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**Third-Party Funding in International Commercial Arbitration:**

**Financing Justice or Compromising Integrity?**

An Analysis of Opportunities, Regulatory Frameworks and Risks

Eingereicht am: 29.08.2025



## Erklärung

Ich versichere hiermit, dass ich die anliegende Arbeit mit dem Thema

**Third-Party Funding in International Commercial Arbitration: Financing Justice or Compromising Integrity? An Analysis of Opportunities, Regulatory Frameworks and Risks**

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Nürnberg, 29. August 2025

Natalie v. Bla

Natalie Freiin von Beust

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## Erklärung

Ich erkläre mich hiermit mit der Einsichtnahme in die anliegende Arbeit mit dem Thema

**Third-Party Funding in International Commercial Arbitration:  
Financing Justice or Compromising Integrity? An Analysis of  
Opportunities, Regulatory Framework and Risks**

durch Teilnehmer/-innen nachfolgender Jahrgänge  
im Master-Studiengang Mediation und Konfliktmanagement  
an der Europa-Universität Viadrina Frankfurt (Oder)

einverstanden.

Nürnberg, am 29. August 2025  
Nürnberg 29. August 2025

Natalie v. Blk  
(Unterschrift)

## Abbreviations

ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
Art.	Article
BRAO	Bundesrechtsanwaltsordnung (German Federal Code for Lawyers)
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC	China International Economic and Trade Arbitration Commission Hong Kong
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Arbitration Institute)
EU	European Union
EUR	Euro
HKIAC	Hong Kong International Arbitration Centre
Hong Kong	Hong Kong Special Administrative Region of the People's Republic of China
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LCIA	The London Court of International Arbitration
NDA	Non-disclosure Agreement
RAD	Representative Actions Directive 2020/1828 in its consolidated version of 13/12/2024
RVG	Rechtsanwaltsvergütungsgesetz (German Lawyers' Fee Act)
SIAC	Singapore International Arbitration Centre
SIarb Guidelines	SIarb Guidelines for Third Party Funders
SCIA	Shenzhen Court of International Arbitration
TEU	Treaty on European Union (2009)
TFEU	Treaty on the Functioning of the European Union (2009)
TPF	Third-Party Funding
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
USD	United States Dollar
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

## Abstract

### Titel der Arbeit:

Drittfinanzierung in der internationalen Handelsschiedsgerichtsbarkeit: Finanzierung von Gerechtigkeit oder Gefährdung der Integrität?

Eine Analyse von Chancen, Regulierung und Risiken

Diese Masterarbeit untersucht die Rolle und Auswirkung von Drittfinanzierung (Third-Party Funding – TPF) in der internationalen institutionellen Handelsschiedsgerichtsbarkeit. Im Mittelpunkt steht die Frage, ob TPF den Zugang zur Justiz fördert oder die Integrität des Schiedsverfahrens kompromittiert. Die Arbeit ordnet TPF in den Kontext zunehmender Komplexität und Kosten internationaler Schiedsverfahren ein und analysiert die Beweggründe für die Inanspruchnahme externer Finanzierung. Der Schwerpunkt liegt auf der vergleichenden Betrachtung der regulatorischen Rahmenbedingungen in der Europäischen Union, Deutschland und Asien und insbesondere in den führenden Schiedsjurisdiktionen in der Sonderverwaltungszone Hong Kong, Singapur und der Volksrepublik China. Zudem werden die Chancen von TPF zur Verbesserung des Zugangs zur Justiz beleuchtet, sowie die Risiken und Interessenskonflikte und daraus entstehenden Herausforderungen für die zentralen Akteure des Schiedsverfahrens herausgearbeitet. Die Arbeit entwickelt schließlich Empfehlungen für die Gestaltung von TPF-Vereinbarungen und institutionellen Schiedsregeln, um ein Gleichgewicht zwischen finanzieller Unterstützung und Verfahrensintegrität zu gewährleisten und TPF als Instrument für einen fairen und effektiven Zugang zur internationalen Handelsschiedsgerichtsbarkeit zu etablieren.

Title of the Thesis:

Third Party Funding in International Commercial Arbitration: Financing Justice or Compromising Integrity?

An Analysis of Opportunities, Regulatory Frameworks and Risks

This master's thesis examines the roles and impact of Third-Party Funding (TPF) in international institutional commercial arbitration. The central question is whether TPF promotes access to justice or compromises the integrity of arbitral proceedings. The thesis situates TPF within the context of increasing complexity and costs in international commercial arbitration and analyzes the motivations for seeking external funding. A particular focus is placed on the comparative analysis of regulatory frameworks within the European Union with an emphasis on Germany and Asia, especially in the leading arbitral jurisdictions of Hong Kong (Special Administrative Region), Singapore and the People's Republic of China. Furthermore, the thesis explores the opportunities TPF offers for improving access to justice, as well as the risks, conflicts of interest and resulting challenges for the key actors in arbitration. Finally, recommendations are developed for the design of TPF agreements and institutional arbitration rules to ensure a balance between financial support and procedural integrity, and to establish TPF as a tool for fair and effective access to international commercial arbitration.

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## I. Introduction

*“Money is only a tool. It will take you wherever you wish, but it will not replace you as the driver”*

- Ayn Rand

As ADR and especially arbitration continues to globalize, TPF is no longer a new topic in the context of ADR. There is, however, a shift in focus from the issue of whether to permit TPR to the question of how to regulate TPF.<sup>1</sup> TPF has emerged as a powerful tool to enhance access to justice, enabling financially constrained parties to pursue meritorious claims that might remain unaddressed otherwise. However, the benefits of TPF are accompanied by significant concerns regarding the core principles of ADR such as neutrality, independence and confidentiality, which underpin the legitimacy of ADR proceedings. There is a constant tension between freedom of financial support which ensures access to dispute resolution, and procedural integrity aimed at preserving procedural fairness and party autonomy. Who really is the driver in the driver's seat and is holding the steering wheel when TPF is involved in arbitration proceedings?

This master's thesis shall illuminate the regulatory framework of TPF within international<sup>2</sup> institutional commercial arbitration with a special focus on the key arbitration jurisdictions in Europe and Asia and shall critically question the role identity of all parties involved in the arbitration proceedings. This thesis shall contribute to the ongoing debate on the legitimacy, future role and extent of TPF in international institutional commercial arbitration, striking a balance between legal accessibility through financial support and procedural integrity.

## II. TPF: Reasons, Key Actors and Typical Forms

Although there is no unified definition of TPF<sup>3</sup>, it is widely defined as *“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*

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<sup>1</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.1.

<sup>2</sup>With “international arbitration” the author refers to any cross-border dispute dealt within arbitration.

<sup>3</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.3.

*to finance part or all of the costs 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”<sup>4</sup>.*

Thus, TPF refers to the provision of funding by a private third party usually driven by commercial interest in arbitration on a non-recourse basis in return for a proportion of the final proceeds.<sup>5</sup>

## **1. Reasons for TPF**

Dispute resolution methods were developed for anyone who is (or feels) unlawfully harmed and is thus entitled to access to justice to recover damages from those responsible for the harmful conduct.<sup>6</sup> For individuals who cannot afford to initiate formal legal proceedings, most modern dispute resolution methods - especially litigation and ADR methods – offer assistance schemes designed to cover legal fees and court costs, thereby ensuring access to justice.<sup>7</sup> Only lately, however, access to justice emerged as a concern not solely for those classified indigent claimants under statutory legal aid thresholds.<sup>8</sup> The rising costs and increasing complexity of dispute resolution, coupled with economic pressure, have also made it significantly more challenging for entities that would otherwise appear to possess adequate resources to resolve their disputes.<sup>9</sup> Claimholders might either not be able to afford the costs of legal proceedings or might not want to use their capital for the pursuit of a claim when the same money could be used for the core business.<sup>10</sup> Additionally, the ongoing worldwide elevated inflation has led individuals and companies to become more cautious regarding costs and risks, while also constraining state budgets.<sup>11</sup> Not

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<sup>4</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.50.

<sup>5</sup>B.Zhang, Third Party Funding for Dispute Resolution, Preface.

<sup>6</sup>G.M.Solas, Third Party Funding, p.1.

<sup>7</sup>Ibid.

<sup>8</sup>Ibid.

<sup>9</sup>Ibid.

<sup>10</sup>N.Pitkowitz, Jevtic & Fremuth-Wolf, Handbook on Third-Party Funding, p.203.

<sup>11</sup>G.M.Solas, Third Party Funding, p.35; A. Flynn, N. Byrom, J. Hodgson, Access to Justice: A Comparative Analysis of Cuts to Legal Aid, Introduction; ifo Institute: Economic Experts Survey (EES) 09/04/2025, Inflation Rates to Rise Worldwide.

only have there been general cuts on spending by states but also restrictions on the provision of legal aid while court costs have been increasing.<sup>12</sup> These developments have raised obstacles to accessing justice and have generated market demand for mechanisms that facilitate the sharing of dispute resolution risks and costs.<sup>13</sup> One could say that the rising demand for TPF is partly due to a lack of public funds for dispute resolution which leads to a need for external private financing.<sup>14</sup> Recently, a number of well-capitalized and legally knowledgeable organizations have therefore offered to assume the costs and also the risks associated with legal disputes on behalf of the parties in return for a portion of any amounts recovered, i.e. TPF.<sup>15</sup> Third-party funders<sup>16</sup> carry out thorough due diligence to ensure they support cases with a realistic prospect of success and indicate the claim's strength, thereby aligning their interests with those of the party receiving the funding and at the same time assuming the financial risk associated with the legal proceedings.<sup>17</sup> Therefore the party funded gains reassurance about the merits of their claim which basically leads to quality control through the Third-party funder. Either the Third-party funder – usually a company - has an in-house team specialized on due diligence questions or the funders include the review of the claim assessment by the client's counsel.<sup>18</sup> The use of AI and machine learning increasingly support this due diligence process and are expected to improve the accuracy of the predictions about case outcomes, allowing for more effective capital allocation.<sup>19</sup> The costs of the due diligence process are either paid by the funder, the party seeking funding, or advanced by the counsel of the client, in which case the costs are covered by the funder retroactively in the event that the funder decides to fund the case.<sup>20</sup>

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<sup>12</sup>G.M.Solas, *Third Party Funding*, p.35.

<sup>13</sup>Ibid.

<sup>14</sup>B.Zhang, *Third Party Funding for Dispute Resolution*, p. 2: Li, X.Y. (2024), *Third-Party Funding in International Arbitration*, *Beijing Law Review*, 15, p.296.

<sup>15</sup>G.M.Solas, *Third Party Funding*, p.2.

<sup>16</sup>In accordance with the English language the generic masculine form is used: unless otherwise indicated, it refers to all genders.

<sup>17</sup>N.Pitkowitz, Jevtic & Fremuth-Wolf, *Handbook on Third-Party Funding*, p.204.

<sup>18</sup>M.Scherer, A.Goldsmith, C.Fléchet, *Third Party Funding in International Arbitration Part 1*, p.214.

<sup>19</sup>F.Pérez, *Litigation Funding in International Arbitration*, *Kluwer Arbitration Blog*, 20/06/2025.

<sup>20</sup>M.Scherer, A.Goldsmith, C.Fléchet, *Third Party Funding in International Arbitration Part 1*, p.214.

It is no wonder, international arbitration has witnessed “[an] explosion of the industry of TPF”<sup>21</sup> as it facilitates access to justice and enables risk mitigation on the one hand but is also a source of lucrative business for the funders on the other hand. Apart from this, the driving forces of TPR, however, are undoubtedly the increasing costs associated with arbitration proceedings as well as the growing recognition of TPF as a valid method for funding legal proceedings.<sup>22</sup> The costs of an arbitration proceeding are divided into legal costs including attorneys’ fees and expenses or costs associated with experts and witnesses and arbitration costs<sup>23</sup> including the fees and expenses of the arbitrators and any institution administering the case (i.e. tribunal fees).<sup>24</sup> On average, arbitration costs and tribunal fees alone, with a dispute value of USD 1M with three arbitrators at an ordinary procedure within the ICC, according to the cost calculator of the ICC amount to USD 39,379.00 per arbitrator and USD 141,472.00 additional tribunal fees.<sup>25</sup> As stated by the cost calculator of the HKIAC, the same procedure would on average amount to USD 828.05/hour per arbitrator and USD 4,458.76 additional tribunal fees.<sup>26</sup> In Singapore, the same procedure would on average amount to USD 104,945.00 arbitrators’ fees with additional USD 8,741.75 administration fees.<sup>27</sup> By way of comparison, a German court proceeding with a value in dispute of USD 1M (equiv. EUR 862,400.00<sup>28</sup>) would incur court costs (including the cost for the judge but excluding any lawyers costs) of only EUR 49,195.89 under the German Lawyers Fees Act. TPF is intended to reduce the arbitral cost burden, “*becoming a principal steward of financial resources, a potent force for funding sources, and a cardinal vehicle for funding development*”<sup>29</sup>.

As global business is thriving and increasing cross-border transactions create more international disputes, arbitration proceedings become indispensable.<sup>30</sup> Arbitration

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<sup>21</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN, p.101.

<sup>22</sup>B.Zhang, Third Party Funding for Dispute Resolution, p. 2: Li, X.Y. (2024), Third-Party Funding in International Arbitration, Beijing Law Review, 15, p.296.

<sup>23</sup>e.g. Art. 38 ICC Arbitration Rules in force from January 2021.

<sup>24</sup>Nedden/Herzberg/, in Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 38 sec.5.

<sup>25</sup><https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/costs-calculator/> (last vis. 16/06/2025).

<sup>26</sup><https://hkiac.org/arbitration/fees/administered-arbitration-fees/fee-calculator-2024> (last vis. 16/06/2025).

<sup>27</sup><https://siac.org.sg/fee-calculator> (last vis. 16/06/2025).

<sup>28</sup>USD-EUR exchange rate on 16/06/2025.

<sup>29</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.1.

<sup>30</sup>Li,X.Y. (2024), Third-Party Funding in International Arbitration, Beijing Law Review, 15, p.296.

is favored by multinational companies for its neutrality, enforceability, confidentiality and flexibility, offering an effective and adaptable solution to resolve disputes arising from different legal and cultural backgrounds.<sup>31</sup> The rise of specialized arbitral institutions and rules further supports the arbitration's role as the preferred method for settling international business disputes.<sup>32</sup> Thus, TPF has been on the rise, reflecting the flourishing of global business with its resulting disputes.<sup>33</sup>

## 2. Key Actors and Typical Options of TPF

All forms of TPF have in common that they require someone other than the disputing parties to cover some cost, i.e. a party's legal fees, an order, award or judgement rendered against the funded party, during the proceedings.<sup>34</sup> Originally, TPF was conceived as a funding model where funders provide a party with the necessary funds in a particular legal dispute in exchange for a portion of the outcome without taking an active part in the resolving of the dispute.<sup>35</sup> However, nowadays funders tend to play a more active role in the disputes which goes far beyond mere lenders.<sup>36</sup> The choice of TPF determinates the law applicable for the financing relationship and thus also for key aspects such as validity of the agreement, the relationship between the contractual parties and the influence of the funder on the legal disputes.<sup>37</sup> In the context of international arbitration, TPF is often "*classified as either subset or a close cousin of litigation funding*"<sup>38</sup>, however, there are a few aspects that differ from the general nature of litigation funding.<sup>39</sup>

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<sup>31</sup>Li,X.Y. (2024), Third-Party Funding in International Arbitration, *Beijing Law Review*, 15, p.296.

<sup>32</sup>Ibid.

<sup>33</sup>Ibid.

<sup>34</sup>M.F.Sweify, *Third Party Funding in International Arbitration*, p.2; L.B.Nieuwveld, V.S. Sahani, *Third-Party Funding in International Arbitration*, p.1.

<sup>35</sup>M.F.Sweify, *Third Party Funding in International Arbitration*, p.2.

<sup>36</sup>Ibid.

<sup>37</sup>Ibid.

<sup>38</sup>L.B.Nieuwveld, V.S. Sahani, *Third-Party Funding in International Arbitration*, p.1.

<sup>39</sup>Ibid.

## a) Key Actors

The players in TPF are the client and subsequently party of a legal dispute - claimant but also respondent<sup>40</sup> - and the funder.

Clients of TPF are often corporations, law firms, sovereign states or individuals, who initiate a claim, i.e. the claimant, or defend against a claim, i.e. the respondent, in an arbitration proceeding.<sup>41</sup> Clients seeking TPF will be asked by the funder to provide information about the dispute to be funded so that the funder can assess the claim.<sup>42</sup> Consequently, the funder will evaluate in detail the strengths and weaknesses of the claim or defense, the probability of success and the ability to recover the losing party within a thorough due diligence process.<sup>43</sup>

The funder, i.e. "*the entity supplying the financial backing*"<sup>44</sup>, may be the client's attorney or law firm, an insurance company or any other outside corporation or (financial) institution.<sup>45</sup> As TPF has emerged as a powerful tool in litigation and arbitration institutions focusing exclusively on TPF have emerged, as opposed to traditional investors who include litigation and arbitration claims merely as one component within a broader portfolio of conventional financial assets.<sup>46</sup> Most of these specialized funding entities are based in countries where the TPF industry is extensively evolved, i.e. especially in the USA and the UK, but as TPF is gaining momentum in Asia, the landscape of specialized entities is also growing there.<sup>47</sup>

## b) Typical Options of Funding Relationships

While a wide range of potential funding relationships and agreements exists, non-recourse financing with repayment contingent on success - herein referred as TPF - represents the "*quintessential scenario*"<sup>48</sup> in international arbitration.<sup>49</sup> Other typical

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<sup>40</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.2.

<sup>41</sup>Ibid.

