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論　　説

A Short Theoretical Assessment on Third Party Funding in International Commercial Arbitration

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1. Introduction

In recent times, a vast wealth of literature has been produced on the topic of third-party funding (TPF) in arbitration[1]. Yet, until very recently, the issue has

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1) See, *ex multis*, Catherine A Rogers, 'Gamblers, Loan Sharks, and Third-Party Funders' in *Ethics in International Arbitration* (Oxford University Press 2014); William W Park and Catherine A Rogers, 'Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force' (The Pennsylvania State University - The Dickinson School of Law 2014); Louise Barrington, 'Third Party Funding and the International Arbitrator' in Patricia Shaughnessy and Sherling Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer* (Kluwer Law International 2017). An example of monograph is: Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (International arbitration law library Volume 35, Wolters Kluwer 2016). There are also quite a few important studies and reports, including Bernardo M Cremades and Antonias Dimolitsa (eds), *Third-Party Funding in International Arbitration* (Dossiers - ICC Institute of World Business Law, ICC 2013). While this paper was being drafted, we referred to The ICCA-Queen Mary Task Force, 'Draft Report for Public Discussion of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (1 September 2017), which was published in its final version as the 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' in April 2018. Also while this paper was being drafted, the Nikolaus Pitkowitz, *Handbook on Third-Party Funding in International Arbitration* (Juris Publishing LLC 2018) was published. . In Japanese, Yoshie Midorikawa, 'Asia ni Shinshutsu wo Hajimeta Third Party Funding [Third Party Funding developing in Asia]' (2015) 43(7) Kokusai Shōji Hōmu

received (with a few notable exceptions) relatively little attention from academia, institutional observers or legislators across the world, especially when compared to *litigation* funding.

This phenomenon is summarily (and inaccurately) described as follows: one party willing to submit (or resist) a claim in arbitration lacks the funds to cover procedural expenses, or would like to cover the economic risk of losing, and therefore asks a financial institution (the "Funder") to support them. In case of victory, the third-party funder will receive remuneration from the damages awarded to the financed party.

This system has become increasingly popular in recent years. While of course it is very useful for parties putting forward meritorious claims but lacking the financial resources to pursue arbitration, it is also very interesting for the financial industry, which sees in it a relatively new and unexplored form of investment[2] where profit margins could potentially be very high.

The idea that third party funding is a mean by which "poor" parties are able to sustain the cost of arbitration fails to properly convey a clear picture of the matter: this situation is not the rule, rather is the exception[3]. The real purpose of third party funding - at least as far as international *commercial* arbitration is concerned - is, from a claimant perspective, a diversification of the financial risk associated with the dispute. For the financial institution, *il va sans dire*, is the expectation of the return on the investment.

The procedure is normally as follows: the party, either directly or (more frequently) through a lawyer or a broker approaches a financial institution

966; Tatsuya Nakamura, 'Daisansha Shikin Teikyō to Chūsai Tetsuzuki [Third Party Funding and Arbitral Proceedings]', (2017) 50 Kokushikan Hōgaku 1.

2) On TPF as an investment, see Duarte G Henriques, 'Third-Party Funding: A Protected Investment?' (2017) 30 Spain Arbitration Review 101.

3) The situation is partially different in investment arbitration, where it may happen that individual investors lack the resources to bring a claim against a sovereign state. There are also examples of states assisted by external funding: the most famous episode in this regard is the support given by the Bloomberg Foundation to Uruguay, supporting the nation as respondent in the claim brought by Philip Morris. See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), available at https://www.italaw.com/cases/460.

providing TPF services. The Funder carries out a preliminary assessment of the case and, in the event it does not deem it financially interesting, declines to provide assistance. In the event the Funder is interested in financing the claim (or counterclaim) then a comprehensive due diligence procedure takes place: the evaluating team is typically composed of both jurists (either lawyers, retired judges or law professors) and financial experts. Key points of evaluation are of course the chances of success, the solvency of the opposing party and ease of enforcement. If the outcome of the due diligence review is positive, then the Funder and the funded party enter into a financing agreement, the content of which may vary greatly but of course its most important provision is the one granting the Funder a return on its investment, normally in the form of a percentage of any recovered amount. Ancillary provisions include the duty of confidentiality (both about the arbitral proceedings and about the financing contract itself) and the extent to which the Funder is allowed to intervene in the procedure (*e.g.* by suggesting the appointment of arbitrators, or counsels).

