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DISCLOSURE OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

DEVER DE REVELAÇÃO DO FINANCIAMENTO POR TERCEIROS NA ARBITRAGEM INTERNACIONAL

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ABSTRACT: The number of arbitration proceedings financed by third parties has grown exponentially in the last decade. While this is a positive development as third-party funding may facilitate access to justice, it may also pose a risk to the integrity of the proceedings, sparking fundamental discussions over the arbitrators' independence and impartiality. Given that funding agreements are private contracts between the funder and the funded party, arbitrators may remain unaware of their existence if the funded party does not disclose it. The article addresses the tension between third-party funding and the arbitrators' duty to disclose any circumstance that might cast doubt as to their independence and impartiality. The authors advocate for the disclosure of third-party funding in order to safeguard the integrity of the arbitration proceedings and uphold the legitimacy of arbitration.

RESUMO: O número de arbitragens financiadas por terceiros cresceu exponencialmente na última década. Embora isso seja um desenvolvimento positivo, já que o financiamento de arbitragens pode facilitar o acesso à justiça, este também pode representar um risco para a integridade dos procedimentos arbitrais, gerando discussões fundamentais sobre a independência e imparcialidade dos árbitros. Como o acordo de financiamento é um contrato privado entre o financiador e a parte financiada, os árbitros podem permanecer sem conhecimento de sua existência se a parte financiada não o divulgar. O artigo aborda a tensão entre o financiamento por terceiros e o dever dos árbitros de divulgar qualquer circunstância que possa suscitar dúvidas acerca da independência e imparcialidade destes. Os autores defendem a revelação do financiamento por terceiros para salvaguardar a integridade do procedimento arbitral e preservar a legitimidade da arbitragem.

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PALAVRAS-CHAVE: Financiamento por Terceiros – Arbitragem Internacional – Conflito de Interesse – Dever de Revelação – Independência e Imparcialidade.

1. INTRODUCTION

Third-party funding has been a topic of ongoing discussion in recent years, given the surge in arbitrations and the increase of costs which triggered an interest and/or need to involve third parties to fund the arbitration. Those third parties obviously are interested in the outcome of arbitration proceedings. The selection of the arbitrators in the eyes of the users of arbitration is or at least can be an important factor to secure a favourable outcome. The funding agreements are private contracts between the funder and the funded party. Accordingly, arbitrators may well remain unaware of their existence. Nevertheless, it also cannot be ruled out that third-party funders participate in the selection process and may favour certain arbitrators whom they have appointed in prior arbitrations. The opposing party may have a legitimate interest in being aware of such circumstances. This sparks fundamental discussions over one of the pillars of arbitration: the independence and impartiality of the arbitrator. Arbitrators have a duty to disclose any circumstance that might cast doubt as to their independence and impartiality. Nevertheless, without knowledge of the third-party funding, they may be unable to discharge their duty to disclose. Therefore, the disclosure of the third-party funding may be essential to safeguard the integrity of the proceedings. This article describes the present legal situation and suggests how to best deal with these issues.

The first provision regarding disclosure of third-party funding in international arbitration was introduced by the IBA Guidelines on Conflicts of Interest in 2014 and much has changed in nearly a decade. Despite its non-binding nature, the IBA Guidelines on Conflicts of Interest have played a pivotal role in paving the way for mandatory disclosure provisions that are becoming the norm in institutional arbitration rules rather than the exception. Accordingly, the purpose of this article is to examine the importance and current framework surrounding the disclosure of third-party funding and how it has evolved in the last ten years[1].

1. It would go beyond the scope of this contribution to propose a definition of third-party funding. This is particularly challenging given the myriad of existing funding models and the fast pace at which they are evolving. Nevertheless, despite numerous varieties, it is possible to identify three key elements around which the concept of third-party funding revolves: (i) the funder is not a party to the arbitration agreement, (ii) the funder provides financial or material support to one of the parties and (iii) the funder's remuneration is contingent upon the outcome of the case. Accordingly, and broadly put, under a funding agreement, a non-party to a dispute undertakes to provide financial support in consideration of a portion of the proceeds if the case is successful.

2. RISE OF THIRD-PARTY FUNDING IN ARBITRATION

Third-party funding in international arbitration has grown exponentially in recent years[2]. It has transitioned from being relatively unknown to playing an increasingly important role in international arbitration. More than just an increase in funded cases, there has been a shift towards a more positive perception of third-party funding[3]. The view that associates third-party funding with impecunious parties or frivolous claims has proven to be misleading. Parties are increasingly opting for third-party funding for purposes like risk management and liquidity maintenance[4]. This has caught the attention of investors seeking to diversify their portfolios[5].

Arbitration proceedings have become more expensive over the last few decades, making high costs a primary concern for parties[6]. Counsel fees, which used to be only a few hundred thousand dollars, can now run into millions due to the increased complexity and length of arbitration proceedings[7]. Furthermore, unlike state courts, which are subsidized by governments, the costs of arbitration fall entirely on the parties[8]. Therefore, whether to bear the high costs of arbitration proceedings or to transfer them to a third-party in exchange for a portion of the proceeds is a decision that parties can make regardless of their financial situation.

2. Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in:* Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 255.

3. See Commission, The Rise of Portfolio Financing in International Arbitration, *in:* BCDR International Arbitration Review, 2018, v. 5(2), p. 264-266. As put by Santos, third-party financing is actually "*sheep in wolf's clothing*", rather than the other way around (Santos, Third-Party Funding in International Commercial Arbitration: A wolf in sheep's clothing?, *in:* ASA Bulletin, 2017, v. 35(4), p. 936).

4. Wahab, Costs in International Arbitration: Navigating Through the Devil's Sea, *in:* Kalicki/Raouf (eds.), ICCA Congress Series No. 20: Evolution and Adaptation: The Future of International Arbitration, ICCA Congress Series, 2019, p. 478; Baltag, The Dynamic Role of Third-Party Funders in International Arbitration, *in:* Brekoulakis et al. (eds.), Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC, 2023, p. 363. On 5 July 2022, Greenland Minerals publicly announced that it had entered into an agreement with a wholly-owned subsidiary of Burford Capital to fund its arbitration costs in the dispute that it had initiated against Greenland and Denmark. According to the company, relying on a third-party funder would preserve its cash reserves, enabling it to seek other investments (Greenland Minerals Ltd's Announcement: Litigation Funding Secured dated 5 July 2022).

