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Third Party Funding and Conflicts of Interest: Is there any way to "Tame the Beast"? A MERCOSUR Overview

Financiamiento de terceros y conflictos de intereses: ¿hay alguna forma de domar a la bestia? Una visión sobre el MERCOSUR

Mauricio Marengo*

* Vinclum Abogados & Consultores, Asunción, Paraguay.

Abstract: The third-party funding (TPF) market has been growing rapidly in the last few years, especially in the international arbitration field. The benefits along with the potential risks TPF could bear have received a lot of attention. Accordingly, the industry's appetite for TPF has grown exponentially in short timeframe. Since 2012, this industry has increased by over 500%, with a significant increase of TPF financial support occurring the Arbitration system and the rising number of active funders looking for viable opportunities[1].
Considering that "precious little is stated with regards to disclosure"[2], it has been assessed whether disclosure should be mandatory in order to avoid the possible existence of conflicts of interest between an arbitrator and the funder. This is of particular relevance when it is considered that arbitral institutions establish and ensure that an arbitrator's independence and impartiality are a must[3], yet the arbitral institutions little say regarding the TPF agreements and their impact on arbitrator's impartiality or independence should a conflict arises.

1 HASHU SHAHDADPURI, Khushboo. "Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory". In: PRYLES, Michael and CHAN, Philip (eds). *Asian International Arbitration Journal*. Singapore International Arbitration Centre in co-operation with Kluwer Law International, 2016, vol. 12, Issue 2, p. 77 – 106. At 77-78

2 GARIMELLA, Sai Ramani. "Third Party Funding in International Arbitration – Issues and Challenges in Asian Jurisdictions". *AALCO Journal of International Law*, 2014, vol. 3, Issue 1, p. 45-60, 2014. At 47. Available at SSRN: <https://ssrn.com/abstract=2520393>

3 Please see: ICC Rules of Arbitration art. 11.1 – ICDR International Arbitration Rules art. 13 – LCIA Arbitration Rules art. 5.3. – UNCITRAL Arbitration Rules art. 12.1

* Email: mmarengo@vinclum.com.py
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Resumen: El mercado de financiación de terceros (TPF) ha crecido rápidamente en los últimos años, especialmente en el campo del arbitraje internacional. Sus beneficios junto con los riesgos que podría soportar han recibido mucha atención. En consecuencia, el apetito de la industria por TPF ha crecido exponencialmente en un corto período de tiempo. Desde 2012, esta industria aumentó en más del 500%, en cuanto a la cantidad de acuerdos de financiamiento celebrados y el volumen de financiadores activos en busca de oportunidades viables.
En este sentido, considerando que "se dice muy poco en cuanto a la divulgación", se analiza si la divulgación debe ser obligatoria para evitar la posible existencia de conflictos de interés entre un árbitro y el financiador. Esto cobra relevancia si se tiene en cuenta que las instituciones arbitrales establecen que la independencia e imparcialidad del árbitro son indispensables, pero poco dicen respecto a los acuerdos TPF y su impacto en la imparcialidad o independencia del árbitro en caso de conflicto.

Keywords: International Arbitration; Third-Party Funding; MERCOSUR.

Palabras clave: Arbitraje Internacional; Financiamiento de Terceros; MERCOSUR.

1. INTRODUCTION

The development of the third-party funding (hereinafter TPF) mechanism has been so rapid that it is already considered to be a new industry. Bearing in mind that TPF is a "popular way to alleviate the financial burden associated with international arbitration proceedings"[4]; as such, it presents a matter that has been discussed in different cases in relation to the disclosure of TPF agreements. There have been debates regarding the extent of the disclosure, what to disclose, in which moment or whom to disclose.

These debates have been made since TPF has blossomed and can no longer be ignored or stopped. This new reality primarily affects the arbitration field, although it is not limited to them. Accordingly, incorporating TPF in arbitration procedures has been the position of several countries that have submitted their comments to the UNCITRAL III Working Group[5] regarding the initial drafts of the provisions.

That being the case, the comments of the Government of Canada demonstrate a simple position behind: TPF can be the vehicle through which justice is accessed[6]. This, taking into account the potential risks that this

4 KNAAP, Daniel R. "Disclosure of Third-Party Funding in International Investment Arbitration: The Implications of Rule 14 as proposed". In: *ICSID Working Paper 4". World Arbitration and Mediation Review (WARW)*. vol. 13 n°2. JurisNet, LLC. 2019. Available at: <https://arbitrationlaw.com/books/world-arbitration-and-mediation-review-wamr>
5 Please see: <https://uncitral.un.org/en/working_groups/3/investor-stat>
6 UNCITRAL WG III – Initial Draft on the Regulation of TPF. Compilation of Comments. Please see: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/

mechanism entails, such as: abuse of process, violation of transparency and confidentiality, integrity of the process. It should also be considered that the regulation of TPF should be examined seeking to avoid excessive regulation.

Furthermore, the TPF regulation also brings to attention the matter related to the relationships between the funders and funded parties, the funders and the arbitrators and the funders and the counterparty, where potential conflicts of interest might occur.

Basically, here we address conflicts of interest that arise in the relationship between parties in a dispute. That is, parties, arbitrators, and a funder. In this sense, the arbitrators and the parties are in the nature of a contract, as can be deduced from the bilateral source of an arbitrator's appointment, even when nomination is made at the initiative of one party.[7] In this contract, the arbitrator must determine how to resolve their competing interests. The adjudicator is not in a position of subordination to the parties"[8]. Thus, arbitrators are to tell whether there might be a conflict.