Notwithstanding its undisputed usefulness, third-party financing has also attracted notable criticism[4], mainly for the following reasons.

First, there is an issue of independence and impartiality. In the lack of any specific duty for a party to disclose the presence of third-party funders, there may be an unintended or undisclosed conflict of interest. Imagine, for example, the situation of an arbitrator who is completely independent and impartial from the party, but has ties to the financial institution behind the party.

Second, international commercial arbitration should be private and confidential[5], and should involve the parties, the arbitral tribunal, and (in the case of institutional arbitration) arbitral institutions. In this case, however, another entity, external to the case, may be involved and informed about the case.

4） Somebody defined TPF's progress "treacherous". Khushboo Hashu Shahdadpuri, 'Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory' (2016) 12 Asian International Arbitration Journal 77, and TPF itself as "a wolf in sheep's clothing" Caroline Dos Santos, 'Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing' (2017) 35 ASA Bulletin 918.

5） This aspect marks another difference with investment arbitration, also in relation with TPF, where the situation is less even. See, for example, https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx

Third, international arbitration is carried out, by definition, across jurisdictions. Some countries are very liberal on the issue (*e.g.* Australia. Hong Kong[6] and Singapore[7] have also recently taken legislative steps to allow for third party funding. See *infra*), some others are quite conservative (*e.g.* Ireland)[8], while others allow it on a case-by-case approach, and some have not taken any explicit position on the matter (*e.g.* France)[9]. Other countries have explored, under the general umbrella of allowing TPF, very interesting forms of self-regulation[10].

Two kind of problems stem from this heterogeneous picture, one of a more practical nature while the other relates to complex private international law issues. As for the first, a difference in regulation may lead to an imbalance in the position of the parties to a dispute, as one of them may benefit from third-party funds while the other may be prevented from doing so by national legislation. As for the second, it will be necessary to establish which law(s) regulate the matter, and whether the issue of third party funding should be dealt with as a procedural or a substantive issue.

Fourth, both the financial and legal sectors are highly regulated. Interest rates, limits on the involvement of the financing institution in underlying operations and other issues are, in most jurisdictions, highly regulated. However, the legal qualification of third-party funding is still uncertain: is third-party funding like any other form of lending? Which rules apply to it? Leaving an uncharted territory may, from one side, leave room for abusive operations (e.g. usury-like interest rates), and from the other may punish lenders who – in good faith – misinterpreted or misapplied the law.

6）Hong Kong (Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Ordinance 6/2017). For a comment, see Kim M Rooney, 'Recent Legal Developments in Third Party Funding of Arbitration and Mediation in Hong Kong' (2017) 19 Asian Dispute Review 172.

7）Singapore (Civil Law Amendment Act, 2017). See Matthew Secomb and others, 'Third Party Funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation' (2016) 18 Asian Dispute Review 182.

8）[2017] IESC 27

9）Ordre des Avocats de Paris, 'Le Financement de l'Arbitrage Par les Tiers ("'Third Party Funding'")' (2017).

10）The most notable example is the *Code of Conduct for Litigation Funders* created by the Association of Litigation Funders of England and Wales (ALF). See http://associationoflitigationfunders.com/.

As a golden rule in legal research, one should never write a paper on a rapidly-changing matter: the risk is that the study will become an historical analysis rather than a depiction of the state-of-the-art by the time it is released. However, even when approaching a "hot topic" (like third-party financing in arbitration) susceptible of sudden changes, it is still possible to focus analysis on the theoretical (or even philosophical) issues behind the matter: those principles, albeit somehow abstract, are less likely to be affected by normative or judicial evolutions. This paper will try to break down the above mentioned key theoretical issues behind third party funding in International commercial arbitration.

2. Key issues

a. Disclosure of the agreement

One of the most heatedly debated issues with regard to the relationship between TPF and international commercial arbitration is whether the financing agreement should be disclosed[11]. On this point, three main positions may be identified: one according to which the *existence* of the agreement should be disclosed, but not its *content*; another which would require disclosing both the *existence* and the *content* of the agreement; and another against any disclosure. Each of those solutions presents problems and potentialities, which are better addressed individually.