5. Cremades, Adapting Disclosure Obligations to the Realities of Modern Third-Party Funding, *in:* BCDR International Arbitration Review, 2019, v. 6(1), p. 6.

6. Voser/Girsberger, International Arbitration: Comparative and Swiss Perspectives, 4th ed., 2021, paras. 104 et seqq.

7. Hanotiau, The Parties' Costs of Arbitration, *in:* Derains/Kreindler (eds.), Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law, v. 4, 2006, p. 213.

8. In addition to the remuneration of its own lawyers, the parties must pay the fees of the arbitrators, administrative costs of the arbitral institution and further expenses in connection with the hearing, such as the venue, accommodation, travel and court reporters.

Nevertheless, this does not mean that companies with less financial strength do not resort to third-party funding. They indeed do, and third-party funding plays a key role in increasing access to justice and leveling the playing field between the parties[9].

3. Conflicts of Interest with Third-Party Funders

As the use of third-party funding in arbitration continues to expand, so too does the complexity of relationships among arbitrators and third-party funders[10]. Consequently, the potential for conflicts of interest or questions surrounding the arbitrators' impartiality and independence is growing. For example, an arbitrator may receive multiple appointments from different parties across unrelated cases, all funded by the same third-party funder. In another scenario, an arbitrator might simultaneously serve as counsel for a funded party and as an arbitrator in a separate case funded by the same funder. Furthermore, as pointed out in a report prepared by the ICCA-Queen Mary Task Force on Third-Party Funding, leading arbitrators have assumed positions within third-party funders, or have worked for them in ad hoc consultant roles[11].

In short, numerous scenarios involving third-party funding have the potential to compromise the integrity of the arbitration. In most of them, the existence of a funding agreement is known only to the funder and funded party as this contract is typically confidential. Accordingly, the opposing party and the arbitral tribunal will learn about a third-party funding only if the funded party discloses it, voluntarily or upon request by the arbitrators. Thus, without disclosure, arbitrators may be unwittingly entangled in conflicts of interest.

4. Arbitrators' Duty to Disclose

A fair resolution of a dispute requires that the arbitral tribunal be independent and impartial. Hence, arbitrators must have no relationship with the parties and hold no interest in the case. Impartiality refers to the absence of bias or predisposition towards a party, while independence implies the non-existence of a financial link between the arbitrator and the parties[12]. In case there is any circumstance that might cause any doubt as to the arbitrator's independence or impartiality, he or she shall bring it to the attention of the parties.

9. Wahab, Costs in International Arbitration: Navigating Through the Devil's Sea, *in*: Kalicki/Raouf (eds.), ICCA Congress Series No. 20: Evolution and Adaptation: The Future of International Arbitration, ICCA Congress Series, 2019, p. 478; von Goeler, Third-Party Funding and its Impact on Procedure, 2016, p. 82 et seqq. and 87 et seqq; Livschitz, Third Party Funding in Arbitration, *in*: Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide, 2nd ed., paras. 19 et seqq; Santos, Third-Party Funding in International Commercial Arbitration: A wolf in sheep's clothing?, *in*: ASA Bulletin, 2017, v. 35(4), p. 936.
10. von Goeler, Third-Party Funding and its Impact on Procedure, 2016, p. 253.
11. ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018), p. 87.
12. Cremades, Adapting Disclosure Obligations to the Realities of Modern Third-Party Funding, *in*: BCDR International Arbitration Review, 2019, v. 6(1), p. 7.

As to the standard for disclosure, the IBA Guidelines on Conflicts of Interest and several major institutions apply a subjective test. This means that arbitrators must put themselves in the parties' position and reveal any information that such parties might be interested in knowing[13]. Even if an arbitrator believes no conflict exists, he or she must still disclose any circumstance that might cast doubt as to his or her independence and impartiality. In fact, if an arbitrator makes such a disclosure, it is because he or she takes the view that there is no conflict, otherwise, the appointment should be declined[14]. Even though a third-party funder is, by definition, a third-party, any connection it has with an arbitrator or his or her law firm is a circumstance to be disclosed[15]. As shown below, the IBA Guidelines on Conflicts of Interest also consider an arbitrator to be equivalent to the party being funded.

As explained above, situations involving third-party funding can be problematic. Without knowledge of both the existence of a funding agreement and the identity of the funder, arbitrators will not be able to fulfill their disclosure obligations[16]. The arbitrators' lack of knowledge, however, does not mean that the conflict of interest does not exist. It still exists, but it remains dormant. If the conflict comes to light later, it risks compromising the integrity of the arbitration proceedings. The arbitrator may be challenged or forced to resign in the middle of the proceedings, or worse, the award may be challenged if already issued[17]. Additionally, a national court may refuse the recognition of the award if the court holds that the arbitrator was not independent and that the award therefore violates public policy[18]. The longer the conflict remains undisclosed, the greater its potential impact on the arbitration[19].

13. Both the IBA Guidelines on Conflicts of Interest (2014) and the ICC speak of "*in the eyes of the parties*" – IBA Guidelines on Conflicts of Interest (3)(a) and ICC Rules (2021), Art. 11(2). The Art. 9.4 of the DIS Rules (2018) refers to a "*reasonable person in the position of a party*" – DIS Rules (2018) and Art. 5.4 of the LCIA Rules (2020) to "*in the mind of any party*".
14. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Explanation to General Standard 2, (c): "[A]n arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned".
15. Beechey, The Pandora's Box of Third-Party Funding: Some Practical Suggestions for Arbitrators in Light of Recent Developments, *in*: Kalicki/Raouf (eds.), ICCA Congress Series No. 20 (Sydney 2018): Evolution and Adaptation: The Future of International Arbitration ICCA Congress Series, v. 20, 2019, p. 571.
16. Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in*: Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 262.
17. Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in*: Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 269.
18. Cremades, Adapting Disclosure Obligations to the Realities of Modern Third-Party Funding, *in*: BCDR International Arbitration Review, 2019, v. 6(1), p. 18; Osmanoglu, Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest, *in*: Journal of International Arbitration, 2015, v. 32(3), p. 332.
19. Cremades, Adapting Disclosure Obligations to the Realities of Modern Third-Party Funding, *in*: BCDR International Arbitration Review, 2019, v. 6(1), p. 16.

