Who's Pulling the Strings? Disclosure of Third-Party Funding Agreements in International Arbitration

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Abstract

Third-party funding (hereinafter TPF) has emerged as a more significant method for financing international arbitration, permitting underfunded claimants to pursue valid claims and enabling parties to handle procedural risks without exhausting their liquidity. Unlike insurance, loans and contingency or conditional-fee arrangements, TPF has developed from past restrictions on maintenance and champerty into a swiftly growing commercial activity. Certain issues related to TPF have been tackled by institutional regulations mandating the disclosure of third-party funders' existence and identity; nonetheless, the regulatory structure still appears disjointed and insufficient.

This article explores the legal and ethical issues associated with TPF, highlighting the conflicts of interest impacting arbitrators, the triangular relationship between lawyers, clients and funders that can lead to control over strategy and influence on the proceedings, as well as the effects of TPF on cost distribution and security for costs. It examines current institutional methods of disclosure and contends that, under specific conditions - especially when funders exert control, maintain extensive termination rights, or limit liability for negative costs - arbitral tribunals need access to significant funding terms. The article ends by supporting measured disclosure authority and broader institutional oversight to protect procedural fairness and the validity of arbitration processes.

Annotasiya

Üçüncü tərəf maliyyələşdirilməsi (bundan sonra ÜTM) beynəlxalq arbitrajın maliyyələşdirilməsi üçün önəmli bir üsul kimi ortaya çıxmışdır. Bu, kifayət qədər maliyyə imkanlarına malik olmayan iddiaçıların əsaslı iddialarını irəli sürməsinə imkan verir və tərəflərin prosedur risklərini likvidliyini tükətmədən idarə etməsinə şərait yaradır. Sığorta, kreditlər və ya kontingent və ya şərti ödənişli müqavilələrdən fərqli olaraq, ÜTM tarixdəki "maintenance" və "champerty" məhdudiyyətlərindən inkişaf edərək sürətlə böyüyən kommersiya fəaliyyəti halını almışdır. ÜTM ilə bağlı bəzi məsələlər üçüncü tərəf maliyyələşdiricilərinin mövcudluğunu və şəxsiyyətini açıqlamağı tələb edən institusional qaydalar vasitəsilə həll edilmişdir; lakin tənzimləmə strukturu hələ də tam dolğun deyildir. Bu məqalə ÜTM ilə bağlı hüquqi və etik məsələləri araşdırır, arbitrların müstəqilliyi və qərəzsizliyinə təsir edə biləcək maraq toqquşmalarını, arbitraj strategiyası və prosesi üzərində təsirə yol aça biləcək hüquqşünas-müştəri-maliyyələşdirici üçbucaqlı münasibətini, həmçinin ÜTM-nin xərclərin bölgüsü və xərclərin təminatı üzərindəki təsirlərini işıqlandırır. Məqalə mövcud institusional açıqlama üsullarını təhlil edir və müəyyən hallarda - xüsusilə maliyyələşdiricilər güclü nəzarət və geniş ləğv hüquqlarına sahib olduqda və ya mənfi xərclərə görə məsuliyyəti məhdudlaşdırdıqda - arbitraj tribunalının maliyyələşdirmə müqaviləsinin əsas şərtlərinə çıxışa ehtiyacı olduğunu iddia edir. Beləliklə, prosedur ədalətliliyini və arbitraj proseslərinin etibarlılığını qorumaq üçün

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müvafiq açıqlama səlahiyyətləri və daha geniş institusional tənzimləmənin vacibliyini irəli sürür.

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Introduction

Pursuing a legal dispute can quickly become very expensive. In arbitration, the parties are responsible for covering the arbitrators' fees as well as the costs of organizing hearings, including venues, travel and other logistical needs. They may also need to pay an administering body and hire specialists or experts to support their case. On top of these expenses, legal representation can require a substantial financial outlay. For many parties, these combined costs can be overwhelming and create serious financial strain.[1]

It is in response to these financial pressures that TPF has developed, allowing a party (mostly the claimant) to pursue a legal claim with financial support provided by an external investor who has no involvement in the dispute.[2] The funding is usually provided on a non-recourse basis, which means that the funded party is not required to repay the money if the claim is unsuccessful.[3] The funder assumes the material risk of the proceedings and is

[1] Caroline Overgaard & Johan Tufte-Kristensen, *Disclosure of Third-Party Funding in Commercial Arbitration*, 2 Nordic Journal of Commercial Law 2, 4 (2020).

[2] Tran Hoang Tu Linh & Bui Trung Hieu, *Third-Party Funding in Commercial Arbitration in ASEAN: Dealing with Conflicts of Interest*, 16 Contemporary Asia Arbitration Journal 97, 97 (2023).

[3] Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, 18 (2018). Available at: https://cdn.arbitration-icca.org/s3fs-

entitled to recover the amount invested together with a return only if the claim is successful and results in a financial recovery.[4]

Although still a relatively recent development in the field of international arbitration, TPF has rapidly evolved into a growing and increasingly sophisticated industry. The rising use of TPF in international arbitration is mainly driven by two factors. First, the global financial crisis has encouraged investors and financial institutions to look for alternative and potentially profitable investment opportunities.[5] International arbitration has become particularly attractive in this respect due to the high monetary value often involved in such disputes. Second, the substantial costs associated with international arbitration have pushed parties to seek external funding. This is especially relevant for claimants with limited financial resources, as well as for companies that prefer to preserve their liquidity, continue their day-to-day operations during the proceedings, or mitigate financial risk by sharing it with an external funder while pursuing a strong legal claim.[6]

Accordingly, the main advantage of TPF is that it makes arbitration financially possible for parties who would otherwise be unable to afford it, thereby improving their ability to pursue claims and ultimately enhancing access to justice.[7] In addition, funding enables large and well-resourced clients to engage in effective risk management while preserving their cash flow by keeping the costs of pursuing arbitration off their balance sheet.[8] However, the participation of a third-party with a substantial financial interest in the outcome of the dispute raises complex legal and ethical concerns. In this context, the central question is whether such funding arrangements should be disclosed and, if so, to what extent this duty of disclosure should go, including whether it may require disclosure of the terms of the funding agreement itself.

