increased. Such institutions are mostly specialised TPF entities, however, many insurance companies, investment banks, law firms and similar bodies have also entered the market to finance arbitration. In view of developing market, the range of funding areas has also expanded, with many third party funders now offering a funding package that covers a portfolio of cases [4].[3]

[1] Litigation funding or financing has a long history in several jurisdictions. It can be utilised by both plaintiff and defendant. For gaining its historical evolution and perspectives.

[2] Third Party Funders are sometimes addressed with several other alternative names, such as Litigation Funders, Third Party Financiers, Attorney Financer, Law Firm Financer, Arbitration Funders, etc. The import of all such terms remain much the same. (For the sake of clarity, in the present paper, third party funding is used in the context of 'TPF in arbitration as well as litigation'. So wherever the term litigation funding is used, the implications are much the same for funding arrangement in arbitration.)

[3] Also called portfolio funding, wherein funding companies provide finances to law firms/lawyers for conducting arbitration. Such an arrangement operates when there is a group of cases to be handled by the funding companies. The package funding *inter alia* includes a range of services including law suit's

The question which surfaces in case involving TPF, typically translates into objection about the very locus of the party having arrangement with a funding company. The real question is—whether the funding company be considered legitimate to pursue claims on behalf of the funded party. In *Teinver S.A et al* v. *Argentina* [23], the Arbitration Tribunal of International Centre for Settlement of Investment Disputes faced fundamental questions relating to the legal sustainability of TPF. In the case, respondent raised an objection that a funding agreement between the claimants and an investment company concerning the financing of the litigation expense could potentially impact the tribunal's jurisdiction, as the claimant has transferred the rights/interests to a third party (an investment company). However, the tribunal rejected the respondent's argument and noted that the funding agreement existed prior to filing of the claims in the arbitration, hence, technically, its jurisdiction remained intact [12].

3 Contemporary Trends in TPF

TPF is mostly a phenomenon confined to Common Law jurisdictions, such as USA, England, and Australia. Litigation/Arbitration finance in these three prominent jurisdictions has proliferated during the last two decades. The remarkable characteristic of this development has been the legal acceptance of this practice within the civil justice system, although with certain reservations. A navigation of trend of TPF in these countries is undertaken below.

3.1 England

In England TPF is permitted under the law. It is considered as a vehicle to access to justice, and hence endorsed by the judiciary and policy makers alike. While under the law funders are deterred from controlling the lawsuit, judiciary has generally maintained a supportive stance to TPF.

Under the English common law, the practices, namely, maintenance and champerty (somewhat akin to TPF) was long prevalent [10][4] but, was later abandoned. Under the concept of maintenance, third party was allowed to support litigation pursued by the proper party. Champerty was a form of maintenance wherein third party would support another's litigation in lieu of part of the proceeds of litigation. Maintenance and champerty were later designated as both crimes and torts. However,

Footnote 3 (continued)
related risk guarantee, financial losses, adverse decision in appeal etc. However, there is no "one size fit all" approach, and depending on the needs of the law firms/lawyers, customized package service may be offered by the funding companies.

[4] Champerty—a subspecies of maintenance—is "an illegal proceeding in which a person (often a lawyer) not naturally concerned in a lawsuit engages to help the plaintiff or defendant to prosecute it, on condition that, if it is successful, that person will receive a share of the property in dispute." Maintenance is the "action of wrongfully aiding and abetting litigation; the act of sustaining a suit or litigant by a party who has no interest in the proceedings or who acts from an improper motive".

vide the Criminal Law Act 1967, the criminal and civil liability under maintenance and champerty ceased to exist [19]. Currently, the public policy demand pushed lawmakers to again introduce the litigation funding, but the scope of it has been much reduced. In essence litigation funders are dissuaded from exerting undue control over the case they fund. The underlying standard of TPF is now largely shaped by the principle of "No win, no fee" The liberal approach of the UK Judiciary over TPF is manifested in few prominent judgments. The Court of Appeal in 2002, held that only those litigation funders who tended to weaken or undermine the court system, in particular, the ends of justice, shall be prohibited from entering into funding arrangements, however, those arrangements entered into with reputed professional funders who demonstrate respect to the integrity of the judicial process are legal [20].

