M&A ARBITRATION GUIDE

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M&A Arbitration Guide

Fourth Edition

Editor

Amy C Kläsener

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Publisher's Note

Global Arbitration Review (GAR) is delighted to publish the *M&A Arbitration Guide*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews, conferences and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the fourth edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are flattered to have worked with so many leading firms and individuals to produce the *M&A Arbitration Guide*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, challenging and enforcing awards and intellectual property, in the same practical way. We also have books in the series on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

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Introduction

Amy C Kläsener[1]

M&A transactions generate a large number of disputes, many of which are procedurally complex. In this book, M&A disputes specialists pool their knowledge on working with problematic contracts in the most contentious disputes. We hope that their experience will be useful to practitioners and clients in preventing and managing M&A disputes. The chapters concentrate on the distinctive procedural aspects of M&A disputes and highlight the key role that substantive law can play in their generation and resolution. The book has a pragmatic focus on planning and contains a plethora of recommendations for minimising the potential for disputes and resolving them efficiently.

The book is divided into two parts, with Part I consisting of 10 chapters focusing on procedural and planning issues, and Part II surveying differences in the substantive and procedural laws that may play a role in M&A disputes.

Any dispute will be heavily influenced by the drafting of the arbitration clause. In Chapter 1, Anne Véronique Schlaepfer and Alexandre Mazuranic of White & Case address pre-arbitral dispute resolution mechanisms, expert determination clauses, and consolidation and joinder. They also consider whether mechanisms such as fast-track arbitration and emergency arbitrator provisions make sense in the M&A context.

Issues of joinder and consolidation present frequently in M&A arbitration. Yan Zhang and Nathaniel Lai of Sidley Austin address these issues in Chapter 2. Potential parties to an M&A arbitration include multiple sellers, guarantors and, increasingly, insurers. The contractual frameworks may include multiple SPAs,

1 Amy C Kläsener is a partner at Jones Day.

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ancillary services or other agreements and insurance contracts. Whatever the context, failing to consider them at the transaction phase can add significant uncertainty, time and cost to the resolution of ensuing disputes.

Many M&A disputes can and should be resolved by expert determination rather than arbitration. However, procedural issues can arise when there is competing or overlapping jurisdiction between the expert and the arbitral tribunal. Dr Wolfgang Peter of Peter & Kim and Dr Daniel Greineder of McNair International address these issues in Chapter 3.

In Chapter 4, Thomas Webster and I consider how the advent of warranty and indemnity insurance will impact M&A arbitration. Warranty and indemnity insurance is now obtained in a large proportion of transactions. Although many or even most disputes will now be handled by the underwriting departments of insurers, the disputes that go to arbitration will raise new procedural issues and challenges.

Quantum determinations play a decisive role in many M&A disputes. In Chapter 5, three experienced quantum experts from AlixPartners, Andrew Grantham, Kai Schumacher and Greg Huitson-Little, offer strategies on how to maximise the value of expert evidence. This starts with identifying the expertise required, investigative and valuation works, and how to communicate complex valuation techniques successfully.

M&A transactions generate a large number of disputes, but a large proportion of them are successfully dealt with in expert determination proceedings and never reach arbitration. In Chapter 6, Sandy Cowan, Fiona Frith and Alexandra Kingston of Mazars share their insights on how to make the most of expert determination proceedings. This begins with selecting the right expert and defining an effective and efficient expert determination process.

In Chapter 7, Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti of Withers provide an excellent introduction to third-party funding. Although third-party funding is not yet widely used in M&A arbitration, it is available as a further risk management tool.

The next two chapters address the two types of clauses in M&A contracts that generate the largest number of disputes. In Chapter 8, William S Dudzinsky, Lance J Phillips, Amy Chen and Michael Mannino of Eversheds Sutherland focus on purchase price adjustment clauses. Their chapter provides strategic advice for drafting purchase price adjustment clauses in light of their potential for generating disputes, including choice of dispute resolution mechanism, and a useful practitioner's checklist. In Chapter 9, Chris Drewe, Patricia Moroney

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and James Fox of Mazars discuss the particularities of accounts warranties. The chapter provides a useful guide for disputes lawyers, explaining the complexity of interpreting and analysing these clauses from an accounting expert's perspective.

The capstone chapter of Part I is Chapter 10, which pulls together advice to parties on how to structure their contracts to minimise the potential for dispute. Jonathan M Moses of Wachtell, Lipton, Rosen & Katz discusses key clauses that aid parties in ensuring that the deal closes, defining and limiting liability, reducing the risk disputes arising from true-ups and earn-out clauses, as well as minimising the impact of disputes on ongoing business relationships.

Part II focuses on the choice of substantive law in M&A contracts. The first eight chapters provide a geographical survey focusing on the particularities of substantive law that may influence the outcome of M&A disputes. Each chapter is structured in the same way for ease of comparison. This edition includes chapters for China (Sidley Austin), Germany (Freshfields Bruckhaus Deringer), Italy (Fieldfisher), South Korea (Kim & Chang), Switzerland (Thouvenin), the United Kingdom (Pallas Partners) and the United States (K&L Gates).

In these chapters, the first section considers the frequency of M&A disputes for transactions. The range in frequency is due in no small part to the substantive law and the extent to which it allows disputes to proceed on statutory grounds notwithstanding contractual limitations of liability. In particular, certain civil law jurisdictions open the door to cases where there are allegations of intentional failure to disclose relevant information.

The second section considers the frequency of litigation versus arbitration as a dispute resolution mechanism. Although litigation remains a popular choice, arbitration has become the nearly ubiquitous choice for dispute resolution in many jurisdictions. While a boon to arbitration practitioners, the dearth of published decisions in M&A disputes makes books like this all the more important.

The following section assesses the relative frequency of types of M&A disputes, including price adjustment disputes, earn-out disputes, pre-contractual failure to disclose and fraud disputes, and disputes arising from misrepresentations and breaches of warranties. While this cannot be done with scientific precision, this Section demonstrates again that there are two camps – one tending to allow fraud disputes, and one tending to disallow them. This distinction may be so significant as to brand the former as buyer-friendly regimes and the latter as seller-friendly.

The fourth section of each chapter in Part II addresses the applicable standard in the case of fraud or a failure to disclose information in the transaction phase. The scope of this standard, and the extent to which parties may derogate from

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it in contract, are key factors in determining the volume of fraud-related M&A disputes. This is without doubt a key factor that parties should consider in choosing the applicable substantive law for their agreement.

The next section addresses burden of proof issues. In some jurisdictions there is a shifting of the burden of proof in cases where one party has better access to information or has been accused of wrongdoing. This burden-shifting may, in turn, be characterised as procedural or substantive. Burden-shifting can give the party lacking evidence (usually the buyer) a significant advantage and can thus be relevant to the choice of law. Tribunals may be faced with thorny issues involving the confluence of burden-shifting mechanisms arising under substantive law and procedural mechanisms available in arbitration that exceed those that would normally accompany the burden-shifting mechanism in state courts of that jurisdiction.

Sixth, some laws contain rules on imputation, attribution or pooling knowledge of sellers with management or target representatives. As M&A contracts typically limit representations and warranties to the knowledge of a defined group of persons at the seller, it is possible that relevant information at the target is not disclosed and may form the basis for claims. Whether or not the applicable substantive law contains such doctrines can materially impact a buyer's chances of succeeding on some claims.

In the seventh section, each chapter describes the remedies available under the substantive law of that jurisdiction. While all jurisdictions allow for money damages, some jurisdictions prioritise specific performance or may even provide for rescission or unwinding of the transaction in certain circumstances. Both buyers and sellers are well advised to understand the scope of potential remedies under the chosen substantive law.

In the eighth section, the authors discuss how damages are to be calculated. As discussed in Chapter 5, the choice of method can have a significant effect on the measure of damages. Parties and arbitrators should be aware of this legal backdrop in preparing and assessing expert evidence.