Thus, the purpose of this article is not only to address the disclosure of a funder's existence in the proceedings but also to examine the need for revealing specific provisions of the funding agreements. In that regard, the first part of the article clarifies the essence of TPF in general and explains how it differs from other funding models. The second part examines potential conflicts of interest, including those involving arbitrators and the risk of the funder exercising undue influence over the funded party and the proceedings.

public/document/media_document/Third-Party-Funding-Report%20.pdf (last visited Apr. 17, 2026).

[4] *Ibid*.

[5] Valentina Frignati, *Ethical Implications of Third-Party Funding in International Arbitration*, 32 Arbitration International 505, 506 (2016).

[6] *Ibid*.

[7] Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration*, 1 Grotius Centre Working Paper Series, 7 (2012); Catherina Rogers, Ethics in International Arbitration, 178 (2014).

[8] *Supra* note 3, 20.

The final part considers the possible impact of TPF on cost allocation and decisions regarding security for costs.

I. From Champerty to Capital: The Legal History and Modern Rise of TPF

In the past years, external funding was typically considered illegal according to the medieval doctrines of maintenance and champerty. In the United Kingdom, where these doctrines originated, they remain conceptually distinct yet closely related and have exerted a significant influence on the development of TPF worldwide.[9] Maintenance, in its turn, referred to offering assistance to a party in a lawsuit where the supporter had no real stake, thereby disrupting the legal proceedings.[10] Champerty, on the other hand, described agreements where a third-party funded a claimant's lawsuit in return for a portion of any compensation received.[11]

Historically, these principles aimed to stop misuse by influential individuals who could finance lawsuits merely to intimidate or financially harm their competitors.[12] At that time, courts did not have the means to handle such risks, leading to sweeping bans being enacted. By the nineteenth century in the United Kingdom, maintenance and champerty were viewed as immoral, unethical and against public policy, leading to their prohibition by law.[13]

Nowadays, the reasoning behind champerty regulations has changed. They mainly aim to prevent baseless lawsuits, minimize barriers to resolution and safeguard the attorney-client relationship's integrity.[14] Although certain common law jurisdictions theoretically remain cautious about third-party participation, in reality, these rigid regulations have been eased or eliminated in numerous places. TPF is most commonly used in Australia, England and the United States.[15] Regarding civil law systems, although jurisdictions such as Germany, Austria and Switzerland have developed a degree of TPF activity, the practice remains largely absent in many other civil law countries.[16] Nevertheless, if the TPF industry continues to expand globally

[9] Lisa Bench Nieuwveld & Victoria Shannon Sahani, Third-Party Funding in International Arbitration, 40 (2012).

[10] Douglas Richmond, *Other People's Money: The Ethics of the Litigation Funding*, 56 Mercer Law Review 649, 652-655 (2005).

[11] *Ibid*.

[12] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minnesota Law Review 1268, 1287-1290 (2011).

[13] Max Radin, *Maintenance by Champerty*, 24 California Law Review 48, 64 (1935).

[14] Mariel Rodak, *It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 University of Pennsylvania Law Review 503, 510 (2006).

[15] Nieuwveld & Shannon, *supra* note 9, 11.

[16] Marco De Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 Cardozo Journal of International and Comparative Law 343, 399-405 (2011).

and its benefits become more evident, it is likely that TPF will gain greater traction across civil law jurisdictions as well.[17] Consequently, the legal and ethical obstacles that previously restricted TPF have mostly vanished, leading to a more flexible atmosphere.[18] This development has created opportunities for the advancement of a complex and growing TPF market, with additional parties increasingly utilizing or contemplating external financing to back their claims.

A. Not an Insurance, Not a Loan: What Makes TPF Different

Before analyzing TPF in detail, it is useful to distinguish it from other forms of legal financing with which it is often compared.

TPF is frequently compared with insurance, as some insurance products seem to fulfill a comparable risk-distribution role. The distinction, however, is in the manner and timing of support delivery. Typically, insurance does not cover the expenses related to legal proceedings. Instead, it provides protection from specified financial risks by reimbursing the insured post-dispute resolution, such as covering costs or legal fees that are not recoverable.[19] In contrast, TPF refers to supplying capital throughout the proceedings to facilitate the advancement of the claim. It is also noteworthy that insurance premiums are usually significantly lower than the returns typically expected by a third-party funder.[20] The two models further vary in how they address risk. Insurance relies on mutual benefit: the insured pays a premium for protection, regardless of the result of the claim.[21] TPF is usually non-recourse, indicating that if the claim fails, the party receiving funds does not have to reimburse the funder. Moreover, insurance companies mitigate risk by distributing it among a wide range of policyholders, while third-party funders evaluate claims on a case-by-case basis and aim for a return connected to the outcome of the specific dispute.[22]

Nevertheless, the difference is not definitive. Specific arrangements can blur the traditional distinction between insurance and TPF. For example, similar to TPF, premiums under most After-the-Event (hereinafter ATE) insurance policies are payable only upon a successful outcome; if the insured party loses the case, no premium is owed.[23] Moreover, certain ATE policies go

[17] *Id*., 408-411.