Further, in another decision of 2005, the Court of Appeal demonstrated approval of professional litigation funders, and called them as vehicle for access to justice [2]. In yet another landmark judgment [8] in 2006, the English Commercial Court affirmed the decision of an arbitrator which allowed a successful claimant to recover the TPF costs from the losing party. Court ruled that such costs will fall under 'other costs' as per section 59(1) (c) of the UK Arbitration Act, 1996. In addition, in the very recent case [25][5] of 2017, a Competition Appeal Tribunal (CAT) in UK stated with approval of the litigation funding, noting, in particular, that such arrangements were necessitated by the developing market trend, and could, thus play a pivotal role in balancing the financial status of the parties.

Hence, TPF is now well-established in the English litigation landscape. In the last few years, it has acquired industrial dimensions with several large TPF firms establishing their presence in and around London.[6] The TPF market has experienced a significant rise in number of participants, the capital available to them, the kind of cases which are funded and the scale of investments made.

3.2 USA

It is a known fact that US is the world's largest legal market. TPF, which began in late 1990s here, has now penetrated the mainstream of legal market, with an increased number of investors/companies putting an astonishing amount of money in the TPF industry. It remains obvious that investors are motivated by the prospect of gaining huge returns which are not dependent on economic or market conditions.

[5] The bench asserted in positive manner about litigation financing, noting "a range of extrajudicial material which valued the significance of TPF in enabling access to justice." It stated that it would not be problematic to work out what a fair return in litigation funding should be, not least as there is 'now a brewing market in litigation financing'.

[6] See the profile of an independent entity called Association of Litigation Funders (the ALE), which is charged by the Ministry of Justice with ensuring self-regulation of litigation funding in England and Wales. *See*, Association of litigation Funders, *available at* http://associationoflitigationfunders.com/about-us/ (last accessed 19-11-2017); *See also*, C. Lamm & E. Hellbeck, *Third Party Funding in Investor-State Arbitration*, in B. Cremades & A. Dimolitsa (eds.) Dossier X: Third Party Funding in International Arbitration (ICC Publishing, Paris, 2013) pp. 101–102.

Professional funders in US consider lawsuits as assets in the same way as any other receivables. Commenting on the trend, Burford Capital[7] states:

> It may seem bizarre to think of investment in litigation, but when one sees the collateral dynamics linked with the litigation process in US, the professional funders become more gravitated towards the idea of TPF [6].

Moreover, it is claimed that the practice successfully attempts to "even out the playing field between the financially strong litigants, who are accustomed to contesting cases in courts, and individuals or small to middle-sized companies, who are quite novice in fighting legal battles and who may be easily overwhelmed." [6, 22].

In view of the spiralling graph of TPF in US, recently a clarion call [6][8] has been made to set forth procedural rules for the Federal Courts to demand the disclosure of the third-party litigation funding at the very beginning of the lawsuit. It is firmly opined that courts should know if their attempts to settle disputes may be thwarted by a party (TPF) who is not present in the court room, but who operates behind the veil. Disclosure in such situation is required as it would help courts measure the sufficiency of representation in putative class actions, where courts are also supposed to examine the financial resources that lawyer will commit to the class.

In regard to the demand of disclosure of funding aspect in litigation or arbitration, the general approach of the judiciary in US is said to be receptive to such demand. In a nationwide survey [21][9] of judges conducted in 2014 over this perplexing question of disclosure in TPF, a large majority of them expressed preference for knowing the litigation funding in advance at the beginning of such lawsuits before them. Further a sizeable majority also expressed the view that TPF would increase the number of lawsuits, and hence the same could not be accepted. The result of the aforesaid survey, although not government sponsored, nevertheless created ripples in the TPF community in US.

Recent cases on TPF in US depict how courts are finding it difficult to build unanimity or forge consensus on the issue of disclosure on third party funding arrangements, especially in the context of discovery. In one such case [15] of 2015, the US District Court in New York refused a request for production of information/documents in respect of TPF arrangements between plaintiff and its funder. However, in a case [11] of 2016, the Federal District Court in California displayed allowed for request for production of funding agreement, stating that the "continued absence of

[7] Burford Capital is one of the leading global finance firms based in USA. It business activities, among other things, include litigation/arbitration finance, law firm lending, managing corporate risks, judgment enforcement etc.