The first solution is currently the most favored among scholars, practitioners, and institutions. The disclosure of the funding agreement (and the name of parties thereof) allows for the verification of any potential conflict of interest between the arbitrators and the financial institution involved, which otherwise could remain submersed and create serious problems if discovered during the procedure. However, if this approach is followed, it is still necessary to assess who would be in charge of the discovery procedure. In this sense there are two opinions, which

11) Jennifer A Trusz, 'Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 The Georgetown Law Journal 1649. See also William Stone, 'Third Party Funding in International Arbitration: A Case for Mandatory Disclosure' (2015) 17 Asian Dispute Review 62.

are already reflected in the practice. According to some, the *party* who entered into a TPF agreement to finance its arbitration-related costs must disclose the circumstance[12]. Some others put the initiative to either order[13] or suggest[14] the disclosure on either the arbitral tribunal, or, in case of institutional arbitration, the arbitral institution.

The solution to disclose not only the existence, but the full content, of the financing agreement, is not very popular, and actually fiercely opposed by the financial sector[15]. The criticism is based on the fact that the full disclosure of the agreement would impact on party's confidentiality and would make the TPF as a whole much less attractive. This skepticism is not ungrounded: on the other hand, a full disclosure of the financing agreement would allow for better control over

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12) The duty to disclose is imposed upon the party by the *IBA Guidelines on Conflict of Interest in International Arbitration* in their Standard 7 (a): "A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the 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. The party shall do so on its own initiative at the earliest opportunity" (emphasis added).

13) See, Singapore International Arbitration Center (SIAC), *Practice Note PN 01-17* (31 March 2017). *Administered Cases under the Arbitration Rules of the Singapore International Arbitration Center. On Arbitrator Conduct in Cases Involving External Funding*, in particular point 5 "Unless otherwise agreed by the Disputant Parties, the Tribunal shall have the power to conduct such enquiries as may appear to the Tribunal to be necessary or expedient, which shall include ordering the disclosure of the existence of any funding relationship with an External Funder and/or the identity of the External Funder and, where appropriate, details of the External Funder's interest in the outcome of the proceedings, and/or whether or not the External Funder has committed to undertake adverse costs liability".

14) See, the CAM-CCBC Administrative Resolution 18/2016, *Ref.: Recommendations regarding the existence of third-party funding in arbitrations administered by CAM-CCBC*, Article 4: "In order to avoid potential conflicts of interest, CAM-CCBC recommends the parties to report the existence of third-party funding to CAM-CCBC at the earliest opportunity" (emphasis added).

15) Burford Capital, one of the most active players in the market, made its opposition unmistakably clear in several occasions. See, for example, Christoper P. Bogart, "Third-party financing of international arbitration", http://www.burfordcapital.com/blog/international-arbitration-financing/. Christoper Bogart is the CEO of Burford, but also one of the pioneers of TPF. His opinion was sought by the ICC itself when preparing the Dossier (see 1. above), to which he contributed with an article Christopher P Bogart, 'Overview of Arbitration Finance' in *Third-party Funding in International Arbitration* (ICC 2013).

how, and to which extent, the funder is contractually allowed to intervene (or interfere) in the arbitration proceedings.

Finally, the solution *not* to disclose even the *existence* of the financing agreement is deemed inappropriate by both scholars and institutions, but it is actually the most practiced option so far. Aside from evident practical advantages (for the parties involved), the theoretical support for this solution is based on the fact that ignorance of the very existence of a third party connected to the procedure would sterilize any potential conflict of interest: to put it in practical terms, if an arbitrator has any kind of relationship with a financial institution but they do not know such institution is involved in a dispute they are arbitrating, how could they be in any way biased or affected? Logical as it may sound, and even when approaching the matter with a naïve attitude (*i.e.*, assuming that no under-the-table contacts between parties, funders, and arbitrators occur), this option actually poses several problems, the biggest one is about finding out that a TPF agreement exists when the procedure is an advanced stage, or even after the award is issued. Suppose the situation when the existence of a funder who happens to have a significant financial (or personal) relationship with an arbitrator is revealed during the procedure: the arbitrator may legitimately claim that no conflict *existed*, as they have been unaware of the financing agreement. However, it is very difficult to imagine that the circumstance would have no impact on the procedure, considering also the fact that the arbitrator must *be*, *remain* and *appear*[16] independent and impartial.