The most important conflict of interest scenario is the one that may exist due to a former or current relationship between the arbitrators and the funder. Here a cornerstone principle in arbitration proceedings - the independence of the arbitrators - is in jeopardy. Therefore, it is important to note that independence is mainly why we try to avoid any possible conflict, which implies that the "arbitrator should not have any actual or past dependent relationship with the parties of a nature to influence the arbitrator's freedom of judgment"[9].

Another key feature is the impartiality, which "means that the arbitrator should not privilege one party and should not have any prejudgment regarding the question in dispute"[10]. It is necessary to understand the crucial role they play when refering to any conflict of interest, since the lack of any of them could give room to challenges and subsequent annulments of awards. These would be the worst-case, yet possible, scenarios considering the grounds listed in Article V of the New York Convention[11].

Therefore, avoiding conflicts of interest is not only a matter of proceedings but also of the enforcement of the award as well. In addition, one of the consequences could also be the removal of the arbitrator[12]. This

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7 HASCHER, Dominique. "Independence and Impartiality of Arbitrators: 3 Issues". *American University International Law Review*, vol. 27, n° 4, 2012, p. 789-806. HeinOnline.

8 UK. THE SUPREME COURT. *Jivraj v. Hashwani* [2010] EWCA Civ 712. Judgment Para. 23. Available at: <https://www.supremecourt.uk/cases/docs/uksc-2010-0170-judgment.pdf>

9 LEW, Julian; MISTELIS, Loukas and KRÖLL, Stephan. "Comparative International Commercial Arbitration". Kluwer Law International, 2006. At 261.

10 OSMANOGLU, Burcu. "Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest". *Journal of International Arbitration,* Kluwer Law International 2015, 32, n° 3, p. 325–350. At 332.

11 UNITED NATIONS. UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, 10 june 1958. Available at: <http://www.newyorkconvention.org/english>

12 LEW, Julian; MISTELIS, Loukas and KRÖLL, Stephan. Op. cit. At 255.

issue is deeper when it is assessed in light of the absence of rules from institutions about the conflicts of interest, and the mandatory disclosure of TPF agreements.

These potential issues, which are addressed in this paper and at the end, a brief of the current scenario of the TPF in the MERCOSUR countries is made in order to point out how little importance the countries have given this matter.

2. SUBJECT MATTER DEVELOPMENT

A challenge to the arbitrator can occur at any stage. Although it may not be the common practice, since it is more common to challenge an arbitrator when the proceedings are about to start. These challenges – made once the arbitration is in full motion – can affect and delay the continuation of the proceedings[13]. Thus, this can affect not only the outcome, but also to the time an arbitration case might take.

Although it may not be a simple task to do, the outcome that is sought here, in accordance with the principles of the IBA Guidelines on Conflict of Interest in International Arbitration[14], is that of reducing the potential conflict of interest between an arbitrator and the funder. Since a potential conflict exists where the funder with whom the arbitrator has a relationship is supporting one of the parties in the ongoing arbitration procedure. In this matter, take for example an arbitrator who is a counsel in another case requiring funding, or an arbitrator serving as a consultant with the funder. In these cases, it might be obvious that the arbitrator could be biased since the outcome would also affect the funder's interests, thus it might affect his or hers too[15]. Therefore, the value of disclosure not only rests in the avoidance of possible conflicts of interest but in preventing the arbitration process to be tainted to the point that the execution of the award might be in jeopardy due to undisclosed information. The disclosure of the funding agreement might be objected to by the funders and their representatives by stating that "there is no history of successful challenges to awards based on the failure to disclose the presence of external interests in arbitration. Indeed, a survey of case law reveals not a single instance in the world of any court setting aside or refusing to enforce an arbitral award because of a lack of disclosure of third-party financing"[16].

13 ALLEN, Nathalie; MALLET, Daisy "Arbitrator Disclosure - No Room For The Colour Blind". *Asian International Arbitration Journal. Singapore International Arbitration Centre (in cooperation with Kluwer Law International).* Kluwer Law International, 2011, vol. 7, Issue 2, p. 118 – 147.

14 Please see General Standard 3 of the IBA Guidelines on Conflicts of Interest 2014.

15 HU, Yue. "Mandatory Disclosure of Third-Party Funding in International Arbitration". *Peiking University of Transnational Law Review Blog.* Last accessed January 25, 2020. Available at: <http://stllawreview.com/index.php/2019/04/20/mandatory-disclosure-of-third-party-funding-in-international-arbitration/>

16 BOGHART, Christopher. "Deeply Flawed: A Perspective on the ICCA-Queen Mary Task Force on Third-Party Funding". *Buford Capital LLC Blog.* Last accessed January

Nonetheless, as Boghart has attested "disclosure in arbitration exists so that arbitrators can check for potential conflicts and thereby preserve the integrity of the award and minimize the risk of post-award challenge"[17], the importance of this is decisive considering the risks of leaving room available to delays in the proceedings or giving grounds to possible annulment of the award.

The seriousness of avoiding conflicts of interest dwell not only in the interest of the funded party – and the funder – to obtain a favorable award, thus *win* the case, but also in avoiding delays, suspensions and future annulments of the award due to undisclosed possible situations that might have led to conflicts of interest. Hence, it is stated from the beginning that to avoid these conflicts the only way forward is by the incorporation of TPF agreements.

TPF cases have brought with them the issue of whether it is important or not to reveal who is the funder and how involved they are in the case[18]. Thus, the issue here is that of regulating the disclosure and the extent of disclosure. In this regard, considering that TPF "is an inevitable commercial reality that cannot be suppressed any longer"[19], it is important to note that the first-ever attempt at voluntary self-regulation by litigation funders is the Code of Conduct of the Association of Litigation Funders in the UK[20], which could apply not just to funders based in England and Wales, but arguably also to other funders of arbitrations seated in other jurisdictions[21]. Its effectiveness has been doubted given that it only applies to the members of the Association, therefore it cannot be taken as official regulation of TPF in litigation[22].

