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Topic – Third party funding has been heralded as both a cure and a scourge in international arbitration. Its continued usage in both commercial and investment treaty arbitration has given rise to a number of substantive and procedural issues. In considering these issues please come to a conclusion on whether third party funding has a future in international arbitration and if so, what kind of future

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"*Globalization means we have to re-examine some of our ideas, and look at ideas from other countries, from other cultures, and open ourselves to them. And that's not comfortable for the average person*."[1] Globalization is indeed a phenomenon involving all sectors and industries, the legal one included. It led to the development of international trade, a crossroad of different entities, trade cultures and economic flows: a melting pot of legal practices which was a favorable cradle to the rapid development of international arbitration.

As this field kept evolving as the appropriate mean of resolving major international disputes, so did the complexity of the proceedings, the economic difficulties, the number of actors in the "*game*", the "*number of constraints being placed upon corporate legal budgets*"[2] and the rising cost of every move made. In this context, there is a high demand from the key players to find alternative ways to finance their participation to the arbitration game without bearing massive financial risks, especially when they could be hazardous due to discrepancies in the drafting of the *midnight clause*, dilatory techniques and enforcement difficulties.[3]

For instance, an OECD analysis pointed that investment arbitration disputes cost, in average, US$ 8 million.[4] Particularly, in a single dispute regarding mass claims, the parties disbursed approximatively "*US$ 40 million in legal fees just to reach the decision on jurisdiction*".[5] Arbitration is costly, both in commercial and investment disputes. In this context, the market supplied a natural solution to trump the system's self imposed cap: Third-Party Funding[6].

At first, TPF came in as an answer to a fundamental procedural issue in arbitration: to restore the equality of arms between the belligerent parties in arbitration proceedings, particularly when an impecunious claimant sought justice and asserted its rights against major companies and states. However, there is a "*growing corporate utilization of funding by large, well-resourced entities. These entities may be looking for ways to manage risk, to reduce legal budgets, take the cost of pursuing arbitration off-balance sheet, or to pursue other business priorities instead of allocating resources to financing an arbitration matter*".[7] As such, TPF appears to be constantly evolving and adapting to the market

[1] Quote by Herbie Hancock, American composer.

[2] International Council For Commercial Arbitration, Report of the ICCA-Queen Mary Task Force On Third-Party Funding In International Arbitration (2018), *available at https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf* (hereinafter "**Task Force Report**" last accessed December 1, 2019), p.18, fn. 32, citing Von Goeler J., "Third-Party Funding in International Arbitration and its Impact on Procedure," *Kluwer Law International*, Netherlands, 2017, p. 8, fn. 1, citing CIArb Costs of International Arbitration Survey 2011, p. 13.

[3] Costargent J-R., "Le financement par un tiers comme réponse aux évolutions de l'arbitrage international", *Versailles University Arbitration Journal,* No. 1, October 2012, non-official translation.

[4] OECD, "Government perspectives on investor-state dispute settlement: A progress report", *Freedom of Investment Roundtable*, December 2012, *available at http://www.oecd.org/daf/inv/investment- policy/ISDSprogressreport.pdf* (last accessed December 1, 2019).

[5] Kessedjian C., "Good governance of third party funding", *Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues by the Columbia Center on Sustainable Investment*, No. 130, September 2014.

[6] Hereinafter referred to as "**TPF**".

[7] Task Force Report, p. 20, fn. 36 citing Bogart C. P., "Third-Party Financing of International Arbitration", *The European Arbitration Review 2017 (GAR Special Report)*, October 2016.

targeted.