[8] The group who believes that "disclosure of third-party funding at the beginning of lawsuit is a just legal necessity', consists of several influential entities viz., US Chamber Institute for Legal Reforms, American Tort Reform Association, American Insurance Association along with some other leading corporate counsels and bar practitioners.

[9] The nationwide survey on impact of TPF was conducted by George Mason University School of Law, Virginia, USA. Survey result revealed that out of 357 federal and state judges nationwide, almost two-thirds stated they would prefer to know whether funding has been made in the case before them.

such relevant document (funding agreement) will deprive the affected party from the ability to make his own reasonable assessment.

TPF has acquired a complex image of itself in US. The current legislative and judicial opinion seem to favour the idea of allowing the disclosure of funding arrangements, yet the picture is not definitely clear at the moment. At the best, it may be said, that while the number of investors in TPF has grown exponentially here in the last decade, but the whole sector has been also facing the flak from judiciary. A sort of 'jurisdiction-by-jurisdiction basis along with 'case by case' approach can be said to be guiding the current spectrum of TPF industry in USA.

3.3 Australia

In comparison to UK and US, TPF field in Australia is much more developed in terms of its practice and acceptance. Litigation finance emerged here in the beginning of 1990s, and ever since then, it has become ingrained in the civil justice system of Australia.[10] While professional funders are permitted to invest into litigation/arbitration, yet the very nature of such funding agreements have often raised fundamental questions concerning legal sustainability or reasonableness of such arrangements.

In a case [7] of 2006, the High Court of Australia while considering the provisions of a New South Wales Legislation abolishing maintenance and champerty as torts, held that TPF per se is not against public policy or abuse of court process. The Court explained that the fact that a professional funder may exercise control over proceedings by buying the rights to litigation/arbitration does not render the funding arrangements opposed to public policy. The Court further held that financial gains made out of assistance in litigation or arbitration could only be opposed to public policy if there was a legislative provision against maintaining actions (in the present case, such provision stood abolished). The Court while upholding legality of TPF, rejected all such concerns about the possibility of unfair bargains and the potential for funders to undermine the administration of justice. Finally, addressing such doubts, Court ruled that where these concerns arose they could be sufficiently dealt with by applying the existing doctrines of contract and equity as well as by existing rules regulating lawyers' duties to the client and court.

In essence, the Court in *Fostif* case (*supra*) held that a person who hazards funds in litigation naturally wishes to control the litigation. In other terms, it is considered appropriate that a third party, who holds only financial stake in the outcome of case, should have some restrictions placed on their control of the proceedings. Legal practitioners should, therefore, tread cautiously in TPF matters as they are required to act in the client's best interests at all times, and so, they must generally take clear instructions before making substantial decisions in regards to their client's claim [7].

Further, in another landmark decision [5] in 2014 the Supreme Court of Victoria allowed a different judicial perspective to evolve. In it, the Court provided an

[10] For comprehensive coverage of TPF in Australia, *see generally*, *Regulation of Third Party Litigation Funding in Australia* (Position Paper) Law Council of Australia (2011).

illustration of the circumstances where courts post *Fostif* would be prepared to intervene in TPF related matters. The Court reasoned that lawyers connected with the litigation funder should be restrained from acting for the representative plaintiff in a class action in situations where the funder was owned with majority by entities controlled by the solicitor acting in the matter. The Court ruled that under its inherent jurisdiction, the lawyers in such circumstances would be prevented from acting in order to maintain the public perception about the propriety integrity of judicial process. The aforesaid ruling carved one of such instances where TPF would be undesirable.

Theoretically, presently, Courts in Australia have assumed equitable jurisdiction in TPF matters, and thereby, they could set aside a funding agreement where the interests of funders constituted an equitable fraud in that it effected a bargain by taking surreptitious benefit of a person's lack of ability to judge for himself, by reason of weak status, ignorance or necessity.