Currently, there is no widespread requirement to disclose the presence or identity of funders. There are no uniform standards regarding how to do it

25, 2020. Available at: <https://www.burfordcapital.com/insights/insights-container/deeply-flawed-a-perspective-on-the-icca-queen-mary-task-force-on-third-party-funding/>

17 Ibid.

18 Please see: GOLDSMITH, Arer; SCHERER, Maxi. . "Third Party Funding in International Arbitration in Europe. Part I: Funders' Perspectives". I*nternational Business Law Journal, Roundtable* 2012, vol. 2, p. 207-219. Where the hands-on and hands-off approach is explained succinctly. Also: BEISNER, John; MILLER Jessica; RUBIN."Selling Lawsuits, Buying Trouble. Third-Party Litigation in the United States". U.S. Chamber Institute for Legal Reform, 2009. Available at: <https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf>

19 HASHU SHAHDADPURI, Khushboo. *Supra* note 1. At 78.

20 ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND & WALES. Available at: <https://associationoflitigationfunders.com/code-of-conduct/>

21 KALICKI, Jean. "Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2)". *Kluwer Arbitration Blog*, March 13, 2012. Last accessed February 2, 2020. Available at: <http://arbitrationblog.kluwerarbitration.com/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/>

22 KALICKI, Jean. "Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 2 of 2)". Kluwer Arbitration Blog, March 14, 2012. Last accessed February 2, 2020. Available at: <http://arbitrationblog.kluwerarbitration.com/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/?print=pdf>

and to what extent. One example is the Canada-EU Trade Agreement "CETA"[23], chapter 8, section F, addresses the TPF subject and it establishes mandatory disclosure stating "the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third-party funder"[24]. Although the burden of disclosure is on the funded party, the extent of the disclosure is limited to the name and address of the funder. Another example is the Singapore International Arbitration Center "SIAC"[25], which in its Investment Arbitration Rules of 2017[26] established as a discretionary power of the tribunal the possibility to order the disclosure of a funder and details of an agreement, but it is not mandatory for the parties[27]. This demonstrates that there is not a unique line on how the disclosure of TPF agreements are regulated. Notwithstanding this fact, in many jurisdictions the TPF is left unregulated[28].

Appropriately, regulating the disclosure by the funded party of the existence and identity of funders is necessary so that arbitrators could make appropriate disclosures and decisions regarding potential conflicts of interest[29]. Accordingly, in this regard it was proposed within the ICCA-Queen Mary Task Force on Third-Party Funding that "instead of a general presumption of disclosure as a matter of course in every case, it should be more tailored to actual potential conflicts. Under this view, the Principles [on conflicts of interest] should only confirm the authority of arbitrators and arbitral institutions to request disclosure of such information, as needed, and allow parties and funders to make disclosures of material facts that they agree arbitrators should consider"[30].

Furthermore, the lack of legal regulation of TPF is rather problematic as funding agreements are getting more and more common in practice[31]. With this in mind, it is also significant to point out that many observers still consider

23 Text of the Agreement available at: <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

24 EUROPEAN COMMISSION. "EU-Canada Comprehensive Economic and Trade Agreement" (CETA). Art. 8.26.

25 Please see. SINGAPORE INTERNATIONAL ARBITRATION CENTRE. Available at :< https://www.siac.org.sg>

26 Text of the Investment Arbitration Rules available at: <https://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf>

27 SINGAPORE INTERNATIONAL ARBITRATION CENTRE. SIAC Investment Arbitration Rules, Rule 24 (L).

28 THRASHER, Rachel Denae. "The Regulation of Third Party Funding: Gathering Data for Future Analysis and Reform". *Law and Justice in the Americas Working Paper,* Series 9. 2018. Available at:< https://lawdigitalcommons.bc.edu/ljawps/9>

29 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (hereinafter Task Force). The ICCA Reports Nr. 4. 2018. At 83. Available at: <https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html>

30 Ibid. At 84.

31 COMMISSION ON ARBITRATION AND ADR. ICC Commission Report: Decision on Costs in International Arbitration. ICC Dispute Resolution Bulletin, 2015, Issue 2, p. 45. Available at:<https://iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf>

the TPF industry as the "wild west" due to a lack of regulation relating to the practice in many countries. Many of the countries who do have regulations suffer from a lack of uniformity and an array of conflicting laws at the sub-national level (i.e., the laws of states, provinces, territories, etc.)[32].

In the current scenario of TPF is still unclear whether a party would be required to disclose the existence of a funding arrangement to the adverse party, the administering institution, or potential arbitrators. This hesitation engenders the chance of undisclosed conflicts that could threaten the fairness or enforceability of awards. In some cases, disclosure may proceed transparently and thus lessen the probability of conflicts surfacing only late in the case[33]. In this vein, in *Oxus Gold PLC v. Republic of Uzbekistan*[34], the Tribunal stated that the presence of a third-party funder "has no impact on [the] arbitration proceeding"[35]. Nevertheless, this is not to be the common practice as would be seen below.

2.1. How to Regulate Disclosure?

The idea of non-disclosure holds authority since the rationale that explains it is that imposing a general duty to disclose appears oddly paternalistic, as it is in the funders and the funded party's own best interest to disclose. In a case of a potential conflicts between the funder and an arbitrator, the former would be aware of the need to guarantee that no such conflicts exist in order to avert the award from being set aside or not enforced, since it otherwise risks losing its investment[36].