While the notion sounds new and is considered a recent addition to the arbitration panorama, it is an established practice in litigation.[8] As the concept made its way in the arbitration sphere, "*many of the considerations that motivated prohibitions against champetry and maintenance weakened*"[9] and were re-analyzed in common law jurisdictions.[10] Thus, after first emerging in Australia in the 90's, TPF in arbitration expanded to other parts of common law jurisdictions and to a more limited number of civil law jurisdictions. In the latter, "*professional attorney ethics rules and ownership of claim constraints take center role*" in providing any limitations on third-party funding arrangements.[11]

On the other side, doctrine is unanimous in stating that "*whether in favour or against, third-party funding of litigation and, more recently, arbitration, is an undeniable and important reality*".[12] It is indeed hard to miss the development of a dispute funding global market worth more than US$ 10 billion and still growing. It is clear that "*third-party funders have now matured into prominent businesses in the litigation market – Burford made $225 million profit after tax, up 36 per cent from last year*"[13]. "*Under these circumstances, it is no wonder that third party funding has become the talk of the town*"[14], but what exactly *is* TPF? (**I**) While the demand for alternative ways of financing arbitration does exist and increases everyday, the implementation of the practice faces heavy criticism, particularly on the issues of arbitrator conflicts of interest, confidentiality, privilege, and costs issues (**II**), which begs the question: what does the future hold for TPF? (**III**)

I. Third-Party Funding: a kaleidoscopic concept

The concept of "*third-party funding*" is a global one that can encompass a multiplicity of different and constantly evolving funding models which come under a variety of forms. Indeed, funding comes in all shapes and forms: it "*may be structured through corporate debt or equity (…), or as risk-avoidance*

[8] Moseley S., "Disclosing Third-Party Funding in International Investment Arbitration*"*, *Texas Law Review*, Volume 97, Issue 6, *available at* https://texaslawreview.org/archive/volume-97/issue- 6-volume-97/ (last accessed December 1, 2019) fn. 5 citing Frignati V., "Ethical Implications of Third-Party Funding in International Arbitration", Arbitration International, Volume 32, Issue 3, 2016. See also Goldsmith A., Melchionda L., "Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)", *International Business Law Journal*, Issue 1, 2012, pp. 53-76.

[9] Baumann A., Singh M.M., "New forms of third-party funding in international arbitration: investing in case portfolios and financing law firms", *Indian Journal of Arbitration Law*, Vol. 7, Issue 2 (2019).

[10] Arkin v. Borchard Lines Ltd and others [2005] EWCA Civ 655; see also Hong Kong Legislative Council's 2017 amendments to the Arbitration Ordinance (Cap. 609), Part 10A (ss. 98E-98W).

[11] Task Force Report, p. 18, fn. 31 citing Bao C., "Third Party Funding in Singapore and Hong Kong: The Next Chapter", *Journal of International Arbitration*, 2017, Issue 3, pp. 387-400; see also Secomb M., Tan P. and Wingfield T., "Third Party funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation", *Asian Dispute Review*, 2016, Issue 4, pp. 182-188.

[12] Task Force Report, p. 17, fn. 29 citing Cremades B. M., "Chapter 12. Concluding remarks", in Cremades Sanz- Pastor B. M. and Dimolitsa A., eds., *Third-Party Funding in International Arbitration* (ICC Dossier) (Kluwer 2013) p. 153.

[13] Task Force Report, p. 17, fn. 29, citing Financial Times, "Arbitration academics are living in the dark ages" (19 November 2017). See also Burford Capital's Quarterly Summer 2017 Overview, *available at* http://www.burfordcapital.com/wp-content/uploads/2017/07/Burford-Quarterly-Summer-2017.pdf (last accessed December 2019).

[14] Kessedjian C., "Good governance of third party funding", *Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues by the Columbia Center on Sustainable Investment*, No. 130, September 2014.

instruments, or full transfers of the underlying claims. More recently, "law firm financing" and "portfolio funding" have emerged, so did the practice of refinancing portfolios of funded cases". In addition, "*some third-party funders may become involved either before a claim is filed or later in the process, specializing only in award execution or funding for expert witness costs, while others fund all costs, including a potential adverse award of costs.*"[15].