Ninth, the authors address the potential overlap between contractual and tort claims arising from the same set of facts and circumstances. In certain jurisdictions, law or doctrine may prevent an injured party from asserting tort claims in parallel.

Tenth, the authors analyse whether a choice of law clause in respect of the M&A contract would be interpreted to extend to ancillary tort claims arising out of or in connection with the transaction.

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In the eleventh section, the authors consider whether there are special substantive issues in the jurisdiction that bear consideration. Some jurisdictions may subject M&A transactions to substantive rules governing sale of goods, whereas others may subject them to laws governing general terms and conditions, consumer protection laws or laws concerning unfair contract terms. For example, some jurisdictions may enforce 'best efforts' requirements, while others will not.

Finally, each chapter considers any special procedural issues that may arise in M&A disputes. These include special rules regarding the form of arbitration agreements, rules regarding joinder and consolidation, expert determinations, court support of arbitration, and special issues involving set-aside or recognition and enforcement.

Part II concludes with an overview chapter, authored by myself, analysing the country surveys and demonstrating some of the ways in which the choice of substantive law in the M&A contract may affect the outcome of an M&A dispute.

Conclusion

My thanks go to the talented and experienced team of lawyers and experts who have come together to deliver a truly pragmatic guide for M&A and disputes practitioners. This book continues to break new ground by considering the procedural, substantive and strategic aspects of M&A disputes. We are all grateful to Global Arbitration Review for including this book in the series of GAR Guides and for the team's highly professional guidance and support.

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Part I

Key Issues in M&A Arbitration

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CHAPTER 7

Third-Party Funding in International Arbitration

Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti[1]

Introduction

The significance of third-party funding (TPF) (also referred to as litigation funding, third-party financing or legal finance) in international arbitration has become axiomatic during the past decade, even if its nature (and very definition) remain as contested as the procedural and regulatory initiatives that have accompanied its growth and development. Indeed, it is difficult to identify another dimension in the field of international arbitration the progression of which has been more consequential for the practice of international arbitration during this period than TPF. This is a function of many variables, including, but by no means limited to:

- legal and regulatory initiatives in many jurisdictions to liberalise historic prohibitions and restrictions on TPF (sometimes as part of renewed efforts to facilitate access to justice in the context of reduced public or legal aid funds);
- the relative efficacy of initiatives for self-regulation (albeit not without controversy);
- the maturation and deepening of the TPF market;
- the standardisation of some market practices, even as greater specialism and focus have emerged among some funders;

1 Hussein Haeri is a partner, Clàudia Baró Huelmo is a senior associate and Giacomo Gasparotti is an associate at Withers LLP. The authors would like to thank their colleagues Martha Eker-Male and Carolina Mauro for their research assistance.

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- the enhanced awareness of litigating parties and their counsel of the potential advantages of TPF and the means of accessing it; and
- the considerable engagement of the international arbitration community with the legal and practical issues raised, or perceived to be raised, by TPF.

It is striking that it was only in 2011 that Lord Justice Jackson welcomed the establishment of a Code of Conduct by the Association of Litigation Funders,[2] which itself followed less than two years after Lord Jackson's Review of Civil Litigation Costs in England and Wales.[3] Since the first Code of Conduct,[4] numerous developments have occurred in the sphere of TPF, including: its legal and regulatory acceptance for international arbitration disputes in important arbitration jurisdictions such as Singapore and Hong Kong; its increased use in practice and concomitant visibility in the jurisprudence (including regarding issues such as disclosure, costs and enforcement); and enhanced scrutiny and consideration by academics and practitioners in various studies and reports, perhaps most prominently in the Report of the International Council for Commercial Arbitration (ICCA) – Queen Mary Task Force on Third-Party Funding in International Arbitration of 2018 (the ICCA-Queen Mary Task Force).[5]

TPF can be employed to finance a broad range of arbitration (and litigation) disputes, conducted across different sectors and under different procedural rules. TPF is reported to be frequently used in merger and acquisition (M&A) and commercial arbitration and it also finds use in investment treaty arbitration.[6]

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2 Lord Justice Jackson, 'Third Party funding or Litigation Funding: Sixth Lecture in the Civil Litigation Costs Review Implementations Programme' (23 November 2011), The Royal Courts of Justice, https://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf (last accessed 17 September 2022).

3 Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (December 2009), www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (last accessed 17 September 2022).

4 Code of Conduct for Litigation Funders, November 2011, subsequently updated January 2018, https://associationoflitigationfunders.com/code-of-conduct/ (last accessed 17 September 2022).

5 International Council for Commercial Arbitration (ICCA), Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4, April 2018, www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf (last accessed 17 September 2022) (ICCA-Queen Mary Report).

6 James McKinnon, 'Using Legal Finance for M&A Arbitrations' in Edward Poulton (ed.), *Arbitration of M&A Transactions: A Practical Guide* (Second Edition) (Globe Law and Business, 2020), 447.

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Although some of the particularities of M&A arbitration may have a bearing on the way TPF operates in this sub-type of commercial arbitration, it is fair to say that, overall, the basic 'mechanics' of TPF, as well as some of the main procedural issues posed by it, do not significantly vary between M&A arbitration and other forms of arbitration. The same holds true for the regulation of TPF, which is generally uniform across sub-types of commercial arbitration, with some potential differences when it comes to investment treaty arbitration (and differences with litigation). Accordingly, to understand the role of TPF in M&A arbitration, one cannot ignore its role in the broader context of international arbitration.

While not purporting to be comprehensive in any way, this chapter canvasses some of the most significant initiatives and developments regarding TPF to take stock of the broad state of play of TPF in M&A arbitration as well as in international arbitration in general, which shows every sign of becoming yet more consequential in this field during the coming decade. Following a brief definitional overview of TPF, this chapter highlights some of the particularities concerning the role of TPF in M&A arbitration. It then considers, more generally, the mechanics of TPF – and, in particular, the participants involved, the due diligence process and the economic and legal terms of funding agreements. Thereafter, it addresses the regulation of TPF, looking at certain common law and civil law jurisdictions that are prominent in this sphere, as well as pertinent arbitration rules, guidelines and self-regulation. Finally, the chapter canvasses some issues regarding TPF in arbitral proceedings, including confidentiality, disclosure, security for costs and other cost-related issues.

Defining TPF

Defining TPF is itself the subject of controversy.[7] This was indeed one of the predicate issues faced by the ICCA-Queen Mary Task Force in the course of its work.[8] The definition of TPF has also been discussed in the United Nations

7 Stavros Brekoulakis and Catherine Rogers, 'Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy' (31 July 2019), Academic Forum on ISDS Concept Paper, 2019/11, 5, noting that 'the precise definition of third-party funding . . . remains elusive', https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/13-rogers-brekoulakis-tpf-isds-af-13-2019-version-2.pdf (last accessed 17 September 2022).

8 See ICCA-Queen Mary Report (op. cit. note 5), 46 *et seq.*

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Commission on International Trade Law (UNCITRAL) Working Group III.[9] An aspect of this definitional difficulty is that the financing of a party to a dispute by a non-party is an operation that can be carried out by a variety of actors, for a variety of reasons and purposes, and through a variety of legal and financing tools. Thus, for example, the UNCITRAL Secretariat noted, with regard to the broad and inclusive definition of 'third-party funding' contained in its 2022 draft provisions on procedural reform,[10] that:

> *[UNCITRAL Working Group III] may wish to consider whether this broad definition is appropriate, as it could inadvertently result in regulating other types of support (for example, amicus curiae submissions in support of a position, pro bono legal services provided by a law firm and legal advice provided by an advisory centre).*[11]

It should also be noted that the purpose for which TPF is defined can affect the definition itself. For example, a descriptive, socio-economic definition of TPF is not necessarily the same as a legal definition of TPF.