It is our opinion that the prevailing solution (*i.e.* the disclosure of the existence of the agreement) is the most suitable even on a theoretical level. We share the feeling that, in order to ensure a proper control over the issue, the full disclosure of the financing agreement is unnecessary, but at the same time we believe that the "Chinese Wall" approach based on a fragile silence on the matter does not provide adequate guarantees. As for the initiative about the disclosure, we believe that the most appropriate solution is to impose the duty upon the party (in this siding with

16） See, Michael D. Schafler and others, 'The Appearance of Justice: Independence and Impartiality of Arbitrators under Indian and Canadian Law' (2017) 5 Indian Journal of Arbitration 150. On independence and impartiality see *infra*.

the IBA Guidelines)[17]: otherwise the risk is to force arbitral tribunals and institutions to enter into an unproductive and potentially inconsistent exercise of "hide-and-seek" with the parties. A general duty to disclose seems more adequate.

b. Independence and Impartiality

Independence and impartiality[18] are cornerstones of international commercial arbitration. All arbitrators[19] must be independent (from the parties) and impartial (towards the dispute) otherwise they are not allowed to accept the appointment. The general rule is that, upon appointment, all the arbitrators involved must release a declaration in which they disclose to the parties every and any possible reason which could lead to a doubt about their independence and impartiality.

The presence of a third party funder, as already mentioned above, must be taken into account in this regard[20]: however, the funder is not a party to the procedure, which means that its involvement in the dispute is, from one side, less intense, but its financial interest in the outcome is possibly even stronger than that the concerned party's.

Of course the arbitrator, upon accepting the appointment, must disclose existing conflicts, provided that they are aware of their existence. The arbitrator's duty, however, is not, according to the prevailing opinion, strictly limited to *known* conflicts: the concerned individual, in fact, is under the duty to carry out

17) See, Tatsuya Nakamura, 'Daisansha Shikin Teikyō to Chūsai Tetsuzuki [Third Party Funding and Arbitral Proceedings]', (2017) 50 Kokushikan Hōgaku 7 (However, the author does not seem to limit the scope of the disclosure to the existence of the agreement).

18) See, generally, William W Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 629.Some include a different category of "neutrality", with different nuances. See Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitration Justice' (1989) 10 Michigan Journal of International Law 39; David A Lawson, 'Impartiality and Independence of International Arbitrators' (2005) 23 ASA Bulletin 22; Diana-Loredana Hogas, 'Insights on the Arbitrator's Requirement of Independence' (2015) Special Issue Journal of Law and Administrative Sciences 235.

19) Murray L Smith, 'Impartiality of the Party-Appointed Arbitrator' (1990) 6 Arbitration International 320.

20) Burcu Osmanoglu, 'Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' (2015) 32 Journal of International Arbitration 325.

reasonable inquiries[21] to find out about the existence of any potential conflict which may give grounds to doubt about their independence and impartiality. This, in practice, is normally accomplished by carrying out conflict check procedures customary of the legal profession. In case of third-party funding, what are the boundaries of such duty?

This explains why it is substantially impossible (and conceptually inappropriate) to deal with the issues of independence and impartiality and disclosure of the financing agreement separately. Without an appropriate disclosure of the financing agreement the arbitrator may be burdened with an unreasonable activity of looking out for potential conflicts.

In the case a funder is involved in the procedure, and the duty to disclose is properly complied with, it is necessary to consider the status of the third party. Contacts with parties or with their counsels are regulated in detail in authoritative guidelines (the IBA Guidelines being the most famous instrument in this regard), and by case-law created by arbitral institutions, which increasingly publish their decisions on confirmation procedures and challenges about independence and impartiality[22]. The world of TPF still lacks such detailed regulation and experience[23]. However, according to authoritative opinions, it is possible to put the funder basically in the same position as the party under several perspectives (serial appointments, etc.)[24]. We believe this approach is reasonable, as the interest

21） Also according to the IBA Guidelines, Standard 7 (d): “An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence”.

22） The Arbitration Institute of the Stockholm Chamber of Commerce started this trend, but now several institutions (including the ICC, LCIA, Milan Chamber of Arbitration, etc.) publish some or all their decisions on challenges based on independence and impartiality, either in full or abridged version. See also LCIA, ‘LCIA Arbitrator Challenge Digests’ (2011) 27 Arbitration International 283.

23） As mentioned, however, things are moving in the direction of some soft-law regulation. See the ICC Guidance Note for the disclosure of conflicts by arbitrators, 12 February 2016.