However, regulated or not, the use of TPF in arbitration cases is a development that is here to stay. The genie is out of the bottle, and no one has suggested that it ever may be persuaded to return[37]. This is not because of his unwillingness to return to the bottle, but because practitioners, institutions and prospects of parties could be severely affected should it go back. Therefore, it is necessary to understand how the issues pertaining to regulation can be resolved.

Disclosure regulation can be implemented properly addressing the issues that TPF poses for international arbitration. Basically, it is intended to prove that disclosure is a useful tool for mitigating the possible downsides, such as conflicts of interest, while preserving the upsides, such as access to

32 SHANNON, Victoria A. "Harmonizing Third-Party Litigation Funding Regulation". C*ardozo Law Review*, February 2015, vol. 36, n°. 3, p. 861-912. HeinOnline.
33 KALICKI, Jean. *Supra* note 21.
34 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL).*Oxus Gold PLC v. Republic of Uzbekistan*, UNCITRAL Case. Available at: <https://www.italaw.com/cases/781>
35 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL). Final Award, 17 August 2015. Para. 127. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf>
36 VON GOELER, Jonas. "Third-Party Funding in International Arbitration and its Impact on Procedure". *International Arbitration Law Library,* vol.35, 2016. At 151.
37 KALICKI, Jean. *Supra* note 21.

justice[38]. Not only is it desirable to regulate the disclosure of TPF agreements to avoid possible conflicts of interest, partiality, or dependence from an arbitrator, or to avoid unnecessary delays, but for the sake of transparency during the proceedings as well. The first and probably the most compelling legal argument in favor of disclosure is the need to maintain the independence and impartiality of arbitrators[39].

There are few rule-making bodies that have implemented disclosure regulations directed toward TPF in arbitration[40]. This is more evident in the investment field, though, there have been efforts to regulate the disclosure of TPF within this industry. In ICSID, during the Rules and Regulations Amendment Process, the disclosure of TPF was included[41]. To comprehend how new this topic is it can be mentioned that on August 16, 2019, the ICSID Secretariat published its Working Paper #3 on Proposals for Rule Amendments[42]. It is established within the document that a party shall disclose the name of any non-party from which the party, affiliates or representatives received funds[43], and in its Note to the Rule it was explained that sovereign States generally recognize that TPF is a mechanism that provides important benefits by enhancing access to arbitration to small and medium enterprises.

Yet, before the debate on how to regulate disclosure had begun, several investment tribunals had ordered it. However, the way they have done so is interesting to highlight since it is clear that no single unified criteria about disclosure and the extent of it existed at that time. We can reference that in *EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic*[44] the tribunal ordered the claimants - who had already disclosed that their claim was financed by an outside funder[45] - to disclose the identity of the funder[46]. Only the identity was required. Now, in *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*[47] the tribunal ordered the

38 MOSELEY, Sarah. "Disclosing Third-Party Funding in International Investment Arbitration". *Texas Law Review*, vol. 97, n°6, May 2019, p. 1181-1203. HeinOnline.

39 DE BRABANDERE, Eric; LEPELTAK, Julia. "Third Party Funding in International Investment Arbitration". *Grotius Centre Working Pape*r No. 2012/1. Available at: <https://ssrn.com/abstract=2078358. At 385>

40 Ibid. At 1192.

41 INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES. Rules and Regulations Amendment Process. Available at: <https://icsid.worldbank.org/en/amendments

42 INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID). *P*roposal for amendment of the ICSID rules. *Working Paper,* August 2019, n°3, vol.1. Available at: <https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf>

43 Ibid. ICSID Arbitration Rules, Rule 14 Notice of Third-Party Funding.

44 INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES. *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case Nr. ARB/14/14. Available at: <https://www.italaw.com/cases/3210>

45 Ibid. Respondent's Application for Provisional Measures. Para. 32. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw6263.pdf>

46 INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES. *EuroGas Inc and Belmont Resources Inc v Slovak Republic. Supra* note 44. At 145.

47 PERMANENT COURT OF ARBITRATION (PCA) *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*. UNCITRAL PCA Case 2013-15. Available at: <https://pca-cpa.

claimant to reveal its funder's identity "for purposes of transparency"[48] and rejected the submission to disclose the terms of the agreement[49]. Also in another ICSID case, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*[50], the tribunal went further, ordering the claimant to disclose the names and details of the funder along with the terms of that funding agreement "to ensure the integrity of the proceedings (…) since it considers that transparency is important in cases like this"[51]. This shows that revealing the presence of a funder was considered by the tribunals even though the absence of any rule or guidelines regarding it. Nevertheless, we can see no uniformed standard about the extension of the disclosure.

In this regard, the opinion of the users of the international arbitration system is likely to incline towards the need for regulation, as it has shown the Queen Mary and White & Case 2015 Survey[52], in which 71% of its respondents felt that the disclosure of third party funding should be regulated[53]. This necessity turns imperative since the non-disclosure could potentially disrupt the arbitral process if an arbitrator learns about the existence of the funding agreement during the course of the proceedings[54]. It is likely that if this happens, the award would probably be challenged. Therefore, we must analyze how regulation can take place:

a) Regulation of disclosure by legal texts

It is a fact that Arbitration Rules are slowly adapting and updating to the existence of TPF in international arbitration. The rules tend to establish the principle of disclosure of TPF[55]. This appears as one of the ways the beast can be tamed.