To delineate the scope of its enquiry, the ICCA-Queen Mary Task Force formulated the following working definition of TPF:

> *The term 'TPF' refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,*
>
> *a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and*

9 See United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), Forty-third session (Vienna, 5–16 September 2022), 'Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform', Note by the Secretariat, 11 July 2022 (A/CN.9/WG.III/WP.219), draft provision E-1, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_219_-_draft_provisions_on_procedural_reform_.pdf (last accessed 1 September 2022) (UNCITRAL Draft provisions on procedural reform, Note by the Secretariat).

10 ibid., draft provision E-1(3): '"[t]hird-party funding" means any provision of direct or indirect funding or equivalent support to a party to the [international investment dispute] proceeding ("funded party") by a natural or legal person who is not a party to the proceeding ("third-party funder") in return for remuneration dependent on the outcome of the proceeding'.

11 ibid., [56].

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> *b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.*[12]

This is a broad formula that illustrates the multitude of forms that TPF may take. For example, it encompasses a variety of arrangements other than 'archetypal' TPF provided by commercial funders (although this sub-category is itself amorphous to some extent), such as covering work carried out by legal counsel on a conditional fee or contingency basis and certain forms of insurance – for both claimants and respondents.[13]

However, in a narrower sense, TPF can denote 'non-recourse' legal finance provided by a commercial funder under the terms of a funding agreement, typically to a claimant (or sometimes defendant) in return for a share of the amounts recovered in the proceeding. A more elaborate arrangement is 'portfolio financing', whereby financing is provided in respect of a group or portfolio of claims held by a certain entity or entities, or to legal counsel working on multiple cases, usually on a conditional fee or contingency basis.[14] It is mainly with these two forms of TPF that this chapter is concerned.

Role of TPF in M&A arbitration

Before considering the more general aspects of TPF, its regulation and its effects on arbitral proceedings (which apply to M&A arbitrations as well as to other forms of arbitration), we highlight some of the particularities of TPF in M&A arbitration.

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12 ICCA-Queen Mary Report (op. cit. note 5), 50. It is to be noted that for specific purposes, such as the regulation of disclosure, the Task Force adopted a narrower definition. See ibid., 52.

13 ibid., 51. The inclusion of insurance within the definition of TPF was the subject of debate on and outside the Task Force. See ibid., 53–55; James Clanchy, 'Whatever happened to third-party funding in international arbitration?' (21 October 2019), LexisNexis, https://www.lexisnexis.co.uk/blog/dispute-resolution/whatever-happened-to-third-party-funding-in-international-arbitration (last accessed 2 September 2022).

14 Oliver Gayner, Alistair Croft, Anna Stier and Kate Hurford, 'Third-party funding for international arbitration claims: overview' (2020), Practical Law UK, https://uk.practicallaw.thomsonreuters.com/0-521-2902 (last accessed 2 September 2022).

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M&A arbitration indicates the arbitration of disputes relating to mergers and acquisitions, generally arising out of, or in relation to, the underlying transaction documents. Typically, those disputes arise between a seller and a buyer, although they can also involve other subjects such as insurers, if there is a warranty and indemnity (W&I) insurance policy (and this provides for arbitration of the disputes arising thereunder).[15]

Arbitration is a preferred method for resolving M&A disputes.[16] According to the most recent statistics published by the London Court of International Arbitration (LCIA) in 2021, shareholders' agreements, share purchase agreements (SPAs) and joint venture agreements were the fourth most common types of agreements seen in LCIA-administered arbitrations (reflecting 14 per cent of all agreements).[17] The fact that arbitration is often chosen as a dispute settlement method for M&A disputes is not surprising, if one considers that arbitration generally provides for confidentiality, finality and enforceability of the award, flexibility and the possibility of having the dispute adjudicated by arbitrators with suitable expertise. Although it is difficult to have access to statistics (because commercial arbitration proceedings are typically confidential and so are funding agreements), it has been pointed out that M&A (as well as commercial) arbitrations are frequently funded.[18] A closer look at the most common types of M&A disputes helps to explain why those are suitable for TPF but also shows that, at the same time, not all M&A disputes may meet the interest of a funder.

It is commonplace to say that the most common types of M&A disputes are post-closing disputes, concerning alleged breaches of the representations and warranties set out in the transaction agreement (typically, the SPA), alleged misrepresentations during the negotiations, or the adjustment of the purchase price in accordance with the mechanisms set out in the transaction agreement

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15 On warranty and indemnity (W&I) insurance and arbitration of W&I insurance disputes, see Amy C Kläsener and Thomas H Webster, 'Special Issues in Connection with Warranty and Indemnity Insurance' in the third edition of this work.

16 Harald Frey and Dominique Müller, 'Arbitrating M&A Disputes' in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition, Wolters Kluwer, 2018), 1117; Eliane Fischer and Michael Walbert, 'The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions' in Christian Klausegger, Peter Klein and Florian Kremslehner (eds.), *Austrian Yearbook on International Arbitration 2017* (Manz Verlag Wien, 2016), 22.

17 London Court of International Arbitration (LCIA), '2021 Annual Casework Report', 10.

18 James McKinnon, 'Using Legal Finance for M&A Arbitrations' in Edward Poulton (ed.), *Arbitration of M&A Transactions: A Practical Guide* (Second Edition, Globe Law and Business, 2020), 447.

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(for example, earn-out mechanisms).[19] Those disputes are typically fact-intensive, complex and can involve significant sums in dispute. Legal fees can therefore be significant and expert evidence may be required. The relief sought typically includes monetary damages (or the restitution of part or the whole price paid by the buyer), although it can also include other forms or relief, such as the rescission of the SPA.

In light of the foregoing, post-closing disputes are often suitable for TPF. The claimant may be inclined to use TPF to mitigate the financial burden of arbitrating the claim (particularly if, as it is often the case, it is the buyer, which has already paid significant amounts to the seller under the terms of the SPA). A funder may see a potentially rewarding investment in funding the claim. Furthermore, it is not uncommon for the parties to stipulate in the transaction agreement that the provisional purchase price will be paid into an escrow account.[20] In such a case, should, for instance, the buyer deem that the final purchase price is to be reduced (e.g., because new liabilities of the target company have arisen after the closing, which are covered by the representations and warranties), the buyer would be entitled to bring a claim against the seller and, if successful, satisfy its claim out of the amounts in escrow. The escrow mechanism facilitates the enforcement of price-related claims (including price adjustment claims) and, therefore, makes the enforcement of a possible award easier. This is also a factor that can encourage a funder to fund these kinds of claims.

There are other types of M&A disputes that may not be suitable to attract TPF. Apart from pre-closing disputes (which normally are resolved quickly and may not be suitable for a full-blown arbitration), another type of proceeding that often arises out of the transaction agreement is an expert determination proceeding.[21] Although the dividing line between arbitration and expert determination or appraisal can be blurred, it exists and entails important consequences. Expert determinations normally involve specific and technical questions rather than factual and legal disputes.[22] Most importantly, expert determinations are not considered to be awards and, therefore, are not enforceable under the United

19 Anne Véronique Schlaepfer and Alexandre Mazuranic, 'Drafting Arbitration Clauses in M&A Agreements' in this work; Frey and Müller (op. cit. note 16), 1117.

20 See Frey and Müller (op. cit. note 16), 1124.

21 See, on this topic, Wolfgang Peter and Daniel Greineder, 'Conflicts between Expert Determination Clauses and Arbitration Clauses' in the third edition of this work.

22 See Gary Born, *International Commercial Arbitration* (Third Edition, Kluwer Law International, 2021 – updated August 2022), section 2.02(C)(2)(b).

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Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[23] This is one of the main reasons why a funder may not be as interested in financing expert determinations.