[18] Maxi Scherer, Third-Party Funding in International Arbitration: Towards Mandatory Disclosure of Funding Agreements?, in *Dossier X: Third-party Funding in International Arbitration* 95, 95 (2013).

[19] *Supra* note 3, 35.

[20] *Ibid*.

[21] Maximilian Albert Müller, Approaches to Defining Third-Party Funding: Challenges and Practical Consequences, in *Handbook on Third-Party Funding in International Arbitration* 3, 9 (2nd ed. 2025).

[22] *Ibid*.

[23] *Supra* note 3, 54.

beyond covering adverse cost orders and may also reimburse a party's own legal fees and expenses.[24] Nevertheless, a key difference remains that, unlike TPF, ATE insurance does not provide upfront funding to support the conduct of the dispute itself. Another example is the so-called "Freight, Demurrage and Defense" (hereinafter FD&D) insurance, commonly used in the shipping industry, which can cover legal and related costs arising from certain disputes. In a manner comparable to TPF, the assumption of such costs is typically discretionary and depends on an assessment of the merits of the case.[25] However, the key distinction from TPF lies in the structure of the relationship. The party must already be part of the funding framework, namely a member of the relevant FD&D club, before any dispute arises, rather than obtaining funding on a case-by-case basis after the dispute has materialized.[26]

TPF also differs fundamentally from traditional loans. The defining feature of a loan is the obligation to repay the borrowed amount together with interest, irrespective of the outcome of the dispute.[27] In contrast, TPF does not create a repayment obligation unless the claim succeeds and generates recoverable proceeds. Although some profit participating loans may resemble TPF in that the lender's return is linked to the outcome of the case, they remain conceptually different because the principal must still be repaid in full even if the claim is unsuccessful, whereas a funder bears the risk of losing its entire investment if the case fails.[28]

In addition to insurance and loans, TPF can also be distinguished from funding arrangements with attorneys, namely contingency fee and conditional fee arrangements. When attorneys handle a case on a full or partial contingency fee basis, they may effectively act as funders by covering some or all the arbitration costs and taking on the risk of loss if the claim is unsuccessful.[29] A conditional fee arrangement, on the other hand, resembles contingency representation, but the lawyer imposes a reduced fee instead of charging nothing if the client loses.[30] If the client succeeds in the case, the lawyer gets the total fee based on the standard hourly rate, plus a success fee as a reward for the positive result.[31] A fundamental difference between contingency fee agreements and conditional fee agreements is the distribution of risk. Contingency fee agreements put the full risk of loss completely on the

[24] Vicki Waye, Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US, 87 (2008).
[25] Müller, *supra* note 21, 8.
[26] *Ibid*.
[27] *Id*., 9.
[28] *Ibid*.
[29] Lisa Bench Nieuwveld & Victoria Shannon Sahani, Third-Party Funding in International Arbitration, 4-5 (2nd ed. 2017).
[30] *Supra* note 9, 6.
[31] *Id*., 7.

lawyer, while conditional fee agreements distribute the risk between the lawyer and the client.[32] As a result, conditional fee agreements guarantee that the lawyer obtains at least some payment for the services rendered, regardless of whether the claim fails. TPF primarily differs from these models because the financing is provided by an independent third-party rather than by a participant already involved in the dispute, namely the lawyer. Unlike lawyers, third-party funders are investing in the claim as a financial asset rather than providing a service for a fee.[33] Furthermore, while lawyers are bound by professional ethics and oversight from bar associations, the TPF industry remains largely unregulated.[34]

B. When Money Meets the Tribunal: The New Rules of TPF in Arbitration

Originating in the litigation context, as discussed above, TPF in international arbitration is a relatively recent phenomenon. Despite its novelty, its use in arbitral proceedings appears to be increasing rapidly. Accordingly, arbitration institutions and regulatory authorities across the world have progressively created regulations to manage TPF. One of the very first examples was the adoption of a Practice Note by the Singapore International Arbitration Centre (hereinafter SIAC) on 31 March 2017,[35] in response to the introduction of new legislation in Singapore permitting TPF.[36] This Practice Note addresses arbitrator conduct in arbitrations involving "External Funding". It contains, inter alia, the following definitions:

"'External Funder' means any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings".

"'Direct Economic Interest' means an interest in the arbitration proceedings resulting from the provision by a non-Disputant Party to a Disputant Party of funding for or indemnity against the award to be rendered in the arbitration proceedings".[37]

In addition, the SIAC Investment Arbitration Rules expressly address TPF. Article 24 empowers the arbitral tribunal to: *"order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the*

[32] *Ibid*.

[33] Frignati, *supra* note 5, 508.

[34] Jennifer Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Georgetown Law Journal 1649, 1653-1654 (2013).

[35] *See* SIAC Practice Note for Administered Cases – On Arbitrator Conduct in Cases Involving External Funding (2017). Available at: https://siac.org.sg/wp-content/uploads/2022/08/Practice-Note-for-Administered-Cases-%E2%80%93-On-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf (last visited Apr. 24 2026).

[36] Singapore Civil Law (Amendment) Act, section 5B (10) (2017). Available at: https://sso.agc.gov.sg/Acts-supp/2-2017/ (last visited Apr. 24 2026).