<sup>42</sup>Ibid.

<sup>43</sup>Ibid.

<sup>44</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.3.

<sup>45</sup>Ibid.

<sup>46</sup>Ibid.

<sup>47</sup>Ibid.

<sup>48</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.7.

<sup>49</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.3.

options of funding relationships are attorney financing, insurance, loans and assignment of a claim.<sup>50</sup>

### (1) Attorney Financing

In attorney financing, the funder is and must be an attorney directly involved in the pending dispute, who argues the case and thus functions as both funder and attorney.<sup>51</sup> Depending on the law applicable to the agreement, attorney financing can take the form of pro bono, contingency or conditional fee arrangements.

Strictly speaking, pro bono representation is not a form of funding but it is regarded as such because there is no cash flow between the attorney and the client - the attorney assumes the costs of representing the client, who does not have the financial resources on their own, without any promise or expectation of reimbursement or profit.<sup>52</sup> Pro bono funding is mostly motivated by a political or social cause, thus the funder agrees not to receive any direct benefits from the proceeding of the case funded.<sup>53</sup> In the event of contingency representation the attorney's fee is contingent upon the client obtaining a monetary compensation.<sup>54</sup> The attorney usually advances the costs of legal representation for the client, and is later reimbursed for expenses, as well as receiving an additional fee (i.e. the contingency fee) calculated as a portion or percentage of the recovered amount.<sup>55</sup> Therefore, if the dispute is lost, the attorney will not receive any contingency fee.<sup>56</sup> Conditional attorney funding refers to an arrangement in which the attorney receives a discounted fee unless the client wins the case; if the client is successful, the attorney is paid the regular hourly rate plus an additional bonus for winning the case.<sup>57</sup> In case of conditional attorney funding, the attorney will at least receive some remuneration for their efforts.<sup>58</sup> All of the attorney financing models have in common that the client

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<sup>50</sup>L.B.Nieuwveld, V.S. Sahani, *Third-Party Funding in International Arbitration*, p.3ff; M.F.Sweify, *Third Party Funding in International Arbitration*, p.3ff.

<sup>51</sup>M.F.Sweify, *Third Party Funding in International Arbitration*, p.4.

<sup>52</sup>*Ibid.*

<sup>53</sup>T.H.Tu Linh & B. Trung Hieu, *Third Party Funding in Commercial Arbitration in ASEAN*, p.103.

<sup>54</sup>M.Steinitz, *Whose Claim Is This Anyway?*, 08/2011, p.1292f.

<sup>55</sup>*Ibid.*

<sup>56</sup>*Ibid.*

<sup>57</sup>M.Steinitz, *Whose Claim Is This Anyway?*, 08/2011, p.1279; L.B.Nieuwveld, V.S. Sahani, *Third-Party Funding in International Arbitration*, p.5.

<sup>58</sup>M.F.Sweify, *Third Party Funding in International Arbitration*, p.5.

keeps direct control over the management of their case even if the attorney assumes most / all of the risk of the client losing the case.<sup>59</sup>

## (2) Insurance

Insurance companies undertake to cover the costs of legal representation in proceedings to defend against liability or recover damages or to pay any award, order or judgement rendered against the insured or both.<sup>60</sup> A central characteristic of insurance agreements is that the insurer assumes significant, if not complete, authority over the handling of the claim, including the settlement of any negotiations or the withdrawal from claims, thereby limiting the direct involvement of the insured party in their own case.<sup>61</sup>

There are two specific types of insurance known as “Before-The-Event”<sup>62</sup> and “After-The-Event”<sup>63</sup> insurance, which are designed to cover either the insured’s own legal costs, the legal costs of the opposing party in the event of an unsuccessful outcome, or both.<sup>64</sup> As these two specific types of insurance cover the attorney fees and necessary expenses to pursue or defend against a claim, they generally do not require the client to give up control over the management of their own case.<sup>65</sup> In exchange, however, the client might be obliged to personally cover any judgement or award if the case is unsuccessful.<sup>66</sup>

## (3) Loans

Loans are to be repaid irrespective of the ultimate outcome of the dispute.<sup>67</sup> A client may obtain financing in form of a loan from a law firm, a bank or any other financial institution with the main benefit that the client maintains full authority and control

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<sup>59</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.5.

<sup>60</sup>M.Steinitz, Whose Claim Is This Anyway?, 08/2011, p. 1295ff.

<sup>61</sup>Ibid.

<sup>62</sup>i.e. insurance before legal action is contemplated due to an event.

<sup>63</sup>i.e. insurance after legal action has already begun.

<sup>64</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.4.

<sup>65</sup>Ibid.

<sup>66</sup>Ibid.

<sup>67</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.6.

over the conduct of the dispute.<sup>68</sup> The drawback, however, is that the client cannot offset any risk of an unfavorable result of the dispute, as the loan remains repayable regardless of how the dispute is resolved.<sup>69</sup>

#### (4) Assignment of Claims

As parties are free to assign their contractual rights to others - unless prohibited by law or the contract itself - they can easily transfer their claims to third parties and leave the dispute to the assignee.<sup>70</sup> Assignment of claims typically take place in the context of significant corporate events, including restructuring, asset sales, as well as during liquidation proceedings in the course of bankruptcy, insolvency or comparable legal proceedings.<sup>71</sup>

#### (5) TPF as Non-Recourse Financing with Repayment Dependent on Success

*“Classic Third-Party Funding”*<sup>72</sup> is the main subject of this master’s thesis in the form of *“non-recourse financing, where repayment is contingent on the client’s success in the dispute”*<sup>73</sup> and herein referred to as TPF. In this case the funder is an external entity, i.e. not a party to the dispute<sup>74</sup>, which has complete freedom in deciding the extent of its financial commitment in a specific dispute and can thus provide more protection than any insurance and depending on the TPF agreement is allowed to be involved in the case on a daily basis and might also have an active role in strategic decision-making.<sup>75</sup> TPF is intended to optimize the anticipated financial return from the lawsuit, thus the only interest of funders is in providing financing to the client in exchange for a return on investment in case of success of the case.<sup>76</sup> TPF goes beyond

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<sup>68</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.3; L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.6.

<sup>69</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.6.

<sup>70</sup>M.Steinitz, Whose Claim Is This Anyway?, 08/2011, p. 1296; M.F.Sweify, Third Party Funding in International Arbitration, p.9.

<sup>71</sup>M.Steinitz, Whose Claim Is This Anyway?, 08/2011, p. 1296; L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.6.

<sup>72</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.7.

<sup>73</sup>Ibid.

<sup>74</sup>N.Pitkowitz, M.A. Müller, Handbook on Third-Party Funding, p. 5.

<sup>75</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.5ff; Li, X.Y. (2024), Third-Party Funding in International Arbitration, Beijing Law Review, 15, p.298.

<sup>76</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.6; Li, X.Y. (2024), Third-Party Funding in International Arbitration, Beijing Law Review, 15, p.298.

any attorney funding as funders do not have to be attorneys and furthermore, TPF offers a thorough evaluation of the claim addressing both its legal merits and financial implications, as the funder subjects the claim to an extensive due diligence process before approving the funding.<sup>77</sup> The principal amount covered by the funding agreement - unless a cap budget has been agreed upon - grows over time in line with the costs incurred in pursuing the legal claim, without any interest being charged.<sup>78</sup> The funder's return rises with a higher recovery and falls with a lower recovery, or is forfeited entirely if the claim is unsuccessful.<sup>79</sup> In case of a failure of the claim, the funder has no recourse against the funded party for reimbursement of expenses or access to any other assets of the funded party.<sup>80</sup> Because of the high risks involved, funders tend to fund only cases with a more than likely probability of recovery and adequate returns, resulting in only approximately 10% of applications being approved for funding.<sup>81</sup> The decision to provide funding is based on the merits of the case, the economics of the proposed investment and the enforceability of any award.<sup>82</sup>

The funder exercises significantly less control than an insurer; in principle, funders do not argue the case and are not directly involved in the dispute.<sup>83</sup> There has been a shift, however, from passive funders who only provide parties with the necessary financials in exchange of a percentage of the outcome, to more active funders who take influence on the dispute itself.<sup>84</sup> So, while some funders still see themselves only as funding the client, who has the full decision-making authority in the dispute, other funders with principal investing, tend to acquire decision-making authority for themselves.<sup>85</sup>

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<sup>77</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.5; U.Sinha, A Step to the fore in Arbitration – Third-Party Funding, 11/2022.

<sup>78</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.7.

<sup>79</sup>Ibid.

<sup>80</sup>Ibid.

<sup>81</sup>N.Pitkowitz,A. Jevtic and A. Fremuth-Wolf, Handbook on Third-Party Funding, p.204; Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.25.

<sup>82</sup>Li, X.Y. (2024), Third-Party Funding in International Arbitration, Beijing Law Review, 15, p.298.

<sup>83</sup>M.F.Sweify, Third Party Funding in International Arbitration, p.4.

<sup>84</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.7; M.F.Sweify, Third Party Funding in International Arbitration, p.2.

<sup>85</sup>M.Sweify, Third Party Funding in International Arbitration, p.97.

In terms of content, TPF primarily distinguishes between funding of claims and funding by interest in the procedure.<sup>86</sup> In the case of claims funding one can distinguish between consumer and commercial claims; whilst in consumer claims funding, the funder would invest in rather low value personal injury claims, commercial claim funding involves the funding of large businesses or wealthy individuals with disputes of higher value.<sup>87</sup> Commercial claims funding with regard to contract and commercial disputes is regarded as the “*most dominant model of TPF*”<sup>88</sup> as consumer claim funding is not very promising due to the lack of hard evidence and thus problems of proof and low amounts in dispute.<sup>89</sup>

Looking at funding by interest in the procedure, there is either funding with direct economic interest, i.e. the funder’s interest in the arbitration proceeding following the funding agreement or funding with indirect economic interest through a series of contractual agreements or relationships, with the most prevalent example being law firm financing, where law firms obtain funding from Third-party funders under agreements structured as loans, rather than through the conventional “*no win, no fee*”<sup>90</sup> TPF.<sup>91</sup>

One could also distinguish between funding by markets, where as a “*primary-market funder*”<sup>92</sup> would be the funder, who first made an agreement with a party part of an arbitration proceeding, and the “*secondary-market funder*”<sup>93</sup> being an entity, to which the securities of the first funder have been transferred in form of a claims trade without the funded party being involved.<sup>94</sup>

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<sup>86</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p.101f.

<sup>87</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p.102.

<sup>88</sup>C.Veljanovski, TPF in Europe, p.418.

<sup>89</sup>Ibid.

<sup>90</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p.103.

<sup>91</sup>Ibid.

<sup>92</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p.104.

<sup>93</sup>Ibid.

<sup>94</sup>Ibid.

### III. Regulatory Frameworks in Europe and Asia

As mentioned above, this master's thesis is focused on the key arbitration jurisdictions in the EU and Asia as these regions host the most preferred seats for arbitration worldwide.<sup>95</sup> These include in particular Paris, Singapore, Hong Kong and Beijing, as well as London, which - despite the UK's withdrawal from the EU - remains one of the leading global arbitration venues.<sup>96</sup> The five most favored arbitral rules are the ICC Rules, HKIAC Rules, SIAC Rules, LCIA Rules and UNCITRAL Rules.<sup>97</sup> However, the CIETAC Rules are also particularly preferred by Asia-Pacific users - the top five preferred sets of arbitration rules by region starting from position one in Asia-Pacific are the HKIAC Rules, followed by the SIAC, ICC, CIETAC and SCIA Rules.<sup>98</sup> In Europe, ICC Rules come first, followed by the LCIA, SIAC, UNCITRAL and ICSID Rules.<sup>99</sup>

Arbitration proceedings can be conducted in two ways: with the support of an arbitral institution ("institutional arbitration") or without the support of such an institution ("ad hoc arbitration").<sup>100</sup> As this master's thesis focuses only on institutional arbitration, it does not consider any ad hoc arbitral regulations concerning TPF. In this respect, neither the UNCITRAL Model Law 1985 nor the UNCITRAL Arbitration Rules 2012 are explicitly analyzed in relation to TPF regulations, even though they might form the basis of many institutional regulations. The ICSID Rules are also excluded from the following analysis as they are specialized rules on investment arbitration.

To provide an overview of the most preferred institutional arbitration regulations in the EU and Asia, this master's thesis will take a closer look at the arbitral rules of the ICC, HKIAC, SIAC and CIETAC, as well as the general regulations on TPF in the EU. Due

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<sup>95</sup>School of International Arbitration of Queen Mary University of London, International Arbitration Survey The path forward, 2025, p.5.

<sup>96</sup>Ibid.

<sup>97</sup>Ibid.

<sup>98</sup>School of International Arbitration of Queen Mary University of London, International Arbitration Survey The path forward, 2025, p.9.

<sup>99</sup>School of International Arbitration of Queen Mary University of London, International Arbitration Survey The path forward, 2025, p.5.

<sup>100</sup>Nedden/Herzberg/Kopetzki, in Nedden/Herzberg/Kopetzki, ICC-SchO, introduction, paragraph 9.

to the author's professional experience in Germany, the thesis will also provide a brief insight into the regulations of the DIS.

## **1. Regulatory Frameworks in the EU**

### **a) EU**

There are currently no specific regulations concerning TPF in arbitration at EU level, which, at first sight is surprising given that TPF in the EU is considered "*a problem to be regulated, rather than an opportunity to increase access to justice*"<sup>101</sup> but comprehensible when it comes to reasons of competency, subsidiarity, market freedoms and fundamental rights regulated in the treaties of the EU, i.e. TEU and TFEU.<sup>102</sup> Against the background of the principle of subsidiarity according to Art. 5 (3) TEU it is up to the member states of the EU to introduce regulations for TPF,<sup>103</sup> precisely because TPF does not fall within the exclusive competence of the EU (see Art. 2 TEU). That is why, "*it is the national legislator, with in-depth knowledge of the home justice system*"<sup>104</sup> that introduces regulations of TPF especially as "*Member States have a primary responsibility to make adequate legal aid available to those who lack sufficient resources with a view to ensuring access to justice for all*"<sup>105</sup>.

With regard to the RAD in its consolidated version of December 13, 2024 there is, however, EU law concerning TPF in litigation mainly for protection of consumers and for improvement of consumers' access to justice and avoidance of abusive litigation.<sup>106</sup> According to Art. 10 RAD member states must ensure that, when a representative action is funded by a third party, insofar as allowed in accordance with national law, conflicts of interests are prevented. Funding from third parties with an economic interest in the case must at no point divert the action from protecting the collective interests of consumers.<sup>107</sup> Thus, member states are to ensure that decisions

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<sup>101</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.37.

<sup>102</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.37, 49.

<sup>103</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.38.

<sup>104</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.44.

<sup>105</sup>European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130 (INL) – (2023/C 125/01), considerations (A).

<sup>106</sup>[https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive\\_en](https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive_en) (last vis. 20/06/2025); Art. 1 (1) RAD.

<sup>107</sup>Art. 10 (1) RAD.

by qualified entities are not unduly influenced by third parties in a way that harms the collective interest of consumers.<sup>108</sup> *“In cases where any justified doubts arise with the respect to [the compliance of theforesaid]”*<sup>109</sup>, parties “shall disclose [...] a financial overview that lists sources of funds used to support the representative action”<sup>110</sup> and thus disclose the fact of TPF. Even though the impact of these regulations on arbitration proceedings is highly unlikely<sup>111</sup>, one does get a picture of the attitude of the EU towards TPF. The EU’s position towards TPF in litigation is cautiously permissive while being aware of the risks, particularly regarding conflicts of interest and undue influence by funders. With the RAD the EU imposes strict safeguards to ensure that the collective interests of consumers remain paramount and are not compromised by economic interests of the funders. The overall approach seems to be “*conditional acceptance*”, i.e. allowing TPF provided that transparency, independence and consumer protection are guaranteed.

This approach is also reflected in the current proposal for regulating TPF in the form of Directive 2020/2130<sup>112</sup>, Annex to the European Parliament Resolution of September 13, 2022 (2023/C 125/01)<sup>113</sup>, primarily in litigation; however, its scope of application could be extended to arbitration as the Directive refers to “*proceedings*” as “*any domestic or cross border civil or commercial litigation, or any voluntary arbitration procedure or alternative dispute resolution mechanism [...]”*<sup>114</sup>.<sup>115</sup> Motivated by the aim of harmonization, the Directive 2020/2130 proposes an authorization system for TPF, which should apply to litigation and arbitration proceedings with the place of arbitration within the EU.<sup>116</sup> Although Resolution 2023/C 125/01 states that TPF “*if properly regulated [could] be used more often as a tool to support access to justice [...] and could also increasingly help to*

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<sup>108</sup>Art. 10 (2) a) RAD.

<sup>109</sup>Art. 10 (3) RAD.

<sup>110</sup>Ibid.

<sup>111</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.39f.

<sup>112</sup>Annex to the European Parliament Resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130 (INL) – (2023/C 125/01), herein after referred as „Directive 2020/2130“.

<sup>113</sup>European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130 (INL) – (2023/C 125/01), considerations (A); herein after referred to as „Resolution 2023/C 125/01“.

<sup>114</sup>Art. 3 (e) Directive 2020/2130.

<sup>115</sup>N.Pitkowitz, Steinbrück & S.Zeyer, Handbook on Third-Party Funding, p.46.

<sup>116</sup>SchiedsVZ 2023,121,122.