That said, the most frequent disputes that can arise out of an M&A transaction are suitable for TPF. To conclude, although they are not M&A arbitrations, investment arbitrations can also sometimes arise following M&A transactions, in relation to public measures adopted in respect of the target company or the buyer. For example, *Ares and MetalGeo v. Georgia* arose out of the declaration of invalidity of an SPA for the acquisition of a stake in a state-owned steel pipe manufacturing plant.[24] This kind of dispute (as with investment arbitrations in general) may also be suitable for TPF.

'Mechanics' of TPF

The mechanics of TPF can best be understood by parsing out the core elements: namely, the participants involved; the due diligence process; and the economic and legal terms of funding agreements.

Participants

Key actors for TPF include the funded party (whether a corporate entity or legal person, individual, government or other entity), the funder and the funded party's legal counsel. In a typical scenario, the funded party is a claim holder: a person or entity that has a legal claim and intends to resolve it via arbitration (or, indeed, other legal) proceedings against a respondent. The funded party could also be the respondent to legal proceedings in which it has a counterclaim that is

23 Wolfgang Peter and Daniel Greineder, 'Conflicts between Expert Determination Clauses and Arbitration Clauses' in this work; Dirk Otto, 'Article IV' in Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (INTA, 2010), 158.

24 *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia*, International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/05/23, Award, 26 February 2008 (redacted), [9.3.45]–[9.3.52], at https://jusmundi.com/en/document/decision/en-ares-international-s-r-l-and-metalgeo-s-r-l-v-georgia-award-tuesday-26th-february-2008 (subscription required) (last accessed 1 September 2022). See, also, summary of the Award in Jarrod Hepburn, 'Long-Unpublished Award Against Republic of Georgia from Ares International Case Finds FET Breach Following Bad Faith Negotiations, but Frowns on Broad Notions of Judicial Expropriation' (16 May 2016), Investment Arbitration Reporter, https://www.iareporter.com/articles/long-unpublished-award-against-republic-of-georgia-finds-fet-breach-following-bad-faith-negotiations-but-frowns-on-broad-notions-of-judicial-expropriation/ (subscription required) (last accessed 1 September 2022).

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funded (although this is not the only circumstance in which a respondent to legal proceedings may benefit from TPF, since a respondent typically has an economic benefit or advantage from successfully defending a claim).[25]

The claim holder could be interested in TPF for many reasons. This is not only where the claim holder cannot afford some or all of the representation costs, arbitrators' fees and other costs of an arbitration or is impecunious (although such a situation is certainly catered for by the existence of TPF). It may also be because the claim holder prefers to allocate its resources differently, including through risk-sharing or seeking to turn its legal department into a profit rather than a cost centre.[26]

The second key actor is the funder. Commercial funders are typically public companies, private companies or private funds[27] (including high net worth individuals and family offices that fund cases). There is increasing liquidity in the TPF market with many institutional investors investing in the sector. The third key actor is the legal counsel advising and representing the claim holder.

There are agreements that regulate the relationships between these three participants. The cornerstone is the funding agreement, which is essentially an agreement between the claim holder and the funder regulating the conditions for funding (including the cessation of funding), security over the proceeds of the arbitration or litigation, means of resolving disputes such as concerning settlements and choice of legal counsel, and the economics or waterfall arrangements for payment from a successful outcome. In addition to the funding agreement, there is an engagement letter or agreement between the legal counsel and the claim holder. The legal counsel acts on behalf of the claim holder, which retains control over the claim and the right to instruct the legal counsel. As such, there is no attorney–client relationship between the legal counsel and the funder, although the funding agreement may (and typically does) provide that the claim holder and its legal counsel keep the funder updated about key developments in the case. Notably, the funder's success is partly dependent on the legal counsel, so the claim holder's choice of legal counsel may be one of the factors that a funder considers when choosing whether or not to fund a claim.[28]

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25 ICCA-Queen Mary Report (op. cit. note 5), 23–24.

26 James MacKinnon, 'Using Legal Finance for M&A Arbitrations', Edward Poulton (ed.), *Arbitration of M&A Transactions: A Practical Global Guide* (Second Edition, Global Law and Business, 2014), 450–51, [3.1]–[3.2].

27 See Gayner, Croft, Stier and Hurford (op. cit. note 14).

28 MacKinnon (op. cit. note 26), 455, [5.5].

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Finally, it is not uncommon for the legal counsel to act partly on a conditional fee or contingency basis, with the funder paying a portion of the legal counsel's fees as they accrue, with a recovery of the discount offered and a success fee to be paid to the legal counsel out of the proceeds of the case if and when it is successful. This scheme entails the legal counsel having 'some skin in the game' and sharing some of the funding risks with the funder.[29]

Due diligence

The due diligence phase, which typically precedes the signing of the funding agreement, allows the funder to assess the value of the claim and the risks associated with it, allowing the funder to determine whether the case meets its risk profile and appetite and, if so, how much the rate of return should be, which will then be factored into the economics offered to the claim holder.

The assessment of a claim is based on a number of considerations, including:

- the identity of the claim holder and counterparty;
- jurisdictional and admissibility aspects of the claim;
- merits aspects (both factual and legal);
- the amount of damages that could reasonably be awarded (and lower thresholds);
- the likelihood that the litigating counterparty will pay the ensuing award;
- whether the litigating counterparty holds enforceable assets;
- the likely duration of determination of the claim; and
- the costs for bringing the claim.[30]

29 As commented on by Hussein Haeri at the Withers 2018 Annual Arbitration Conference (Third-Party Funding in International Arbitration): 'there is an expectation from some clients that legal counsel will have some skin in the game. Some funders are keen for lawyers to take risks, whereas others are agnostic about it' (Uliana Cooke, 'Market trends and legal issues in third-party funding' (8 August 2018), *Global Arbitration Review*, www.globalarbitrationreview.com/article/1172791/market-trends-and-legal-issues-in-third-party-funding (last accessed 1 September 2022)).

30 Mick Smith and Antonio Wesolowski, 'Mechanics of Third-Party Funding: A Funder's Perspective' in Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (Second Edition, Kluwer Law International, 2017), 35–36. See also Stavros Brekoulakis and Catherine Rogers, 'Third-Party Financing in ISDS, A Framework for Understanding Practice and Policy', Academic Forum on ISDS Concept Paper 2019/11 (31 July 2019), www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/13-rogers-brekoulakis-tpf-isds-af-13-2019.pdf (last accessed 1 September 2022); ICCA-Queen Mary Report (op. cit. note 5), 25.

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The value of the claim should be high enough to ensure that, if the claim is successful, the sums invested by the funder will be refunded with the funder's expected rate of return. Also, there should remain a sufficient margin for the claim holder.[31]

The due diligence process frequently entails a first level of review conducted by the funder internally (which can precede the non-binding offer of economic terms for funding the case, subject to further diligence and determination) and a second level of review, often with the advice of external counsel (which can precede an investment committee decision to fund the case and the preparation of the funding agreement).[32] Many funders ask to have an exclusivity period during the latter part of the due diligence phase (at least after they have offered indicative economic terms to fund the case) to avoid spending time and resources in circumstances where the claim holder then chooses to proceed with another funder.[33]

Funding agreement

The economic and legal terms of the funding agreement vary from case to case. However, based on the authors' experience, there are some recurring themes and mechanisms that are widely prevalent in funding agreements that can otherwise diverge materially in structure and style. This is largely true, for example, regarding economic formulae (even if the economics themselves can be quite heterogeneous), circumstances pertaining to the termination of the funding agreement, issues concerning confidentiality and privilege, settlement and legal counsel.

The funded amounts are typically determined in accordance with a case budget.[34] The funder may also agree to pay, or cause to be paid (such as with after-the-event insurance, or otherwise), adverse costs orders that might be issued against the claim holder, or to provide security for costs for the claim holder, if the tribunal so directs.