Moreover, an undisclosed connection between an arbitrator and a third-party may damage the arbitrator's reputation[20].

Notably, lack of disclosure is not per se a ground to annul the award[21]. An award should be annulled only if the circumstance that was not disclosed indeed gives rise to justifiable doubts as to the arbitrator's impartiality or independence. The threshold for finding a conflict of interest is higher than that for making a disclosure. According to the IBA Guidelines on Conflicts of Interest: (i) a fact shall be disclosed because it could cast doubt on the arbitrator's impartiality or independence in "the eyes of the parties"[22] while (ii) for a successful challenge, an objective test must be met: the disclosed fact must give rise to "justifiable doubts" as to the arbitrator's impartiality or independence *from* "the point of view of a reasonable third person having knowledge of the relevant facts and circumstances"[23]. In other words, failure to disclose a fact does not, by itself, transform such fact into a circumstance warranting a conflict of interest[24]. However, the non-disclosure may be considered together with other matters in determining the challenge, but it is not per se dispositive[25]. The ICC Note to Parties and Arbitrators has a clear clarification in this respect in the sense that a failure to disclose is not in itself a ground for disqualification, but it will be considered by the ICC in assessing whether an objection to a challenge is well founded[26].

The unawareness of a conflict does not automatically exempt an arbitrator from failing to disclose it. It is generally accepted that arbitrators have a duty to take reasonable steps to inform themselves of potential conflicts of interest[27]. Some institutional arbitration rules impose duties on arbitrators to investigate for conflicts of interest[28]. For example, before any nomination or appointment is confirmed in ICC proceedings, an arbitrator must submit the ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence. By ticking the box "Nothing to disclose", he or she is confirming that "due enquiry" has been made[29]. Similar form and language are also found in the Swiss Arbitration Centre's Declaration of

20. ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018), p. 87.
21. This is the understanding, *e.g.* in Switzerland (X. S.A. v. Y., Tribunale federale,15 October 2001, *in*: ASA Bulletin, 2002, v. 20(2), p. 321-328). For a compilation of case law in this respect, see Crivellaro, Does the Arbitrators' Failure to Disclose Conflicts of Interest Fatally Lead to Annulment of the Award? The Approach of the European State Courts, *in*: The Arbitration Brief 4, No. 1, 2014, p. 121-141.
22. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), 3(a).
23. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), 2(b).
24. See Voser/Petti, The Revised IBA Guidelines on Conflicts of Interest in International Arbitration, *in*: ASA Bulletin, 2015, V. 33(1), p. 17.
25. Born, International Commercial Arbitration, 4th ed., 2021, p. 2030.
26. ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, para. 26.
27. ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018), p. 114.
28. Born, International Commercial Arbitration, 4th ed., 2021, p. 2051.
29. ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence form: "*Nothing to disclose: I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality*".

Acceptance and Statement of Impartiality and Independence[30]. The IBA Guidelines on Conflicts of Interest also provide for a duty to investigate and even go a step further by stating forth that a failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries[31]. Nevertheless, there is no guidance as to what constitutes a due enquiry.

In reaching a decision on whether to remove arbitrators or annul awards, institutions and courts must assess the factual circumstances regarding the fact that was not disclosed, its connection with the case and whether the arbitrator was aware of it – and if so, why it was not disclosed[32]. In sum, it is a question that has to be decided on a case-by-case basis that will eventually depend on the analysis of the proof[33]. In any event, it does not seem reasonable to place the duty of safeguarding the procedure solely on the arbitrators' shoulders while key information that might have a direct impact on their assessment of independence and impartiality is in the hands of the parties[34].

5. DISCLOSURE OF THIRD-PARTY FUNDING

Absent a legal or institutional provision requiring a party to disclose third-party funding, such a party is under no duty to reveal it[35]. A key question therefore, that came along with the rise of third-party funding is whether there should be such an obligation. This is an issue that has been debated extensively[36]. When the IBA Sub-committee tasked with the revision of the IBA Guidelines on Conflicts of Interest was formed in 2012, it quickly became clear that this topic required guidance[37]. Shortly thereafter in 2013, the International Council for Commercial Arbitration (ICCA) in collaboration with Queen Mary University convened a Task Force on Third-Party Funding in International Arbitration to address questions that were arising in this context. Notably, given the real risk of conflict (as had already occurred in certain cases), the IBA Sub-Committee and the ICCA-Queen Mary Task Force operated under the assumption that some form of disclosure would be necessary[38].

30. Swiss Arbitration Centre's Declaration of Acceptance and Statement of Impartiality and Independence: "Nothing to disclose: I declare that I am, and shall remain, impartial and independent. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence".
31. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), 7(d).
32. See Crivellaro, Does the Arbitrators' Failure to Disclose Conflicts of Interest Fatally Lead to Annulment of the Award? The Approach of the European State Courts, *in*: The Arbitration Brief 4, No. 1, 2014, p. 140.
33. ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018), p. 114.
34. Cremades, Adapting Disclosure Obligations to the Realities of Modern Third-Party Funding, *in*: BCDR International Arbitration Review, 2019, v. 6(1), p. 5.
35. von Goeler, Third-Party Funding and its Impact on Procedure, 2016, p. 126.
36. Crivellaro/Melchionda, Disclosure and Conflicts of Interest in Relation to Third-Party Funding, *in*: BCDR International Arbitration Review, 2018, v. 5(2), p. 281.
37. Voser/Petti, The Revised IBA Guidelines on Conflicts of Interest in International Arbitration, *in*: ASA Bulletin, 2015, v. 33(1), p. 24.
38. Park/Rogers, Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force, Legal Studies Research Paper No. 42-2014, Penn State Law, p. 7.

In 2015, Queen Mary and White & Case published its International Arbitration Survey which had enquired into whether disclosure of third-party funding should be mandatory and, if so, to what extent. The survey revealed that 76% of the survey respondents agreed that the disclosure of the use of third-party funding should be mandatory and 63% agreed that the identity of the funder should be mandatorily disclosed. As for the terms of the funding agreement, only 29% of the survey respondents found that their disclosure should be mandatory[39].