*ensure that public interest cases are brought to court and to reduce significant economic imbalances*<sup>117</sup>, doubts clearly prevail with regard to TPF as litigation funders rather than acting in the interests of the party funded may act in their own economic interest by striving to control the litigation and demanding an outcome that pays the funder the greatest return instead of focusing on what is best for the party funded.<sup>118</sup> Still, there seems to be an urgent need for regulation of TPF as it *“is expected to play a growing role in the coming years, but [...] remains largely unregulated in the Union, despite the fact that it could present not only benefits, but also material risks to the administration of justice that need to be addressed [...]”*<sup>119</sup>. As the provisions within Directive 2020/2130 relate almost exclusively to the regulatory area between consumers and businesses, it is unlikely that this proposed Directive will actually have any impact on TPF culture in arbitration proceedings since - at least within the EU - arbitration almost only exists between business-to-business.<sup>120</sup> Furthermore, as the Final Report Mapping TPF in the EU from March, 21 2025 by the European Commission showed, there continues to be considerable disagreement as to the extent to which regulation is necessary at all.<sup>121</sup>

## **b) ICC**

As one of the most established and preferred arbitration institutions worldwide,<sup>122</sup> founded in 1919 and operating an international court of arbitration since 1923<sup>123</sup>, the ICC deserves mention in this master’s thesis to ensure a global perspective on arbitration rules and institutions. According to the ICC Arbitration Rules in force from January 2021<sup>124</sup> in their Art. 11 (7) *“[...] each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding claims of*

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<sup>117</sup>Resolution 2023/ C 125/01, considerations (C).

<sup>118</sup>Resolution 2023/ C 125/01, considerations (E).

<sup>119</sup>Resolution 2023/ C 125/01, considerations (J).

<sup>120</sup>Study on Mapping Third Party Litigation Funding in the European Union, 21/03/2025, p. 692.

<sup>121</sup>Study on Mapping Third Party Litigation Funding in the European Union, 21/03/2025, p. 692, where three different approaches in form of „No regulation“, „light-touch regulation“ and „strong regulation“ are discussed according to a mapping study, that takes stock of the TPF situation in the EU and maps legislation, practice and debate on TPLF in the Member States and four non EU-countries.

<sup>122</sup>ICC Press Release from 08/10/2020.

<sup>123</sup>Nedden/Herzberg/Kopetzki, in Nedden/Herzberg/Kopetzki, ICC-SchO, preliminary remarks, paragraph 1.

<sup>124</sup>ICC Arbitration Rules in force as from 01/01/2021.

*defenses and under which it has an economic interest in the outcome of arbitration”.*

Art. 11 (7) was implemented only with the latest revision of the ICC Arbitration Rules in 2021 with the intention of making arbitration proceedings more transparent, *“aiming to ensure any conflict disclosures are made in a timely and forthcoming manner”*<sup>125</sup> <sup>126</sup>.

Accordingly, it is mandatory to disclose promptly the existence and identity of any person who is not a party, i.e. not only Third-party funders, and who has entered into an agreement to finance the assertion or defense of claims, whereby that third party holds an economic interest in the result of the arbitration.<sup>127</sup> Only then will arbitrators be able to fulfill their disclosure obligations regulated in Art. 11 (2) and (3) in particular concerning impartiality and independence which could be compromised by, for example, financial involvement with the third party, cooperation with a party funder as a party representative, repeated appointment as arbitrator in proceedings involving this specific party funder or the existence of any other relationship with this third party.<sup>128</sup> Art. 11 (7) does not foresee any consequences in case of failure to comply with the disclosure requirements. However, the violation of the disclosure requirements could jeopardize the validity and enforceability of the arbitral award, especially if it later appears that the arbitrator has any relationship to the third party and therefore their impartiality and independence cannot be guaranteed. Any withdrawal of the arbitrator due to bias discovered too late will result in additional costs and procedural delays, which could be imposed on the party in breach of the obligation in the course of the arbitral tribunal’s decision on costs.<sup>129</sup>

### **c) Germany - DIS**

Germany is among the European civil law jurisdictions where TPF for litigation proceedings emerged relatively early.<sup>130</sup> However, litigation has predominantly been financed through legal expenses insurance which may explain why TPF has often

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<sup>125</sup>ICC Press Release from 08 October 2020.

<sup>126</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 98.

<sup>127</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 97.

<sup>128</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 112.

<sup>129</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 115.

<sup>130</sup>G.M.Solas, Third Party Funding, p.95.

developed as an extension of established insurers.<sup>131</sup> Overall, the structure of the German civil procedure, in particular the clear regulation and thus predictability of court and lawyer's fees and the fundamental prohibition of contingency fee agreements, known as "*Erfolgshonorar*"<sup>132</sup> appear to have contributed to the favorable conditions for the development of TPF in litigation proceedings.<sup>133</sup> According to the German Federal Constitutional Court, the primary rationale behind the prohibition of contingency fee agreements was to safeguard the independence of lawyers, protect clients seeking legal assistance from being taken advantage of excessive fees and maintain equality of arms in legal proceedings.<sup>134</sup> In light of these fundamental principles, which are essential in a constitutional state<sup>135</sup>, German Law allows only very limited exceptions to this prohibition, e.g. when the mandate relates to a monetary claim of a maximum of EUR 2,000.00.<sup>136</sup> Within German Law, "*lawyers are viewed as independent agents, bound by the law and justice to be concerned only with the client*"<sup>137</sup>, a lawyer exercises a liberal profession, the activity does not constitute a trade.<sup>138</sup> Therefore, a German lawyer can hardly fund their own clients. Thus, it is inevitable that the financing of litigation proceedings by independent third parties is particularly appealing as a third private party does the financing activity completely at their own risk, without involvement in the conduct of the dispute and/or provision of legal advice.<sup>139</sup>

There is, however, no regulation or guideline for TPF neither within the German Civil Code, which regulates arbitration proceedings where the place of proceedings is in Germany,<sup>140</sup> nor within the Arbitration Rules of the DIS and at this point there are no reform proposals currently published or known.<sup>141</sup> The position paper on the modernization of German Arbitration Law published by the Federal

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<sup>131</sup>G.M.Solas, Third Party Funding, p.95.

<sup>132</sup>§ 49b (2) BRAO.

<sup>133</sup>G.M.Solas, Third Party Funding, p.95.

<sup>134</sup>German Federal Constitutional Court (BVerfG), judgement from 12/12/2001 – 1 BvR 2576/04.

<sup>135</sup>Regulated in Article 2 (2) Basic Law of the Federal Republic of Germany.

<sup>136</sup>§ 4a (1) No. 1 RVG.

<sup>137</sup>L.B.Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.179.

<sup>138</sup>§ 19 Abs. 1 BRAO.

<sup>139</sup>G.M.Solas, Third Party Funding, p.98.

<sup>140</sup>see §§ 1025 ff. ZPO.

<sup>141</sup>BMJV, Eckpunkte zur Modernisierung des deutschen Schiedsverfahrensrechts from 18.04.2023.

Ministry of Justice on April 18, 2023 does not contain any reform proposals or clarifications with regard to TPF within arbitration proceedings either.<sup>142</sup>

## 2. Regulatory Frameworks in Asia

### a) Hong Kong - HKIAC

As of February 1, 2019, new legislation in Hong Kong allowing TPF for arbitration,<sup>143</sup> as well as for related court and mediation proceedings, has come into effect. Therefore, TPF is allowed if the seat of arbitration is in Hong Kong, or, in cases where the arbitration takes place outside of Hong Kong, for funding services rendered within Hong Kong; this means that TPF is allowed both in international and domestic arbitration.<sup>144</sup> The purpose of the amendment was "*to (a) ensure that [TPF] of arbitration is not prohibited by particular common law doctrines; and (b) provide for measures and safeguards in relation to [TPF] in arbitration*"<sup>145</sup>. "*The law aimed to maintain the city's status as a preferable arbitration hub*"<sup>146</sup> since in recent times increasing globalization and the expansion of international trade have enabled Hong Kong to emerge as "*the world's leading arbitration center*"<sup>147</sup>.<sup>148</sup> However, the principle of the Rule of Law, inherited by the common law tradition from England, has been firmly established in Hong Kong's society since the colonial period - independence, impartiality and integrity of the legal system are fundamental to Hong Kong's reputation and success.<sup>149</sup> It was therefore crucial to the Hong Kong legislators - being aware of the risks of TPF, in particular the excessive control over the proceedings by the funder and conflicts of interest - that TPF did not undermine these principles.<sup>150</sup> Thus, the Secretary of Justice issued a non-binding Code of Practice<sup>151</sup> implemented by Division 4 of the Arbitration Ordinance on December 7, 2018

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<sup>142</sup>BMJV, Eckpunkte zur Modernisierung des deutschen Schiedsverfahrensrechts from 18.04.2023.

<sup>143</sup>Arbitration Ordinance (Cap 609) (AO) -

[https://www.elegislation.gov.hk/hk/cap609?SEARCH\\_WITHIN\\_CAP\\_TXT=Third%20Party](https://www.elegislation.gov.hk/hk/cap609?SEARCH_WITHIN_CAP_TXT=Third%20Party) (last vis. (06/28/2025).

<sup>144</sup>HKIAC Blog, Felicia Cheng, TPF – the answer to access to justice?, B.Zhang, Third Party Funding for Dispute Resolution, p. 118.

<sup>145</sup>Amended Arbitration Ordinance (Cap 609) (AO) – Division 2, Section 98E.

<sup>146</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.55.

<sup>147</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.56.

<sup>148</sup>Ibid.

<sup>149</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.55, 56.

<sup>150</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.55, 56.

<sup>151</sup>Code of Practice for Third Party Funding of Arbitration, hereinafter referred to as Hong Kong Code of Practice for TPF.

regulating the requirements for funding agreements and thus supplementing the new legislation by addressing the financial capacity of funders, ethical considerations and suggestions on how to address conflicts of interest.<sup>152</sup> As Hong Kong inherited the concepts of maintenance and champerty<sup>153</sup> from English Law combined with a strong legislative reluctance towards TPF, it took some time before the flourishing of international trade and commercial dispute resolution proceedings had such an impact on Hong Kong that a legal basis for TPF was created to meet the needs of these international actors.<sup>154</sup>

According to Section 98G of the amended Arbitration Ordinance, TPF in arbitration “*is the provision of arbitration funding for an arbitration (a) under a funding agreement; (b) to a funded party; (c) by a third party funder; and (d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement*”<sup>155</sup>. According to the definitions, “*third party funder is a person (a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than the funding agreement*”<sup>156</sup>, while “*the reference to a person who does not have an interest in an arbitration includes (a) a person who does not have an interest in the matter about which an arbitration is yet to commence; and (b) a person who did not have an interest in an arbitration that has ended*”<sup>157</sup>. Thus, TPF cannot be provided by a lawyer or a legal practice representing a party or former party to the arbitration, but lawyers may participate in arbitration funding if they do not represent either of the party in the funded case.<sup>158</sup>

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<sup>152</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.55; Arbitration Ordinance (Cap 609) (AO) – Division 4; G.M. Solas, Third Party Funding, p.80; HKIAC Blog, Felicia Cheng, TPF – the answer to access to justice?

<sup>153</sup>Legal doctrines in common law aimed at preventing abusive legal proceedings by restricting third-party involvement. While within maintenance an unconnected third-party assist to maintain a litigation, i.e. through financial support, champerty means a third-party financing the litigation costs in return for a share of the proceeds without having legitimate interest in the dispute. Both doctrines were abolished in 1967 (see SchiedsVZ 2017,49 (59);

<https://www.iclr.co.uk/knowledge/glossary/maintenance-and-champerty/>

<sup>154</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.57.

<sup>155</sup>Amended Arbitration Ordinance (Cap 609) (AO) – Division 2, Section 98G.

<sup>156</sup>Amended Arbitration Ordinance (Cap 609) (AO) – Division 2, Section 98F, 98J.

<sup>157</sup>Amended Arbitration Ordinance (Cap 609) (AO) – Division 2, Section 98F, 98J.

<sup>158</sup>HKIAC Blog, Felicia Cheng, TPF – the answer to access to justice?; B. Zhang, Third Party Funding for Dispute Resolution, p.58.

HKIAC as “one of the world’s leading dispute resolution organizations”<sup>159</sup> and established under Hong Kong Law but completely free and independent from any type of influence by the Hong Kong legislator established their own Administered Arbitration Rules<sup>160</sup> last revised and taken effect from June 1, 2024.<sup>161</sup> According to Art. 4.3 (h) (i) HKIAC Arbitration Rules, the Notice of Arbitration “shall include the existence of any funding agreement and the identity of any third party funder pursuant to Article 44”, in this respect, of course, also the Answer to the Notice of Arbitration (see Art. 5.1 (g) HKIAC Arbitration Rules) and the Request for Joinder of any additional Party (see Art. 27.6 (i) HKIAC Arbitration Rules) shall include the same information. Art. 44 HKIAC Arbitration Rules foresees that in case “*a funding agreement is made, the funded party shall communicate a written notice to all other parties, the arbitral tribunal [...] and HKIAC of (a) the fact that a funding agreement has been made; and (b) the identity of the third party funder*” as soon as a funding agreement has been concluded. Additionally, TPF has an impact on the costs of arbitration and their apportion between the parties as the arbitral tribunal shall consider the circumstances of the case (see Art. 34.4 HKIAC Arbitration Rules) and thus “*may take into account any factors it considers relevant, including [...] any third party arrangement*” (see Art. 34.4 (d) HKIAC Arbitration Rules).

## **b) Singapore - SIAC**

The Civil Law (Amendment) Act 2017 (No 2 of 2017) with the new sections 5A and 5B (Third-Party Funding Regulations 2017<sup>162</sup>) of the Singaporean Civil Law Act came into force on March 1, 2017 paving the way for TPF in international arbitration.<sup>163</sup> In 2017, Singapore was the only country in Asia to introduce explicit national regulation of TPF and is also one of the select jurisdictions worldwide to have implemented such measures.<sup>164</sup> Before this amendment, TPF was not allowed under Singaporean

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<sup>159</sup><https://www.hkiac.org/about-us> (last vis. 28/06/2025).

<sup>160</sup>hereinafter referred to as HKIAC Arbitration Rules.

<sup>161</sup><https://www.hkiac.org/about-us> (last vis. 28/06/2025).

<sup>162</sup>Herein referred to as the CLA 2017 in its most recent form dated 18/12/2024.

<sup>163</sup>B. Zhang, Third Party Funding for Dispute Resolution, p.93; Law Society Singapore, Guidance Note 10.1.1., section. 7.

<sup>164</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN, p.105.

Law.<sup>165</sup> The main intention of this amendment was on the one hand to facilitate access to justice in international arbitration led by the Singaporean Rule of Law and on the other hand to live up to Singapore's "*readiness [...] to instrumentally appropriate legal reforms and procedures*"<sup>166</sup> thereby upholding Singapore's status as a premier global hub for arbitration.<sup>167</sup> Thus, the common law instruments of maintenance and champerty were abolished as torts in section 5A (1) of the CLA 2017 to enable TPF in particular for international arbitration proceedings; court proceedings or mediation proceedings arising out of or in any way connected with international arbitration; enforcement of an arbitration agreement and enforcement of an award or foreign award under the International Arbitration Act.<sup>168</sup> Therefore, until then, TPF was only allowed in international arbitration but not in proceedings such as domestic arbitration or litigation.<sup>169</sup> This distinction between domestic and international proceedings was reflected in Singapore's dual arbitration regulatory system. The Singaporean arbitration regulatory system consists of the Arbitration Act 2001<sup>170</sup> applying to domestic arbitration and the International Arbitration Act 1994<sup>171</sup> applying to international arbitration and non-international arbitration in case parties agreed to apply the UNCITRAL Model Law.<sup>172</sup> However, in 2021, the Ministry of Law decided to extend TPF framework "*to cover domestic arbitration proceedings, certain proceedings in the Singapore International Commercial Court, and related mediation proceedings*"<sup>173</sup> and thereby "*offer[ing] businesses an alternative avenue to fund meritorious claims and further strengthen Singapore's position as an international commercial dispute resolution hub*"<sup>174</sup>. These changes were implemented through the Civil Law (Third-Party Funding) Amendment Regulations of 2021, which came into force on June 28, 2021 and were revised again

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<sup>165</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.93.

<sup>166</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.94; Rajah, Authoritarian Rule of Law, (2012), p. 41.

<sup>167</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.6; B. Zhang, Third Party Funding for Dispute Resolution, p.93.

<sup>168</sup>Law Society Singapore, Guidance Note 10.1.1., section 8, 2; Civil Law Third-Party Funding Regulations 2017 (S 68/2017), Regulation 3.

<sup>169</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.97.

<sup>170</sup>Arbitration Act 2001 (revised edition from 31/12/2021).

<sup>171</sup>International Arbitration Act 1994 (revised edition from 31/12/2021).

<sup>172</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.98.

<sup>173</sup>Press Release of the Singaporean Ministry of Law from 21 June 2021.

<sup>174</sup>Ibid.

with effect from December 18, 2024.<sup>175</sup> The reason for this amendment was mainly that the original framework for TPF in 2017 was well received by funders and the wider business, legal and arbitration communities, leading to a greater presence of funders in Singapore and growing business interest in alternative litigation financing options.<sup>176</sup> Additionally, feedback from the Ministry of Law 2018 public consultation<sup>177</sup> indicated strong support for expanding the TPF framework to additional types of proceedings.