[37] *Supra* note 35, § 3.

outcome of the proceedings and/or whether or not the third-party funder has committed to undertake adverse costs liability".[38] The same disclosure requirement is restated and further elaborated in the SIAC Arbitration Rules, specifically in Rule 38, thereby confirming SIAC's continued regulatory approach to TPF.[39]

A similar development can be observed in the VIAC Arbitration Rules, which define TPF in Article 6 (1.9) as follows: *"third-party funding refers to any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative (Article 13), to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings".*[40]

Comparable regulatory approaches are also reflected in other institutional frameworks, including the HKIAC Rules,[41] ICC Rules[42] and ICSID Rules.[43] Across these instruments, a common principle emerges: the existence of TPF arrangements and the identity of the funder must be disclosed to the opposing party, the arbitral tribunal and, where applicable, the administering institution.[44] It is worth noting that the same approach is reflected in Azerbaijan, as the BAC Rules require disclosure of any TPF agreement, including the full name and contact details of the funder, in the notice of arbitration and the response thereto.[45]

The rationale behind this requirement is to identify potential conflicts of interest affecting the arbitrators, particularly with respect to their impartiality

[38] Investment Arbitration Rules of the Singapore International Centre, art. 24 (2017). Available at: https://jusmundi.com/en/document/rule/en-siac-singapore-international-arbitration-centre-investment-arbitration-rules-2017-siac-investment-rules-2017-sunday-1st-january-2017 (last visited Apr. 24, 2026).

[39] Arbitration Rules of the Singapore International Arbitration Centre, rule 38 (2025). Available at: https://siac.org.sg/siac-rules-2025 (last visited Apr. 24, 2026).

[40] Arbitration Rules of the Vienna International Arbitration Centre, art. 6(1.9) and 13(a) (2025). Available at: https://www.viac.eu/en/arbitration-basics/arbitration-rules/ (last visited Apr. 24, 2026).

[41] Administered Arbitration Rules of the Hong Kong International Arbitration Centre, art. 44 (2024). Available at: https://hkiac.org/arbitration/rules-and-practice-notes/2024-administered-arbitration-rules/ (last visited Apr. 24, 2026).

[42] Arbitration Rules of the International Chamber of Commerce, art. 11(7) (2021). Available at: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-11 (last visited Apr. 24, 2026).

[43] Arbitration Rules of the International Centre for Settlement of Investment Disputes, rule 14 (2022). Available at: https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/chapter-ii-establishment-of-the-tribunal#rule-8501 (last visited Apr. 24, 2026).

[44] *Supra* notes 39, 40, 41, 42, 43.

[45] Arbitration Rules of the Baku Arbitration Centre, art. 6.3(g) and 7.2(g) (2025). Available at: https://www.bakuarbitrationcentre.org/rules (last visited Apr. 24, 2026).

and independence.[46] However, this regulatory consensus does not extend to the disclosure of the substantive terms of TPF agreements. In other words, while disclosure of the funder's existence and identity is widely mandated, only a limited number of rules expressly empower arbitral tribunals to order disclosure of relevant provisions of the funding agreement and typically only where such disclosure is deemed necessary. Thus, the underlying justifications for the necessity of disclosing the terms will be examined in the following sections.

II. Secret & Stakes: Walking the Disclosure Tightrope in Funded Arbitration

The disclosure of funding arrangements is a particularly sensitive issue for both funded parties and funders. In investment arbitration, tribunals are more likely to require disclosure of the terms of funding agreements, a practice that reflects the distinctive nature of investor-state arbitration as a private dispute resolution mechanism with a public dimension.[47] In commercial arbitration, by contrast, disclosure of funding terms remains relatively rare, as confidentiality is one of the central values underpinning this form of dispute resolution.[48]

Concerns about confidentiality stem from the fact that the operation of TPF necessarily involves the exchange of confidential, privileged and at times highly sensitive information. During the funder's initial due diligence and throughout the proceedings, the funded party must share information relating to the merits of the case, legal strategy and the ongoing conduct of the arbitration.[49] As a result, the conclusion of a non-disclosure agreement is typically the first step in any TPF arrangement, serving to safeguard confidentiality and preserve legal privilege over the materials exchanged.[50] Where such confidentiality agreements are in place from the outset, the information shared with the funder is generally regarded as protected by legal privilege or, in certain circumstances, common interest privilege.[51] On this basis, funded parties frequently rely on instruments such as the The International Bar Association (hereinafter IBA) Rules to resist requests for

[46] Trusz, *supra* note 34, 1674.

[47] Nikolaus Pitkowitz & Maximilian Albert Müller, Disclosure Obligations in Commercial and Investment Arbitration, in *Handbook on Third-Party Funding in International Arbitration* 91, 98 (2nd ed. 2025).

[48] Selvyn Seidel & Sandra Sherman, "Corporate Governance" Rules are Coming to Third Party Financing of International Arbitration (and in general), in *Dossier X: Third-party Funding in International Arbitration* 32, 40 (2013).

[49] *Supra* note 21, 22.

[50] Mick Smith & Jeffery Commission, Case Selection and Commercial Terms of Funding Agreements, in *Handbook on Third-Party Funding in International Arbitration* 163, 168 (2nd ed. 2025).

[51] *Ibid*.

disclosure of the funding terms.[52] Although these Rules are not binding on arbitral tribunals, they are widely used in practice as an authoritative soft law reference.

Against this background, striking an appropriate balance between transparency and the protection of confidentiality and privilege becomes increasingly important. This balance is relevant not only for assessing potential conflicts affecting the impartiality and independence of arbitrators, as discussed above, but also and perhaps more critically, for identifying conflicts of interest that may arise from the relationship between the funded party and the funder.