To date, it appears that only two states implemented regulations on the issue and sought to define the concept of TPF in international arbitration. Some international treaties have also attempted to provide such definition under investment treaties and free trade agreements[16]. However, the TPF notion has yet to be directly addressed by arbitral institutions.

As a result, despite its rise in international arbitration, the meaning of TPF is still an open-debate in the arbitration place. Doctrine observed that "*even funders themselves disagree over the precise definition of third-party funding or whether it is even capable of definition"*.[17]

In the absence of a universally recognized definition and considering the void in domestic and international regulations on the matter, a Task Force on Third-Party Funding in International Arbitration has attempted to set a definition on the concept. In a Report released in 2017, the Task Force considered that "*all types of dispute funding that would fit within the following definition:*

> *The term "third-party funding" refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,*
>
> *a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and*
>
> *b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.*"[18]

[15] Task Force Report, p. 47, fn.77, citing Kantor M., "Third-Party Funding in International Arbitration: An Essay About New Developments", *24 ICSID Review*, 2009, Issue 1, pp. 65-74; See also Trusz J. A., "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", *101 The Georgetown Law Journal*, 2013, pp. 1649-1654.

[16] Task Force Report, p. 61, fn.113-114, citing the [draft] EU-Vietnam Free Trade Agreement, Chapter 8, Article (2), January 2016, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (last accessed December 1, 2019) and the European Union's proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership, Section (3), Article (1), dated 12 November 2015, *available at* http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last accessed December 1, 2019).

[17] Task Force Report, p. 46, fn.77, citing Scherer M., Goldsmith A., "Third-Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives", *2 International Business Law Journal, Roundtable*, 2012, pp. 209-210, *available at* https://www.transnational-dispute-management.com/news/20120312.pdf (last accessed December 1, 2019).

[18] Task Force Report, p.50.

While the definition was provided for study purposes, it tried to be as broad as possible in order to cover the many aspect of the notion of TPF. However, even if this definition appears as comprehensive, a feeling of incompleteness remains when assessing how moving and expending the market and the funding models evolve. The work of defining this concept is all the more important when considering the size of the funding industry and its current self-regulation. When this sort of arrangement made its way towards arbitration, many welcomed the advantages described above, however, just like globalization, change in general is open to criticism.

II. Third-Party Funding: a date with no etiquette?

When reaching out to a funder to go down the arbitration road, the parties' expectation is mostly for them to pick up the bill at the end of dinner. In this configuration, is your date also supposed to know table etiquette and abide by them? This arbitration *ménage à trois* has raised numerous concerns among the legal community.

The continued usage in both commercial and investment treaty arbitration of the unregulated TPF has given rise to a number of substantive and procedural issues which put TPF under scrutiny and criticism, particularly on the issues of arbitrator conflicts of interest, confidentiality, privilege, and costs issues.

The main and most recurrent issue regarding TPF is the potential conflict of interest with arbitrators. When the intervention of a funder is not known to the arbitral tribunal, issues of conflicts of interest between the third party funders and the arbitrators may indeed arise.

While there is "*nearly universal agreement that disclosure of the identity of a funder is necessary for an arbitrator to undertake analysis of potential conflicts of interest. There was somewhat less consensus about how and when such disclosure should occur*."[19] Indeed, there is no obligation on funders, third parties to the arbitration proceedings, to disclose the funding of a party. It would then be the funded party's burden to comply with any disclosure order of rule.[20] The ways to approach such disclosure vary considerably in practice. Indeed, "*some require systematic disclosure, while others simply affirm arbitrators' power to order disclosure*".[21] This problematic is a crucial one, and the preoccupations in this regard are legitimate since the award could later on be the subject of annulment on the grounds that the arbitrators were conflicted. As no regulation on TPF has been universally implemented, the worry pertains to the use by funders of confidential and privileged information on other cases subject to their funding.