24） This may also be argued, by way of analogy, from the IBA Guidelines, Standard 6 (b): “If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party”. See also, Tatsuya Nakamura, ‘Daisansha Shikin Teikyō to Chūsai Tetsuzuki [Third Party Funding and Arbitral Proceedings]’, (2017) 50 Kokushikan Hōgaku

of the funder in the outcome of the dispute is at least as strong as the party's.

c. Confidentiality and Privilege

Arbitration procedures are, in principle, confidential: the logical (and legal) consequence is that only parties to the arbitration agreement, counsels, and arbitral institutions (and possibly experts involved in the proceedings) should have access to the file. Moreover, materials to which lawyers have access because of their involvement as counsels are considered, in many jurisdictions, privileged. However, in case of TPF, it is difficult (but admittedly not impossible) to imagine that a funder would be happy to be excluded from monitoring its investment, in this case the proceedings itself.

The problem is, however, more fascinating in theory than in practice, as there are many possible solutions to this issue. The involvement of third parties to an arbitration procedure is not at all uncommon, as external consultants and experts are often invited to assist the arbitral tribunal: in order to permit their access to confidential information, the duty of confidentiality is simply extended to them using a contractual arrangement. In this regard however, it is necessary to remember that the case of TPF is different: while experts are explicitly invited by the arbitral tribunal to access the file, the funder has only a contractual relationship with a party. This said, the situation is (again) not unique, as even individual parties may avail themselves of the help of third subjects.

In the Common law world, even in the absence of a specific contractual duty, the matter is covered by what is referred to as the "common interest" doctrine, according to which when a party has a legitimate interest in the outcome of a dispute they should be allowed to access the related information, and this would not be considered a violation of legal privilege or confidentiality[25).

In Civil law jurisdictions it is customary to regulate the matter by using a contractual tool, sometimes even in the form of an implicit obligation. Problems

4, 32, footnote 3.

25) See, Meriam N Alrashid and others, 'Impact of Third Party Funding on Privilege in Litigation and International Arbitration' (2012) 6 Dispute Resolution International 101.

may therefore only arise in the event that there is a breach involving somebody other than the Funder.

There are, however, other solutions. One is an explicit legislative provision granting Funders access to confidential information of the case: this is the approach taken by Hong Kong[26）].

Another (radical) option would be that of requiring the Funder to join the arbitration agreement and become an effective party to the procedure: in that case, there would be no possibility to object to its access to the file. However, this solution creates more problems than it solves: irrespective of the manifest disproportionality vis-à-vis the purpose of preventing confidentiality/privilege issues, a joinder to the procedure must also be blessed by the acknowledgement of the other party (or parties) involved. It seems to us that, given also the relative importance of this issue, that requiring the Funder to become a party to the proceedings would be excessive indeed, and other solutions would be more appropriate[27）].

d. Internationality

International commercial arbitration is a wonderful and challenging playground for the private international law scholar. Each proceeding may be governed or influenced to some extent by a plurality of legal orders, *i.e.* the law applicable to, respectively: the merits of the dispute; the procedure; the law of enforcement; the set aside procedure; and the interim measures which parties may require. In this regard, it is necessary to consider what happens in case of a TPF operation which – as it is most often the case – happens across borders. Imagine, for example, an arbitration having its seat in a country where TPF is not permitted, but in which one of the parties has its center of operation in a country where TPF is allowed

26） See, Ordinance 6/2017, Division 5, 98T.

27） Cf. Tatsuya Nakamura, ‘Daisansha Shikin Teikyō to Chūsai Tetsuzuki [Third Party Funding and Arbitral Proceedings]’, (2017) 50 Kokushikan Hōgaku 15 (The author claims that the disclosure to the Funder can be considered necessary for the access to justice and hence the party should be allowed to disclose the infomation, to a reasonable extent, to it as the exception of the duty for the confidentiality. He also claims that the party has a duty to require the Funder to keep the confidentiality).

and is funded by a Funder seated in a place where TPF is unregulated. How does the reticulate of applicable laws have an impact on the issue? First, it is necessary to deal separately with issues regarding the funding agreement itself and issues about the procedural aspects of TPF in arbitration.

As far as the agreement is concerned, fascinating as the problem may look, it is, in practice, almost irrelevant, for the following reasons. Under this perspective, the issue of TPF is, most likely, an issue of *substantive* law, outside the arbitration procedure. Hence, it should not affect the procedure itself: while of course the matter is relevant for the involved parties, and may lead to liability issues in the relationship between the Funder and the funded party, it is unlikely that it may have a direct impact on the arbitration itself.