Given the exponential growth of TPF in domestic litigation, especially in three leading jurisdictions of UK, USA and Australia, it is highly likely that funding will surge in international arbitration as well. In civil law jurisdictions such as France, Germany, Switzerland etc., TPF field is yet to take off in a major way. TPF in these jurisdictions is practiced at a much lower scale in comparison to UK, USA and Australia. The lack of adequate TPF structure in civil law domains can be explained by a number of reasons, viz., stringent procedural rules relating to costs, lack of litigiousness, and the personalised character of legal claim.

3.4 Singapore

In January 2017, the Singaporean Parliament passed certain amendments to the Civil Code in order to allow the third-party funding and establish it with restrictions, like the disclosure of the funding body and its personality in addition to its intervention in the proceedings of the arbitral proceedings and determining any interest in the outcome of the case or not.[11]

3.5 Hong Kong

In Hong Kong, the Civil Code was amended accordingly with the required of the legal nature by the presence of a third-party funding in the arbitration case, allowing any party not having a legitimate interest to participate in the case. The Ministry of Justice in Hong Kong launched a national dialogue on Aug, 8th 2018 for 2 months to obtain written views on the best practice of the third-party funding; the result was a legal amendment that entered into force on Feb, 2nd 2019 and came under Chapter 609 of its Arbitration Act.[12]

[11] http://arbitrationblog.kluwerarbitration.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/ (last accessed 17-06-2019).

[12] http://arbitrationblog.kluwerarbitration.com/2017/07/16/hong-kong-approves-third-party-funding-arbitration/ (last accessed 17-06-2019).

3.6 India

In India After such a great development in India in all fields, the term "third-party funding" of arbitration is not indulged in the legal society because the legislative and judicially authorities in India is afraid to adopt it in the legislative system, which makes silence is the master of the situation; hence, and the situation must be counted by many researchers and scholars who ask the state to adopt this principle [18].

3.7 Jordan

In Jordan (Civil Law), to adopt the third-party funding for the arbitration cases, Article 60 of the Bar Association Law should be amended to permit lawyers to fund the arbitration cases and to add an article to the Jordanian Arbitration Law No. 31 of 2001 and Banking Law No. (28) For the year 2000 and Jordanian Companies Law. No. (22) for the year 1997 allowing the third-party funding proceedings, all official departments, and private sector collaborate to form a special and independent system that regulates the third-party funding with the needs for a supervisory authority to control it.

3.8 Nigeria

In Nigeria, whilst the Arbitration and Conciliation (Repeal and Re-enactment) Bill 2017 has been extensively reviewed with calls for a more explicit recognition of TPF in the Bill among others, the law as it stands does not prohibit the incidence of TPF in the Nigeria-seated arbitrations, a better approach, would be to demand for an enactment of a comprehensive regulatory framework for TPF, as is obtainable in other jurisdictions, by calling for a holistic revision to the Bill to provide for issues bordering on the disclosure of funding arrangements; conflict of interest considerations as it pertains to the arbitrators; element of control and influence of the funder in the proceedings as well as other concerns in this space. An adoption of this approach will make Nigeria an attractive choice as a seat for contracting parties in arbitrations.[13]

4 TPF in International Arbitration

TPF in arbitration offers a strategy where a party unrelated to a claim makes available finance to all or part of the costs incurred by the proper party to arbitration (usually the claimant). The funder is remunerated as per the funding arrangement, which is basically the agreed percentage of the outcome (arbitral award) or the success fee or a combination of the two.

[13] http://arbitrationblog.kluwerarbitration.com/2018/06/07/third-party-funding-arbitration-nigeria-yea-nay/ (last accessed 17-06-2019).

Though utilised for long in litigation, TPF has recently made inroads into the field of arbitration. However, TPF in international arbitration (both commercial and investment related disputes) is presently considered at its infancy stage. The nature of TPF when used in arbitration remains very much similar to litigation funding. However, since characteristics of arbitration differ from those of litigation, therefore, the specific nuances of funding arrangement in ADR require detailed and meticulous examination.