This sentiment in the arbitration community that the existence of a third-party funding and the identity should be systematically disclosed was also reflected in the report prepared by the Task Force on Third-Party Funding released in 2018[40]. As shown below most leading arbitral institutions, as well as some national laws and investment treaties, have since adopted positions in line with these findings. The prevailing view today that is that disclosure of the existence and the identity of the funder is indispensable for the arbitrators to perform a complete conflict-check[41]. Hence, disclosure of the third-party funding serves as a means to protect the independence and impartiality of arbitrators[42].

6. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

The first big step towards disclosure of third-party funding was taken by the IBA Council in 2014 when it revised the IBA Guidelines on Conflicts of Interest that had been issued ten years before and had found great acceptance within the arbitration community[43]. The IBA Guidelines on Conflicts of Interest have become a major reference with respect to conflicts of interest and disclosure despite their non-binding nature[44]. Initially, the IBA Guidelines on Conflicts of Interest contained no reference to third-party funding when they were first

39. Queen Mary's 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration with White & Case, slide 48.

40. Whether disclosure of third-party funding should be mandatory or ordered on an individual basis by arbitrators was a source of disagreement within the Task Force – including among its drafters. See ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018), p. 81 (footnote – dagger).

41. Crivellaro/Melchionda, Disclosure and Conflicts of Interest in Relation to Third-Party Funding, *in:* BCDR International Arbitration Review, 2018, v. 5(2), p. 287; Baltag, The Dynamic Role of Third-Party Funders in International Arbitration, *in:* Brekoulakis et al. (eds.), Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC, 2023, p. 363.

42. Chaisse, Delays Expected but Duration of Delays Unpredictable: Causes, Types, and Symptoms of Procedural Applications in Investment Arbitration, *in:* Arbitration International, 2021, v. 37(4), p. 888.

43. See Cremades, Adapting Disclosure Obligations to the Realities of Modern Third-Party Funding, *in:* BCDR International Arbitration Review, 2019, v. 6(1), p. 10.

44. A survey confirmed that arbitral institutions, arbitral tribunals and courts often referred to the IBA Guidelines on Conflicts of Interest (67% of decisions resolving issues of conflicts of interest). In 69% of these decisions, the Decision-maker chose to follow the Guidelines (According to the IBA Report on the Reception of the IBA Arbitration Soft Law Products of 2016, para. 103).

issued in 2004. This was not surprising – after all, third-party funding was not as common as it eventually became. Nevertheless, the scenario was starting to change when the IBA Guidelines on Conflicts of Interest were under revision, naturally causing concern revolving around conflicts of interest[45]. Through such a revision, two important amendments as regards third-party funding were introduced: (i) the inclusion of third-party funders and insurers as equivalent to parties[46] and (ii) the duty of a party relying on third-party funding to inform of any relationship between the arbitrator and the funder on its own initiative at the earliest opportunity[47].

The IBA Guidelines on Conflicts of Interest also clarified what constitutes a third-party funder[48], defining it as: "any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration"[49]. Therefore, third-party funder "may be considered effectively to be that party"[50].

Accordingly, the IBA Guidelines' traffic-light list of situations that can qualify as conflicts or raise doubts as to the arbitrators' independence or impartiality should also be considered when analysing the connection between the arbitrator and the funder. For example, if the arbitrator served as counsel for the funder or has been appointed as an arbitrator on two or more occasions by parties supported by the same funder, these are circumstances that fall within the orange list and should be disclosed[51].

Finally, it is worth noting that the ICCA-Queen Mary Task Force was consulted during the revision of the IBA Guidelines on Conflicts of Interest[52]. Thus, the revised IBA

45. Zuleta/Friedland, The 2014 Revisions to the IBA Guidelines on Conflicts of Interest in International Arbitration, *in*: Dispute Resolution International, v. 9(1), 205, p. 6.

46. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Explanation to General Standard 6(b): "Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration".

47. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 7(a) – Duty of the Parties and the Arbitrator: "A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity".

48. And "*insurer*".

49. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Explanation to General Standard 6(b).

50. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Explanation to General Standard 6(b).

51. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Orange List, 3.1.1 and 3.1.3.

52. Park/Rogers, Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force, *in*: Austrian Yearbook on International Arbitration: The ICCA Queen-Mary Task Force, p. 120.

Guidelines on Conflicts of Interest were the result of much debate among leading specialists in the field and paved the way for arbitral institutions to follow[53].

7. Duty to Disclose Third-Party Funding under National Laws

Specific legislation regarding third-party funding exists only in a few jurisdictions, such as Singapore, Hong Kong and Nigeria. Having their legal systems rooted in common law, these three jurisdictions inherited the prohibition of maintenance and champerty from English law. Maintenance refers to the act of providing assistance to a party whereby the funder has no interest in the claim itself. Champerty, a form of maintenance, involves a third-party providing support in return for a share in the proceeds[54].

However, while these offences were abolished in England and Wales over half a century ago through the Criminal Law Act 1967, they remained a barrier to third-party funding in these former English colonies. However, this has recently changed. Singapore[55], Hong Kong[56] and Nigeria[57] have enacted laws removing this impediment in order to strengthen a pro-arbitration stance. Additionally, an obligation to disclose third-party funding exists in all three jurisdictions.

In Singapore, the obligation to disclose is set forth in the Legal Profession (Professional Conduct) Rules 2015. These rules mandate that legal representatives disclose the presence

53. This was also recognized by the ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018): "To date only a handful of arbitral institutions have addressed third-party funding directly. Of those that have, most appear to have taken the IBA Guidelines as a starting point".

54. See Montpetit, The Economics of International Arbitration and Third-Party Funding: What It Is, What It Might Be, and What It Should Be, *in*: Fullelove et al. (eds.), International Arbitration in England: Perspectives in Times of Change, 2022, p. 216-217.