A. When Bias Hides in Plain Sight: Arbitrator Conflicts

Potential conflicts of interest involving arbitrators were among the earliest and most significant concerns raised in relation to the participation of third-party funders in international arbitration. In particular, questions have emerged regarding whether disclosure should be required, who should make such disclosures and the appropriate scope of information necessary to allow arbitrators, parties and arbitral institutions to assess possible conflicts arising from the involvement of a funder.[53]

Any conflicts of interest that surface during the proceedings could have detrimental effects. Parties have the right to contest the independence or impartiality of an arbitrator at any point during the arbitration process. If the challenge is made at an advanced stage, it may result in the arbitrator being replaced and significantly disrupt the proceedings.[54] Cases where a conflict is discovered only after the award has been made are even more problematic because they may lead to annulment procedures or the award not being recognized or enforced.[55] These results should be avoided wherever possible because arbitral proceedings require a substantial investment of time, money and resources. As soon as possible, preferably prior to the arbitrator's appointment, possible conflicts of interest should be recognized and resolved.

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[52] International Bar Association's Rules on the Taking of Evidence in International Arbitration, art. 9.2 and 9.3 (2020). Available at: https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b (last visited Apr. 24, 2026).

[53] *Supra* note 3, 82.

[54] Selvyn Seidel, Third-Party Investing in International Arbitration Claims: To Invest or not to Invest? A Daunting Question, in *Dossier X: Third-party Funding in International Arbitration* 16, 22 (2013).

[55] According to Article V(1)(d) of the 1958 New York Convention, one of the grounds for refusing the recognition and enforcement of an arbitral award is that "*[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*".

The requirements of independence and impartiality are fundamental to the integrity of arbitral proceedings, although they are conceptually distinct.[56] Impartiality relates to the arbitrator's state of mind and the absence of bias, whereas independence concerns objective factors, such as past or present relationships with parties involved in the arbitration.[57] This latter requirement also extends to relationships between arbitrators and third-party funders supporting one of the parties.[58]

Various scenarios illustrate how TPF may give rise to conflicts of interest. For example, a situation may arise where an arbitrator is appointed in a case funded by a third-party funder that had previously financed another case in which the same individual acted as counsel.[59] The involvement of the same funder across different proceedings, with the same person acting in different professional roles, may cast doubt on the arbitrator's independence and impartiality. This risk is particularly relevant in international arbitration, where arbitrators and counsel are often drawn from a relatively small professional community.[60] Additional examples of potentially problematic situations include repeated appointments of the same arbitrator linked to the same funder,[61] existing professional or commercial relationships between a funder and the arbitrator's law firm, or situations in which an arbitrator holds shares or other financial interests in a funding entity.[62] Each of these circumstances may raise legitimate concerns regarding conflicts of interest.

The International Bar Association was among the first bodies to formally address conflicts of interest linked to TPF through the adoption of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.[63] Although these Guidelines are not binding unless expressly agreed upon by the parties, they are widely regarded as an international benchmark for assessing arbitrator independence and impartiality and are therefore highly relevant in the context of TPF.[64] The Guidelines consider funders to be relevant for the purposes of a conflict analysis where they "*have a direct*

[56] Gary Born, International Commercial Arbitration, 1463 (2009).
[57] Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, 36 (2012).
[58] *Supra* note 34, 1665.
[59] Laurent Levy & Régis Bonnan, Third-Party Funding: Disclosure, Joinder and Impact on Arbitral Proceedings, in *Dossier X: Third-party Funding in International Arbitration* 78, 85 (2013).
[60] Sundaresh Menon, Some Cautionary Notes for an Age of Opportunity, 7 (2013). Available at: https://singaporeinternationalarbitration.wordpress.com/wp-content/uploads/2013/08/130822-some-cautionary-notes-for-an-age-of-opportunity-1.pdf (last visited Apr. 24, 2026).
[61] Rogers, *supra* note 7, 194.
[62] *Supra* note 34, 1665.
[63] *Supra* note 3, 87.
[64] *Supra* note 21, 18.

economic interest in the prosecution or defence of the case in dispute, a controlling influence on a party to the arbitration or influence over the conduct of the proceedings, including the selection of arbitrators".[65] They further require arbitrators to disclose circumstances that "*may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence*".[66] Hence, where TPF is involved, arbitrators are expected to disclose pertinent information concerning the funding relationship.

In line with this approach, many arbitral institutions have incorporated disclosure requirements into their rules, as demonstrated in the previous section. These rules commonly require parties to disclose the existence and identity of any third-party funder at an early stage of the proceedings, thereby enabling potential conflicts of interest to be identified and addressed promptly. Therefore, in practice, the duty of both arbitrators and the disputing parties to disclose such details is clearly established.

B. Triple Entente or Triple Trouble? The Claimant-Counsel-Funder Power Play

Although a typical funding agreement is formally concluded between a client and a funder, it cannot be characterized as a purely bilateral relationship due to the involvement of the client's lawyer.[67] This so-called "three-cornered relationship" gives rise to a range of potential conflicts of interest. Such conflicts may emerge both at the stage of concluding the funding agreement and during the arbitral proceedings themselves and usually stem from the divergence between: (i) the client's interest in achieving the most favourable outcome; (ii) the lawyer's interest in securing payment for legal services; and (iii) the funder's interest in maximizing its return on investment.[68]

The primary issue related to TPF involves the addition of another interest in the process, specifically, the financial interest of the funder. Since funders typically lack an interest in the actual merits of the conflict and are mainly driven by profit, there is an innate risk that contractual agreements might provide them with a certain level of influence over the arbitration process.[69] Funders usually aim to safeguard their investment by staying engaged in case management, although the degree of involvement differs greatly. Some funders adopt a passive investor role, merely receiving periodic updates, which is understandable given the financial investment they make. Others,

[65] IBA Guidelines on Conflicts of Interest in International Arbitration, Explanation to General Standard 6(b) (2024). Available at: https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024 (last visited Apr. 24, 2026).