After recovering the investment sum, a funder's returns are often calculated as a function of the invested amount (typically the invested amount multiplied by a figure) or as a function of the recovered amounts (typically a percentage of the recovered amounts). The two formulae are often combined to the effect that the funder is entitled to 'the greater of' a multiple of the invested amount and a percentage of the proceeds of the case. It is also not uncommon to see a sliding

31 ICCA-Queen Mary Report (op. cit. note 5), 25.
32 ibid., 31.
33 id.
34 Smith and Wesolowski (op. cit. note 30), 31–32.

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scale of percentages and multipliers to the extent that the further in time the recovery, the higher the multiplier or percentage to the funder (reflecting standard economic principles of internal rate of return and the time value of money). Conversely, the funding agreement may provide that the higher the recovery with reference to certain threshold amounts, the lower the multiplier or percentage to be paid to the funder. Counsel with an economic interest in the outcome (such as by way of a conditional fee or contingency agreement) will typically also recover their discount and success fee sums before the claim holder. Generally, the claim holder will be paid the remaining sums from the proceeds after the funder and counsel, in what is frequently styled an overall waterfall arrangement of the distribution of proceeds.

TPF is typically provided on a non-recourse basis, meaning that if the claim holder loses the case, no funds need to be paid to the funder (and there is usually no security or guarantees, other than security against the proceeds of a successful outcome, which can be effected in various ways depending on the applicable law or laws).

Funding agreements also typically contain provisions governing how settlement decisions are made. The claim holder retains control over its claim and the proceedings, with the funder having a supervisory role (although the degree of supervision may be more or less intense).[35] A corollary is that the decision of whether to settle or not should be left with the claim holder. However, such a decision may have affect the funder's investment (if the claim holder settles for too low an amount or, conversely, wishes to continue with its claim based on unrealistic damages expectations, where it may be more prudent to settle for a lesser sum). For these reasons, a typical provision entails referring the matter in stipulated eventualities to an independent counsel, who will evaluate whether a settlement decision is appropriate in the circumstances of the case.

Other key terms of funding agreements are clauses relating to the funder's ability to terminate the agreement. This is a tool that the funder may use, inter alia, if it has reason to believe that prosecuting the case is no longer advisable (for instance, because some occurrence has significantly raised the risk level) or if the claim holder has become insolvent (although that is not necessarily an insurmountable obstacle to the claim and funding proceeding).

35 ICCA-Queen Mary Report (op. cit. note 5), 28.

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Regulation of TPF

Each country has its own regulations (or lack thereof) when it comes to TPF and there are differences between the approach taken by some common law jurisdictions (as well as marked differences between respective common law jurisdictions) and some civil law jurisdictions. Given the multiplicity of legal and regulatory responses to TPF in jurisdictions around the world and the significant quantity of detailed assessments that have been carried out on jurisdiction and regionally specific bases, this chapter only briefly addresses high-level and indicative aspects of approaches to TPF in certain jurisdictions.

Common law jurisdictions

Starting with England and Wales, the widespread use of TPF may seem counter-intuitive when considering the English law doctrines of maintenance and champerty. The doctrine of maintenance refers to a person 'support[ing] litigation in which they have no legitimate concern without just cause or excuse'.[36] The doctrine of champerty is an aggravated form of maintenance in which the intervening 'stranger' to the litigation also has a financial interest in the outcome of the claim.[37] The goal of their prohibition was, inter alia, to protect vulnerable litigants at risk of exploitation, prevent the proliferation of speculative claims and guard against the tampering of evidence.[38] The Criminal Law Act 1967 abolished the torts and crimes of maintenance and champerty (although it did not exclude the possibility of certain contracts being treated as contrary to public policy or otherwise illegal).[39]

England and Wales now recognises TPF (and, indeed, many of the largest funders are prominent in the UK and London litigation markets) but does not subject it to a formal regulatory framework. Nevertheless, some degree of

36 *Akhmedova v. Akhmedov* [2020] EWHC 1526 (Fam), [33]. See also, for example, *Casehub Ltd v. Wolf Cola Ltd* [2017] EWHC 1169 (Ch); Lord Neuberger, 'From Barretry, Maintenance and Champerty to Litigation Funding' (8 May 2013), Harbour Litigation Funding First Annual Lecture, [11], https://www.supremecourt.uk/docs/speech-130508.pdf (last accessed 1 September 2022).

37 id.; *Re Trepca Mines Ltd* (No. 2) [1963] Ch. 199.

38 Rodney Keong, 'Paving the way for third-party dispute resolution funding' (International Law Office, 22 November 2018) www.internationallawoffice.com/Newsletters/Arbitration-ADR/Singapore/Dentons-Rodyk/Paving-the-way-for-third-party-dispute-resolution-funding (last accessed 1 September 2022).

39 Criminal Law Act 1976, Section 14(1)-(2).

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oversight of TPF and the role of funders can be evidenced in the jurisprudence. For instance, in the case of *Excalibur Ventures LLC v. Texas Keystone*, the Court of Appeal of England and Wales held that:

> *Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest. What the judge characterised as 'rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals' is what is to be expected of a responsible funder . . . and cannot of itself be champertous.*[40]

More recently, the English courts have confirmed their favour of TPF, such as in *Akhmedova v. Akhmedov*, in which Mrs Justice Knowles noted, inter alia, that: 'the role played by professional funders is now seen by the courts as "highly desirable" in order to facilitate access to justice'.[41]

The position in Ireland is less favourable for TPF. In 2017, in the case of *Persona Digital v. The Minister for Public Enterprise*, the Irish Supreme Court held that TPF by an entity with no independent interest in the underlying proceedings in return for a share of the proceeds from litigation was prohibited under Irish law as contrary to the torts of maintenance and champerty.[42] Despite this ruling, it has been suggested that TPF in international arbitration may be permissible in Ireland since the case concerned litigation rather than arbitration,[43] albeit the point presently remains untested.

With regard to the United States, some authors have pointed out that the advent and rise in popularity of TPF has been slower than in other jurisdictions, especially when it comes to commercial disputes (as opposed to consumer disputes).[44] In terms of legal framework, although there have been proposals to regulate TPF (or, at least, certain key aspects of it, such as disclosure) at the federal

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40 *Excalibur Ventures LLC v. Texas Keystone* [2016] EWCA Civ 1144, [31].

41 *Akhmedova v. Akhmedov* [2020] EWHC 1526 (Fam), [40].

42 *Persona Digital Telephony Limited and Another v. The Minister for Public Enterprise, Ireland and Others* [2017] IESC 27. See also *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44.

43 Rosemary Ioannou and Gavin Smith, 'Dispute resolution funding in Ireland' (Vannin Capital, November 2018), https://www.walkersglobal.com/images/Publications/Articles/2018/12.2018-Vannin-In-Conversation-Series-No12.pd.pdf (last accessed 1 September 2022).

44 Nieuwveld and Sahani (op. cit note 30), 129. This may partly be informed by the fact that legal counsel working on a contingency basis is an established and long-standing feature of many US litigation practices.

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level,[45] TPF remains regulated only at the state level.[46] Similarly, in Canada, the legal framework applicable to TPF varies between provinces. In some common law jurisdictions of Canada, the doctrines of maintenance and champerty can still constitute an obstacle to the full recognition of TPF.[47] However, there are positive developments that concern, inter alia, the use of TPF in international arbitration. Of relevance is the amended British Columbia International Commercial Arbitration Act, which expressly recognises TPF as not being contrary to public policy in British Columbia for the purposes of the recognition and enforcement of arbitral awards.[48] Also relevant for the purposes of international arbitration is the *Crystallex* case (a case under the Companies' Creditors Arrangement Act parallel to the *Crystallex v. Venezuela* International Centre for Settlement of Investment Disputes (ICSID) arbitration),[49] where the courts of Ontario have approved certain financial arrangements entered into by Crystallex to fund its treaty claim.[50] Last, in the context of court litigation, funding agreements have sometimes been scrutinised and approved by the courts, including by the Federal Court in 2021 in *Difederico v. Amazon.com*.[51]

45 See, for example, 'Minutes of the Civil Rules Advisory Committee' (30 October 2014), at 10, www.uscourts.gov/sites/default/files/fr_import/CV10-2014-min.pdf (last accessed 1 September 2022) and, more recently, the bill introduced by some senators in respect of the Litigation Funding Transparency Act of 2019, www.congress.gov/bill/116th-congress/senate-bill/471/text?format=txt (last accessed 1 September 2022).