An additional major point of concern is the impact of TPF on awards "*on allocation of costs and applications for security for costs*"[22] Awards on costs are rendered at the end of the arbitral proceedings

[19] Task Force Report, p.98.
[20] See 2004 IBA Guidelines on Conflicts of Interest in International Arbitration, General Principle 6b.
[21] Task Force Report, p. 115.
[22] Task Force Report, p. 145.

in order to allocate the costs and their amount. In order to decide on cost issues, tribunals will usually take into consideration several criteria. Some assert that the presence of a TPF arrangement would indicate that the party funded is impecunious and would be sufficient ground to order security for costs, or at least to shift the burden of proof on this matter. Others contend that such funding provides for a relevant element in the determination of the allocation of costs at the end of the proceedings.

Some other criticisms pertain to the practice of funders in itself. The speculation practiced by some funders when offering financing services on a case while knowing perfectly it does not have the sufficient budget to ensure the entire procedure. By doing so, these funders expect that their presence will speed up the proceedings or settle the matter through negotiations. These frivolous claims are all the more concerning when they are aimed at states as part of investment disputes, a sector in which the increase of case-load has been, despite the absence of empirical evidence, attributed by some to the presence of TPF arrangements.[23]

It thus appears that, "*rather than debate whether third-party funding is permissible, scholars and practitioners have turned their attention toward how third-party funding can be regulated to ensure efficiency, fairness, and procedural integrity*."[24] Despite all the ink poured to discuss the development of the TPF practice, only very few concrete steps have been taken in order to regulate it.

III. Third Party Funding: a golden ticket?

The arbitration panorama, and more specifically the dispute financing market attached to it, is clearly becoming more sophisticated and diverse. Over the last years, TPF has evolved into a billion-dollar industry involving numerous funders with extremely close ties to dispute resolution that have made us realize that claims could actually be turned into financial assets.

It is predicted that "*demand for such funding will most likely grow, especially as expenses associated with investment treaty arbitration have been continuously increasing. As of 2016, some estimate that at least 40% of the current investment arbitration claims have either secured or explored potential funding from TPFs*". [25]

When asked what trends are to be expected in arbitration in this regard, funders stated that "*the short answer is more, more, more"*.[26] Indeed, "*The growth of the industry shows no signs of slowing*".[27] It is a fact: TPF is the solution supplied for an increasing demand for alternative means of financing. And it

[23] Task Force Report, p.203.
[24] Moseley S., "Disclosing Third-Party Funding in International Investment Arbitration*"*, *Texas Law Review*, Volume 97, Issue 6, *available at* https://texaslawreview.org/archive/volume-97/issue- 6-volume-97/ (last accessed December 1, 2019).
[25] Svoboda O., and Kunstýř J., "Third Party To Pick Up The Bill? Cost Issues Relating To Third Party Funding In Investment Arbitration", *Czech Yearbook of Public and Private International Law,* 2016, volume 7, p.428, fn2, citing Khouri S., Hurford K., Bowman C., "Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding", *Transnational Dispute Resolution 4, in Contingent Fees and Third Party Funding in Investment Arbitration Disputes* (2011).
[26] Steven Friel of Woodsford Litigation Funding in Norton Rose Fulbright, Third-party funding in arbitration – the funders' perspective, Q&A with Woodsford Litigation Funding, Harbour Litigation Funding and Burford Capital.
[27] Task Force Report, p.20.

is "*here to stay: the proliferation of third-party funding has outpaced policies aimed at limiting the practice; jurisdictions that previously outlawed third-party funding have since softened their bans; and arbitral tribunals that have considered challenges to third-party funding arrangements have declined to prohibit them*".[28]

As a result, the supply chain as whole and the environment attached to it needs to adapt. Channels between financiers, lawyers, scholars and legislators need to be open, empirical studies launched and regulations implemented. For this solution to grow appropriately and ethically, both market players and the international legal community need to work closely on regulating it, while still taking into consideration the party autonomy.