In this sense, the favorable point is that instruments bring certainty and consistency to the treatment of this subject. Many tribunals have already

org/en/cases/54/>

48 PERMANENT COURT OF ARBITRATION (PCA). Procedural Order Nr. 10, 11 January 2016. Para. 79. Available at:<https://pcacases.com/web/sendAttach/1562>

49 Ibid. Para. 80.

50 INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES. *Muhammet Cap & Sehil Infaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan.* ICSID Case Nr. ARB/12/6. Available at: <https://www.italaw.com/cases/2036>

51 Ibid. Procedural Order n°3, 12 June 2015. Para. 9. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw4350.pdf>

52 QUEEN MARY UNIVERSITY OF LONDON AND WHITE & CASE. "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration". Available at: <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf>

53 Ibid. At 47.

54 SCHERER, Maxi. "Out in the Open?" Third-Party Funding in Arbitration". *Commercial Dispute Resolution Blog,* 2012. Last accessed February 3, 2020. Available at: <https://www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration>

55 ACERIS LAW LLC. "Disclosure of Third-Party Funding in International Arbitration". 29 December 2017. Last accessed February 3, 2020. Available at: <https://www.acerislaw.com/disclosure-third-party-funding-international-arbitration/>

addressed legal issues arising from TPF[56]. Nevertheless, those can serve as starting points or last resort. Things shall not stay the way they are considering that there is no doctrine of binding precedent or stare decisis in international arbitration[57]. Furthermore, the lack of regulations results in unpredictability. Accordingly, in order to foster predictability within the arbitral institutions, the incremental movement toward greater transparency will continue to gain support as parties realize the benefits of greater control (of what?) which translates in foreseeability[58].

Thus, it is almost impossible to mention the duties of disclosure without referring to transparency. Here the regulation of disclosure by legal instruments can represent an improvement for the users since they promote: 1) increase in use of information provided by the system; 2) enhance in the accuracy or quality of information provided; and, 3) extends the scope of information provided by the system[59]. Now, disclosure obligations target specific information for defined regulatory purposes, whereas transparency rules apply to the activities of an institution, without regard to the nature of the information involved[60]. Then, mandatory disclosure obligations can promote transparency when the availability of specific categories of information allows monitoring of decision making[61].

To understand how this issue is addressed, we can refer to the SIAC Rules of Arbitration which dedicates three different articles to TPF[62]. Not limited to the additional powers of the tribunal[63], the SIAC Rules state the right of the tribunal to order the disclosure, along with the identity of the funder or the source of the funding. Finally, it allows the possibility of disclosing the interest of the funder in the outcome of the proceedings[64]. Similarly, the "CETA" establishes mandatory disclosure[65]. Likewise, ICSID suggested mandatory disclosure in its new proposed rules amendment[66]. It imposes a new obligation on the parties to disclose whether they have TPF, the source of it, and to keep such disclosure of information current through

56 MOSELEY, Sarah. "Disclosing Third-Party Funding in International Investment Arbitration". *Texas Law Review*, May 2019, vol. 97, n°6, p. 1181-1203. At 1193.
57 COMMISSION, Jeffrey P. "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence". *Journal of International Arbitration*, vol. 24, n°2, 2007. p.129–158. Kluwer Law International. Available at: <https://www.linklaters.com/pdfs/Insights/us/JOIA_Article.pdf>
58 ROGERS, Catherine A. "Transparency in International Commercial Arbitration". University of Kansas Law Review, vol. 54, n° 5, June 2006, p. 1301-1338. HeinOnline.
59 WEIL, David. "The Benefits and Costs of Transparency: A Model of Disclosure Based Regulation". *John F. Kennedy School of Government, Harvard University*, June 2002. At 14. Available at < https://ssrn.com/abstract=316145 or http://dx.doi.org/10.2139/ssrn.316145>
60 ROGERS, Catherine A. *Supra* note 58. At 1310.
61 Ibid.
62 SINGAPORE INTERNATIONAL ARBITRATION CENTRE. Rules. *Supra* note 26.
63 Ibid. Art. 24.
64 Ibid. Arts. 33 & 35.
65 CETA. *Supra* note 23.
66 ICSID Arbitration Rules, Rule 14 Notice of Third-Party Funding. *Supra* note 41

the proceeding. Still, they are not required to disclose the funding agreement or its contents for this purpose[67].

Furthermore, the ICC understands the importance of the regulation of the disclosure issue as demonstrated by the publication of its Guidance Note for the disclosure of conflicts by arbitrators[68]. This provides the arbitrators a manual with detailed issues that could potentially put at risk their independence and impartiality, including the existence of TPF[69].

Another good example of how the regulation takes place is the Hong Kong Code of Practice for TPF in Arbitration[70], which came into effect in February 2019. It applies to funders and it leaves the burden of disclosure to them since it includes an obligation to monitor and disclose possible conflicts of interest with the members of the arbitral tribunal[71].

Finally, maybe the most important legal text is the EU-Vietnam Investment Protection Agreement (IPA)[72], although it is not ratified yet. This instrument addresses the issue of TPF, for the first time ever in an Investment Protection Agreement. It stipulates control of TPF in three ways: mandatory notification of TPF to the Tribunal and the other non-funded party, how to comply with this duty, and its connection with granting orders of security for costs and allocation of costs. Specifically, the documents that are to be disclosed include "the existence and nature of the funding agreement and the name and address of the funder"[73]. This provision is important for the sake of this study since it could set a trend for the future of BIT or FTA to be signed, it can accurately show how to tame the beast.

To conclude, it has been analyzed how the disclosure of TPF agreements is being regulated by different legislative instruments or hard law. Although they may vary in the extent of the required disclosure or whose duty it is to reveal the existence of a TPF, it can be said that in the last decade the trend is set and it is towards the disclosure of very little information about the funder, as it is the case of the EU-Vietnam IPA.

b) The self-regulation way

Here the ethical category is a unifying principle that runs throughout the

67 GILCREST, Sarah. "When Peer Pressure Is Not Enough: Mandatory Disclosure and Third-Party Funding". *Arbitration Brief,* vol. 6, n°1, 2019, p. 60-81. HeinOnline.