The Law Society of Singapore published the Guidance Note 10.1.1. on April 25, 2017 outlining recommended practices for lawyers who refer clients to, advise on, or represent clients receiving TPF and was provided in connection with the first TPF framework from 2017 for general guidance purposes only.<sup>178</sup> According to this Guidance Note, TPF “*involves a commercial funder agreeing to pay some or all of the claimant’s legal fees and expenses*”<sup>179</sup> whereas the funder’s remuneration depends on the outcome of the case and is determined either as a proportion of the amount ultimately recovered or as a multiple of the funder’s investment.<sup>180</sup> In case of failure of the claim, the funder regularly does not receive any remuneration and remains liable for the claimant’s legal fees or any other costs the funder agreed to bear.<sup>181</sup> The definition of a “*qualifying Third-party funder*”<sup>182</sup> is further clarified by Section 4 of the CLA 2017: “*the Third-party funder carries on the principal business, in Singapore or elsewhere, of the funding costs of dispute resolution proceedings to which the Third-party funder is not a party [and] has a paid-up share capital of not less than \$5 million<sup>183</sup> or the equivalent amount in foreign currency or not less than \$5 million or the equivalent amount in foreign currency in managed assets*”. It follows from this provision that only professional third party funders with principal business in funding legal claims are legally entitled to offer TPF, preventing that

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<sup>175</sup>Civil Law (Third-Party Funding) Regulations 2017 –hereinafter referred to as the CLA 2017 in its most recent form dated 18/12/2024.

<sup>176</sup>Press Release of the Singaporean Ministry of Law from 21 June 2021.

<sup>177</sup>Press Release of the Singaporean Ministry of Law from 03 April 2018.

<sup>178</sup>Law Society Singapore, Guidance Note 10.1.1., section 2.

<sup>179</sup>Law Society Singapore, Guidance Note 10.1.1., section 4.

<sup>180</sup>Law Society Singapore, Guidance Note 10.1.1., section 5.

<sup>181</sup>Law Society Singapore, Guidance Note 10.1.1., section 6.

<sup>182</sup>Section 5B (10) of the CLA 2017.

<sup>183</sup>Singapore Dollars.

*“inexperienced and unprofessional”*<sup>184</sup> third party funders engage in arbitration proceedings.<sup>185</sup> However, Singapore was well aware of the fact that even professional third party funders might exert undue influence over the proceedings, occasionally acting through legal representatives of the client.<sup>186</sup> Thus and to avoid any conflict of interest, legal professionals may introduce or refer clients to a Third-party funder but only as long as they do not derive any direct financial benefit from it and additionally should inform the client about the extent of the funding agreement with particular emphasis on the funder’s responsibility for any adverse costs.<sup>187</sup> Additionally, the Singaporean Law foresees a duty of legal professionals to disclose TPF of their client especially to the court/tribunal.<sup>188</sup>

In addition to the Guidance Note 10.1.1., the statutory provisions are complemented by the SIArb Guidelines for Third Party Funders established by the Singapore Institute for Arbitrators in May 2017 which *“aim to promote the best practices among Funders who intend to provide funding to parties in Singapore-seated international arbitrations”*<sup>189</sup>. These guidelines establish requirements for transparency and accountability in the relationship between the funder and the funded party and are intended to promote funders to behave *“with high ethical standards towards Funded Parties”*<sup>190</sup> and to assist counsels with the handling of TPF and thereby safeguarding the integrity of international arbitration proceedings in Singapore.<sup>191</sup>

Furthermore, SIAC also issued a Practice Note on TPF<sup>192</sup> in Singapore in 2017 and has recently regulated TPF in Art. 38 of their institutional regulations, the SIAC Arbitration Rules 2025<sup>193</sup>. Following from Art. 38.1 SIAC Arbitration Rules, “a

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<sup>184</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.104.

<sup>185</sup>Ibid.

<sup>186</sup>Ibid.

<sup>187</sup>Law Society Singapore, Guidance Note 10.1.1., section 13, 15; B.Zhang, Third Party Funding for Dispute Resolution, p.105.

<sup>188</sup>See rule 49A of Professional Conduct Rules 2015.

<sup>189</sup>SIArb Guidelines for third party funders, section 1.3, hereinafter referred to as SIArb Guidelines.

<sup>190</sup>SIArb Guidelines, section 1.3.

<sup>191</sup>Ibid.

<sup>192</sup>SIAC Practice Note 01/17 (31/03/2017) on Arbitrator Conduct in Cases involving External Funding, herein after referred to as Practice Note 01/17.

<sup>193</sup>Arbitration Rules of Singapore International Arbitration Center SIAC Rules 7th Edition, 01/01/2025, herein after referred to as SIAC Arbitration Rules.

*party shall disclose the existence of any [TPF] agreement and the identity and contact details of the Third-party funder in its Notice or Response as soon as practicable upon concluding a [TPF] agreement".* Also, a party shall not enter into a TPF agreement that could create a conflict of interest with any member of the Arbitral Tribunal – if such a conflict arises, the Tribunal may even require the party to terminate the funding agreement.<sup>194</sup> Even though the mere disclosure or existence of a TPF agreement does not indicate a party's financial position, the Tribunal may, however, according to Art. 38.6 SIAC Arbitration Rules, consider such an agreement when allocating costs under the SIAC Arbitration Rules.

As of the Guidance Note 10.1.1., it is recommended "*that legal practitioners [...] review all of these [Regulations and Guidelines] together to obtain a comprehensive overview of the current issues pertaining to [TPF] in Singapore*"<sup>195</sup>. The sanction for the violation of the CLA 2017 is, though, that funders will not be able to enforce their rights under a TPF agreement.<sup>196</sup>

### **c) People's Republic of China - CIETAC**

In China<sup>197</sup>, TPF developed as a "*trend of venture capitalists and legal service providers joining forces to form a new type of service that can help parties overcome risk aversion and financial constraints*"<sup>198</sup>. TPF has been a reality in the arbitration practice in China as a result of international influence and an answer to local needs in form of internal issues of the Chinese legal system which lacks a funding system.<sup>199</sup> The question of process financing has always been considered outside the responsibility of both the Arbitration Tribunal and the Court.<sup>200</sup> Consequently, while Chinese law does not provide sufficient mechanisms to effectively facilitate or regulate the financing of dispute resolution proceedings, as a civil law jurisdiction,

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<sup>194</sup>Art. 38.3 SIAC Arbitration Rules.

<sup>195</sup>Law Society Singapore, Guidance Note 10.1.1., section 3.

<sup>196</sup>See Section 5 B (4) CLA 2017; M. Solas, Third Party Funding, p.73.

<sup>197</sup>This master's thesis refers to Mainland China as in People's Republic of China when referring to China.

<sup>198</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.159.

<sup>199</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.159; Etgen, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 48 sec.7.

<sup>200</sup>Etgen, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 48 sec.7.

the Chinese legal system does not expressly prohibit the practice of TPF either.<sup>201</sup> In 2022, for the first time, the Jiangsu Province Wuxi Intermediate People's Court held in a decision that the disclosure of a third party does not infringe upon either the confidentiality or the integrity of the arbitral award - this court ruling may be considered as the formal recognition of TPF in arbitration proceedings.<sup>202</sup> The concept of TPF would also be in line with the Chinese Rule of Law and the rules governing the disposition of commercial disputes - China "*shares the objective [...] of the rule of law, that is, to facilitate commercial dispute resolution and to optimize commercial orders*"<sup>203</sup>, notwithstanding the political beliefs and constitutional structures in China.<sup>204</sup> At present, the funding of commercial cases appears to be the primary field in which TPF is most commonly used.<sup>205</sup>

However, in China, arbitration proceedings seem to be better equipped for TPF than litigation, as, despite the absence of direct regulation in the existing Arbitration Law of the People's Republic of China which came into force on September 1, 1995, arbitration institutions have incorporated provisions into their rules to define TPF and address its potential risks.<sup>206</sup> CIETAC is one of the major permanent commercial arbitration institutions in the world and is the largest and most important arbitration institution in China.<sup>207</sup> In 2024 a total of 6,013 new cases were accepted, whereas in 2023 it were 5,237 new cases, thus the year-on-year increase was 14.82%.<sup>208</sup> The cases worked on by CIETAC involved 93 countries and regions with parties coming from 77 different countries and regions with the top ten most frequently involved countries and regions in foreign-related cases being Hong Kong, the USA, the British Virgin Islands, the Cayman Islands, Italy, Germany, Japan, Singapore, Republic of

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<sup>201</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.160.

<sup>202</sup>Ruili Airlines Limited Company v Yunnan Jingcheng Group Limited and Others, Jiangsu Province Wuxi Intermediate People's Court, Case No. (2022) Su 02 Zhi Yi 13, Civil Order, 30/05/2022; Etgen, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 48 sec.7.

<sup>203</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.167.

<sup>204</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.166,167.

<sup>205</sup>B.Zhang, Third Party Funding for Dispute Resolution, p.162.

<sup>206</sup>Ibid.

<sup>207</sup>Brödermann, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Introduction sec.21; <https://www.cietac.org/en/category/about-us> (last vis. 09/07/2025).

<sup>208</sup>CIETAC 2024 Work Report and 2025 Work Plan, p.1; CIETAC 2023 Work Report and 2024 Work Plan, p.1.

Korea and Russia.<sup>209</sup> The 2024 Work Report<sup>210</sup> showed that especially emerging disputes over the performance of TPF agreements have recently come into focus, highlighting new developments in international arbitration.<sup>211</sup> The CIETAC Arbitration Rules were revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on September 2, 2023 and became effective as of January 1, 2024. These newly revised Arbitration Rules were to reflect international trends and thus also introduced the new Article 48 on TPF to “*mark [a] further step in regulating [TPF] in CIETAC arbitration cases*”<sup>212</sup>, which are anticipated to increase in the future.<sup>213</sup> According to Art. 48 (1) Sentence 1 of the CIETAC Arbitration Rules “*once a [TPF] agreement is concluded, the funded party shall communicate to the Arbitration Court, without any delay, the existence of the [TPF] agreement, the financial interest therein, the name and the address of the third party funder and other relevant information*”. The scope of this regulation is to not only identify the funder but also the conditions of funding and the influence of the funder on the arbitration proceeding.<sup>214</sup> The Arbitration Court shall then forward such information to the other parties and the arbitral tribunal (see Art. 48 (1) Sentence 2). Additionally, under Art. 48 (2) CIETAC Arbitration Rules, the arbitral tribunal may take into account the existence of the TPF arrangement when deciding the costs of arbitration and other fees in the award.

Art. 48 CIETAC Arbitration Rules does not, however, foresee any regulation regarding to which extent the arbitrator in a relevant arbitration proceeding shall also be obliged to disclose his relationship with the Third-party funder.<sup>215</sup> According to Art. 31 (1) CIETAC Arbitration Rules, “*an arbitrator [...] shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence*”. When deciding which facts or circumstances need to be disclosed, especially the criteria of Art. 34 of the Arbitration Law of the People’s

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<sup>209</sup>CIETAC 2024 Work Report and 2025 Work Plan, p.2,3.

<sup>210</sup>CIETAC 2024 Work Report and 2025 Work Plan, p.7.

<sup>211</sup>CIETAC 2024 Work Report and 2025 Work Plan, Work Report.

<sup>212</sup>Press release from 01/01/2024, Kluwer Arbitration Blog.

<sup>213</sup>Ibid.

<sup>214</sup>Etgen, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 48 sec.2.

<sup>215</sup>Etgen, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 48 sec.4.

Republic of China are applicable<sup>216</sup> which regulates the possibility to apply for a withdrawal of an arbitrator especially if they are “(1) *a party in the case or a close relative of a party or of an agent in the case; (2) [they have] a personal interest in the case; [they have] other relationship with a party or [their] agent in the case which may affect the impartiality of arbitration [..]*”. It has not (yet) been clarified whether this Art. 34 also applies to Art. 48 CIETAC Arbitration Rules and how far the arbitrator’s duty of disclosure extends under the CIETAC Arbitration Rules.

Furthermore, the CIETAC Hong Kong - not to be confused with HKIAC - published Guidelines for TPF for Arbitration in September 2017<sup>217</sup> setting out “*certain principles of practice and conduct which [CIETAC Hong Kong] encourages parties and arbitrators to observe in respect of [...] arbitration proceedings administered by CIETAC Hong Kong [...]*”<sup>218</sup>. Those Guidelines therefore do not directly apply for the CIETAC proceedings; however, they are still cited by CIETAC as an achievement for the regulation of TPF through CIETAC in general.<sup>219</sup> They are voluntary<sup>220</sup> but reflect „*certain principles of international best practice in relation to Funding*“<sup>221</sup> and formulate recommendations for parties seeking funding. According to the CIETAC Hong Kong TPF Guidelines “funding” is defined as “*when a person or entity who does not, or will not, have an interest recognized by law in the arbitration other than under the funding arrangement ('Funder') contributes funds directly or indirectly, or provides other material support to a party in arbitration ('Funded Party') and has a direct economic interest in the award to be rendered in the arbitration*”<sup>222</sup>.

#### **IV. TPF: Access to Justice through Financial Support or Loss of Integrity?**

As mentioned above, when talking about reasons for TPF, the emergence of TPF in ADR marks a significant development in the ongoing pursuit of access to justice. Traditionally, the ability to enforce one’s rights through litigation or arbitration was

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<sup>216</sup>Brödermann, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 31 sec.1.90.

<sup>217</sup>CIETAC Hong Kong Arbitration Center Guidelines for Third Party Funding for Arbitration, hereinafter referred to as CIETAC Hong Kong TPF Guidelines.

<sup>218</sup>CIETAC Hong Kong TPF Guidelines, sec. 1.1.

<sup>219</sup>CIETAC press release from 01/01/2024.

<sup>220</sup>CIETAC Hong Kong TPF Guidelines, section 1.4.

<sup>221</sup>CIETAC Hong Kong TPF Guidelines, section 1.5.

<sup>222</sup>CIETAC Hong Kong TPF Guidelines, sec. 1.2.

closely tied to the claimant's own financial resources or, in limited cases, to public legal aid mechanisms. Additionally, in international commercial arbitration proceedings, the principle of "*cost follow the event*" applies, which means that the losing party must bear the entire costs of the legal dispute.<sup>223</sup> However, as costs and complexities of dispute resolution have escalated, even well-resourced parties face barriers when pursuing their claims. In this context, TPF has arisen as a financial method enabling a broader spectrum of parties to access justice without bearing the full financial risks of proceedings.

At its core, TPF serves a dual function: it facilitates access to justice by providing the necessary financial support to parties in need and allows for mitigation of any risks connected with the outcome of the dispute. The involvement of professional funders, who assume the costs and risks in exchange for a share of any recovery, has transformed the landscape of dispute resolution and especially international commercial arbitration where the financial stakes and procedural costs are more than substantial.

However, TPF raises fundamental questions about the integrity of the dispute resolution process and its "*players*"<sup>224</sup> as "*human beings whose behaviors vary in the degree of error or deception*"<sup>225</sup>. While TPF undeniably opens doors to a wider range of claimants and thus leads to a more balanced arbitration environment, it simultaneously introduces commercial interests into proceedings that have traditionally been guided by principles of independence and impartiality. TPF "raises a range of asymmetric imbalances between the parties and the arbitrators' decision-making"<sup>226</sup>. The challenge therefore lies in balancing the benefits of TPF with the need to safeguard the integrity of the dispute resolution process.

In order to gain a better understanding of the influence of TPF on arbitration proceedings and the associated risks, this master's thesis will analyze the potential

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<sup>223</sup>Hofstätter/Giammarco, *Schiedsverfahren in der Unternehmenspraxis*, p. 45 sec.4.1.7.

<sup>224</sup>M.Sweify, *Third Party Funding in International Arbitration*, p.63.

<sup>225</sup>*Ibid.*

<sup>226</sup>M.Sweify, *Third Party Funding in International Arbitration*, p.62.

loss of integrity of the key actors, i.e. the arbitrator, the funded party, the Third-party funder and the opposing party, through conflicts of interest by influence of TPF in an arbitration process, while also taking a closer look on the relevant duties of these key actors during an arbitration proceeding when TPF is involved.

## **1. Duties and Potential Conflicts of Interest Concerning the Arbitrator**

### **a) Duties**

An arbitral tribunal constituted to resolve an international dispute functions within a fundamentally different framework than a judge presiding over a national court.<sup>227</sup> Judges operate within a legal system that precisely defines their authority and responsibilities, furthermore they are typically given full immunity from liability related to their judicial activities.<sup>228</sup> In contrast, the powers, obligations and jurisdictions of an arbitral tribunal are derived from a complex interplay of the parties' agreement, applicable laws in form of the law of the seat of arbitration, the law governing the arbitration agreement and the law of any jurisdiction where recognition or enforcement of the award may be pursued and the institutional rules governing the arbitration proceeding.<sup>229</sup> The duties imposed on an arbitrator can be divided into three categories: duties imposed by the arbitration agreement of the parties, duties imposed by law and ethical duties.<sup>230</sup>

#### **(1) Duties Imposed by the Arbitration Agreement**

Parties may choose to impose specific duties upon an arbitrator within their arbitration agreement, such as a specific timeline for the provision of an award after the appointment of the arbitral tribunal, or even during the course of the proceeding.<sup>231</sup>

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<sup>227</sup>N.Blackaby, C.Partasides, International Arbitration, sec. 5.02.

<sup>228</sup>N.Blackaby, C.Partasides, International Arbitration, sec. 5.01.

<sup>229</sup>Ibid.

<sup>230</sup>N.Blackaby, C.Partasides, International Arbitration, sec. 5.50.

<sup>231</sup>N.Blackaby, C.Partasides, International Arbitration, sec. 5.51, 5.52.

## (2) Duties Imposed by Law / Institutional Regulations

The duties imposed by law derive from the law of the seat of arbitration, the governing law of the arbitration agreement, or the institutional regulations the parties chose within their arbitration agreement. As this master's thesis focuses on international commercial institutional arbitration, it will again, only take a general look at the institutional regulations analyzed within this thesis, i.e. the ICC, DIS, HKIAC, SIAC and CIETAC Arbitration Rules.