46 Among the state sources that may be relevant to TPF, it is worth recalling, in particular, the common law and statutory limitations on litigation funding (including the common law doctrines of champerty, maintenance and barratry, in those states where they are still considered to be applicable) and attorney ethics rules. See Elizabeth Korchin, Patrick Dempsey and Eric Blinderman, 'United States' (22 November 2021), in *The Third Party Litigation Funding Law Review* (Fifth Edition), https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/usa (last accessed 1 September 2022).

47 See Nieuwveld and Sahani (op. cit. note 30), 195 *et seq.*

48 British Columbia International Commercial Arbitration Act, RSBC 1996, c 233, Article 36(3).

49 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2.

50 See *Re Crystallex International Corporation*, 2012 ONSC 538 (aff'd 2012 ONCA 404) and *Re Crystallex International Corporation*, 2011 ONSC 7701 commented on by Natalie V Kolos and James Plotkin in 'Guest Blog: Third Party Funding in Canada' (11 April 2018), https://www.mccarthy.ca/en/insights/blogs/international-arbitration-blog/guest-blog-third-party-funding-canada (last accessed 1 September 2022).

51 *Difederico v. Amazon.com, Inc.*, 2021 FC 311, [33]-[108], [115].

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In 2017, Singapore liberalised its approach to TPF by abolishing the torts of maintenance and champerty and expressly legalising TPF in relation to international arbitration proceedings, as well as for connected court and mediation proceedings.[52] According to the 2017 law and regulations, the 'principal business' of the funder must be the funding of dispute resolution proceedings and it must have 'a paid-up share capital of not less than US$5 million'.[53] A funder that fails to comply with these requirements will not be able to enforce its rights under a TPF agreement unless the lack of compliance was accidental or inadvertent.[54] Requirements are also imposed on counsel, which must disclose the existence of TPF, as well as the identity and address of the funder, to the tribunal and other parties to the proceedings at their inception (or as soon as possible thereafter).[55] The scope of proceedings for which TPF is admitted was broadened in 2021 and now covers 'arbitration proceedings' *tout court*, whether international or domestic, and connected court proceedings.[56]

Hong Kong, another common law jurisdiction that recognises the doctrines of maintenance and champerty, has similarly followed suit in recognising TPF. Following the recommendation of the Law Reform Commission, Hong Kong enacted the Arbitration and Mediation Ordinance 2017, which now permits TPF of arbitration.[57] Of note is the obligation to disclose the existence of a funding agreement within 15 days of the conclusion of the agreement, which is imposed directly on the funded party, not on its counsel.[58] As for the obligations of funders,

52 Civil Law (Amendment) Act 2017; Civil Law (Third Party Funding) Regulations 2017.

53 Civil Law Act (Chapter 43, revised edition 1999) (as amended by the Civil Law (Amendment) Act 2017, Section 2), Section 5B(2).

54 ibid., Section 5B(3)–(6).

55 Singapore Legal Profession Act 2001 (Cap. 161), Sections 11, 15 and 130I; Singapore Legal Profession (Professional Conduct) Rules 2015, Section 3; Christine Sim, 'Third Party Funding in Asia: whose duty to disclose?' (Kluwer Arbitration Blog, 22 May 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/22/third-party-funding-asia-whose-duty-disclose/ (last accessed 1 September 2022).

56 Civil Law (Third Party Funding) Regulations 2017, Regulation 3(a)–(b), as amended by the Civil Law (Third-Party Funding) (Amendment) Regulations 2021, Regulation 2. See Olivia de Patoul, 'Singapore' (22 November 2021) in *The Third Party Litigation Funding Law Review* (op. cit. note 46).

57 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Ord. No. 6 of 2017. This was followed by a Code of Practice for TPF of Arbitration, which should be read in conjunction with the Arbitration Ordinance 2017.

58 Christine Sim, 'Third Party Funding in Asia: whose duty to disclose?' (Kluwer Arbitration Blog, 22 May 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/22/third-party-funding-asia-whose-duty-disclose/ (last accessed 1 September 2022).

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the Code of Practice sets out a number of rules.[59] Regardless of whether they are corporate entities or individuals, funders have to ensure that their promotional materials are 'clear and not misleading' and have to 'take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it'.[60] The Code also requires funders to have access to at least HK$20 million of capital, to effectively manage any conflicts of interest and to submit annual returns to the advisory body.[61] In August 2021, the Hong Kong government established an Advisory Body on Third Party Funding of Arbitration and Mediation.[62]

Turning to India, the Arbitration and Conciliation (Amendment) Act 2015 and its 2019 amendment neither regulate nor prohibit TPF.[63] However, according to certain authors, TPF is impliedly recognised in certain provisions of the Act and of the Code of Civil Procedure 1908.[64] In the case of *Bar Council of India v. AK Balaji*, the Supreme Court of India observed that 'there appears to be no restriction on third parties (non-lawyers) from funding the litigation and getting repaid after the outcome of the litigation'.[65] Accordingly, there is no blanket restriction on financing parties to a dispute, as long as the funder is not bound by Indian Bar Council Rules.[66]

59 Arbitration Ordinance (Chapter 609), Schedule, setting out the Code of Practice for Third Party Funding of Arbitration.

60 ibid., Sections 2.2 and 2.3(1).

61 ibid., Sections 2.5(2), 2.6(1) and 2.19.

62 The Advisory Body was established pursuant to Pursuant to Section 98X(1) of Part 10A of the Arbitration Ordinance. See Government of the Hong Kong Special Administrative Region, Department of Justice, 'Advisory Body on Third Party Funding of Arbitration and Mediation', https://www.doj.gov.hk/en/about/advisory_body.html (last accessed 1 September 2022).

63 Pranav V Kamnani and Aastha Kaushal, 'Regulation of Third Party Funding of Arbitration in India: The Road Not Taken', *Indian Journal of Arbitration Law* (Issue 2, January 2020), 151–65.

64 Shaneen Parikh and Anand Mohan, 'Third-party funding in India: principles and challenges' (16 November 2021), *Global Arbitration Review*, https://globalarbitrationreview.com/third-party-funding-in-india-principles-and-practical-challenges (last accessed 1 September 2022).

65 *Bar Council of India v. A.K. Balaji, AIR* 2018 SC 1382, [35].

66 Bar Council of India Rules 1975, Part VI, Chapter II: Standards of Professional Conduct and Etiquette, Rules 20–21.

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In Australia, TPF has been recognised at the federal level, with the Federal Court having held in 2002 that:

> *the Court must be seen to be willing to move with the times. There are ongoing concerns about the high costs of litigation; there are risks that citizens with justifiable causes of action may be kept out of courts because of their inability to pay the costs of litigation or because they fear the financial risks of litigation.*[67]

Furthermore, maintenance and champerty have been abolished in some (but not all) states in Australia.[68] In some states, specific regulations are imposed on funders.[69]

Civil law jurisdictions

In the French legal system, TPF is largely unregulated and has only been addressed by arbitral bodies, including the International Chamber of Commerce (ICC) International Court of Arbitration, and other non-legislative authorities such as the National Bar Council and the Paris Bar.[70] In general, TPF is considered not to be prohibited, a view supported by a 2006 decision of the Court of Appeal of

67 *Gore v. Justice Corporation Pty Ltd* (2002) 119 FCR 429.