55. On 10 January 2017, the Singapore parliament passed an act to amend the Civil Law Act in order to abolish the tort of maintenance and champerty. This act also expressly provides that a funding agreement is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty. The new provisions entered into force on 1 March 2017. In addition to the reform of the Civil Law Act, the Civil Law (Third-Party Funding) Regulations 2017 that had been made on 21 February 2017 also came into effect on 1 March 2017. These Regulations also laid the foundation for third-party funding by setting out the scope of the proceedings in which third party funding is admissible and by establishing the necessary qualifications that third-party funders have to meet.

56. On 23 June 2017, the Legislative Council in Hong Kong passed an ordinance to amend the Arbitration Ordinance and the Mediation Ordinance to ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty and provide for measures and safeguards in relation to third party funding of arbitration (Hong Kong, Ordinance No. 6 of 2017 dated 23 June 2017 (Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017). To accommodate the legalization of third-party funding in arbitration proceedings, the Hong Kong International Arbitration Centre (HKIAC) amended its rules to recognize third party funding agreements and to put in place the obligation to disclose its existence and identity of the funder (Chan, Hong Kong, *in:* Perrin (ed.), Third Party Litigation Funding Law Review, 2nd ed., 2018, p. 79).

57. The Nigerian Arbitration and Mediation Act 2023 was signed on 26 May 2023 and replaced the former arbitration law of 1988. Section 61 of the new law sets forth that the torts of maintenance and champerty do not apply to third-party funding in arbitration proceedings (See Alakija, Nigeria's New Arbitration Act: What You Need to Know, Kluwer Arbitration Blog, 25.06.2023).

of any third-party funding agreement, as well as the identity of the funder at the beginning of the proceedings or as soon as practicable following the conclusion of a third-party funding contract[58]. However, it should be noted that this provision does not extend to foreign lawyers who are not registered in Singapore[59].

Under the Hong Kong arbitration law, parties that have secured third-party funding must give written notice of the funding agreement's existence and the third-party funder's name. The disclosure must occur at the outset of the arbitration or within 15 days after the funding agreement has been concluded if this was made after the arbitration commenced[60]. Additionally, the Hong Kong Government also issued the Code of Practice for Third Party Funding of Arbitration. This code sets out the practices and standards of good practice with which third-party funders are expected to comply and also reinforces the obligation for disclosure in funded arbitration cases[61].

In Nigeria, Section 62 of the new arbitration law requires the party to submit a written notice informing the name of the funder and its address at the commencement of the arbitration or without delay as soon as the funding agreement was concluded if after the beginning of the arbitration[62].

8. Duty to Disclose Third-Party Funding under Institutional Rules

Most of the leading arbitral institutions have recently revised their arbitration rules and introduced specific provisions addressing third-party funding. The revisions show a clear trend towards mandatory disclosure of the third-party funding in order to assist the arbitrators to comply with their disclosure requirement. For instance, this is the case of the ICC arbitration rules (2021), which require the funded party to promptly inform (prospective) arbitrators of the existence and identity of any third-party funder[63]. Like the arbitrator's duty to disclose, the party's obligation to inform of a third-party funding is of an ongoing nature. Systematic disclosure was also incorporated by the HKIAC (2018)[64], WIPO (2021)[65],

58. Legal Profession (Professional Conduct) Rules 2015, Rule 49A.

59. Legal Profession (Professional Conduct) Rules 2015, Rule 3(8). See also Chan, Three 'Pitfalls' for the Unwary: Third-Party Funding in Asia, Kluwer Arbitration Blog, 15 December 2018; Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in*: Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 267.

60. Hong Kong, Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Art. 98U.

61. Code of Practice for Third Party Funding of Arbitration on 7 December 2018, Art. 2.10.

62. Nigerian Arbitration and Mediation Act 2023, Section 62.

63. ICC Rules (2021): "In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration".

64. Hong Kong International Arbitration Centre's Rules (2018), Art. 44.2.

65. WIPO Arbitration and Mediation Center's Rules (2021), Arts. 9(vii) and 11(b).

VIAC (2021)[66], CAM-CCBC (2022)[67], CEA (2022)[68], DIAC (2022)[69] and ICSID (2022)[70], which included disclosure of third-party funding in the matters to be addressed in the request for arbitration (or answer to it) or require the parties to file a notice of third-party funding with such submissions[71]. With respect to conflict-check[72], the information required by these institutions is also limited to the identity of the third-party funder, with the exception of the ICSID Arbitration Rules that also require the names of the persons and entities that own and control that third-party funding if it is a company[73].

Other arbitral institutions did not introduce mandatory disclosure, but expressly empowered arbitrators to order information regarding the funding agreement on its own initiative or on application of a party. This is the case of the AAA-ICDR (2021)[74] and SIAC Investment Rules (2017)[75].

Contrary to this trend are the LCIA Rules and the Swiss Rules, which did not address third-party funding in their new rules despite having amended them in 2020 and 2021 respectively. However, it should be noted that, according to the Swiss Rules Practice Note issued in March 2023, funded parties are "expected to disclose the existence and identity of the third-party funder, so as to enable each arbitrator to run a conflict check to ensure that the involvement of the third-party funder does not affect the arbitrator's independence or impartiality"[76]. Since the Swiss Arbitration Centre's note "serves the purpose of providing guidance", one cannot derive a mandatory obligation to disclose[77].

The DIS Rules, which were revised in 2018, are also silent on third-party funding from it. However, given the current trend towards mandatory disclosure, it is likely that third-party funding will be a topic to be considered in the next revision of the DIS Rules. In this case, the

66. Vienna International Arbitral Centre's Rules (2021), Art. 13a(1).
67. Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada's Rules (2022), Arts. 7.1(h) and 8.1(g).
68. Corte Española de Arbitraje's Rules (2022), Arts. 2(i) and 7(i).
69. Dubai International Arbitration Centre's Rules (2022), Art. 22.1.
70. ICSID Arbitration Rules (2022), Rule 14(2).
71. CEA (2022), ICSID Rules (2022).
72. The Art. 22.1 of the 2022 of the DIAC Rules sets forth that the party shall disclose whether the funder has committed to an adverse costs liability. However, this matter does not relate to the assessment of conflict.
73. ICSID Arbitration Rules (2022), Rule 14(1).
74. International Centre for Dispute Resolution's Rules (2021), Art. 14(7).
75. Singapore International Arbitration Centre's Investment Rules (2017), Art. 24(l).
76. Swiss Rules of International Arbitration Practice Note (2023), para. 100.
77. Swiss Rules of International Arbitration Practice Note (2023), "*1. This Practice Note serves the purpose of providing guidance regarding the practice of the Swiss Arbitration Centre ("Centre") when administering arbitration proceedings under the Swiss Rules of International Arbitration ("Swiss Rules"), with a particular focus on the changes that were brought about by the latest revision of the Swiss Rules in 2021. This Practice Note is limited to selected issues where additional explanations on the application of the Swiss Rules may be useful to the users, parties, counsel, and arbitrators alike*".