In respect of international commercial arbitration,[14] due to the private and often confidential nature of the mechanism, the available data remains few and far between. However, through emergent trend and anecdotal evidence, it is noticed that demand for TPF services has registered exponential growth in international commercial arbitration in the last decade or so.[15] The growing use of TPF is mainly explained further by the fact of increased reliance being placed on arbitration as a mechanism for settling commercial and investment related disputes in domestic and international arena. It remains obvious that costs incurred in any arbitration have been spiralling, and so is the demand for TPF.

In view of the proliferation of TPF, the professional funders have also acquired a high degree of expertise on the ways and means of assisting their clients. Invariably, funding services are sought by the clients in view of the credentials of the funding agencies, especially their advanced level of preparedness and better understanding in managing legal risks related to disputes. Understandably, the package offered by the TPF agency thus gravitate the clients for a variety of purpose.

5 Beneficial Factors and Drawbacks

It is a stated reality that unforeseen risks and commercial disputes will always occur even if the contract between the parties is drafted meticulously, and relationship between them is harmonious. It is again true that resolution of complex disputes invariably requires detailed technical and factual evidence, which is inevitably very costly affair, more so in international arbitration. Though TPF in such situation can provide fall back option to the distressed party, yet, suffice it to say, the party must

[14] International commercial arbitration is a thriving industry, with thousands of cases being administered by several arbitral institutions around the world such as International Chamber of Commerce (ICC) Paris, London Court of International Arbitration (LCIA) London, and other globally known arbitration centres in places such as Singapore, Hong Kong, New York, Vienna, Dubai etc. A significant number of parties in international arbitration, notwithstanding their financial status, seek financial assistance from professional funders, and thus the demand for such funding visibly outstrips the supply. *See*, C. Lamm & E. Hellbeck, *supra* n. 6.

[15] For comprehensive coverage of the developing trend of TPF in international commercial arbitration, see generally, M. Kantor, Costs and Third Party Funding in International Arbitration, Global Arbitration Review, Vol. 5(2) 2010; *See also*, S. Brekoulakis, *The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report*, Kluwer Arbitration, Feb. 18, 2016, available at http://kluwerarbitrationblog.com/2016/02/18/the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-ap-plications-the-icca-queen-mary-task-force-report/ (last accessed 25-11-2017).

tread carefully in selecting the package offered by the TPF firm(s), as any poorly planned funding option may well constitute a significant encumbrance on parties. In other terms, businesses that may face themselves embroiled in a dispute in international arbitration should carefully reckon the potential advantages that TPF can offer and should be equally acquainted with the possible risks.

Bringing a claim to arbitration and progressing with it may turn out to be prohibitive. Outside funding can facilitate the meritorious claim, but, what is required is to weigh all options, including the risk assessment by the legal expert, before exploring TPF options. There is no set form for contract for funding, thus parties can negotiate an arrangement according to the tailor-made solutions, which works for them. In view of the fact that uncertainty of the arbitral award keeps looming over the head, so the parties should be ready to own up the responsibility for the outcomes of the arbitrated dispute, as well as for the negotiated deal with funders.[16] Further, as stated earlier, since international arbitration is largely confidential, so the detailed structure or the nitty-gritty of funding agreement may not be allowed to be disclosed in the proceedings of international arbitration?

A very significant factor for entering into a funding agreement with an outside party can be the extra layer of scrutiny or an additional opportunity to examine the appropriateness of legal strategy that often comes with it. Since a third party is a business entity, so it is not likely to support a claim which it thinks to have no chance of success. This particular aspect, although undesirable from the fund-seeking party' perspective, nevertheless may afford opportunity to such party to have a re-look and re-strategize his/her case in arbitration [26] Third party funders often have their own legal experts who help assess the legal claims and evaluate the strength and weakness of the claims. This expert vetting service is in fact necessary for advancing a claim which involves a huge stakes in terms of money. So from commercial perspective too, it is indispensable to have a particular case for arbitration re-evaluated under the TPF arrangement.