[66] *Id*., General Standard 3(a).

[67] Rogers, *supra* note 7, 184.

[68] Carolyn Lamm & Eckhard Hellbeck, Third-Party Funding in Investor-State Arbitration, in *Dossier X: Third-party Funding in International Arbitration* 101, 107 (2013).

[69] *Supra* note 9, 9-11.

however, exercise significant influence, such as being involved in selecting counsel or arbitrators and engaging in settlement discussions.[70]

In theory, the claimant's lawyer is required to act exclusively in the client's best interests and to provide candid advice on the advantages and disadvantages of entering into a funding arrangement.[71] In practice, however, conflicts may arise where a lawyer recommends TPF primarily to ensure payment of legal fees, regardless of the strength of the claim. This risk is exacerbated where the funder effectively acts as the lawyer's paymaster, or where the lawyer is selected or vetted by the funder.[72] Since funders generally retain the "power of the purse",[73] including the ability to terminate funding, lawyers may feel pressured to prioritize the funder's interests over those of the claimant, thereby undermining their independence and creating uncertainty as to whom they truly represent.[74]

Conflicts may also materialize during settlement negotiations. The claimant and the funder may have divergent preferences regarding settlement strategy, timing and quantum. For example, a funder may favour an early settlement to improve cash flow, whereas the claimant may wish to pursue prolonged negotiations in the hope of securing a more advantageous outcome.[75] Where the funder has appointed the lawyer, the lawyer may be incentivized to advise acceptance of a settlement that aligns with the funder's financial objectives but not with the claimant's best interests.[76] In extreme cases, such influence may amount to an abuse of process.[77] Funding agreements may further exacerbate these risks by granting the funder direct influence over settlement decisions, for instance by requiring the claimant to consult the funder before accepting an offer or by conferring veto rights over settlements, effectively having the final say in such matters.[78] In the *Pork Antitrust case*, for example, the funder prevented the funded party from pursuing a proposed settlement on the basis that the offered amount was insufficient, as funder approval was contractually required.[79]

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[70] Rogers, *supra* note 7, 194; *supra* note 34, 1655.

[71] Charles Kaplan, Third-Party Funding in International Arbitration: Issues for Counsel, in *Dossier X: Third-party Funding in International Arbitration* 70, 73 (2013).

[72] *Id*., 75.

[73] Georges Affaki, A Financing is a Financing is a Financing…, in *Dossier X: Third-party Funding in International Arbitration* 10, 13 (2013).

[74] Lamm & Hellbeck, *supra* note 68, 109.

[75] Vicki Waye, *Conflicts of Interest between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 Bond Law Review 225, 238 (2008).

[76] Yang Xinglong, *Third Party Funding under Investor-State Arbitration: Respondent State's Risks and Recent Developments in ASEAN and Hong Kong*, 6 Ramkhamhaeng Law Journal 179, 188 (2017).

[77] De Brabandere & Lepeltak, *supra* note 7, 8.

[78] *Abu-Ghazaleh v. Chaul*, No. 3D07-0217 (Dec. 2, 2009).

[79] *In re Pork Antitrust Litigation*, No. 21-md-02998 (Jun. 3, 2024).

Diverging interests between the funder and the funded party may also undermine the efficiency of the arbitral process. Where the relationship between the parties deteriorates, the continuation of the proceedings may be jeopardized. If a funder exercises its contractual right to terminate funding, the claimant may be unable to continue financing the arbitration, potentially resulting in the suspension or abandonment of the proceedings.[80] Accordingly, the funder's termination discretion constitutes an additional source of procedural risk.

To mitigate these conflicts, potential issues should be clearly identified and addressed in the funding agreement by the funder, the claimant and the claimant's lawyer. As emphasized in the literature: "*The agreement should expressly recognize that the lawyer who has the conduct of the claim owes his or her professional and fiduciary duties to the claimant and that, in the event of a conflict of interest between the claimant and the funder, the lawyer may continue to act solely for the claimant, even if the funder's interests are adversely affected by him or her doing so*".[81] Moreover, beyond the mere disclosure of the existence and identity of the funder, certain key terms of the funding agreement should be disclosed as a matter of course at an early stage of the proceedings. Such disclosure may include, while excluding commercially sensitive information, provisions reflecting the funder's rights, such as termination for convenience or veto rights, which may have the potential to disrupt the conduct of the proceedings. Besides, any terms evidencing the funder's degree of control or influence, particularly where such influence may give rise to serious conflicts of interest, should also be disclosed. More importantly, arbitral tribunals should be vested with explicit authority to order any further disclosure, as warranted by the circumstances of the case and where necessary, in order to safeguard the integrity of the proceedings.

III. The Price of Access: Funding, Liability and the Cost Battles of Arbitration

TPF is capable of influencing the costs of arbitration at different stages of the proceedings. In particular, its impact may arise: (i) during the proceedings, when the arbitral tribunal considers an application for security for costs; and (ii) at the final stage, when the tribunal determines the allocation of arbitration costs and fees. As a result, the question of whether arbitral tribunals should take the existence of TPF into account when deciding on security for costs or cost allocation is closely linked to the broader debate on

[80] *S&T Oil Equipment & Machinery Ltd. v. Romania*, No. ARB/07/13 (Jul. 16, 2010).