DIS Rules might introduce systematic disclosure through a provision under Art. 9 (Impartiality and Independence of the Arbitrators, Duties of Disclosure) or as a matter to be addressed during the case management conference under Art. 27 (Efficient Conduct of the Proceedings) and Annex 3 (Measures for Increasing Procedural Efficiency).

Some authors were critical of the inclusion of a general duty to inform of any and all cases of third-party funding on the grounds that this would be time-consuming and would create side-issues unnecessarily and therefore disclosure should be made only where necessary, *i.e.* in case of a conflict[78]. It was also argued that there would be no need to have a general duty to disclose as it would be in the interest of the funder to disclose it if the integrity of the proceedings were at stake. Otherwise, the funder would lose its investment in case of an enforceable award[79].

While there is certainly a point to this argument, there are counterarguments that ultimately prevail. First, the inclusion of a general requirement in arbitration rules provides predictability. Second, arbitral institutions tend to be better equipped than arbitrators to prepare rules in this respect, *e.g.* to find a better definition of third-party funding[80]. Third, disclosure at the commencement of the arbitration may help to avoid further challenges arising from subsequent revelation of a third-party funding[81]. Fourth, institutional provisions will allow the arbitral tribunal and parties to focus on more pertinent matters relating to the procedure instead of investigation of conflicts[82].

9. DUTY TO DISCLOSE THIRD-PARTY FUNDING UNDER INVESTMENT TREATIES

In addition to national laws and institutional rules, recent investment treaties have also addressed third-party funding by including disclosure obligations in their terms. These typically require parties to disclose the name and address of the third-party funder[83]. Similar

78. See Lévy/Bonnan, Third Party Funding – Disclosure, joinder and impact on arbitral proceedings, *in:* Cremades/Dimolitsa (eds.), Third-Party Funding in International Arbitration, ICC Institute Dossier X, 2013, p. 82; von Goeler, Third-Party Funding and its Impact on Procedure, 2016, p. 160.
79. von Goeler, Third-Party Funding and its Impact on Procedure, 2016, p. 155.
80. Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in*: Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 271.
81. Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in*: Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 271.
82. Kreindler/Goldsmith, Should Parties Disclose the Existence of a Third-Party Funder? (Disclosure and Conflicts of Interest), *in*: Tung et al. (eds.), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, 2019, p. 271.
83. (i) EU-Canada Comprehensive Economic and Trade Agreement (CETA)(in force provisionally since 21 September 2017), (ii) the EU-Singapore Free Trade Agreement and Investment Protection Agreement (in force since 2019), (iii) the Canada-Chile Free Trade Agreement and (iv) European Union-Viet Nam Investment Protection Agreement (in force since 2021), (v) Indonesia–Australia Comprehensive Economic Partnership Agreement (in force since 2020), (vi) Argentina–Chile Free Trade Agreement (in force since 2019);

provisions have also been integrated into model investment treaties, such as those of Canada and the Netherlands[84].

It is worth noting that UNCITRAL (United Nations Commission on International Trade Law) is currently working on model clauses concerning third-party funding. These clauses are designed to be potentially incorporated into investment treaties or serve as a foundation for further individual drafting. The initial draft of these clauses was released for comments in 2021 and includes various draft provisions and alternatives for different scenarios, in which third-party funding might be permitted, prohibited entirely, or allowed with restrictions[85]. In addition, the draft also includes a provision related to disclosure. This disclosure provision appears to have been formulated comprehensively in order to stimulate further consideration of the topic. It should not be interpreted as a definitive recommendation by the Working Group on what is deemed most appropriate. This draft clause deals with the disclosure of beneficial owners, funding agreements, and potential penalties for failure to disclose. Due to the extensive nature of this clause, its specifics will be addressed below when relevant.

10. Extent of Disclosure of Third-Party Funding

As shown above, there is a trend towards mandatory disclosure, generally limited to information regarding the existence of a third-party funding and the identity of the funder[86]. Accordingly, the funding agreement or its terms need not be disclosed.[87] This is the approach that has been most adopted in practice even in cases not subject to rules regarding mandatory disclosure. Several arbitral tribunals have put an ongoing obligation on the parties to disclose the name (and address) of the funder in the specific procedural rules at the outset of the proceedings[88]. In other arbitrations, arbitral tribunals have ordered a party to provide such information upon application of the opposing party. For example, in *South American*

(vii) Indonesia-Singapore Agreement on the Promotion and Protection of Investments (in force since 2021); (viii) Indonesia-Switzerland Agreement on the Promotion and Reciprocal Protection of Investments (signed in 2022).

84. Netherland's Model Investment Agreement (2019) and Canada's Model Foreign Investment Protection and Promotion Agreement (2021).

85. Available at the UNCITRAL's website: [https://uncitral.un.org/en/thirdpartyfunding].

86. *EuroGas Inc. and Belmont Resources Inc. v. The Slovak Republic*, ICSID Case No. ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures dated 17 March 2015, p. 145 (lines 1-4).

87. Blackaby/Wilbraham, Third-Party Funding in Investment Treaty Arbitration, *in*: Yannaca-Small (ed.), Arbitration Under International Investment Agreements: A Guide to the Key Issues, 2nd ed., 2018, para. 26-59.

88. *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5. Procedural Order No. 1 dated 19 February 2019, paras. 10.4 and 10.5; *Estate of Julio Miguel Orlandini-Agreda v. Plurinational State of Bolivia*, PCA Case No. 2018-39, Procedural Order No. 1 dated 4 February 2019, paras. 11.1 and 11.2; *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 1 dated 29 November 2019, paras. 10.4 and 10.5; *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Procedural Order No. 2 dated 13 May 2020, paras. 9.4-9.7.