If the thesis that the funding agreement falls entirely under matters of substantive law is accepted, then its regulation in the place of arbitration should become irrelevant: the place of arbitration, in fact, determines the law applicable to the procedure, and does not cover issues relating to the matter in dispute, more so as TPF is ancillary to the procedure but is not a part of the merits of the case.

Procedural aspects are indeed more complicated: for example, an arbitral tribunal's order directed to the parties to disclose the existence of a TPF would be regulated by the law applicable to the procedure (*i.e.*, generally speaking, the *lex loci arbitri*). Of course this is just an example, and many other aspects of TPF may have an impact on procedural, *strictu sensu*, elements (allocation of costs, disclosure of documents, etc.)[28]: in this regard, it seems that the intervention of the procedural mandatory rules of the seat of arbitration (constituting international procedural public policy[29]) would be inevitable.

Also when considering enforcement, we have a bifurcation: as far as the funding agreement is concerned, the very fascinating problem so intriguing for the international law scholar becomes gray and rather dull. The only leeway to make it fascinating again is to imagine a country where TPF is considered contrary to

28) Nicolas Costabile and Anthony Lynch, 'Applicable Law in Arbitrations Involving Third-Party Funding Agreements' (2017) 30 Spain Arbitration Review 165.

29) Laurence Shore, 'Applying Mandatory Rules of Law in International Commercial Arbitration' in George A Bermann and Loukas A Mistelis (eds), *Mandatory rules in international arbitration* (Juris Publishing LLC 2011).

the public policy of the national legal order: this could lead to refusal to recognize and enforce an award under Art V 2(b) of the New York Convention. Yet, no country so far has expressed such a radical attitude, and even some very conservative countries (like Ireland) have stated that TPF is not allowed in *litigation*, but there is no certainty that such prohibition would also extend to *arbitration*. However, if some procedural issue affected by TPF had had an impact on the procedure, up to resulting in a violation of due process, even a national court entrusted with the recognition and enforcement of the award would need to consider the matter and may well deny *exequatur* on that basis.

The issue of conflict of laws may, in any case, become more interesting in a *de jure condendo* perspective. If further regulation is created, providing, for example, disclosure duties, that may have a stronger impact in the framework of violation of mandatory provisions of national laws. But for the time being international jurists should curb their enthusiasm and adopt a skeptical stance.

e. Professional ethics issues[30)]

The legal community has long struggled to create a truly “international” professional ethics regulation: international commercial arbitration is, by its own nature, conducted across countries and, most of the time, handled by lawyers coming from different jurisdictions. Since the regulation of professional ethics is still largely a national matter, it may well happen that counsel involved in the same proceedings are subject to different deontological standards. This of course may lead to an unequal playing field, and the issue has been dealt with in many ways by some influential organizations like the IBA[31)].

The matter of professional ethics is indeed one of the spikiest points relating to TPF, especially so as conflicts of interest may easily arise between counsel to the

30） On the ethical implications of TPF see generally Valentina Frignati, ‘Ethical Implication of Third-Party Funding in International Arbitration’ (2016) 32 Arbitration International 502.

31） See, the IBA Guidelines on Party Representation in International Arbitration, 2013. The Guidelines are extensively commented by Peter Ashford, *The IBA Guidelines on Party Representation in International Arbitration* (Cambridge University Press 2016).

parties and to the Funder. Sometimes the Funder may have a positive interest in reaching a settlement to recover their investment, but this might not be in the best interest of the funded party. The Funder and the funded party may disagree on the choice of the arbitrator to be appointed, or about which defense strategy may be the most effective for the dispute at stake. For these reasons also, it is necessary to require a very strict standard of professional ethics, and to limit any positive interference of the Funder or its counsels in the procedure. This is the approach taken, for example, by the Code of Conduct of the ALF of England and Wales[32].

This problem seems to be sometimes underestimated by professionals involved in funded cases: evidence suggests that lawyers often act as brokers between Funders and funded parties, but this may lead them to walk into a conflict of interest which is inappropriate, if not explicitly forbidden, under most national codes of conduct.

Aside from these blatant cases of conflict, other situations may be problematic as well: for example, during the due diligence stage inevitably performed by the Funder. Is the evaluation of the chances of success “legal advice”, as such reserved to qualified attorneys under several countries’ professional law (*e.g.*, the Japanese *Bengoshi hō*)? While the answer is probably negative[33], it is still a point worth mentioning when approaching such matter.