[81] Wayne Attrill, Ethical Issues in Litigation Funding, Paper Presented at the Globalaw Conference, 11 (Feb. 16, 2009). Available at: https://portal.omnibridgeway.com/docs/default-source/site-documents/ethical-issues-paper-imf09---globalaw-conference.pdf (last visited Apr. 24, 2026).

the necessity of disclosure obligations.[82] Furthermore, even if tribunals are deemed entitled to consider funding arrangements, such a rule would be largely ineffective if tribunals remain unaware of the provisions of the funding agreement itself.

The distribution of arbitration expenses is, as a general principle, left to the judgment of the arbitral tribunal. Unless restricted by the agreement of the parties, the relevant arbitration regulations, or obligatory clauses of the lex arbitri,[83] tribunals have extensive power in deciding how the expenses of the proceedings will eventually be allocated.[84] Three main methods of cost allocation can be recognized in arbitral practice. Under the initial principle, often called the "English rule", costs are typically granted to the party that prevails.[85] In the second approach, referred to as the "American rule", each side is responsible for its own expenses regardless of the result.[86] A third, more adaptable method permits tribunals to assign costs according to various case-specific factors, such as the behavior of the parties and the effectiveness of the procedures.[87] Due to the significant costs commonly linked to international arbitration and the chance that expenses might be allocated at the end of the process, tribunals are often requested to mandate security for costs. These measures aim to protect the standing of the winning party by guaranteeing its ability to reclaim costs if it succeeds.[88]

Notwithstanding the rapid expansion of TPF practice in arbitration, regulatory guidance addressing its implications for cost allocation and security for costs remains limited. With respect to cost allocation, Singapore stands out as one of the few jurisdictions where tribunals are expressly authorized to take TPF arrangements into account when issuing costs awards.[89] By contrast, there is an almost complete absence of explicit rules addressing how TPF should affect applications for security for costs.[90] As a result, tribunals are largely left to rely on general principles, case law and doctrinal guidance when confronted with such issues.

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[82] Rogers, *supra* note 7, 213.

[83] Born, *supra* note 56, 2488-2502.

[84] *Supra* note 42, art. 38; Arbitration Rules of the London Court of International Arbitration, art. 28 (2020); International Arbitration Rules for IFTA Arbitrations of the International Centre for Dispute Resolution, art. 38 (2022); Arbitration Rules of the United Nations Commission on International Trade Law, art. 42 (2021).

[85] Arbitration Act 1996, section 61(2). Available at: https://www.legislation.gov.uk/ukpga/1996/23/section/61 (last visited Apr. 24, 2026).

[86] William Kirtley & Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?* 30 Journal of International Arbitration 17, 19 (2013).

[87] De Brabandere & Lepeltak, *supra* note 7, 11.

[88] Jeffrey Waincymer, Procedure and Evidence in International Arbitration, 641 (2012).

[89] *Supra* note 38, art. 35; *supra* note 39, rule 38.6.

[90] *Supra* note 3, 165.

Scholarly commentary has progressively endorsed the perspective that TPF agreements ought to be factored in when tribunals address issues concerning cost distribution and security for costs.[91] A common debate in the literature is that the critical element should be how much the funder has impacted the proceedings and the creation of costs. Based on this, a difference should be made between cases where the funder only offers financial backing and those where it takes on a more engaged or authoritative role.[92] When the involvement of funders has noticeably affected the proceedings, such as by influencing procedural strategy, extending the arbitration duration, or raising costs, it can be suitable for tribunals to consider this effect in their cost decisions.[93] Judicial decisions in some local courts reinforce this functional perspective. Courts in places like the United States and England have, when suitable, broadened responsibility for adverse costs to third-party funders who had effective control over the legal proceedings.[94] In *Abu-Ghazaleh v. Chaul*, for instance, a Florida appellate court decided that funders might be considered parties to the case because they can influence the litigation's direction, making them responsible for the legal fees and expenses of the victorious defendant. These choices demonstrate an openness to overlook official party standing and concentrate instead on the actual dynamics of power and authority.[95]

The relevance of TPF becomes even more pronounced in the context of security for costs. Such orders are regarded as particularly justified where a claimant's arbitration expenses are financed by a third party that stands to benefit from a favourable outcome but bears no responsibility for satisfying an adverse costs award if the claim fails.[96] This situation, often described as an "arbitral hit-and-run", has been repeatedly identified by arbitrators and commentators as presenting especially compelling grounds for ordering security for costs.[97] The underlying concern is that funding may allow a claimant to pursue arbitration as though solvent while externalizing the economic risks of the proceedings. Some tribunals have embraced a more extensive fairness-centered evaluation when examining these situations. A pertinent example is an ICC tribunal ruling from 3 August 2012, where the

[91] De Brabandere & Lepeltak, *supra* note 7, 15.
[92] *Ibid*.
[93] *Ibid*.
[94] In *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd* (2004), the Court drew a distinction between "pure" funders and third-party funders who exercised substantial control over the proceedings. It held that, where a funder had such control and the proceedings failed, considerations of justice required the funder to be liable for the successful party's costs.
[95] *Supra* note 78.
[96] Nadia Darwazeh & Adrien Leleu, *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, 33 Journal of International Arbitration 125, 131 (2016).
[97] *Id*., 139.

details of the funding agreement had already been presented to the tribunal.[98] The tribunal closely reviewed the agreement and decided to enforce security for costs, given that the claimant did not possess enough assets to cover a potential adverse costs award, the funding agreement excluded such costs and the funder had the unrestricted ability to terminate the agreement at will. All these factors combined were deemed to pose an intolerable risk of injustice.[99] It is sometimes argued that, in the absence of an application for security for costs, disclosure of TPF agreements should not be ordered. However, this position is not entirely convincing. For instance, in *Muhammet Çap v. Turkmenistan*, the tribunal ordered disclosure on the basis that the respondent intended to seek security for costs.[100] Based on this context, it is the author's view that disclosure should considered necessary to ensure that such an application could be made effectively and assessed on a properly informed basis, without causing unnecessary delay to the proceedings. Accordingly, the absence of a pending security for costs application should not preclude disclosure.