According to Art. 11 ICC Arbitration Rules every arbitrator must be and remain impartial and independent of the parties involved in the arbitration. A very similar regulation can be found in Art. 11.1. HKIAC Arbitration Rules. Art. 9.1 DIS Arbitration Rules<sup>232</sup> additionally rules that the arbitrator "*shall be impartial and independent of the parties throughout the entire arbitration and shall have all the qualifications, if any, that have been agreed upon by the parties*", whereas Art. 20.1 SIAC Arbitration Rules moreover obligates arbitrators to conduct themselves in accordance with the SIAC Arbitration Rules, SIAC's Code of Ethics<sup>233</sup> and the Practice Notes<sup>234</sup>. According to Art. 24 (1) CIETAC Arbitration Rules, an "*arbitrator shall not represent either party, and shall be and remain impartial and independent of the parties and treat them equally*" and according to Art. 24 (2) CIETAC Arbitration Rules "*shall perform [the] duties in accordance with the [CIETAC Arbitration Rules] and carry out the arbitral proceedings diligently and efficiently*".

To safeguard this impartiality and independence, the nominated arbitrator according to Art. 31 (1) CIETAC Arbitration Rules is obliged to disclose "*any facts or circumstances likely to give rise to justifiable doubts as to the impartiality or independence*". Art. 9.4. DIS Arbitration Rules and Art. 11 (2) ICC Arbitration Rules foresee the same declaration duty. The same goes for Art. 11.4 HKIAC Arbitration Rules where the arbitrator has to disclose these circumstances before confirmation or appointment. According to Art. 20.2. SIAC Arbitration Rules, the arbitrator has the same obligations on disclosure but furthermore must sign a "*Statement of*

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<sup>232</sup>2018 DIS Arbitration Rules effective as of 1 March 2018.

<sup>233</sup>Code of Ethics for Arbitrators, hereinafter referred to as SIAC Code of Ethics.

<sup>234</sup>Practice Note 01/17; SIAC Practice Note PN – 02/07 for Ad Hoc Cases.

*Acceptance, Independence, Impartiality, and Availability*<sup>235</sup> after appointment. The same obligation to disclose also applies if such circumstances arise during the arbitral proceeding.<sup>236</sup> Anyhow, the arbitrator is obliged to make every effort to ensure that the award is enforceable<sup>237</sup>, meaning that in doubt the arbitrator should always disclose any conflicts of interest.<sup>238</sup>

Although the terms independence and impartiality are frequently used, they are not defined in any of the just cited Arbitration Rules. In general, the concept of independence is objective in nature, thus the arbitrator has to be independent of all parties involved in the proceedings, i.e. also independent from any counsel representing a party.<sup>239</sup> Arbitrators must therefore not be in an economic or any other relationship of dependence on any party of the arbitral proceeding, nor have any direct or indirect links to a party.<sup>240</sup> The concept of impartiality, on the other hand, refers to the subjective mindset of the arbitrator and their equal treatment of the parties.<sup>241</sup> This means that a dependent arbitrator might be still impartial - they still would not be suitable as an arbitrator within the meaning of the cited Arbitration Rules since a lack of independence would regularly imply a lack of impartiality and undermined the parties' confidence in the proceedings.<sup>242</sup>

As far as TPF goes, the institutional regulations do not impose any additional special duties upon arbitrators, especially not in relation to disclosure (see above), but entitle them to take the existence of a TPF agreement into account when deciding on the costs of the proceeding.<sup>243</sup>

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<sup>235</sup>see Art. 20.1 SIAC Arbitration Rules; Only an Emergency Arbitrator is obliged to sign the same statement according to Art. 3 (2) CIETAC Rules for Emergency Arbitrator Procedures.

<sup>236</sup>see Art. 11 (3) ICC Arbitration Rules, Art. 9 (6) DIS Arbitration Rules, Art. 31 (2) CIETAC Arbitration Rules, Art. 11 (4) HKIAC Arbitration Rules, Art. 20 (3) SIAC Arbitration Rules.

<sup>237</sup>See Art. 42 ICC Arbitration Rules.

<sup>238</sup>A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.288.

<sup>239</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 5.

<sup>240</sup>Ibid.

<sup>241</sup>Ibid.

<sup>242</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 5; Nedden, in: Nedden/Herzberg/Kopetzki, DIS-SchO, Art. 9 Rn.13.

<sup>243</sup>Art. 34.4 HKIAC Arbitration Rules, Art. 38.6. SIAC Arbitration Rules, Art. 48 (2) CIETAC Arbitration Rules.

### (3) Ethical Duties

Furthermore, an arbitrator has certain ethical obligations which can often be found in the guidelines published in addition to the Arbitration Rules by arbitration institutes or any other arbitral entities.

As far as the herein relevant arbitration institution goes, only the Asian arbitration institutions published their own Guidelines for Arbitrators in general and/or for TPF in particular. HKIAC published the Code of Ethical Conduct<sup>244</sup> with six rules concerning the ethical behavior of an arbitrator, who must always “*act fairly, [...] impartially [...] and free from bias*”<sup>245</sup>, disclosing any potential conflict of interest throughout the proceeding.<sup>246</sup> SIAC issued a Code of Ethics for Arbitrators<sup>247</sup>, too, according to which an arbitrator must be “*independent and impartial*”<sup>248</sup>, disclosing any circumstances that could raise doubts about their impartiality or independence before or during an arbitration proceeding.<sup>249</sup> The Singaporean Practice Note 01/17 which implied rules of conduct for an arbitrator in cases involving external funding has been rendered more or less superfluous by the recent introduction of Art. 38 SIAC Arbitration Rules. CIETAC published a Code of Conduct for Arbitrators on April 27, 2021 which came into force on May 1, 2021<sup>250</sup> which was “*formulated to regulate arbitrators’ behavior, strengthen professional ethics and enhance the credibility of arbitration*”<sup>251</sup> and obligates arbitrators to avoid any conflicts of interests, to disclose any circumstances that may affect their impartiality and to render arbitral awards independently.<sup>252</sup>

The internationally recognized standard are the IBA Guidelines on Conflict of Interest in International Arbitration<sup>253</sup> approved by the IBA Council on May 25, 2024 but

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<sup>244</sup><https://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct> (last vis. 11/07/2025).

<sup>245</sup>Rule One, Rule Two HKIAC Ethical Code of Conduct.

<sup>246</sup>ibid.

<sup>247</sup><https://siac.org.sg/wp-content/uploads/2024/06/SIAC-Code-of-Ethics-for-Arbitrators-1-Jan-2025.pdf> (last vis. 11/07/2025).

<sup>248</sup>Art. 1 SIAC Code of Ethics.

<sup>249</sup>Art. 1, 2 SIAC Code of Ethics.

<sup>250</sup><https://www.cietac.org/en/articles/25135> (last vis. 11/07/2025).

<sup>251</sup>Para I, CIETAC Code of Conduct for Arbitrators.

<sup>252</sup>Para IV, VII CIETAC Code of Conduct for Arbitrators.

<sup>253</sup>hereinafter referred as to IBA Guidelines.

originally established in 2004.<sup>254</sup> Although these guidelines are soft law and thus have no binding character, they are considered to be “*international established practice*”<sup>255</sup>.<sup>256</sup> The IBA Guidelines contain “*General Standards and Explanatory Notes on the Standards*”<sup>257</sup> as the “*primary source for evaluating the existence of conflicts of interest*”<sup>258</sup> by establishing a “*reasonable third person test*”<sup>259</sup> and - if necessary according to an “*in the eyes of the parties’ test*”<sup>260</sup> - the obligation to disclose.<sup>261</sup> The IBA Guidelines contain a non-exhaustive list of possible conflicts of interest of the arbitrator, “*with the aim of illustrating the General Standards, assisting arbitrators in making their disclosures, and aiding parties in assessing whether disclosed information may be such as to create a doubt as to the arbitrator’s independence and impartiality*”<sup>262</sup>. Some of these listed situations are so serious that even if disclosed by the arbitrator, they are not subject to the parties’ discretion (i.e. “Non-waivable Red List”).<sup>263</sup> Others are serious (i.e. “Waivable Red List”) or raise serious doubts about the impartiality and independence of the arbitrator (i.e. “Orange List”) and must therefore be disclosed, but can be overcome by appropriate waivers from the parties (in case of waivable red list) or by not raising objections after disclosure (Orange List).<sup>264</sup> Furthermore, there is the “Green List” with situations that are not considered to be conflicts of interest and thus do not have to be disclosed.<sup>265</sup> Anyhow, arbitrators should always undertake an investigation whether there might be a potential conflict of interest just to protect their own reputation and to be able to ensure effective handling of the dispute.<sup>266</sup>

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<sup>254</sup>Introduction of the IBA Guidelines para 2.

<sup>255</sup>Brödermann, in: Brödermann/Etgen, CIETAC Arbitration Rules 2024, Art. 30 sec.1.

<sup>256</sup>A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p. 289.

<sup>257</sup>Introduction of the IBA Guidelines para 2.

<sup>258</sup>Ibid.

<sup>259</sup>Ibid.

<sup>260</sup>Ibid.

<sup>261</sup>Ibid.

<sup>262</sup>Introduction of the IBA Guidelines para 3.

<sup>263</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO, Art. 11 ICC-SchO, paragraph 9;

<sup>264</sup>Ibid.

<sup>265</sup>Introduction of the IBA Guidelines para 3.

<sup>266</sup>C.A.Rogers, Handbook on Third-Party Funding, p.87.

## b) Potential Conflicts of Interest

TPF can „*reshape the arbitral structure and the arbitrators' calculus*“<sup>267</sup> when disclosed in or before an arbitration proceeding. Without disclosure of a TPF agreement, arbitrators “*are, in reality, powerless against the impact of [TPF] upon the proceedings, especially the funders' behavioral conduct*“<sup>268</sup> and are unable to perform a complete conflict check as they are obliged to ensure their independence and impartiality.<sup>269</sup> However, as soon as arbitrators are aware of TPF, they might not be as impartial in deciding the case as they should be under their duties (see above).<sup>270</sup> As an underlying and often concealed influence, the funders' financial stake in the outcome of the dispute may indicate that the funders are in fact the real party in interest - even if the claim was not assigned to the funders by the TPF agreement -, which could impact the arbitrators' jurisdiction or admissibility of the claim.<sup>271</sup> Even though the funders have no direct influence on the arbitration agreement being the basis for the arbitration proceeding themselves, they might still resemble claimants from an economic perspective as both of them receive a part of the final award issued by the arbitral tribunal.<sup>272</sup> Thus, arbitrators might indirectly exercise jurisdiction over the funder by issuing any cost order, which in the end the funder will pay.<sup>273</sup> According to Art. 34.4 HKIAC Arbitration Rules, Art. 38.6. SIAC Arbitration Rules, Art, 48 (2) CIETAC Arbitration Rules, the arbitrator is expressly entitled, when deciding the costs of arbitration and other fees in the award, to take into account the existence of any TPF agreement. This at least raises the risk that arbitrators “*hold funders liable for some procedural aspects*“<sup>274</sup> or might impose costs on the funded party or ask for the security of costs knowing that the funder will ultimately bear the payment.

Apart from the influence that the financial aspect of TPF can have on an arbitrator, another conflict of interest might arise as the arbitrator has to evaluate and decide

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<sup>267</sup>M.Sweify, Third Party Funding in International Arbitration, p.63.

<sup>268</sup>M.Sweify, Third Party Funding in International Arbitration, p.65.

<sup>269</sup>A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.287.

<sup>270</sup>M.Sweify, Third Party Funding in International Arbitration, p.106.

<sup>271</sup>M.Sweify, Third Party Funding in International Arbitration, p.81.

<sup>272</sup>M.Sweify, Third Party Funding in International Arbitration, p.84.

<sup>273</sup>M.Sweify, Third Party Funding in International Arbitration, p.86.

<sup>274</sup>Ibid.

on a claim that was already evaluated by experts and was subjected to a detailed due diligence by the Third-party funder before (see above). Thus, TPF might influence the arbitrator's assessment of the final award as it might change the arbitrator's view of the parties' arguments, the likelihood of one party prevailing over the other or even the amount of damages the arbitrator would have otherwise rewarded.<sup>275</sup> “[TPF] may prompt arbitrators to overstep the jurisdictional phase without fully considering the jurisdictional objections, based on the fact that the funder has objectively vetted the case”<sup>276</sup> and furthermore the existence of only one funded party in an arbitral proceeding might also imply that the dispute must be decided clearly in favor of the funded party, because otherwise the funder would have never taken on the TPF agreement.<sup>277</sup> The conflict of interest might get worse as soon as an arbitrator asked parties to disclose any information concerning the TPF agreement or the details of the Third-party funder's interest in the outcome of the case<sup>278</sup> as the arbitrator might subconsciously consider the funder's interest in the outcome and evaluation of the claim, i.e. the party with TPF would clearly be favored due to their financial backup which would render the legal assessment of the case in extreme cases irrelevant.<sup>279</sup> Imagine the funder decides to withdraw from funding, perhaps because the funder discovered essential risks associated with the claim or because the claim has lost its commercial appeal and the funder has a contractual right to terminate the funding agreement during the proceeding.<sup>280</sup> As the parties might be obliged to disclose any changes in the funding agreement to the arbitrator,<sup>281</sup> the arbitrator will inevitably become aware of the withdrawal. In such a scenario, there is a legitimate concern that the arbitrator may no longer be able to approach the claim with complete neutrality and impartiality. The knowledge of the funder's withdrawal could subconsciously influence the arbitrator's perception, leading them to view the claimant's legal position as weakened or less credible which might affect the judgement on the merits of the dispute. The presence and knowledge of TPF can easily blur the distinction between favorably viewing the funded party's case due to

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<sup>275</sup>M.Sweify, Third Party Funding in International Arbitration, p.108.

<sup>276</sup>M.Sweify, Third Party Funding in International Arbitration, p.111.

<sup>277</sup>Ibid.

<sup>278</sup>i.e. according to Art. 38.4 SIAC Arbitration Rules.

<sup>279</sup>M.Sweify, Third Party Funding in International Arbitration, p.115,116.

<sup>280</sup>G.M.Solas, Third Party Funding, p.281.

<sup>281</sup>Art. 38.2. SIAC Arbitration Rules, Art. 44.3 HKIAC Arbitration Rules.

the anticipated detailed legal assessment through the funder and unfairly casting doubt on the opposing party's position by considering their legal position at least not as strong as the funded party's case.<sup>282</sup> Thus, it might occur that the unfunded party unconsciously feels under pressure to convince the arbitrator that the lack of funding does not have an influence on the strength of their legal position<sup>283</sup> or the funded party, after the termination of the funding agreement, may feel even greater pressure to clearly demonstrate and substantiate the merits of the claim.

Furthermore, there is a power imbalance between parties with TPF and those without during an arbitration proceeding. It is already commonly discussed that professional representation of a party in an ADR proceeding can have a vital impact on the outcome of a case, i.e. professional representation especially of "*weaker parties*" can reduce the effects of inequality.<sup>284</sup> Financial "*representation*" in forms of TPF could have the same impact - arbitrators might either favor the funded party or support the unfunded party in order to balance out a perceived or imagined power imbalance. Additionally, if an arbitrator is familiar with a Third-party funder and has observed inappropriate conduct by this funder in previous cases, they might be more likely to favor the unfunded party.<sup>285</sup>

The most obvious conflict of interest might arise in situations, where the arbitrator or their law firm have a relationship of any kind with the Third-party funder. This relationship might be considered as a situation from the "*non-waivable Red List*"<sup>286</sup> and thus lead to the exclusion of a particular arbitrator to be appointed as an arbitrator to a particular dispute. As Third-party funders "*may have direct economic interest in the prosecution or defense of the case in dispute, a controlling influence on a party [or on the conduct of the arbitration [proceeding]]*"<sup>287</sup> they might "*be considered to bear the identity of a party*"<sup>288</sup>, which is why it might already lead to a conflict of interest if the arbitrator holds financial interest in litigation funds of the

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<sup>282</sup>M.Sweify, Third Party Funding in International Arbitration, p.121;123.

<sup>283</sup>M.Sweify, Third Party Funding in International Arbitration, p.123.

<sup>284</sup>O.Garal-Ayal/R.Perry, Imbalances of Power in ADR, p.791.

<sup>285</sup>M.Sweify, Third Party Funding in International Arbitration, p.120.

<sup>286</sup>See in particular Standard 6 and the Non-Waivable Red List IBA Guidelines.

<sup>287</sup>General Standard 6 (b) IBA Guidelines.

<sup>288</sup>Ibid.

Third-party funder in question, has a beneficial financial arrangement with the same or is a member of its corporate bodies.<sup>289</sup> Even the repeated appointment might be critical in case the arbitrator is repeatedly appointed by parties funded by the same Third-party funder - this could definitely raise concerns about influence or interdependency.<sup>290</sup> Therefore, according to 3.2.8 of the Orange List of the IBA Guidelines the arbitrator has to disclose repeated appointments. A conflict of interest relating to a Third-party funder may result in the removal of an arbitrator or even an effective challenge to the award, which would lead to the parties and the funder wasting time and money and the arbitrator suffering the embarrassment of the questioning of their independence and integrity.<sup>291</sup>

## **2. Duties and Potential Conflicts of Interest Concerning the Funded Party**

### **a) Duties**

Private autonomy in forms of party autonomy is the fundament of national and international arbitration law.<sup>292</sup> This Party Autonomy is particularly evident in arbitration through the private agreement between the parties to submit to arbitration, thereby excluding civil jurisdiction, i.e. the arbitration agreement.<sup>293</sup> Party autonomy is therefore not only safeguarded in most of the jurisdictions worldwide but especially safeguarded in the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 and other international treaties and agreements<sup>294</sup>, which obligates contracting states to recognize a party agreement about submission to arbitration.<sup>295</sup> Furthermore, this legal principle is also expressed in various forms in Arbitration Rules, e.g. within the regulation that the party agreement shall prevail the Arbitration Rules agreed on

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<sup>289</sup>A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.288; N.Pitkowitz, Jevtic & Fremuth-Wolf, Handbook on Third-Party Funding, p.72; K.Muigua, Third Party Funding in International Arbitration, p.13.