There are of course other issues, and it would be impossible to draw a general picture comprising all possible problems. It is however, necessary to keep in mind that national ethical codes of conducts (or professional legislations) may be, in comparative terms, surprising[34]: hence caution – accompanied with proper comparative research - should always be the guiding principle.

f. Enforcement of the Award

The final theoretical point in this paper regards the enforcement of the award.

32) ALF Code of Conduct, 9.3

33) Tatsuya Nakamura, ‘Daisansha Shikin Teikyō to Chūsai Tetsuzuki [Third Party Funding and Arbitral Proceedings]’, (2017) 50 Kokushikan Hōgaku 34-35.

34) For example, under the Italian Code of Conduct for Lawyers, Art. 42, it may be problematic to evaluate critically the professional advice rendered by another lawyer.

As is well known, arbitration proceedings only bind the parties who are signatories to the arbitration agreement, and the same principle applies to enforcement: an award may only be enforced against a party to the arbitration. Yet, the in the case of TPF, it may well be the case that the party to the procedure (*i.e.* the funded party) does not have enough resources to comply (either spontaneously or forcibly) with an unfavorable award, while a subject formally external to the dispute – but still associated with it – (*i.e.* the Funder) would be able to financially settle the matter. While of course the relationship between the funded party and the Funder is regulated in the financing agreement, the other party to the arbitration is external to such contractual relationship, and therefore has no direct way of extracting money from the Funder.

There is a heated debate about whether, and to which extent, it would be appropriate to allow a winning party to have direct redress about the financial entity founding their opponent. Two solutions are put forward: one would be to impose on the Funder some form of waiver, under which they automatically and preventively renounce any resistance to payment. In this case, the funding agreement would also embody a warranty.

The other, again radical, solution would be to require the Funder to enter the arbitration agreement for the purpose of enforcement. While the practical attractiveness of this option is clear (it would be possible to enforce the award against a party with no further issues), it seems that would be a distortion, a misunderstanding about what the TPF is about.

Moreover, the doubt about whether TPF should necessarily imply some specific regulation as for the enforcement is not easy to solve. As practice shows, it has become somehow “fashionable”[35] to ask for security for costs when a Funder is

35） Pierre Karrer and Marcus Desax, ‘Security for Costs in International Arbitration – Why, When and What If…’ in Robert G Briner and others (eds), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (Heymann 2001); Philippe Pinsolle, ‘Third Party Funding and Security for Costs’ (2013) 2 Cahiers de l’arbitrage/Paris Journal of International Arbitration 399; Anna Joubin-Bret, ‘Spotlight on Third-Party Funding in Investor-State Arbitration: RSM Production Corporation v Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint-Lucia’s Request for Security of Costs, 13 August 2014 (Siegfried Elsing, Gavan Griffith, Edward Nottingham)’ (2015) 16 The Journal of World Investment & Trade 727; Miriam Harwood and others, ‘Third-Party Funding: Security for Costs and Other Key Issues’ (2017) 2 The

involved. The narrative is that the very existence of a funding agreement is a symptom of the lack of financial resources: according to available sources, this largely misrepresents the reality of TPF. It seems therefore that there are no convincing grounds by which the evaluation of the opportunity to grant security for costs should be evaluated any differently because of the presence of a TPF agreement[36).

3. Conclusions

The debate about TPF is a positive sign of how vital and vibrant the world of international commercial arbitration is. Moreover, it casts a light on a practice which has been going on under the radar for several years, and now receives its fair share of attention. However, one should not mistake the fashionableness of a topic with the need to intervene in it. As mentioned, TPF-like schemes have been ongoing for decades, without much hassle: the spotlight should not be mistaken for the need to intervene with heavy regulation, which would probably cause more harm than benefit.

It is desirable however that legislators and courts alike take a clear stance about the legitimacy of TPF as a whole, and provide some straightforward indications about its criticalities. In law, uncertainty is extremely dangerous: the recent legislative reforms in Australia, Hong Kong and Singapore go in the direction of clarity; the decision by the Supreme Court of Ireland shows why such clarity is needed. This said, a niggling regulatory exercise is not needed, at least from the legislator: details should be left, as it is often the case in international commercial arbitration, to the learned and active arbitration community. In this sense, arbitration institutions, lawyers' organization, funders' associations and – last but not least – academics may provide guidance for a healthy and robust development of TPF.

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36) On the issue in general see Karrer and Desax (n 35).