In practice, it is not uncommon for claimants and funders to agree in advance on a cap for adverse costs liability, specifying the maximum amount the funder would be prepared to cover if the claim were unsuccessful.[101] Nevertheless, most funders remain reluctant to assume responsibility for adverse costs, given the already significant financial exposure associated with funding arbitration proceedings.[102] Despite this reluctance, funders may still face the risk of being drawn into security for costs considerations, particularly in jurisdictions applying the "English rule".[103] This risk was clearly illustrated in the *Arkin case*, where the court held the funder liable for the opposing party's costs up to the amount of its financial contribution. The Court reasoned that fairness required permitting recovery from a funder whose financial support had enabled the pursuit of a claim that ultimately lacked merit.[104]

Against this background, the issue of disclosure assumes particular importance. Where a tribunal seeks to determine whether it would be unfair to allow a funded party to proceed without providing security, a careful examination of the funding arrangement becomes unavoidable.[105] In such circumstances, the tribunal must assess not only the existence of TPF, but also

[98] *Supra* note 3, 171.

[99] *Ibid*.

[100] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan*, No. ARB/12/6, Procedural Order No. 3 (Jun. 12, 2015).

[101] *Supra* note 9, 12-13.

[102] Kirtley & Wietrzykowski, *supra* note 86, 18.

[103] *Supra* note 68, 111.

[104] *Arkin v. Borchard Lines Ltd*, EWCA Civ 655 (May 26, 2005).

[105] *Supra* note 3, 171-172.

the specific terms governing that relationship. Therefore, alongside the provisions on termination rights and the degree of funder control, as mentioned in the earlier section, arrangements relating to liability for adverse costs should be disclosed as an advance automatic disclosure requirement, in order to determine whether the funder assumes this liability or not. In addition, arbitrators should be allowed to request disclosure of the relevant coverage for this liability and any further disclosure as they see fit, based on the facts of the case. In this sense, the significance of disclosure lies not merely in revealing that TPF exists, but in enabling the tribunal to understand how the funding relationship operates in practice. Without access to the relevant contractual terms, tribunals are deprived of the information necessary to assess fairly whether security for costs should be ordered or whether the funding arrangement should influence the allocation of costs.

Last but not least, it is the author's view that arbitral tribunals, in any event, possess the authority to order disclosure on the basis of their general procedural powers, particularly where this is necessary to safeguard the integrity of the proceedings. This approach is reflected in *García Armas v. Venezuela*, where the tribunal held that disclosure to the opposing party was appropriate in order to protect its legitimate interest in being informed of the terms of the TPF arrangement, especially in relation to the risk of an adverse costs award against the funded party.[106] Nevertheless, in order to avoid uncertainty and potential disputes and to ensure a more straightforward and consistent conduct of proceedings, it is preferable for arbitration rules to include explicit provisions governing disclosure obligations.

Conclusion

TPF has changed access to international arbitration by allowing parties without resources to pursue valid claims and by providing advanced risk-management tools for financially equipped litigants. Simultaneously, TPF presents a unique array of legal and ethical dilemmas: possible conflicts that may influence arbitrators' independence and impartiality, a triangular dynamic that can undermine counsel's obligations and enable considerable influence over the conduct of the proceedings and practical challenges for tribunals in distributing costs or mandating security for costs.

These strains clarify why disclosure has turned into the central focus of modern regulation and institutional practices. There is broad agreement that revealing the funding source and the identity of the funder should occur early to identify and manage potential conflicts before they disrupt proceedings. In contrast, revealing the essential terms of funding agreements continues to be contentious as it lies at the crossroads of tribunal equity, party confidentiality and evidence privilege. However, the analysis indicates that there are

[106] *García Armas and others v. Venezuela*, 2016-08, Procedural Order No. 9 (Jun. 20, 2018).

situations, particularly those involving significant control by funders, where termination rights leave claimants vulnerable to abandonment, or where funders explicitly avoid liability for adverse costs, in which tribunals cannot reasonably address issues of security or cost distribution without reviewing the contractual agreements.

Thus, a fair and principled method is essential. Firstly, certain provisions discussed in the article should be disclosed in addition to the funder's name and the existence of the funding arrangement. Moreover, standard regulations need to safeguard confidentiality and legal privilege while granting tribunals the authority to mandate the disclosure of funding agreements when necessary to maintain the equity and effectiveness of the arbitration. Besides, funding agreements must include explicit protections: acknowledgment of counsel's fiduciary responsibility to the client, restrictions on funder influence regarding litigation strategy and settlements and clear terms regarding liability for adverse costs. Given that the use of TPF in international arbitration is increasing steadily, it is therefore advisable that institutional arbitration rules, taking into account approaches such as that reflected in the SIAC Rules 2025, be expanded and refined in accordance with this development, providing clearer and more comprehensive regulation of TPF and expressly empowering tribunals to address disclosure issues in a consistent and predictable manner.