68 Nieuwveld and Sahani (op. cit note 30), 91.

69 An example is in Victoria, where litigation funders have, inter alia, a duty to 'further the administration of justice' under the Civil Procedure Act 2010. For further information, see Nieuwveld and Sahani (op. cit note 30).

70 See Arne Fuchs and Lisa Richman, 'The Arbitration Agreement and Arbitrability, Third-party Funding in International Arbitration: A Comparative Analysis', in Klausegger, Klein, Kremslehner, et al. (eds.), *The Austrian Yearbook on International Arbitration 2020* (Manz'sche Verlags-und Universitätsbuchhandlung 2020), 78–79. On 21 February 2017, the Resolution on the practice of third-party funding was adopted by the Paris Bar Council; see Isabelle Michou, Pierre Pic and Yasmin Mohammad, 'Third-Party Funding – the French Perspective', in *Vannin Capital: Funding in Focus* (25 October 2017), *Mondaq*, https://www.mondaq.com/france/arbitration-dispute-resolution/640364/third-party-funding-the-french-perspective (last accessed 17 October 2022).

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Versailles.[71] Of relevance is a 21 February 2017 resolution adopted by the Paris Bar Council on the practice of TPF in international arbitration,[72] which addresses the professional and ethical obligations for lawyers in cases involving TPF.

Similarly, TPF is not expressly regulated in Italy. Eminent commentators have submitted that funding agreements do not correspond to any of the 'typical contracts' regulated by the Italian Civil Code.[73] Consequently, funding agreements fall under the spectrum of Article 1322(2) of the Code, according to which the parties shall be free to conclude 'atypical contracts' in so far as those pursue interests worthy of protection under the law.[74] In this regard, there is arguably nothing illicit or contrary to public policy in funding a party to a proceeding in return for a share of the proceeds, although some authors show some scepticism.[75] A rule that may have a bearing on the debate on TPF in the Italian legal system is Article 13(4) of Italian Law No. 247 of 31 December 2012 regulating the legal profession. This provision could be interpreted as prohibiting lawyers from entering agreements whereby legal fees are comprised, in whole or in part, of a share of the assets in dispute (i.e., *pactum de quota litis*).

The same holds true for Switzerland, where TPF is neither specifically regulated nor prohibited.[76] In this regard, commentators often refer to a 10 December 2004 decision of the Federal Supreme Court, which set aside a draft law proposed by the Cantonal Council of Zurich envisaging a prohibition

71 Versailles Court of Appeal, CT0012, 1 June 2006, www.legifrance.gouv.fr/juri/id/JURITEXT000006950886/ (last accessed 17 October 2022), cited in Arne Fuchs and Lisa Richman, 'The Arbitration Agreement and Arbitrability, Third-party Funding in International Arbitration: A Comparative Analysis', in Klausegger, Klein, Kremslehner, et al. (eds.), *The Austrian Yearbook on International Arbitration 2020* (Manz'sche Verlags-und Universitätsbuchhandlung 2020), 79; Mick Smith and Antonio Wesolowski, 'Mechanics of Third-Party Funding: A Funder's Perspective' in Nieuwveld and Sahani (op. cit. note 30), 225.

72 Resolution of the Paris Bar Council, 21 February 2017, https://www.twobirds.com/-/media/pdfs/france/en-paris-bar-council-resolution-dated-21-feb.pdf (last accessed 1 September 2022).

73 Giorgio de Nova, 'The impact of a Litigation Funding Agreement on Commercial International Arbitration with seat in Italy', *Rivista dell'Arbitrato* (1 December 2019), 3.

74 id.

75 Dai Yokomizo, Giorgio Fabio Colombo and Francesca Benatti, 'Osservatorio, un breve inquadramento teorico del third party funding nell'arbitrato commerciale internazionale', 4 (1 August 2019), Banca Borsa Titoli di Credito 564, Section 1.

76 Sébastien Besson, Antonio Rigozzi and Silja Schaffstein, 'Switzerland: Delos Guide to Arbitration Places (GAP)' (24 May 2019), Delos Dispute Resolution, 20, https://lk-k.com/wp-content/uploads/2019/06/BESSON-RIGOZZI-SCHAFFSTEIN-Delos-GAP-2nd-edn-Switzerland-2019.pdf (last accessed 1 October 2022).

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on TPF.[77] The Council focused, inter alia, on potential conflicts of interest on the part of lawyers.[78] However, the Court concluded that, although caution was to be adopted with TPF, a general prohibition on it would be disproportionate and violate economic freedom.[79]

In mainland China, TPF is neither prohibited nor expressly regulated.[80] Nevertheless, the 2017 Investment Arbitration Rules of the Chinese International Economic and Trade Arbitration Commission expressly address TPF.[81]

Similarly, in Japan TPF is not prohibited but there are some provisions in the Attorneys Act and the Trust Act that may have a bearing on TPF (although without being plainly applicable to it).[82]

In South Korea, there is no specific regulation (or prohibition) on TPF, although some doubts have been expressed as to its compatibility with other legislative instruments, such as the Korean Trust Act and the Attorney-at-Law Act.[83]

European Union

In June 2021, Axel Voss MEP submitted a report to the EU Legal Affairs Committee, proposing the adoption of a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding in the European Union. The report advocates for the regulation and supervision of litigation funders and for the imposition of a limit on funders' recovery, and addresses

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77 id.; Noradèle Radjai, 'Case notes on third-party funding – Switzerland', *Global Arbitration Review*, 37, www.lalive.ch/data/publications/Third_Party_Funding.pdf (last accessed 1 September 2022), citing BGE 131 (2004) I 223 *et seq.*

78 BGE 131 (2004) I 223 *et seq.*, Section 4.6.

79 ibid., I 223 *et seq.*, Section 4.8.

80 Fuchs and Richman (op. cit., note 71), 73, 84–85.

81 See Chinese International Economic and Trade Arbitration Commission, International Investment Arbitration Rules, Article 27.

82 See Daniel Allen and Yuko Kanamaru, 'Japan' (November 2021) in *The Third Party Litigation Funding Law Review* (op. cit. note 46), citing and discussing Articles 72 and 73 of the Attorneys Act and Article 10 of the Trust Act.

83 Gitanjali Bajaj, Ernest Yang and Queenie Chan, 'Third-Party Funding in the Asia-Pacific Region' (11 June 2020), *Global Arbitration Review*, www.globalarbitrationreview.com/chapter/1227826/third-party-funding-in-the-asia-pacific-region (last accessed 1 September 2022). Article 7 of the Korean Trust Act provides that '[a]ny trust which aims mainly at having the trustee proceed a litigation, shall be null and void', https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1051&lang=ENG (last accessed 1 September 2022). Article 34(5) of the Attorney-at-Law Act provides that '[f]ees and other profits earned through services that may be provided only by attorneys-at-law shall not be shared with a person who is not an attorney-at-law', https://elaw.klri.re.kr/eng_service/lawView.do?hseq=766&lang=ENG (last accessed 1 September 2022).

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perceived ethical issues, disclosure and transparency and the powers of supervisory authorities and courts to enforce funding legislation.[84] The International Legal Finance Association (ILFA) submitted a letter to the European Commission in response to Mr Voss' report on 7 March 2022.[85]

Arbitration rules, guidelines and self-regulation

The regulation of TPF is not confined to national laws. For example, provisions on TPF have found their way into institutional arbitral rules. In addition to those mentioned above, an interesting example is the Hong Kong International Arbitration Centre Rules of 2018, which contain provisions on (1) TPF addressing disclosure,[86] (2) the potential impact of TPF on costs[87] and (3) the relationship between TPF and confidentiality.[88] Another example is the 2020 Arbitration Rules of the Milan Chamber of Arbitration, which address disclosure of TPF.[89] The 2021 Arbitration Rules of the ICC contain a provision on disclosure of TPF.[90] The ICC also addresses TPF in its 2021 Note.[91] Finally, TPF is addressed in the Hague Rules on Business and Human Rights Arbitration[92] and in the ICSID Arbitration Rules 2022.[93]

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84 European Parliament, Committee on Legal Affairs, 'Draft Report with recommendations to the Commission on Responsible private funding of litigation' (Special Rapporteur: Axel Voss) (17 June 2021) Doc 2020/2130(INL), https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf (last accessed 1 September 2022).