<sup>290</sup>C.A Rogers, Handbook on Third-Party Funding, p.71.

<sup>291</sup>G.M.Solas, Third Party Funding, p.264; R.Portenti, Three's a Crowd, 15 Arb. L. Rev., p.111.

<sup>292</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO/DIS-SchO, introduction, p.1; Gantenberg, in: Martinek/Semler/Flohr, VertriebsR-HdB/§ 92 sec. 20.

<sup>293</sup>Nedden/Kopetzki, in: Nedden/Herzberg/Kopetzki, ICC-SchO/DIS-SchO, introduction, p.1.

<sup>294</sup>e.g. Art. IV par. 1 European Convention on International Arbitration of 21 April 1961; N.Blackaby, C.Partasides, International Arbitration, sec. 6.07.

<sup>295</sup>Article II United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards from 1958.

between the party within the limits of mandatory law,<sup>296</sup> or regulations according to which the parties' agreement shall prevail if the parties have agreed on the place of arbitration,<sup>297</sup> or the provision that the Arbitration Rules shall only apply if the parties have not agreed otherwise in their arbitration agreement.<sup>298</sup> The parties are the "*masters of the proceeding*" and should have the greatest possible influence on the conduct and ending of the arbitration proceeding itself, the applicable law as well as on the selection of their arbitrator, legal counsel and also, if necessary, their funder.<sup>299</sup> Thus, international commercial arbitration is considered to be "a private system of justice depending on the consent of the parties"<sup>300</sup>.

Despite their freedom in the conduct of the arbitral proceeding, the parties are subject to a duty of disclosure under certain circumstances especially when it comes to TPF. According to Art. 11 (7) ICC Arbitration Rules, "*in order to assist prospective arbitrators and arbitrators in complying with their [own] duties [concerning their impartiality and independence], each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses and under which it has an economic interest in the outcome of the arbitration*". A similar regulation is provided in Art. 48 (1) CIETAC Arbitration Rules, obligating parties once a TPF agreement is concluded, to communicate to the Arbitration Court "*the existence of the [TPF] agreement, the financial interest therein, the name and address of the Third-party funder and other relevant information*", whereas Art. 38.1 SIAC Arbitration Rules obligates parties to disclose only the existence of any TPF agreement, the identity and contact details of the Third Party Funder and - only after considering the views of the parties - more details of the TPF agreement, such as the interest in the outcome of the proceedings and whether the Third-party funder has committed to undertake adverse costs liability (see Art. 38.4 SIAC Arbitration Rules). According to Art. 44.1 HKIAC Arbitration Rules, the funded parties are only to

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<sup>296</sup>e.g. Art. 4 (3) CIETAC Arbitration Rules; Art. 19 ICC Arbitration Rules.

<sup>297</sup>e.g. Art. 7 (1) CIETAC Arbitration Rules.

<sup>298</sup>e.g. Art. 4.3.(g), Art. 6.1 HKIAC Arbitration Rules, Art. 10.2. DIS Arbitration Rules.

<sup>299</sup>Herzberg, in: Nedden/Herzberg/Kopetzki, ICC-SchO, introduction to Art. 11-15, sec.3; N.Blackaby, C.Partasides, International Arbitration, sec.1.82.

<sup>300</sup>N.Blackaby, C.Partasides, International Arbitration, sec.1.83.

disclose the fact that a funding agreement has been made and the identity of the funder. Additionally, according to the Ethical Standard 7 (a) of the IBA Guidelines, parties shall inform an arbitrator of any relationship, direct or indirect, between the arbitrator and any party of the proceedings or any other person or entity the party believes an arbitrator should take into consideration when making their own disclosures concerning their impartiality or independence. The SIAC Arbitration Rules reinforce this ethical duty and explicitly oblige the parties not to enter into a TPF agreement that could create a conflict of interest with any member of the Arbitral Tribunal and provide that, if such a conflict arises, the Tribunal may even require the party to terminate the funding agreement.<sup>301</sup>

There are some recommendations for parties seeking funding regulated within the CIETAC Hong Kong TPF Guidelines, i.e. ensuring that the TPF agreement is set out in a formal arbitration funding agreement and that the party seeking funding obtains independent legal advice on the agreement itself and any communication issue with the funder, especially concerning the disclosure of confidential information.<sup>302</sup>

## **b) Potential Conflicts of Interest**

The practice of TPF shows that funders can in principle have an influence in the disputes they fund.<sup>303</sup> This influence might not only be exerted on the funded party itself but also on its legal counsel as also the legal counsel might try to “*stick to the funders’ preferences*”<sup>304</sup> having in mind that the funder is liable for the costs in the proceedings and already examined the case before deciding on the funding of the claim.<sup>305</sup> Thus, the introduction of TPF might lead to a loss of party autonomy of the funded party leaving the decision on the conduct of proceedings to the funder itself. It might happen that the claiming party wishes for an award whereas the funder seeks for a settlement as a “*quicker and generally more efficient way [...] to conclude a dispute and cash[es] the proceeds*”<sup>306</sup>. Or, in case both funded party and funder agree

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<sup>301</sup>Art. 38.3 SIAC Rules 2025.

<sup>302</sup>CIETAC Hong Kong TPF Guidelines, section 2.1., 2.2., 2.5, 2.6.

<sup>303</sup>M.Solas, Third Party Funding, p.278.

<sup>304</sup>Ibid.

<sup>305</sup>Ibid.

<sup>306</sup>M.Solas, Third Party Funding, p.279.

on waiving a settlement if the funders' due diligence has clearly shown that the claim will be entirely successful, TPF might also cast a shadow over the opposing parties' autonomy who might be more willing to settle for a less advantageous settlement in order to avoid a proceeding with significant costs and - in their view - uncertain results.<sup>307</sup> It just cannot be denied that there might be a conflict between the funders' investment objective and the funded parties' objective on the outcome of a dispute, especially if those objectives are not in line and the funded party wishes to obtain immediate relief instead of a financially significant outcome. While the parties may permit their legal counsel to exercise authority over day-to-day decisions, they still retain control over the key decisions such as settlement decisions.<sup>308</sup> However, the funders' level of influence can extend to settlement decisions or even to the replacement of the legal counsel if, in the funders' view, disadvantageous strategies are adopted by the party's counsel.<sup>309</sup> In any case, the "*funders' profit-oriented realities*"<sup>310</sup> might lead to an undisputable influence on the funded party causing a loss of integrity of the latter. For instance, it might happen, that the funded party would deliberately agree to a settlement in order to preserve its business relationship with the respondent, while the funder may insist on an award to optimize the financial outcome of the dispute. From this perspective, funded parties might lose their flexibility in the procedural conduct and decision making that makes arbitration so unique and which they would never have within a state court proceeding<sup>311</sup> - this might lead to the question whether a party under strong influence of a funder is still party of the proceeding or whether the funder himself should already be regarded as party to the proceeding.

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<sup>307</sup>M.Sweify, Third Party Funding in International Arbitration, p.63.

<sup>308</sup>M.Sweify, Third Party Funding in International Arbitration, p.96.

<sup>309</sup>M.Sweify, Third Party Funding in International Arbitration, p.97.

<sup>310</sup>Ibid.

<sup>311</sup>Trittmann, IWRZ 2016, 255.

### 3. Duties and Conflicts of Interest Concerning the Third-Party Funder

#### a) Duties

The main challenge to the rule of law of the TPF agreement is without doubt claim control.<sup>312</sup> The funder is not allowed to participate in the conduct of the dispute neither through the development of arguments nor the draft of pleadings, nor are they allowed to participate in the day-to-day case work and may not make any strategic decisions in the case.<sup>313</sup> Overstepping these control limits, e.g. through exceeding the value of the underlying claim by more than 50%, might lead to problems within the enforceability of the award.<sup>314</sup> In accordance with the concept of party autonomy, the right to control the dispute strategy should always remain with the funded party.<sup>315</sup>

Apart from any duties prevailing from the TPF agreement or from any professional regulations, the Third-party funder has - depending on the Arbitration Rules applicable to the arbitration proceeding - Ethical Duties to comply with. In Singapore, according to the SIArb Guidelines, prior to engaging in a TPF agreement, the funder must especially ensure to meet all legal and regulatory requirements for TPF in Singapore, check for any conflicts of interest and should furthermore advise the party asking for funding to obtain independent legal advice on the TPF agreement.<sup>316</sup> The funder must not seek privileged information from the funded party's legal counsel unless the party consents and is thus required to respect the confidentiality or NDA between the party and its counsel.<sup>317</sup> Later on, the funder must neither induce any steps causing the funded party's legal counsel to breach his professional duties nor seek control of the conduct of the dispute, except as expressly permitted in the TPF agreement, and should not allow counsels to hold ownership interest in the funder.<sup>318</sup> Furthermore, the funder shall "*recognize that the Funded Party's legal*

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<sup>312</sup>M.Sweify, Third Party Funding in International Arbitration, p.99.

<sup>313</sup>Ibid.

<sup>314</sup>Article V United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards from 1958.

<sup>315</sup>M.Smith, J. Commission, in: Handbook on Third Party Funding, p.169.

<sup>316</sup>SIArb Guidelines, section 2.1.

<sup>317</sup>SIArb Guidelines, section 2.2.

<sup>318</sup>SIArb Guidelines, section 6.1.

*[counsel] owes professional ethical duties of loyalty and confidentiality to the Funded Party, even though payment of the fees of the [counsel] may be made by the Funder*<sup>319</sup>, therefore the funder is not allowed to enter into any agreement with the counsel without the consent of the funded party.<sup>320</sup> Any potential conflicts must be managed properly according to the TPF agreement<sup>321</sup>, the same applies for the termination of the funding and the extent of liability after termination.<sup>322</sup> Finally, the funder has to cooperate with the funded party when it comes to the disclosure to the arbitral tribunal or court if the applicable rules so require (see above).<sup>323</sup>

According to the Hong Kong Code of Practice for TPF, the Third-party funder must not only make sure that the funded party was made aware of the right to seek independent legal advice on the TPF agreement but must also set out and explain clearly all key features and terms of the proposed TPF agreement.<sup>324</sup> The TPF agreement has to stipulate explicitly and clearly that the funder will not - except to the extent permitted by law - try to influence the funded party or their counsel to give control or conduct of the proceedings to the Third-party funder or try to influence the arbitral tribunal or institution involved.<sup>325</sup> Furthermore, the Third-party funder has to accept an ongoing disclosure obligation to give timely notice to the funded party about any issues regarding the capital adequacy of the funder<sup>326</sup> and maintain effective procedures (i.e. in form of an official complaints procedure<sup>327</sup>) for managing any conflict of interest arising within the TPF relationship.<sup>328</sup>

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<sup>319</sup>SIarb Guidelines, section 6.2.1.

<sup>320</sup>SIarb Guidelines, section 6.2.2.

<sup>321</sup>see also Law Society Singapore Guidance Note 10.1.1, section 13.

<sup>322</sup>SIarb Guidelines, section 6.2.3, 7.

<sup>323</sup>SIarb Guidelines, section 8.

<sup>324</sup>Hong Kong Code of Practice for TPF, section 2.3. (1) and (3).

<sup>325</sup>Hong Kong Code of Practice for TPF, section 2.9. (1), (3).

<sup>326</sup>According to Section 2.5. (2) Hong Kong Code of Practice for TPF the funder must maintain access to a minimum of HK\$20 million of capital and have the capacity to pay all debts when they become due and payable and cover all of its aggregate funding liabilities under all of its funding agreement for a minimum period of 36 months.

<sup>327</sup>Hong Kong Code of Practice for TPF, section 2.18.

<sup>328</sup>Hong Kong Code of Practice for TPF, section 2.5. (4) (a), 2.6.

## b) Potential Conflict of Interest

Third-party funders are “*financially motivated entities*”<sup>329</sup> which will “*endeavor to prosecute the claim as efficiently as possible, maximizing its value, and limiting costs and risks*”<sup>330</sup>. This, however, leads to the most crucial question when it comes to the integrity of the Third-party funder: are the funders financing their own interests or those of the funded party?

This question is already relevant when it comes to the choice of the legal counsel of the funded party. In practice, a funder will generally not agree on funding a claim unless they agree with the party’s choice of legal representation.<sup>331</sup> Thus, some funders recommend counsels to the party seeking funding or even require the appointment of the legal counsel through themselves or the replacement of the chosen counsel by the party through a counsel selected by the funder for the conclusion of any TPF agreement.<sup>332</sup> The same goes for the appointed arbitrator, where funders might reject any funding in case the “*appointed arbitrator [...] was not satisfactory*”<sup>333</sup>. Furthermore, in many cases the party selects their own counsel but the funder is the one paying the lawyer’s fees.<sup>334</sup> Informational asymmetries might arise where the funder monitors the case - especially if the counsel was appointed by the funder themselves or in cases the counsel seeks approval of or input on strategic decisions.<sup>335</sup> Thus, it could happen, that as the counsel passes information that is not covered by confidentiality which contains legitimate reasons of concerns about the success of the claim, the funder seeks to terminate the TPF agreement.<sup>336</sup> Additionally, in cases the claimant wishes to settle against the will of the funder, the counsel suggested by the funder might feel pressured to follow the funder’s opinion with the goal of gaining repeat business.<sup>337</sup> So it might be, that the counsel chooses

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<sup>329</sup>G.M.Solas, *Third Party Funding*, p.277.

<sup>330</sup>Ibid.

<sup>331</sup>M.Scherer, A.Goldsmith, C.Fléchet, *Third Party Funding in International Arbitration Part 1*, p. 215.

<sup>332</sup>M.Scherer, A.Goldsmith, C.Fléchet, *Third Party Funding in International Arbitration Part 1*, p.216.

<sup>333</sup>Ibid.

<sup>334</sup>Law Society Singapore, *Guidance Note 10.1.1.*, section 35 (a).

<sup>335</sup>M.Sweify, *Third Party Funding in International Arbitration*, p.97; Law Society Singapore, *Guidance Note 10.1.1.*, section 35 (b).

<sup>336</sup>M.Sweify, *Third Party Funding in International Arbitration*, p.97; G.M.Solas, *Third Party Funding*, p.261.

<sup>337</sup>Law Society Singapore, *Guidance Note 10.1.1.*, section 35 (c).

to manage the dispute for the best interest of the funder, pressured by the funder itself, instead of their client's.<sup>338</sup> On the other hand, the relationship between the funder and the counsel can be very tense, as "*funders have an interest in reducing costs, while lawyers, to perform their job at their best, need time, and would [...] prefer to be remunerated on an hourly basis*"<sup>339</sup> with no time or cost cap involved. As the lawyer would prefer to choose an extensive and thorough proceeding, the funder might wish to "*pursue a quick and cheap dispute resolution procedure*"<sup>340</sup>. In cases the funder includes clients claims as one component within a broader portfolio of conventional financial assets, the funder might even be tempted to seek to distribute their resources in a manner to gain the best outcome for their portfolio, which does not necessarily align with the benefits and interests of the funded party.<sup>341</sup> Funders should be "*obliged to respect a fiduciary duty of care requiring them to act in the best interest [of the funded party]*"<sup>342</sup> and the control over the legal proceedings must always be the responsibility of the party and the legal counsel.<sup>343</sup>

Another conflict of interest might arise in the event of disagreements over fundamental strategic decisions on the conduct of the dispute. Thus, it is crucial to regulate this potential conflict in the TPF agreement, which will be discussed in more detail in section V. 1. b) on page 51. Anyhow, this is one of the reasons why it is crucial that the party seeking funding should also be asking for independent legal advice on the TPF agreement itself to secure their rights for the period before, during and after the arbitral proceeding.

Finally, it goes without saying that a funder has an undeniable conflict of interest in cases where the funder has some sort of interest in the potential opposing party; then the funder should decline any agreement with the claimant right away.<sup>344</sup>

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<sup>338</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p.115.

<sup>339</sup>G.M.Solas, Third Party Funding, p.261.

<sup>340</sup>G.M.Solas, Third Party Funding, p.262.

<sup>341</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p.115.

<sup>342</sup>Resolution 2023/ C 125/01, Ethical issues No.7.

<sup>343</sup>Ibid.

<sup>344</sup>G.M.Solas, Third Party Funding, p.261.

#### 4. Conflicts of Interest Concerning the Opposing Party

There are no specific duties or ethical recommendations to comply with by the opposing party, i.e. the respondent, when TPF is involved. However, the respondent might still be influenced after the disclosure of the TPF agreement and thus suffer a loss of integrity.

From the respondent's perspective, the claimant's decision to seek financial support might suggest that the claimant lacks sufficient funds of their own and thus the funding might affect the conduct of the arbitration proceeding.<sup>345</sup> Who is the real party in interest? The claimant or the funder? "*Introducing [TPF] into a dispute may shift the bargaining power to the funded party at the expense of the opposing party*"<sup>346</sup>, who is now not only facing one opponent but maybe two, as the funder might take influence on the conduct of the proceeding and especially on settlement decisions.<sup>347</sup>

Additionally, in cases of an impecunious claimant, with the backing of external funding, the claimant might be able to engage a large legal team and various experts, which could pressure the respondent to adopt a similar approach, thereby increasing their own expenses.<sup>348</sup> While these costs may not pose an issue for the funded claimant, they could, however, become problematic and hindering for the respondent, particularly if they had not anticipated or are unwilling to allocate significant financial resources to the dispute.<sup>349</sup> Therefore, in case the TPF agreement does not foresee the coverage of costs award in case of loss for the claimant, the presence of TPF might even exacerbate the costs and losses of the respondent as they reacted to the cost excessive strategy of the claimant.<sup>350</sup> The social effect of TPF might thus lead to "*vexatious litigation*"<sup>351</sup>, i.e. "*those situations in which claims are brought regardless of their merits, just to harass or damage the counterparty, [simply*

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<sup>345</sup> A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.283.