Silver Limited v. Bolivia, the arbitral tribunal ordered claimant to disclose the name of the third-party funder but not the funding agreement[89].

This approach is reasonable as the content of the contract with the funder is in principle irrelevant for conflict check purposes. As put by the ICSID in Working Paper # 2 when rejecting proposals relating to the inclusion of disclosure of the entire funding agreement in its new rules: "[Rule 14] requires disclosure of the fact of funding and the name of the funder only, as nothing further is required to achieve the purpose of the rule, avoidance of conflicts of interest"[90]. This is in accordance with the prevailing view in the literature[91].

A funder that invests in an arbitration has a direct interest in its outcome, just like a party, and should therefore be treated as such for the assessment of potential conflicts of interest. This is irrespective of the percentage to which the funder might be entitled in case of a successful award or the degree of control it may exercise over the case. If upon disclosure of the identity of the funder, the arbitrators deem that more information is necessary to run a conflict-check, they may still request it. However, this information will probably be related to the ownership of the funder rather than the terms of the funding agreement.

Arbitrators must proceed very carefully when considering ordering disclosure of the terms of the funding agreement and should refrain from doing it unless necessary under exceptional circumstances. Otherwise, there is a high probability that the funded party will provide unnecessary confidential information, which can only leave it in a more vulnerable position. For instance, the disclosure of the economic terms of the funding agreement might enable the counterparty to anticipate the value at which the funded party would be willing to settle[92] or its expected likelihood of success[93].

It should be noted that some arbitral tribunals have gone further than the identity of the funder and requested disclosure, for example, of the terms of the third-party funding

89. *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15. Procedural Order No. 10 dated 11 January 2016: *"[T]he disclosure of the name of the funder, the Tribunal considers that, for purposes of transparency, and given the position of the Parties, it must accept Bolivia's request of disclosure of the name of SAS' funder"*.

90. ICSID, Working Paper # 2, Proposals for Amendment of the ICSID Rules, March 2019, para. 139.

91. Blackaby/Wilbraham, Third-Party Funding in Investment Treaty Arbitration, *in*: Yannaca-Small (ed.), Arbitration Under International Investment Agreements: A Guide to the Key Issues, 2nd ed., 2018, para. 26-59; Crivellaro/Melchionda, Disclosure and Conflicts of Interest in Relation to Third-Party Funding, *in*: BCDR International Arbitration Review, 2018, v. 5(2), p. 294; Dodge et al., Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?, Kluwer Arbitration Blog, 31 January 2022; Álvarez et al., Two's a crowd, three's a party: The coming of age of third-party funding in international arbitration, in: Revista del Club Español del Arbitraje, v. 2021, Issue 40, p. 35.

92. Lévy/Bonnan, Third Party Funding – Disclosure, joinder and impact on arbitral proceedings, *in:* Cremades/Dimolitsa (eds.), Third-Party Funding in International Arbitration, ICC Institute Dossier X, 2013, p. 79.

93. Blackaby/Wilbraham, Third-Party Funding in Investment Treaty Arbitration, *in*: Yannaca-Small (ed.), Arbitration Under International Investment Agreements: A Guide to the Key Issues, 2nd ed., 2018, para. 26-59.

relating to the payment of adverse costs orders[94]. However, this additional information was irrelevant for the analysis of conflicts of interests.

Another disputed point regarding the extent of disclosure relates to the information regarding the ultimate beneficial owner. The new 2022 ICSID Rules require more than the disclosure of the identity of the funder if this is an entity. According to Rule 14 of the ICSID Rules on the notice of third-party funding, "[i]f the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person".

This wording was included in the final version of the rules, but not without controversy. In its Working Paper # 5, ICSID had rejected proposals made by States that Rule 14 should require disclosure of the non-party funder's corporate structure and ultimate beneficial owner[95]. According to the ICSID, several factors had been taken into account, namely: (i) risks regarding the integrity of arbitration proceedings had not been a concern in practice, and non-party funders have provided ample information for arbitrators to assess whether they have a conflict, (ii) such a provision would create significant confusion for users of the rules, making the provision unclear and difficult to comply with, (iii) other institutions and treaties had not required such level of information and (iv) further information might still be required if needed. Nevertheless, the wording quoted above was reintroduced in the Working Paper # 6 after reiterated new requests, including from the European Union and its Member States which took the view that the disclosure of the ultimate beneficial owner might be particularly important in cases of complex funding arrangements.

However, a general requirement regarding information about the ultimate beneficial owner does not seem the best approach. In addition to the reasons set out in Working Paper # 5, it should be noted that, by requesting such information the rules are demanding more information concerning the third-party funder than information of the funded party[96].

11. Party's Failure to Disclose the Existence of Third-Party Funding

Despite the growing framework on mandatory disclosure of third-party funding, specific sanctions in case of failure to disclose remain largely unaddressed. One exception is the BIT between Indonesia and Australia, which provides that the arbitral tribunal may order the suspension or termination of the proceedings if the investor fails to disclose third-party funding[97]. These are, however, severe measures that shall be applied only in exceptional circumstances as they prevent a party from pursuing its claim and may amount to a denial of justice. The possibility of suspending or terminating the procedure is also contemplated in

94. *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015.

95. ICSID, Working Paper # 5, Proposals for Amendment of the ICSID Rules, June 2021, para. 39.

96. Dodge et al., Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?, Kluwer Arbitration Blog, 31 January 2022.

97. Indonesia-Australia Comprehensive Economic Partnership Agreement (in force since 2020), Art. 14.32(3).

UNCITRAL's initial draft on the regulation of third-party funding. In addition, the initial draft also provides that the arbitral tribunal may take into account such failure to disclose when determining the allocation of costs or take any other appropriate measure.

The measure regarding costs is regarded as the most appropriate. The EU–Vietnam treaty and the CIETAC International Investment Arbitration Rules have express provisions in this regard[98]. Nonetheless, it is questionable whether a specific provision to this effect is indeed necessary. Given that the parties' behavior during the arbitration is a key factor in the allocation of costs, the fact that a party withheld information that should be disclosed would naturally also be considered. This was also the understanding during the revision of the ICSID rules and therefore no provision addressing specific sanction was introduced despite suggestions to do so[99].