While significant benefits may be had from TPF, parties should also take note of the associated risks. Presently, a lot of debate concerns the conflict of interest that may occur when there is an involvement of third party funders in international arbitration [1].[17] In plain terms, the major stakeholders, namely, arbitrators, law forms

[16] By and large, the often observed rule stipulates that the arbitrator will not be able to oblige a request for disclosure of details about TPF in international arbitration if the funded party has not shared the existence of such TPF. Where the party has not disclosed the existence of TPF, as is often the case, the arbitrator will not be apprised of the presence of TPF and thus have no means of evaluating whether to make disclosures on this subject. *See*, decision of ICSID Tribunal in *RSM Production Corporation* v. *Saint Lucia*, ICSID Case No. ARB/12/10; *See also*, Michelle Bradfield, *Third Party Funding: Adding to the War Chest of Procedural Tools Available to Respondents*? *available at* https://www.biicl.org/documents/1390_m_bradfield_dentons_thirdpartyfunders.pdf?showdocument=1 (last accessed 30-11-2017).

[17] The potential or perceived conflict of interest situation can arise between the third party funder and the arbitrator or one of the arbitrators appointed by the parties to arbitrate the dispute. As for instance, where the arbitrator is a partner of a law firm with which the funder shares prior relationship. This fact can seriously damage the perceived propriety of arbitration process. Further, where the fact of funding has been kept secret for long (post beginning of arbitration process), disclosure of such a connection at later stage can cause acute difficulties. To avoid such a situation, it is appropriate for funder to have prior checks on the nature of rule of disclosure (if any) before agreeing to fund the costs of a party in arbitra-

and TPF providers can have recurring dealing with each other, and so it is necessary for the fairness of the arbitration process that conflict of interest situation is avoided. Due to lack of mandatory rules on disclosure, most arbitral institutions are not bound by them. If a conflict of situation is discovered, this may pose serious problems of enforceability for any award handed down by the arbitrator. Hence, it is often recommended that for the sake of the best interest of all the parties, including the arbitrators and TPF providers that within the funding agreement disclosure aspect in regards to conflict of interest should be carefully scrutinized. Further, the arbitral rule followed by arbitrator or arbitral institution should provide for disclosure to the extent necessary for determining whether a conflict of interest exists. The difficulty gets acute when the funding arrangement puts a complete embargo on disclosure, whereas the arbitral rule relied on by the arbitrator allows for disclosure in conflict of interest situation. Presently, the whole area related to disclosure remains unregulated, and it is not certain how the balance between competing interests of various parties in respect of disclosure or non-disclosure could be achieved in international arbitration involving TPF arrangement. The possible solution remains that all the parties remain extra vigilant by having a close deliberation and fine examination of the funding agreement and the arbitral rule governing disclosure of conflict of interest.

The regulation of TPF in international arbitration is not covered by any corpus of international law. There is no binding institutional rules that specifically provide for compulsory revelation of any funding arrangement. However, in the wake of rapid proliferation of international commercial arbitration, a plethora of soft law instruments[18] has emerged, which provides guidance to the stakeholders specially the arbitrator(s) to minimize the level of difficulty in conflict of interest situation. In this regard, the Guideline issued by International Bar Association (IBA) in 2014[19] attempts to cover the conflict of interest situation, which is as follows:

> The parties are required to disclose any relationship with the arbitrator. Disclosure of 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 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) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the

Footnote 17 (continued)
tion. Arbitrators too have the solemn obligation to make full disclosure of any potential conflict of interest.

[18] Some Guidelines (soft laws) on conflict of interest have gained wide acceptance in the global arbitration community such as those framed by arbitral institution of repute viz. International Bar Association, London. *See generally*, IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by Resolution of IBA Council on Oct. 23, 2014, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last accessed 03-12-2017).

[19] *Id*. General Standard 7a: Duty of the Parties and the Arbitrator.

arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

Similarly, under the ICSID (Convention) Rules of Arbitration,[20] a 'safeguard' is provided which requires the arbitrator(s) to declare past and/or present relationship (if any) with the parties, which includes any knowledge of funder being associated with the said arbitrator(s). But, logically, any such disclosure of past or present relationship with funder is dependent on the arbitrator(s) knowledge of the funding arrangement. If the latter fact is not known in advance, arbitrator(s) simply cannot be held guilty of hiding anything, which further means that funded party ought to give way for disclosure in the event of conflict of interest situations.