68 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (with the inclusion of the Guidance Note). Available at: <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>

69 Ibid. Para. 28.

70 Full text of the Hong Kong Code of Practice for Third Party Funding in Arbitration available at: <https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf>

71 Ibid. Art. 2.7.4.

72 The texts of the Free Trade Agreement along with the Investment Protection Agreement is available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437

73 EU-VIETNAM INVESTMENT PROTECTION AGREEMENt. Art. 3.37.1. Available at: <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf>

codes of conduct[74]. Funders are self-regulating the ethics of their profession through codes of conduct and best practices[75]. In the United States, there is the American Legal Finance Association "ALFA"[76], and in England and Wales there is the Association of Litigation Funders "ALF"[77]. Both organizations have issued codes of conduct for their members[78]. Even the individual funders have best practices and codes of conduct. As an example, we can cite IMF Bentham Ltd., that released a Code of Best Practices for itself[79].

Likewise, the Conseil de l'Orde (Paris Bar Council) has adopted a resolution[80] indicating its support for TPF best practices. It aims to confirm that this industry is in the interest of clients and counsels, particularly in the international arbitration field[81]. This shows that even the countries with a civil law rather than common law can adopt self-regulation TPF issues.

Interestingly, in Brazil the TPF industry is not regulated. Nonetheless, the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada "CAM-CCBC"[82] seeking to self-regulate this matter issued the Administrative Resolution No. 18[83], which is a five-article resolution in which *recommends* the parties to report the existence of TPF at the earliest opportunity. It also requires full information about the funder in said communication[84]. This way, funders, arbitrators and practitioners can rely on this administrative resolution to regulate the disclosure. The approach taken by the CAM-CCBC is unusual since it seems to understand that it lacks the power to coerce the parties to comply with the resolution, hence it simply *recommends* them to disclose the presence of funders.

Now, being unwilling to disclose funding due to the lack of rules, in the hope that if they lose they could "discover" a conflict of interest between an

74 SHANNON, Victoria A. *Supra* note 32. At 911.
75 ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND & WALES. See supra note 20,
76 AMERICAN LEGAL FINANCE ASSOCIATION (ALFA). Available at: < https://americanlegalfin.com/>
77 ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND & WALES. See supra 20.
78 AMERICAN LEGAL FINANCE ASSOCIATION (ALFA). *Code of Conduct*. Available at: https://americanlegalfin.com/alfa-code-of-conduct/> and ASSOCIATION OF LITIGATION FUNDERS. *Code of conduct.* Available at: <https://associationoflitigationfunders.com/code-of-conduct/>
79 BENTHAM, Jeremmy. *Code of Best Practices*. Available at: <https://www.benthamimf.com/docs/default-source/default-document-library/code-of-best-practices-2018.pdf?sfvrsn=e44fd6cd_24>
80 FRANCE. CONSEIL NATIONAL DES BARREAUX. Full text of the Resolution. Available at: <http://www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf>
81 Ibid.
82 CENTRO DE ARBITRAJE Y MEDIACIÓN DE LA CÁMARA DE COMERCIO BRASIL-CANADÁ (CAM-CCBC). Resolution n°18, 2016. Available at: <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/>
83 Full text of the Administrative Resolution available at:<https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ra-18-2016-financiamento-de-terceiros-em-arbitragens-cam-ccbc/>
84 Ibid. Art. 4.

arbitrator and funder would be a terrible idea[85]. Not only is it a reproachable conduct, but it may also engender to a lack of good faith which is a general duty in the arbitration process[86]. Nevertheless, even though there is not an obligation to disclose, the good faith duty should not be required to ask a party to disclose its funder[87].

To sum up, we can see that self-regulation may have the benefit of standardizing certain conducts and it helps to fill the void where regulation is absent. It lacks coercive power though, since it cannot be imposed to the practitioners as is the case of the ALFA Code of Conduct[88]. Therefore, the lack of enforcement leaves the scenario at the individual wills of the parties to comply and this is not recommendable since they can just decide not to disclose information.

c) Taming the Beast: a hybrid way

As a third option for the regulation of this subject is soft law, which can be adopted by the tribunals and institutions at any time. In this connection, the IBA Guidelines for Conflicts of Interest were the first instrument specifically addressing TPF. Nonetheless, they are *only* soft law.

Still, General Standard 6(b) and its explanation refer to funders as any person or entity that is contributing funds, or other material support, to the prosecution or defense of the case that has *a direct economic interest* in, or a duty to indemnify a party for, the award to be rendered in the arbitration. This seems like a broad definition, encompassing multiple types of funders, funding mechanisms and interests (e.g. lawyers' contingency fees), but a broader analysis will not be undertaken here and there are already doubts as to whether the standard will effectively clarify the issue of TPF[89]. Therefore, as we can see here, international institutions and organizations have begun to address the involvement of funders.

Furthermore, the industry is increasingly requiring a clear, uniform and binding regulatory framework within the field of international arbitration. This is confirmed by the results of the Queen Mary and White & Case 2015 Survey[90], where the 71% expressed their desire for regulating the industry. In

85 GILCREST, Sarah. "When Peer Pressure Is Not Enough: Mandatory Disclosure and Third-Party Funding". Supra note 67. At 79.

86 LÉVY, Laurent; BONNAN, Régis. "Third-Party Funding: Disclosure, Joinder and Impact on Arbitral Proceedings" in ICC INSTITUTE OF WORLD BUSINESS LAW AND OTHERS (eds). "Third-party Funding in International Arbitration". International Chamber of Commerce, 2013, at 80.