In this context, arbitrators should assess to what extent the lack of disclosure truly led to increased costs. If an arbitrator had to be replaced due to a conflict of interest that could have been prevented, the link between the funded party's omission and the rise in costs would be evident. However, if the subsequent revelation of a funding agreement's existence did not suggest a potential conflict or caused the exchange of submissions or comprehensive letters, sanctioning a party merely as a punitive measure might not be appropriate.

12. Pros and Cons of Disclosure

The information regarding the existence of third-party funding and the identity of the funder may be essential for preserving the independence of the arbitrators and the integrity of the proceedings. However, its disclosure comes with its own sets of challenges as it might trigger trivial issues, causing delay and increase in costs[100]. In particular, a third party may use this information as a pretext for filing applications solely to delay proceedings and inflate costs. This may include requests for disclosure of the terms of the agreements and applications for security for costs. If granted, they may potentially cause significant harm to the party being funded. First, the disclosure of the terms of the entire agreement may reveal confidential information relating to the preparation of the case, its internal assessment, expectations and strategy. Second, security for costs may be a financial burden.

Nevertheless, arbitral tribunals have been rejecting requests for security for costs in this context[101] and the prevailing view is that the disclosure of the funding agreement is in

98. European Union-Viet Nam Investment Protection Agreement (in force since 2020), Art. 3.37 and CIETAC International Investment Arbitration Rules (2017), Article 27 (3).

99. ICSID, Working Paper # 5, Proposals for Amendment of the ICSID Rules, June 2021, para. 44; ICSID, Working Paper # 3, Proposals for Amendment of the ICSID Rules, August 2019, para. 58; ICSID, Working Paper # 2, Proposals for Amendment of the ICSID Rules, March 2019, para. 148.

100. Chaisse, Delays Expected but Duration of Delays Unpredictable: Causes, Types, and Symptoms of Procedural Applications in Investment Arbitration, *in:* Arbitration International, 2021, v. 37(4), p. 890.

101. *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4 dated 12 May 2021, para. 69; *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4 dated 27 November 2020, para. 176; *Estate of Julio Miguel Orlandini-Agreda v. Plurinational*

principle irrelevant for the assessment of conflict of interest[102]. Accordingly, the risk of these two concerns has substantially decreased – albeit not entirely eliminated. Nonetheless, the risk persists that the opposing party might exploit the disclosure of third-party funding to delay the procedure by filling applications for disclosure or objections. In this case, the disclosure will lead to an unproductive exchange of letters or submissions, hampering the regular flow of the proceedings.

The party relying on third-party funding shall weigh all the negative implications that might arise against the advantages that disclosure can bring. The most obvious and important benefit is to eliminate the uncertainties regarding the enforcement of the award that might be cause for the lack of disclosure[103]. Additionally, a party may want to show to the arbitral tribunal that a funder believes in its case strongly enough to finance it, possibly having already carried out due diligence.

When disclosure is mandatory due to existing rules, the funded party has no choice but to comply. However, even if there is no such rule, the party should exercise careful consideration before jumping to the conclusion that non-disclosure would be in its best interest, especially considering that having an award annulled would be a highly unfavorable outcome. Furthermore, given the current pro-disclosure scenario, it does not seem to be the best strategy trying to resist a request for disclosure as it is most likely that the arbitral tribunal will eventually order the information to be provided. According to ICSID's Working Paper # 1, which was published in 2018 in connection with the revision of the ICSID Rules, at least in 20 recent cases at that time, parties agreed to disclose the identity of the funder when requested by the opposing side[104].

13. Conclusion

Recent legislation, case law and literature demonstrate that arbitration practitioners are embracing arbitration financing as a means of facilitating access to justice instead of seeing it as a maneuver for an insolvent party to pursue frivolous claims. The rapid growth and increasingly fundamental role of arbitration financing are positive developments.

State of Bolivia, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs dated 9 July 2019, para. 144; *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15. Procedural Order No. 10 dated 11 January 2016, para. 78; *Guaracachi America, Inc. v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14 dated 11 March 2013, para. 7.

102. See footnote 90.

103. See ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018), p. 86, footnote 173.

104. ICSID, Working Paper # 1, Proposals for Amendment of the ICSID Rules, 2 August 2018, para. 256: "Increasingly, parties voluntarily disclose the existence of TPF if requested by opposing counsel. In fact, in at least 20 recent cases in which the existence of TPF was at issue before an ICSID Tribunal, the parties disclosed the existence of TPF and the identity of the funder without requiring an express order to this effect from the Tribunal".

Nevertheless, one cannot ignore that third-party funding may pose a risk to the integrity of proceedings due to the conflict between lack of disclosure of third-party funding by the funded party and the arbitrator's duty to disclose any circumstance that may cast doubt on his or her independence and impartiality. In order to enable the arbitral tribunal to do a proper assessment of conflicts of interest, third-party funding must be disclosed. Disclosure is therefore necessary to safeguard the integrity of the arbitration proceedings and uphold the legitimacy of arbitration.

The recent revisions of institutional rules show that there is a trend towards mandatory disclosure. The arbitral institutions are correct both (i) in imposing upon the parties the obligation to disclose and (ii) in limiting such information to the existence of the third-party funding and the identity of the funder. The terms of the funding agreement are in principle irrelevant for the assessment of conflict. Provisions on mandatory disclosure are also desirable because it does not seem sensible to place the duty of safeguarding the procedure solely on the arbitrators' shoulders while important information that might have a direct impact on their assessment of independence and impartiality is in the hands of the parties.

Failure to disclose third-party funding is not in itself a ground for disqualification of an arbitrator or annulment of the award but creates a serious risk if there was a circumstance that ought to be disclosed. In the end, whether an arbitrator shall be removed or an award set aside, it is a decision that must be taken case by case based on the factual circumstances. Furthermore, non-disclosure is a circumstance that arbitrators may be take into account when deciding on the allocation of costs. In this case, the arbitrators shall analyse whether there is any connection with lack of disclosure and increased costs.

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