Many agree that "*an exploration of the interplay between dispute funding and international arbitration is not only increasingly timely, but of the utmost importance. The arbitration community must find a way to balance the increasing business need for innovative approaches to the financing of legal matters while protecting the integrity of the arbitral process and the ultimate enforceability of awards*."[29] There are indeed valid concerns relating to the influence of TPF on the arbitration sphere. In order to counter them, regulation could be envisaged. However, the regulations implemented need not be solely limiting the funders' activities, but need to work *de concert* with them to encourage and expand this solution in a more ethical way as to participate to the improvement of international arbitration and raise awareness amongst parties as to the existence of such means.

Some scholars set aside the regulation option and aim for a *soft law* approach by leaving the matter to the arbitral tribunals' discretion. This side of the doctrine states that "*regulation is not the way to go forward. Instead, arbitral institutions should adopt guidelines for arbitral tribunals*".[30] The issue with a set regulation is that while they are being proposed, drafted and implemented, new fund models would have already been created and developed. Furthermore, TPF has become a major industry by mostly applying self regulation. Christopher Bogart from Buford Capital stated that such imposing regulations on such a specific market "*is not merited, and that more regulation targeting simply "third-party funders" would be unfair."*[31]

The idea would then be to draft international guidelines specific to TPF best practices, setting minimum standards, notably in the subject of ethics. Such guidelines would also address, among others, issues of conflict of interest, confidentiality, costs and drafting of funding arrangement so that control of the case remains with the parties and funders' influence on the proceedings is limited. In order to so, use of the

[28] Moseley S., "Disclosing Third-Party Funding in International Investment Arbitration", *Texas Law Review*, Volume 97, Issue 6, *available at* https://texaslawreview.org/archive/volume-97/issue- 6-volume-97/ (last accessed December 1, 2019).
[29] Task Force Report, p.17.
[30] Kessedjian C., "Good governance of third party funding", *Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues by the Columbia Center on Sustainable Investment*, No. 130, September 2014.
[31] Moseley S., "Disclosing Third-Party Funding in International Investment Arbitration", *Texas Law Review*, Volume 97, Issue 6, *available at* https://texaslawreview.org/archive/volume-97/issue- 6-volume-97/ (last accessed December 1, 2019).

Task Force's Report as a springboard is essential, as it is currently "*the most significant and comprehensive contribution to the development and regulation of arbitration funding*".[32]

While Singapore and Hong Kong seem to be pioneers in the matter in commercial arbitration, investment arbitration still has a large void to fill. In investment disputes, ICSID is considering implementing rules on third party funding as part of the currently negotiated amendments.[33]

It must be kept in mind that the ban on such practice would mostly harm the parties and their ability to seek justice in an equal manner. One of the most obvious observation is that TPF is about to profoundly transform the international arbitration sphere. This is probably behind the literature frenzy on this topic. Communication, transparency, comprehension and an open mind are thus the key elements to make sure that, while considering TPF, arbitration does not reflect an outdated practice, unable to anticipate the movements of the economic globalized world and keep up with the new trends and actors. These are simply the blueprints of a more complex and growing legal edifice, and it is up to the legal community and funders to perfect its architecture.

[32]Moseley S., "Disclosing Third-Party Funding in International Investment Arbitration*"*, *Texas Law Review*, Volume 97, Issue 6, *available at* https://texaslawreview.org/archive/volume-97/issue- 6-volume-97/ (last accessed December 1, 2019).

[33] Güven B., Johnson L., "Third-Party Funding and the Objectives of Investment Treaties: Friends or foes?", *Investment Treaty News*, 2019, *available at* https://www.iisd.org/itn/2019/06/27/third-party-funding-and-the-objectives-of-investment-treaties-friends-or-foes-brooke-guven-lise-johnson/ (last accessed December 1, 2019).