87 Ibid. At 81.

88 SHANNON, Victoria A. "Harmonizing Third-Party Litigation Funding Regulation". *Supra* note 32. At 912.

89 ILIESCU, Marius Nicolae. "A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact". *Kluwer Arbitration Blog,* May 2, 2016. Last accessed February 5, 2020. Available at: <http://arbitrationblog.kluwerarbitration.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact/#_ftn3>

90 QUEEN MARY UNIVERSITY OF LONDON AND WHITE & CASE. "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration". *Supra* note

this regard, disclosing the presence of a funder and the identity from the outset of the arbitration proceeding, both to the arbitrators and to the non-funded party, is essential for the integrity and legitimacy of the arbitral system[91].

Accordingly, it is important to note that imposing the duty of disclosure on the parties would be consistent with the general obligation on parties to international arbitration to disclose any fact that may be relevant to the arbitral tribunal[92]. In this respect, the General Standard 7(a) of IBA Guidelines on Conflicts of Interest of 2004, which is not the current version, yet this part was not amended by the 2014 version, considered the duty to disclose to the parties, but this means that not only the parties have this obligation. In this line, Trusz suggested that any relationship with third-party funders should be imposed also on the arbitrators, requiring them to make such a disclosure in their statement of impartiality and independence[93].

Now, the advantage of great upper hand the IBA Guidelines provide is that they are soft law and any arbitral institution in any case can refer to them, unless the parties establish otherwise. Nevertheless, its disadvantage is the enforceability as it is the case with the self-regulation. Thus, the same principle can apply with self-regulation and with this holistic approach offered by the IBA Guidelines, which can be summarized in the fact that the reputation of TPF could be put at risk by a failure by funders to comply with the new regulations[94]. Therefore, it might not resolve the issue of the urgency of regulation in this subject.

This need or urgency for mandatory disclosure on the existence of the funder was exemplified in the case of *Ecuador v Chevron*[95]. In that case, thanks to the imposed disposition on the party's attorney it was revealed the various conflicts that were present between the parties in the litigation due to the existence of a funder in the case, which created turmoil in the case. In view of the quantity of conflicts arising with even greater frequency in international arbitration, it is worrisome that no mechanism currently exists to ensure that the presence of funders is disclosed[96].

52.

91 BLAVI, Francisco. "It's About Time To Regulate Third Party Funding". *Kluwer Arbitration Blog*. December 17, 2015. Last accessed February 5, 2020. Available at: <http://arbitrationblog.kluwerarbitration.com.ubproxy.ub.uni-heidelberg.de/2015/12/17/its-about-time-to-regulate-third-party-funding/>

92 FRIGNATI, Valentina. "Ethical Implications of Third-Party Funding in International Arbitration". Arbitration International, vol. 32, Issue 3, September 2016, p. 505–522. Available at: <https://doi.org/10.1093/arbint/aiw011>

93 TRUSZ, Jennifer. "Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration". *Georgetown Law Journal*, Vol. 101, No. 6, August 2013, p. 1649-1682. At 1677.

94 BLAVI. *Supra* note 91.

95 PERMANENT COURT OF ARBITRATION. PCA Case No. 2009-23. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23. Available at: <https://www.italaw.com/cases/257>, also see: UNITED STATES DISTRICT COURT, SD NEW YORK. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581. March 7, 2011. Available at: <https://www.courtlistener.com/opinion/2477256/chevron-corp-v-donziger/>

96 HASHU SHAHDADPURI, Khushboo. *Supra* note 1. At 91.

3. REGULATION STATUS IN THE MERCOSUR

As the TPF deals are blooming, the MERCOSUR region is not apart from that. Some mentions have been made already regarding its status in the MERCOSUR. Nonetheless, we can assert that the current scenario in the MERCOSUR is that of uncertainty, since there are no clear rules in any of its country members that address this matter.

Although, some considerations have been made by Arbitral Institutions in the MERCOSUR region. In this sense, those who have shown some signals of dealing with TPF are Brazil and Argentina. Unfortunately, that was not the case with Uruguay and Paraguay.

3.1. Argentina

The Arbitration Rules of the Chamber of Commerce and Services[97], which have been modified and updated in 2017, refers to Class Arbitration in its Annex IV. Here, it establishes that "all the financing agreements must be communicated to all parties, and it must be approved by the Arbitration Court, which may require assurances regarding the prohibition for third parties to influence the arbitration process"[98]. No other mention has been found in this country that can shed some light on the regulation of TPF.

3.2. Brazil

The CAM-CCBC center is the pioneer in this matter in MERCOSUR. As we previously mentioned, this Center 2016 through Administrative Resolution No. 18/2016[99], established as a recommendation or guideline that the parties report the existence of a funder as soon as possible, along with their full details (name and address).

In this line of thought, the Chamber of Conciliation, Mediation and Arbitration of the Center of Industries of Sao Paulo (CIESPE)[100] has also regulated disclosure in TPF cases, through Resolution No. 6/2019 where it is also recommended to the funded party the disclosure of the existence of a third-party funder.

3.3. Paraguay and Uruguay

In Paraguay, the CAMP (Center for Arbitration and Mediation of Paraguay) modified its arbitration rules in 2021 but has not included provisions related to TPF. This has been a great opportunity that was not taken advantage of – from this point of view – by the CAMP since the regulations are quite modern but could have been better if these provisions

97 CÁMARA ARGENTINA DE COMERCIO Y SERVICIOS. Available a: <https://www.cac.com.ar/>
98 Please see: <https://www.cac.com.ar/data/documentos/20_Reglamento%20de%20Arbitraje%20CEMARC%20v.17.05.2017.pdf>
99 *Supra* note 82.
100 CÂMARA DE CONCILIAÇÃO, MEDIAÇÃO E ARBITRAGEM DE SÃO PAULO. *Resolução* n°6/2019. <http://www.camaradearbitragemsp.com.br/pt/res/docs/Resolucao_n_6.2019.pdf>

were addressed. This might be a missed chance for the CAMP and we hope that some sort of regulation comes in the next years.