These guidelines, although regarded as "best practices", are not legally binding on the arbitrator. A recent survey furnishes useful insight about the guidelines which are generally held in high regard within the arbitration community parties as well as arbitrators), with nearly 45 percent respondents in the survey affirmatively stating about the regular use of such guidelines in resolving conflict of interest situations [9, 16].

Apart from the risk of conflict, the issue of confidentiality and autonomy also needs to be taken care of by the parties. The funder often wants to assess the merit of the claims, hence he/she would demand for reasonable access to all the relevant materials, which may be commercially sensitive and therefore subject to legal privilege. Of course, the party seeking fund has to determine the extent of access to certain materials by the third party, which are otherwise confidential. Such party should also remain aware of their confidentiality obligations towards the other party, and hence through effective agreement, it has to be ensured that opposite party do not breach them while exchanging information with a third party.

5.1 Cost and Risk Management Benefit

TPF in international arbitration affords not only the financial resources to pursue a claim, but also creates possibilities to contain financial risks connected with the claims arising under arbitration. The fund seeking party can transfer a part or whole of such risks to the funder. The claimant hence can create productive condition for himself to achieve a successful recuperation, without bothering about payment of legal costs and fees, or having to allocate or obtain funds to handle with the outcomes should the claim eventually fail in the arbitration. Of course, such a positive assertion is based on the premise that an effective arrangement has been put in place to meet with unforeseen nature of the arbitral award.

It remains obvious that in international arbitration, legal fees and costs associated with pursuing a claim can be gigantic, which often runs into millions of dollars in

[20] International Centre for Settlement of Investment Disputes (ICSID), Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, 1965 (revised in 2006) Rule 6(2).

most of the cases [17].[21] To restate, where the claim fails, the party at loss, will be liable for not only its own legal expenses, but also for the costs incurred by the other (winning) party. In such situation, the arbitration tribunal is commonly applies the principle of "loser pays it all" [3].[22] Under ICSID Convention, it is provided that in the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.[23]

Similarly, under the UNCITRAL Arbitration Rules,[24] the arbitrator will assess costs against the losing party in a manner which he/she considers appropriate. Within the broad sweep of the term "costs", a number of item/itinerary falls, namely the following:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator, and which is to be fixed by the tribunal itself as per the relevant rule;
(b) The reasonable travel and other related expenses incurred by the arbitrators;
(c) The reasonable expenses incurred on expert advice and other assistances required by the tribunal;
(d) The reasonable travel and other associated costs of the witnesses to the extent that such expenses are approved by the tribunal;
(e) The legal and other expenses incurred by the parties in respect of the arbitration to the extent that tribunal determines that amount is reasonable;
(f) Any other miscellaneous costs or expenses as reasonably determined by the arbitration tribunal.

In a recent case [8] arising in UK, the Court upheld a costs award in arbitration which, *inter alia*, included TPF costs. Significantly, while interpreting the scope of the term "other costs", the Court also concluded that arbitrator possessed wide discretion in matter of awarding cost [8].

At the international plane, the ICSID arbitration tribunal in the recent decisions has touched the context of award of TPF costs. In *RSM Production Corporation* v. *Grenada* [13], underlying the funder's role, the tribunal dismissed an argument that the successful party should not be awarded costs for the legal fees, on the basis that

[21] Authors quoting: "As a large number of cases in arbitration are complex and protracted, the legal fees and costs incurred are huge, which becomes even more gigantic when costs of expert witnesses are added to the final sum".

[22] "Loser pays principle" is the other name for "costs following the event", which has become a common norm in all the jurisdictions.

[23] International Centre for Settlement of Investment Disputes (ICSID), Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, 1965 (revised in 2006) Rule 61(2).

[24] UN Doc. A/RES/31/98 (as revised in 2010). The UNCITRAL Arbitration Rules (used both for commercial and investment arbitration) under Rule 40 states that "the costs of arbitration shall, in principle, be borne the unsuccessful party"; Rule 38 (e) stipulates that "costs shall include the fees/expenses incurred by the arbitrator and such related costs incurred during the arbitral proceedings as reasonably determined by the tribunal".

those legal fees had allegedly been covered by an undisclosed third party. The tribunal concurred with its own stand taken in an earlier case, namely, *Kardassopoulos & Another* v. *Georgia* [14] wherein it had stated that "any third party financing arrangement should be taken into consideration in determining the amount of recovery of the costs" incurred in the arbitration.