<sup>346</sup> M.Sweify, Third Party Funding in International Arbitration, p.63.

<sup>347</sup> Ibid.

<sup>348</sup> A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.283.

<sup>349</sup> A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.283, 284.

<sup>350</sup> A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.284.

<sup>351</sup> G.M.Solas, Third Party Funding, p.234.

*to satisfy the urge to engage in litigation<sup>352]</sup> and not necessarily includes the fact that suing would be done for profit".<sup>353</sup>* In contrast, however, there is the due diligence of the funder before engaging in a TPF agreement, and is a "rational profit maker"<sup>354</sup>, who does not finance a claim based on emotions like revenge but because it promises financial gain<sup>355</sup>, which in turn can put enormous pressure on the respondent and unsettle them in their litigation strategy, causing them - again - to incur further costs in order to hire experts to convince the tribunal of their legal and factual arguments.

Another conflict between the funder and respondent might arise in case the respondent has a relationship of any kind with the funder.<sup>356</sup> Therefore, the EU, regulated in Art. 10 (2) (b) that "*[m]ember states shall ensure that the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent*".

## **V. TPF: Recommendations for Arbitration Institutions and TPF Agreements**

Taking into consideration the regulations and ethical guidelines that have been issued to date, and in particular with regard to potential conflicts of interest and the resulting loss of integrity, the question arises as to how these conflicts can be prevented or resolved. This master's thesis therefore aims to shed light on possible provisions in TPF agreements that enable the funded party to protect their rights and preserve integrity, while gaining access to justice through the funder. In addition, recommendations for the arbitration rules of the arbitration institutions are to be developed in order to attract funders as "*the driving force behind the arbitration*"<sup>357</sup> while simultaneously giving them the necessary space to enable access to justice without causing the key actors of an arbitral proceeding to lose their integrity.

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<sup>352</sup>E.R Manwell, The Vexatious Litigant, p. 1770.

<sup>353</sup>G.M.Solas, Third Party Funding, p.234; E.R Manwell, The Vexatious Litigant, p.1769, 1770.

<sup>354</sup>G.M.Solas, Third Party Funding, p.235.

<sup>355</sup>Ibid.

<sup>356</sup>G.M.Solas, Third Party Funding, p.263.

<sup>357</sup>M.Sweify, Third Party Funding in International Arbitration, p.87.

## 1. A Brief Insight into and Recommendations for TPF Agreements

This master's thesis offers a brief overview of the most common regulations in TPF agreements to then highlight the recommendations for such agreements, without engaging in a detailed analysis of the various contractual forms of TPF agreements.

### a) Brief Insight into TPF Agreements

While the terms of the TPF agreement are tailored to the specifics of each case and should be adapted to the client's specific requirements, there are still standard commercial provisions.<sup>358</sup> Even though TPF should have no influence on case strategy and settlement, funders will - as already outlined in this paper - *"monitor and track the progress of matters they fund"*<sup>359</sup>.

In principle, there are different options of TPF, the most common ones being:

- single case funding, where the funder covers the legal fees of a party to a dispute in exchange for a share of the proceeds obtained within the proceeding;<sup>360</sup>
- defense funding, where the funder covers the legal fees and expenses of a party against which a lawsuit is brought;<sup>361</sup>
- portfolio funding, where the funder provides capital for a portfolio of corporate claims especially enabling funding for claimants with smaller or mid-size cases that would be unavailable for funding in relation to the individual claim;<sup>362</sup>

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<sup>358</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.168.

<sup>359</sup>Ibid.

<sup>360</sup>A.Jevtic/A. Fremuth-Wolf, Handbook of Third-Party Funding, p.202.

<sup>361</sup>A.Jevtic/A. Fremuth-Wolf, Handbook of Third-Party Funding, p.204.

<sup>362</sup>A.Jevtic/A. Fremuth-Wolf, Handbook of Third-Party Funding, p.206; F. Pérez-Lozada, Litigation Funding in International Arbitration, Kluwer Arbitration Blog, 20/06/2025.

- Law firm funding, where the funder provides capital directly to the law firms, i.e. not to the party of the proceeding;<sup>363</sup>
- Funding of group or collective actions and book-building, where the funder provides capital for a group of litigators who file a collective lawsuit;<sup>364</sup>
- Monetization of claims and the purchase of awards, which involves selling all or a part of the expected proceeds from a legal claim to the funder in exchange for an upfront payment, whereas the purchase of an award happens later in the process.<sup>365</sup>

The first and foremost step in any TPF process is the signing of a NDA to set out the basis for confidentiality regulations and the legal privilege on shared materials,<sup>366</sup> but, this NDA should afterwards also become an integral part of the funding agreement as the funded party is obliged to disclose specific information to the funder.<sup>367</sup> TPF agreements are generally structured as non-recourse agreements, i.e. TPF does not constitute a loan and the client is only required to repay the funder if the dispute is resolved in the client's favor.<sup>368</sup> As a result, TPF significantly reduces the financial risk for the funded party, as there is no obligation to reimburse the funder in the event of an unsuccessful outcome of the dispute.<sup>369</sup> Commercial funders are meant to be "*passive financing partners*"<sup>370</sup>, so TPF agreements usually state that the funded party retains control over the litigation strategy and settlement.<sup>371</sup> However, in rare cases such as a purchase agreement on the claim, some funded parties choose to waive or assign the right to decide on a settlement to the funder.<sup>372</sup> In any case, TPF agreements normally foresee that the funded party

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<sup>363</sup> A.Jevtic/A. Fremuth-Wolf, Handbook of Third-Party Funding, p.207; this form of TPF not allowed in every jurisdiction and is mainly used in jurisdictions allowing contingency or conditional fee agreements.

<sup>364</sup> A.Jevtic/A. Fremuth-Wolf, Handbook of Third-Party Funding, p.210.

<sup>365</sup> A.Jevtic/A. Fremuth-Wolf, Handbook of Third-Party Funding, p.212.

<sup>366</sup> Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p. 28; M.Smith/J.Commission, Handbook on Third-Party Funding, p.168.

<sup>367</sup> M.Smith/J.Commission, Handbook on Third-Party Funding, p.168, 169.

<sup>368</sup> M.Smith/J.Commission, Handbook on Third-Party Funding, p.169.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

has “*to behave in a commercially rational manner [and] to follow the reasonable advice of its lawyers*”<sup>373</sup>.

As far as the right to termination of the TPF agreement goes, funders in general are obligated to continue funding, unless the TPF agreement expressly grants them a right of termination. i.e. especially in cases of breach of agreement by the funded party as consequently there is “*no full and honest cooperation by the client*”<sup>374</sup> or in cases of material changes in circumstances.<sup>375</sup> In case of unilateral termination of either the payments or the TPF agreement in whole by the funder, the client is usually protected by a special dispute resolution clause that provides for the parties to jointly appoint an independent expert to resolve any disputes between the funder and the claimant by proposing and implementing a dispute resolution mechanism that is binding on the parties.<sup>376</sup> Other funding agreements include either penalty clauses that determine the amount payable by the funded party in advance in case of breach of contract or clauses that refer to the governing law of the agreement regarding remedies.<sup>377</sup> Nevertheless, there are beliefs that the funder should only be permitted to terminate the funding agreement in “*exceptional and strictly regulated circumstances*”<sup>378</sup>, as the funded party might be left behind with costs which only have been pursued due to the involvement of the funder.<sup>379</sup> In case of termination it is, however, common practice to agree on a “*negotiated exit*”<sup>380</sup>, thus “*a well-prepared funding agreement should include clear future expectations on what would or would not constitute a fair net outcome for the [funder]*”<sup>381</sup>.

Third-party funders recover their investments from arbitral award proceeds. However, their ability to collect may be hindered by conflicting interest of other stakeholders, actions by creditors or shareholders, and disputes over the allocation

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<sup>373</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.169.

<sup>374</sup>M.Scherer, A. Goldsmith, C. Fléchet, Third Party Funding in International Arbitration Part 1, p.218.

<sup>375</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.169; M.Scherer, A. Goldsmith, C. Fléchet, Third Party Funding in International Arbitration Part 1, p.218.

<sup>376</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.170.

<sup>377</sup>M.Scherer, A. Goldsmith, C. Fléchet, Third Party Funding in International Arbitration Part 1, p.218.

<sup>378</sup>Resolution 2023/ C 125/01, Ethical issues No.9.

<sup>379</sup>Ibid.

<sup>380</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.170.

<sup>381</sup>Ibid.

of litigation proceeds.<sup>382</sup> Thus, ancillary agreements such as standstill<sup>383</sup>, escrow<sup>384</sup> and priorities<sup>385</sup> agreements are implemented to mitigate these risks and secure the funder's right to payment.<sup>386</sup>

In general, a funding agreement includes methods for determining the maximum amount of money contributed by the funder, the amount of the return that the funder expects to receive in case of success of the dispute and the maximum adverse costs the funder has to pay, if any, in case the funded party loses the dispute.<sup>387</sup> The price of capital to finance the arbitration proceeding varies by funder and depends on distinct factors such as timing and duration of the case, risk of loss, the arbitral institution involved, risk diversification and recovery prospects.<sup>388</sup> The cost of capital rises in proportion to the level of risk involved,<sup>389</sup> thus, matters with lower risk are proportionally less expensive to finance than those associated with higher risk. As TPF is non-recourse and the client does not need to repay any funding, TPF shifts the risk of loss from the funded party to the funder.<sup>390</sup> As the funders have a "*direct economic interest*"<sup>391</sup> in the funded arbitration proceeding, the arbitration agreement always foresees a return structure in terms of variable, fixed or hybrid structures.<sup>392</sup> Thus, returns can be calculated as a percentage of the proceeds (typical range from 20% to 40%; i.e. variable return) or as a multiple of the costs they have advanced (typical range from 1.5 to 6.0 with an average around 3.0; i.e. fixed return) or as a combination of these structures (hybrid structures).<sup>393</sup>

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<sup>382</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.170.

<sup>383</sup>Temporary waiver of the right to assert a claim, i.e. an agreement in which the funder agrees not to enforce his contractual rights or take actions that could jeopardize the arbitration proceeding (Henrich, BeckOK BGB, § 205 sec.3; M.Smith/J.Commission, Handbook on Third-Party Funding, p.171).

<sup>384</sup>Agreement to have the proceeds directly paid to an escrow agent (M.Smith/J.Commission, Handbook on Third-Party Funding, p.170).

<sup>385</sup>Agreement on the distribution of proceeds after the arbitration proceeding, M.Smith/J.Commission, Handbook on Third-Party Funding, p.170.

<sup>386</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.170.

<sup>387</sup>L.B. Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.12.

<sup>388</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.172 f; L.B. Nieuwveld, V.S. Sahani, Third-Party Funding in International Arbitration, p.12.

<sup>389</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.172.

<sup>390</sup>M.Smith/J.Commission, Handbook on Third-Party Funding, p.172 f.

<sup>391</sup>Practice Note 01/17, sec. 3a.

<sup>392</sup>T.H.Tu Linh & B. Trung Hieu, Third Party Funding in Commercial Arbitration in ASEAN,p. 102; M.Smith/J.Commission, Handbook on Third-Party Funding, p.174,175.

<sup>393</sup>Ibid.

## b) Recommendations for TPF Agreements

### (1) Control and Influence of the Funder

To preserve the integrity of the funded party and the arbitration process as a whole but also “*to avoid or minimize the risks of a challenge to the lawfulness of the funding agreement*”<sup>394</sup> the TPF agreement should ensure that the funder does not exercise any control over the proceeding of the funded dispute.<sup>395</sup> The funding of a dispute shall not depend on how the funded party takes their decisions in the arbitration proceeding and, in particular, must not depend on any decisions regarding settlements or withdrawal of the claim (see above). In this respect, the funded party must weigh up the extent to which it wishes to involve the funder in the proceedings of the case.<sup>396</sup> Does the funder have the right to monitor the fees? Is the funder to be notified in case of any significant developments (e.g. settlement offers)? Does the funder have direct access to the legal team of the funded party and is allowed to attend their meetings? Is the funder in copy on mail correspondence between counsel and the funded party? Does the funder have a say in the funded party’s decision to change legal counsel? These are all questions to be considered while filing the TPF agreement and might even be worth a separate clause just to maintain the power over the arbitral proceeding - “*a balance should be struck between the funder’s interference and the party’s control*”<sup>397</sup>.

The funded party should, however, be aware of the fact that even though the funding agreement leaves the funded party their freedom in the conduct of proceedings, there are always “*hidden*” safeguards introduced to the funding agreement to protect the funder’s investment.<sup>398</sup> One of those safeguards are terms on termination or withdrawal of the agreement, e.g. since the funding is conditional on the merits of the case, a fundamental change in the likelihood of success or dissatisfaction with the

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<sup>394</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.28.

<sup>395</sup>N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.228.

<sup>396</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.28.

<sup>397</sup>M.Sweify, Third Party Funding in International Arbitration, p.104.

<sup>398</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.28.; Resolution 2023/ C 125/01, Ethical issues No.7.

conduct of the funded party may entitle the funder to terminate the funding agreement.<sup>399</sup> One should always keep in mind that the “*withdrawal of funding [is a] powerful [tool of] indirect control*”<sup>400</sup>. Thus, e.g. Art. 15 of Directive 2020/2130 prohibits the unilateral termination of a TPF agreement by the funder without the funded party’s informed consent, except where a court or administrative authority has granted the permission to terminate the agreement, having taken into consideration the interest of both parties.

## (2) Disclosure

As already mentioned above, regardless of the jurisdiction, the party seeking funding should always make sure that a “*robust*”<sup>401</sup> NDA is executed and in effect prior to engaging in any substantive discussions with a potential funder, in order to safeguard the party against the unauthorized disclosure of confidential information and thus any party “*should seek legal advice regarding the doctrines of privilege, professional secrecy, work product and waiver under the law applicable to the [TPF agreement]*”<sup>402</sup>.<sup>403</sup> After concluding the TPF agreement with the funder, this NDA should also prevent the disclosure of any transaction details or funding arrangement provisions as the funding agreement reflects the way in which the funder conducts its business but might also contain sensitive information about the strategies of the conduct on the case.<sup>404</sup> In a nutshell, the NDA is an indispensable requirement for the funder’s initial due diligence of the disputes and its merits as well as for the ongoing communication between funder and funded party during the pending proceedings.<sup>405</sup> Furthermore, the NDA is vital for the safeguarding of the funded parties’ rights as the communication with funders and also any sensitive document

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<sup>399</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.28; N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.228.

<sup>400</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.28.

<sup>401</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.188.

<sup>402</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.189.

<sup>403</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.188.

<sup>404</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.189; A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p. 286.

<sup>405</sup>N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.225.

produced by the funder is in principle not protected by the same privilege as attorney-client information.<sup>406</sup> Thus, e.g. the Guidance Note 10.1.1. recommends lawyers to advise their clients not only to enter into a NDA but also - as there may be the risk that legal privilege in documents will be waived when privileged information is given to the funder - to review the position at law and advise the client on whether common interest privilege (i.e. the pursuit of the funded claims) applies.<sup>407</sup> The same goes for the CIETAC Hong Kong TPF Guidelines recommending parties seeking funding not only to consider the effect of any applicable confidentiality provisions or laws but also to consider if communications with the funder or between funder and legal adviser might be disclosable in subsequent proceedings.<sup>408</sup> The NDA might also oblige the funded party to use their best efforts to restrict the extent of any required disclosure to external parties to the minimum necessary but at the same time contain a confidentiality clause protecting against any opposing party seeking disclosure of information (i.e. important legal aspects, tactical strategies or legal statements) exchanged between the funder, the funded party and their counsel.<sup>409</sup> Thus, there should definitely be a clause regulating the rules for the disclosure of confidential or even privileged information and the extent to which the disclosure is allowed.

### (3) Transparency

Furthermore, it is crucial that the parties provide for regulations regarding the funders' financial status, which is why it should be stipulated that the funder must provide accurate and non-misleading information regarding their financial condition and funding commitment and that the funder will periodically provide statements on any risk of budget exhaustion and will inform the funded party duly in case these risks arise during the dispute.<sup>410</sup> It might even be recommended to request some form of assurance that the funder is in possession of the committed funds.<sup>411</sup> Additionally, it

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<sup>406</sup>G.M. Giesel, Alternative Litigation Finance and the Attorney-Client Privilege (2015), p. 95; G.M.Solas, Third Party Funding, p. 255; N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.226.

<sup>407</sup>Law Society Singapore, Guidance Note 10.1.1., section. 25-29; N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.226.

<sup>408</sup>CIETAC Hong Kong TPF Guidelines, Section 2.5-2.7.

<sup>409</sup>N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.226.

<sup>410</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.193.

<sup>411</sup>N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.226.

should be discussed and clearly regulated whether and under what circumstances the funder will manage the party's litigation expenses, especially in case the litigation costs of the funded dispute exceed the budget.<sup>412</sup>

Transparency is also an issue when it comes to case management. To prevent the loss of integrity of the funded party, the TPF agreement should therefore "*clearly and unequivocally reflect the intentions of the parties with respect to the scope of involvement or control [of the funder, especially] when an unresolved dispute over management and strategy arises*"<sup>413</sup>, i.e. the TPF agreement should clearly determine the appropriate level of the funder's control on the dispute and its proceeding.<sup>414</sup> In addition, the TPF agreement should contain a clause confirming the completion of a conflict check by the funder and oblige the funder to continuously monitor and disclose potential conflict of interest throughout the entire process. Otherwise, in case a conflict is revealed during the process, i.e. the arbitrator is somehow involved with the funder, the party might not be able to seek remedy with the funder.