As to Uruguay, we have not found in the Rules of the Conciliation & Arbitration Center, provisions on TPF. The case with these countries shows how little improvement has been made in terms of development of TPF within the MERCOSUR country members.

CONCLUSION

To sum up, the regulation of TPF is a need considering the confidential nature of both commercial arbitration and the TPF industry. They could present too many problems to allow the issue of arbitrator's conflicts of interest to remain unresolved[101]. The need for the discovery of TPF presence grows every day between funders and clients, considering overall that this industry is neither a menace nor a panacea but an inevitable commercial reality which has tangible benefits to offer in international arbitration, once it can be properly reined in[102].

Now, this need of regulation can be made in two ways: by hard law or by self-regulation. From this point of view, the better way to cope with this matter is with hard law, which fortunately appears to be the trend towards the future of third party funding as the EU-Vietnam FTA along with the Singapore and Hong Kong legislation have showed, as the ICSID has proved to be open to include between its amendments the disclosure of the presence of TPF and as the ICC has also showed in its guidance note. It is crucial to understand that the arbitral institutions and creators of the ad hoc arbitration rules should take it upon themselves to require disclosure by both the arbitrators and the funded parties[103]. This recommendation by no means intends to minimize the huge positive impact that self-regulation has brought to the industry. On the contrary, it is asserted that the self-regulation instruments shall serve as a basis for future hard law instruments since the contributions of the ALFA, ALF and CAM-CCBC is undeniable.

We consider that the MERCOSUR region needs to jump on the bandwagon and address this subject as its importance requires. Some crucial steps have been made, primarily in Brazil, but more needs to be done to properly insert the region in the hot topics of discussion. The MERCOSUR members need to start working together because the TPF industry is not going to go away and prohibition might not be the path forward since the institution is already accepted in international arbitration centers, as have been shown in this paper.

In summary, the "beast" is unleashed which means TPF is here to stay. The proposal to solve the lack of clarity regarding the disclosure of TPF agreements is to regulate them with hard law, which would not mean to

101 TRUSZ, Jennifer. *Supra* note 91. At 1681.
102 HASHU SHAHDADPURI, Khushboo. *Supra* note 1. At 106.
103 TRUSZ, Jennifer. *Supra* note 91. At 1682.

set aside or ignore soft law. The great contribution of the IBA Guidelines on Conflicts of Interest is not ignored, they serve the purpose of support for hard law, arbitral institutions, arbitration and practitioners. Finally, the proposal not only means the regulation of the disclosure but also its extent. It is best that the extent of the disclosure is limited to the general information of the funder, not to the entirety of the funding agreement.

CONFLICT OF INTEREST AND FINANCING

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Financiamento de terceiros e conflitos de interesse: existe uma maneira de domar a fera? Uma visão sobre o MERCOSUL

Resumo: O mercado de financiamento de terceiros (TPF) vem crescendo rapidamente nos últimos anos, principalmente no campo da arbitragem internacional. Seus benefícios, juntamente com os riscos que poderia suportar, receberam muita atenção. Assim, o apetite da indústria pela TPF cresceu exponencialmente em curto espaço de tempo. Desde 2012, essa indústria cresceu mais de 500%, em relação ao número de contratos de financiamento celebrados e ao volume de financiadores ativos em busca de oportunidades viáveis.

Nesse sentido, considerando que "pouco precioso se diz sobre a divulgação", analisa-se se a divulgação será obrigatória para evitar a possível existência de conflitos de interesse entre árbitro e financiador. Isso ganha relevância se levarmos em conta que as instituições arbitrais estabelecem que a independência e a imparcialidade do árbitro são uma obrigação, mas pouco dizem

sobre os acordos da TPF e seu impacto na imparcialidade ou independência do árbitro em caso de conflito.

Palavras-chave: Arbitragem Internacional; Financiamento de Terceiros; MERCOSUL.

Financement par des tiers et conflits d'interets : existe-t-il un moyen d'apprivoiser la bete ? Vers le MERCOSUR

ABSTRAIT: Le marché du financement par des tiers (TPF) a connu une croissance rapide ces dernières années, en particulier dans le domaine de l'arbitrage international. Ses avantages ainsi que les risques qu'il pourrait supporter ont reçu beaucoup d'attention. En conséquence, l'appétit de l'industrie pour le TPF a augmenté de façon exponentielle en peu de temps. Depuis 2012, cette industrie a augmenté de plus de 500%, en ce qui concerne le nombre d'accords de financement célébrés et le volume de bailleurs de fonds actifs à la recherche d'opportunités viables.
En ce sens, considérant que "précieusement peu est dit en ce qui concerne la divulgation", il est analysé si la divulgation doit être obligatoire pour éviter l'existence possible de conflits d'intérêts entre un arbitre et le bailleur de fonds. Cela gagne en pertinence si l'on tient compte du fait que les institutions arbitrales établissent que l'indépendance et l'impartialité de l'arbitre sont indispensables, mais elles disent peu de choses sur les accords TPF et leur impact sur l'impartialité ou l'indépendance de l'arbitre en cas de conflit.

MOTS CLÉS: Arbitrage international, Financement par des tiers, MERCOSUR

BIOGRAPHICAL SUMMARY

Mauricio Marengo. LL.M. in International Law – Universität Heidelberg. Abogado: Universidad Nacional de Asunción. Senior Associate, Vinclum Abogados & Consultores www.vinclum.com.py. Contact: mmarengo@vinclum.com.py