5.2 Tackling Unreasonable Conditions Proposed by Funder

The key principle in TPF is that funders have right to participate in the funding of arbitration but cannot control its proceedings or outcome. Although funders have much at stake and they rely on the goodwill and co-operation of the claimant to achieve a mutual goal, yet it is invariably seen that funders often want to maximize their investments, and towards this end, they would like to gain a degree of economic power over the funded party. In view of such power matrix, unscrupulous funders may tend to exercise leverage over the outcome of the arbitration. In other terms, the concerns remain high that a funder may well take advantage of its economic power by creating unreasonable conditions for the claimant party, in particular through use of its dominant economic status to re-negotiate terms to the severe disadvantage of the funded party at an advanced stage of the ADR process, or to achieve a resolution of the claim which may be incompatible with the client's best interest. Further, a funder may threaten to terminate the funding arrangement, which is one of the common ways of putting undue pressure on the claimant party.[25] However, such adverse situation, although quite imminent, in practice, is often avoided as the interests of the claimant and the funder are commonly aligned.

There are caveats which the claimant party needs to observe against any unfair terms proposed by the funder. In the claims arising under international arbitration the lawyer of the claimant can provide critical legal insight into the funding arrangement. He/she is supposed to perform important check and balance vis a vis funder in his/her capacity as the legal representative of the claimant party. Thus, the claimant's lawyer is obligated to protect the claimant's interests.[26] In general, since TPF in arbitration is complex and costly affairs, so it is commonly anticipated that any funding documentations are clearly vetted by legal experts, both from the standpoints of funder and funded party. In essence, given the high costs and risks involved as well as the growing competitiveness amongst third party funders, it is in the funder's professional interest to act with a high degree of professionalism and to go by the established standards and fair practices while funding claims in any arbitration.

[25] Funder may terminate the funding when it is reasonably ceases to be satisfied about the merits of the dispute; reasonably believes that the dispute is no longer commercially viable; or reasonably believes that there has been a material breach of the TPF Code by the Funded Party. See, for example, the voluntary Code of conduct for TPF as introduced in England and Wales in 2011 (as revised in 2016) which applied to arbitration funding as well, *available at* http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF-1.pdf (last accessed 22-12-2017).

[26] The relationship between them is privileged and is guided by professional rules governing lawyer-client relationship in the given legal jurisdiction.

6 The Way Forward

Both international commercial and investment arbitration, wherein monetary stakes are high, are witnessing increased application of TPF over the past years. However, its proliferating rise has generated a number of potential issues and concerns. It is evident that while TPF attempts to balance the financial status of parties (argument for improved fairness), it also creates certain risks and challenges, as for instance, those concerning disclosure, conflict of interest and cost issues. These concerns are legitimate, and any funding debate has to accommodate such critical issues while focussing on creating a more viable and legally sustainable mechanism for TPF.

The perusal of three different prominent jurisdictions viz., UK, USA and Australia establishes the fact that while traditional litigation funding is increasingly put to regulation, yet, its offshoot, i.e., funding in international arbitration, being a global and fairly recent phenomenon, remains largely unregulated. In this connection, it is to be said, that currently regulatory framework covering TPF is not enacted due to lack of unanimity among relevant stakeholders; however, a corpus of judicial decisions delivered in various jurisdictions along with rulings/observations of international forums such as ICSID or other international arbitration tribunals, may help create a legal paradigm insofar as TPF is concerned.

TPF is going to stay in the litigation/arbitration market not on ad-hoc but permanent basis. The legal doctrines surrounding its application and the complexities, which may surface with its growing usage, require a balanced legislative and judicial approach, both within domestic and international plane-which accommodates the concerns of the industry, parties, arbitrator, and third party alike. Such an approach, it is anticipated, in the days ahead, will end current unpredictability, and generate robust and widely acceptable structures of TPF.

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