#### (4) Dispute Resolution Provision

The funder and the funded party should in any case include a provision into their TPF agreement on how any potential dispute will be resolved.<sup>415</sup> Since both arbitration and mediation proceedings are confidential, it may be advisable to prefer these forms of ADR over litigation proceedings. Another possibility would be the use of a third independent and neutral party who functions as a referee and is selected based on a consensus between the funder and the funded party.<sup>416</sup> These provisions for dispute resolution can mitigate the above-mentioned indirect control of the funder by making termination of the TPF agreement possible only after the agreed dispute resolution proceeding has been concluded.

#### (5) Scope of Funding

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<sup>412</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.193, 197.

<sup>413</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.193.

<sup>414</sup>Ibid.

<sup>415</sup>Ibid.

<sup>416</sup>M.Scherer, A. Goldsmith, C. Fléchet, Third Party Funding in International Arbitration Part 1, p.217.

It goes without saying that the TPF agreement should clearly set out the costs covered by the funder, i.e. it should in particular be regulated whether legal fees, fees for experts engaged by the funded party, arbitrator's fees, evidentiary costs and administrative fees for the arbitration institutions are covered.<sup>417</sup> It is not unusual that the funder covers the costs only up to a specified sum as the initial budget often has to be revised during the course of the proceeding and the progression of the dispute resolution.<sup>418</sup>

Generally, the funder has no obligation to cover adverse costs if the claim of the funded party was unsuccessful, which is why it is not uncommon in the context of international commercial arbitration that the respondent asks for a security of costs especially if they have information on the impecuniosity of the claimant.<sup>419</sup> Especially, as in some jurisdictions the arbitral tribunal may consider the existence of a TPF agreement as a relevant factor when it comes to the application for security for costs.<sup>420</sup> Therefore, either a clause regulating the disclosure of the funders commitment to cover adverse costs to refute the necessity for security for costs should exist or the funder should be obligated to provide the funds required for any security for costs or be obligated to enter into an agreement with an insurer to cover the risks.<sup>421</sup>

Notwithstanding any regulations in case of an unsuccessful outcome of the case, the TPF agreement should regulate the funder's compensation in case of success. Typically, the funded party is required to pay back the funds in addition to a "success fee"<sup>422</sup><sup>423</sup> This "success" should be defined within the TPF agreement or maybe an additional agreement on the distribution of proceeds, as it might not always mean winning the award, but could also mean the achievement of a certain percentage of the claim.<sup>424</sup> Any securities imposed on the parties to secure the funder's

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<sup>417</sup>N.Pitkowitz, MA. Müller, in: *Handbook on Third-Party Funding*, p.226, 227.

<sup>418</sup>N.Pitkowitz, MA. Müller, in: *Handbook on Third-Party Funding*, p.226.

<sup>419</sup>N.Pitkowitz, MA Müller, in: *Handbook on Third-Party Funding*, p.227.

<sup>420</sup>See e.g. CIETAC Hong Kong TPF Guidelines, sec. 4.3.

<sup>421</sup>N.Pitkowitz, MA Müller, in: *Handbook on Third-Party Funding*, p.228, see. e.g. SIArb Guidelines, sec. 3.2; Resolution 2023/ C 125/01, Ethical issues No. 10.

<sup>422</sup>N.Pitkowitz, MA Müller, in: *Handbook on Third-Party Funding*, p.230.

<sup>423</sup>Ibid.

<sup>424</sup>N.Pitkowitz, MA Müller, in: *Handbook on Third-Party Funding*, p.228.

compensation should be carefully considered under the applicable law, especially in cross border scenarios.<sup>425</sup> This should also be taken into account when choosing the law governing the TPF agreement.

#### (7) Recommended Additions to the Due Diligence Checklist of the ICCA-Queen Mary Task Force on TPF in International Arbitration

Finally, particular attention should be given the due diligence checklist of the Report of the ICCA-Queen Mary task force on TPF in international arbitration (2018), which provides a checklist of questions concerning the funder's legal and financial/capital structures, specific obligations to a party, the funder's professional responsibilities and the funding agreement.<sup>426</sup> However, in order to further mitigate and avoid risks of loss of integrity that have been examined so far, it is advisable to include the following additional questions to the checklist concerning the funding agreement:

- Are there any regulations for the funder to regularly report on the status of financing and any changes in their own financial situation? How are significant changes on the part of the funder (e.g. insolvency) handled?
- Are there any other parties on the side of the funder involved (i.e. reinsurers) and how much control do they have over the funder?
- Are there any rules governing early withdrawal by the funder and the consequences for the party?
- Are there any disclosure requirements regarding TPF to the arbitral tribunal or the opposing party in the respective arbitration proceeding? How are these requirements handled and do they comply with the institutional arbitration rules applied in the respective proceedings?

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<sup>425</sup>N.Pitkowitz, MA Müller, in: Handbook on Third-Party Funding, p.231.

<sup>426</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.196ff.

- Are there regulations which confirm the completion of a conflict check of the funder and oblige the latter to continuously monitor and disclose potential conflicts of interest throughout the entire process?
- Are there any regulations governing whether the regulatory framework for TPF will change and how this could affect the ongoing proceedings?

## 2. Recommendations for Institutional Arbitration Rules

### a) Regulation

The necessity for regulation should come as no surprise given the risks described above. The most relevant reason to put specific TPF regulations into effect is to clarify their legality and to control their use.<sup>427</sup> The most appreciable approach is probably the Singaporean approach as it combines hard regulation on TPF with soft law in the form of Guidelines and Guidance Notes making it easier for all actors within TPF to handle TPF. On the European level, there is still a complete lack of regulation even though TPF is “*an expanding practice in the Union*”<sup>428</sup> and thus playing an increasing role in the justice system of European Member States enabling EU citizens access to justice especially within cross-border cases.<sup>429</sup> There is, without any doubt, a necessity to establish common minimum standards at EU level in particular addressing the key aspects relevant to TPF, i.e. transparency, fairness and control of the funders’ influence and thus allowing legislators to exercise effective oversight and control on the protections of the parties involved within TPF, especially, however, of the funded party.<sup>430</sup> Therefore it is necessary to establish a “*system of authorisation*”<sup>431</sup> for funders to ensure the access to justice for EU citizens with proper safeguards such as corporate governance standards, supervisory oversight, requirements for transparency, independence and sufficient capital.<sup>432</sup> The latter is extremely important considering investment arbitration and EU states with the status of a developed state - but it is also relevant when it comes to the monitoring for

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<sup>427</sup>G.M.Solas, *Third Party Funding*, p.292.

<sup>428</sup>Resolution 2023/ C 125/01, Introduction (1).

<sup>429</sup>Ibid.

<sup>430</sup>Resolution 2023/ C 125/01, Introduction (3), (5).

<sup>431</sup>Resolution 2023/ C 125/01, *Regulations and supervision of litigation funders* (6).

<sup>432</sup>Resolution 2023/ C 125/01, *Regulations and supervision of litigation funders* (1).

abusive practices of TPF.<sup>433</sup> However, this authorization system should not impose unnecessary administrative burdens on the EU Member States.<sup>434</sup>

## b) Disclosure

It goes without saying that arbitrators (and funders) should disclose any conflict of interest relevant to the arbitration proceeding (or the funding agreement) at hand. This requires the arbitrator to be informed about the funding agreement in the first place. However, excessive disclosure requirements in relation to the TPF agreement, the funders identity or even other circumstantial information regarding the funding might jeopardize procedural fairness and equality of arms, as they reveal the extent of the party's resources which is an invaluable advantage for the respondent.<sup>435</sup> Normally, arbitral tribunals only require the disclosure of the existence of a TPF agreement and the identity of the funder or any changes in the funding agreement, but do not require the disclosure of the TPF agreement.<sup>436</sup> Still, disclosure of further information on the TPF agreement such as the funders interest in the outcome of the proceeding and whether the funder has committed to undertake adverse costs liability might also have to be disclosed, especially if the "*standing of the funded party is questioned*"<sup>437</sup><sup>438</sup>

When it comes to disclosure in international arbitration, issues of privilege and relevancy always arise – on the one hand, disclosure is necessary to maintain and safeguard the integrity of all key actors within an arbitral proceeding but on the other hand, disclosure can also lead to the loss of integrity of the key actors especially by jeopardizing their independence and impartiality in decision making (see above).<sup>439</sup> One could already argue whether it is necessary to disclose TPF and the funder's identity without cause or if there should be at least a good reason, i.e. an alleged relationship between the arbitrator and the funder. The greatest doubts,

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<sup>433</sup>R.Portenti, Three's a Crowd, 15 Arb. L. Rev., p. 118; SchiedsVZ 2021,121 (109).

<sup>434</sup>Resolution 2023/ C 125/01, Regulations and supervision of litigation funders (1).

<sup>435</sup>SchiedsVZ 2023, 121.

<sup>436</sup>Art. 11 (7) ICC Arbitration Rules, Art. 4.3 (h) (i), 44.3. HKIAC Arbitration Rules, Art. 38.1, 38.2. SIAC Arbitration Rules, Art. 48 (1) CIETAC Arbitration Rules.

<sup>437</sup>M.Sweify, Third Party Funding in International Arbitration, p.65.

<sup>438</sup>e.g. Art. 38.4 SIAC Arbitration Rules, Art. 48. 1 (3) CIETAC Arbitration Rules.

<sup>439</sup>M.Sweify, Third Party Funding in International Arbitration, p.65.

however, concern the requirement to disclose further information on the TPF agreement. In the latter case, a conflict of interest and thus loss of integrity can no longer be ruled out, especially as soon as an arbitrator has asked parties to disclose any information concerning the TPF agreement or the details of the Third-party funder's interest in the outcome of the case<sup>440</sup> as the arbitrator might subconsciously consider the funder's interest in the outcome and evaluation of the claim, i.e. the party with TPF would clearly be favored due to their financial backup which in extreme cases would render the legal assessment of the case irrelevant.

In the 2015 Queen Mary School of International Arbitration Survey, 76% of the survey respondents agreed that disclosure of the existence of TPF and 63% said that the disclosure of the identity of the funder should be mandatory, whereas 71% thought that the full terms of the TPF agreement should not be disclosed.<sup>441</sup> The respondents argued that the disclosure of the existence of the TPF agreement and the identity of the funder would be an assistance for the check of conflicts of interest and provide the arbitral tribunal with information regarding the financial position of the parties and that the full disclosure of the TPF agreement "*would be irrelevant to the effective management of the arbitral process*"<sup>442, 443</sup>

In a nutshell, the degree of disclosure should depend only on the need to protect the relevant interests and the core essence of an arbitration proceeding, i.e. especially impartiality and independence and consequently should not go beyond what is absolutely necessary to protect these interests.<sup>444</sup> Therefore, it should first be determined which interest requires protection at the particular stage of the arbitration proceedings,<sup>445</sup> e.g. the parties' interest in a neutral and independent arbitrator from the beginning of an arbitral proceeding. Subsequently, it must be clarified what information needs to be disclosed in order to safeguard that interest,<sup>446</sup>

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<sup>440</sup>See i.e. Art. 38.4 SIAC Arbitration Rules, Art. 48. 1 (3) CIETAC Arbitration Rules.

<sup>441</sup>Queen Mary, University of London and White&Case – 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p.48.

<sup>442</sup>Ibid.

<sup>443</sup>Ibid.

<sup>444</sup>A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.292.

<sup>445</sup>Ibid.

<sup>446</sup>A.Crivellaro, L. Melchionda, Disclosure and Conflicts of Interest in Relation to TPF, p.292.

e.g. the arbitrator should be informed within the arbitration notice of the existence of a TPF agreement and the identity of the funder to ensure their role as an independent and neutral arbitrator.

Thus, it is recommended to have transparent rules on what to disclose -having this in mind, Art. 48 (1) CIETAC Arbitration Rules, for example, are very vague when regulating that "*other relevant information*" - in addition to the existence of a TPF agreement, the financial interest therein and the name and address of the funder - is to be communicated to the Arbitration Court. Secondly, it should only be mandatory to disclose the existence of the TPF agreement and the funder's identity; any additional information should not be mandatory to disclose without a statement of legitimate interest and a careful consideration of the arbitrator concerning the necessity of such disclosure. Within this consideration process, the arbitrator should take into account the following factors in particular:

- Who is the real party in interest and is the interest of the party legitimate?
- Is the disclosure necessary to clear a potential conflict of interest?
- Is the scope of the requested disclosure proportionate to the purpose it serves?
- Is the integrity of the proceeding and especially of the arbitrator still safeguarded after the disclosure or are additional protective measures necessary?
- Are there any statutory or contractual confidentiality obligations that restrict or prohibit the requested disclosure?

Where disclosure is permitted, it should nevertheless be limited to what is absolutely necessary and - if possible - accompanied by additional protective measures (e.g. appropriate redaction<sup>447</sup>), so that only the most relevant information is disclosed, restrictions of the group of recipients and restrictions on use that extend beyond the

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<sup>447</sup>Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration (2018), p.189.

duration of the proceeding). This ensures that both the need for transparency and the protection of confidential information are both considered.

### **c) Additional Recommendations for Arbitration Rules**

In order to emphasize the duties of the arbitrator and appeal to them, consideration should be given to whether an arbitrator - after disclosure of the existence and identity of TPF - must sign an "*Arbitrator Declaration*"<sup>448</sup> as provided within Rule 16 (3) b) of the ICSID Conciliation Rules<sup>449</sup> addressing matters including the arbitrator's independence and impartiality in the awareness of the existence of a TPF agreement. This declaration shall be given in addition to the obligation of written disclosure in Art. 31 (1) CIETAC Arbitration Rules, Art. 20 (2) SIAC Arbitration Rules, Art. 9 (4) DIS Arbitration Rules, Art. 11(2) ICC Arbitration Rules as this declaration is made upon or prior to the appointment.

As TPF will „*continue to shape the future of arbitration*“<sup>450</sup>, it is not only expedient that specific clauses on TPF are included in the arbitration rules worldwide, but also that internationally recognized guidelines with grading of disclosure requirements in the event of conflicts of interest specifically designed for TPF - potentially based on or added to the IBA Guidelines - are developed. This is the only way to create uniform legal certainty and transparency and to establish a legally and ethically secure framework for TPF.

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<sup>448</sup>accessible at <https://icsid.worldbank.org/rules-regulations/declarations> (last vis. 02/08/2025).

<sup>449</sup>ICSID Conciliation Rules 2022.

<sup>450</sup>F.Pérez-Lozada, Litigation Funding in International Arbitration, Kluwer Arbitration Blog, 20/06/2025.

## VI. Conclusion: Balancing Access to Justice through Financial Support and Procedural Integrity

TPF has become a “*driving force behind the development of the international arbitration industry*”<sup>451</sup> acting as a catalyst for access to justice in an increasingly complex and capital-driven dispute resolution landscape. As this thesis has demonstrated, TPF enables parties to pursue meritorious claims and defend their rights, thereby promoting a more level playing field in international arbitration. The metaphor of the driver’s seat based on the quote by Ayn Rand that guided this thesis captures the dynamic of TPF: while the funder may provide the essential engine that powers the proceedings, it is ultimately the parties themselves as masters of the proceedings that remain in control of the direction and strategy of the case, i.e. TPF does not replace them as the drivers throughout the arbitration proceedings. The arbitrator as “*guardian of the international commercial order*”<sup>452</sup>, in turn, serves as navigator, ensuring that the proceeding remains fair, balanced and in accordance with the arbitration rules, while safeguarding the parties’ autonomy and the integrity of the proceedings.

However, the integration of TPF into arbitration is not without risks. The existence of a TPF agreement introduces new layers of complexity, particularly regarding potential conflict of interest, the independence and impartiality of the key actors in arbitration and the preservation of party autonomy. The risk of funders exercising undue influence in arbitral proceedings must be carefully managed through robust contractual arrangements and clear institutional rules. Especially transparency and disclosure obligations - while essential to prevent conflict of interest - must be balanced against the protection and maintenance of integrity of the key actors to the proceeding.

Until now, the regulatory landscape for TPF has remained fragmented, with significant differences between jurisdictions and arbitral institutions. While some

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<sup>451</sup>B. Zhang, *Third Party Funding for Dispute Resolution*, p.2.

<sup>452</sup>Julian M.D.Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 540 (1978), quoted from: M.Sweify, *Third Party Funding in International Arbitration*, p.106.

jurisdictions, such as Hong Kong, Singapore and China, have introduced detailed rules and guidelines, others, including the EU, and particularly Germany, have yet to adopt regulation. This patchwork approach creates uncertainty within the field of international commercial arbitration underscoring the need for harmonized standards.

In the end, it comes to striking the right balance: ensuring that TPF continuously serves as a tool for financing justice without compromising the core values of arbitration. The recommendations set out in this thesis aim to provide practical guidance achieving this balance. TPF is not merely a financial instrument but a “booming phenomenon”<sup>453</sup> in the evolution of international arbitration. However, as the engine that allows parties to access or to accelerate their pursuit of justice, TPF must be duly regulated to ensure that the driver remains the party itself, with the funder as supportive but not controlling force. Only by maintaining this balance can international commercial arbitration continue to deliver both access to justice and procedural integrity in a globalized world.

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<sup>453</sup>Resolution 2023/C 125/01, introduction (F).

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