85 Letter from Gibson, Dunn & Crutcher LLP on behalf of the International Legal Finance Association to Andreas Stein, European Commission, DG Justice and Consumers (7 March 2022), https://www.ilfa.com/news (last accessed 1 September 2022).

86 Hong Kong International Arbitration Centre Rules (HKIAC), Administered Arbitration Rules 2018, Section VI, Article 44.

87 ibid., Section V, Article 34.4.

88 ibid., Section VI, Article 45.

89 Milan Chamber of Arbitration, Arbitration Rules, 1 July 2020, Section VI, Article 43.

90 ICC Arbitration Rules 2021, Article 11(7).

91 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1 January 2021, [20]–[21] and [27], last sentence ('In assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration, such as third-party funders as well as relationships with other members of the arbitral tribunal, as well as experts or witnesses in the case.').

92 The Hague Rules on Business and Human Rights Arbitration, December 2019, Section VI, Article 55 with commentary.

93 ICSID Arbitration Rules, 2022 version (effective as of 1 July 2022), Rules 14 and 53(4).

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Some arbitral institutions have chosen to deal with TPF in practice or guidance notes rather than in their bodies of rules. This is the approach adopted by, for example, the Stockholm Chamber of Commerce[94] and the Singapore International Arbitration Centre.[95]

At another level of 'regulation' – to the extent adopted by parties and arbitral tribunals – are the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration. When they were revised in 2014, a provision was added to the extent that, if one of the parties to international arbitration proceedings is a legal entity, '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 may be considered to bear the identity of such party'.[96] It follows that a relationship between an arbitrator and such a third person or entity (including a funder) can be relevant for conflicts and disclosure purposes.[97] Also of relevance is General Standard 7(a) of the IBA Guidelines, requiring that a party disclose 'on its own initiative at the earliest opportunity' any direct or indirect relationship existing, inter alia, 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'.

Finally, some funders have chosen to self-regulate to some extent. In this respect, the most noteworthy example is the 2011 Code of Conduct for Litigation Funders, adopted by the Association of Litigation Funders of England and Wales (ALF), updated in 2018. This Code regulates the funding of litigation, arbitration and other dispute resolution procedures. It also includes a number

94 The Stockholm Chamber of Commerce (SCC) adopted the Policy on Disclosure of Third Parties with an Interest in the Outcome of the Dispute in 2019, https://sccinstitute.com/media/1035074/scc-policy-re-third-party-interests-adopted.pdf (last accessed 1 September 2022).

95 The Singapore International Arbitration Centre adopted Practice Note PN-01/17 in 2017 on Arbitrator Conduct in Cases Involving External Funding, https://siac.org.sg/wp-content/uploads/2022/08/Practice-Note-for-Administered-Cases-%E2%80%93-On-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf (last accessed 1 September 2022).

96 International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, General Standard 6(b).

97 In the 'Explanation to General Standard 6', it is clarified that, when a party in international arbitration is a legal entity, '[t]hird-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' (IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, 14).

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of requirements, such as all funders being members of the ALF must have a minimum of £2 million of capital, must be audited by a recognised law firm and must be bound by a detailed complaints procedure.[98] Another example is the ILFA, an association established in 2020 by six leading litigation and arbitration funders.[99] ILFA members undertake to comply with a set of best practices elaborated by the association.[100]

International investment agreements

TPF provisions can also be found in some 'new-generation' treaties with investment provisions. For instance, TPF is addressed in various ways in:
- the EU–Canada Comprehensive Economic and Trade Agreement;[101]
- the EU–Singapore Investment Protection Agreement;[102]
- the Canada–Chile Free Trade Agreement;[103]
- the 2021 Canada Model Bilateral Investment Treaty (BIT);[104] and
- the 2019 Netherlands Model BIT.[105]

98 Code of Conduct for Litigation Funders, January 2018, https://associationoflitigationfunders.com/code-of-conduct/ (last accessed 1 September 2022).

99 For further information, see the International Legal Finance Association (ILFA) website, www.ilfa.com (last accessed 1 September 2022). See also Cosmo Sanderson, 'Third-party funders launch global alliance' (14 September 2020), *Global Arbitration Review*, www.globalarbitrationreview.com/article/1232551/third-party-funders-launch-global-alliance (last accessed 1 September 2022).

100 See ILFA 'Best Practice', www.ilfa.com/#best-practice (last accessed 1 September 2022). ILFA's best practices focus on five key aspects: (1) clarity; (2) respecting duties to the courts; (3) avoid conflicts of interest; (4) preserve confidentiality and legal privilege; and (5) capital adequacy.

101 EU–Canada Comprehensive Economic and Trade Agreement, 14 January 2017, Articles 8.1 and 8.26.

102 EU–Singapore Investment Protection Agreement, 21 November 2019, Articles 3.1(f), 3.8 and 3.19(6).

103 Canada–Chile Free Trade Agreement, 5 February 2019, Article G-23-*bis*.

104 2021 Model Foreign Investment Promotion and Protection Agreement of Canada, Articles 39(2) and 42.

105 2019 Netherlands Model Bilateral Investment Treaty, Article 19.

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TPF has also been addressed within the context of the negotiations on the 'modernisation' of the Energy Charter Treaty.[106]

As a final note, TPF is among the topics currently being considered by the UNCITRAL Working Group III within the scope of its work on investor-state dispute settlement reform. In particular, during the Working Group's deliberations, concerns have been identified regarding the effects of TPF on arbitral proceedings and on the investor-state dispute settlement system.[107] Accordingly, the UNCITRAL Secretariat was tasked with elaborating reforms options for the Working Group to consider. The Secretariat recognised that TPF remains largely unregulated[108] and suggested a range of reform options. Other than prohibiting TPF, the Secretariat considered, inter alia, regulation to limit access to TPF to impecunious claimants, to disclose the use of TPF, to recover the costs of TPF and to establish a code of ethics for TPF.[109] Those reform options were discussed by the Working Group during its 38th session.[110] The Working Group expressed a preference for regulating TPF rather than prohibiting it altogether, and addressed several key issues laying foundations for its future work.[111] Subsequently, the UNCITRAL Secretariat prepared draft provisions on TPF, which it submitted

106 See Ad Hoc Meeting of the Energy Charter Conference (Brussels, 24 June 2022), Finalisation of the negotiations on the Modernisation of the Energy Charter Treaty (ECT), announcing that the Contracting Parties to the ECT have reached an agreement in principle on the modernisation of the ECT and summarising the main changes, at https://www.energychartertreaty.org/modernisation-of-the-treaty/ (last accessed 1 September 2022). Section 3 (Dispute Settlement) includes the following passage: 'Third-party funding. The new provision will require both disputing parties to disclose information on a third party financing its litigation costs' (emphasis omitted).

107 UNCITRAL Draft provisions on procedural reform, Note by the Secretariat (op. cit. note 9), [5] (summarising the previous discussions of the Working Group).

108 ibid., [7].

109 See ibid., [10]–[41].

110 UNCITRAL, Fifty-third session, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session' (Vienna, 14–18 October 2019), 23 October 2019 (A/CN.9/1004), http://undocs.org/en/A/CN.9/1004 (last accessed 1 September 2022).

111 ibid., [81]–[94].

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for comments to delegations and stakeholders on 6 May 2021.[112] An updated version of the draft provisions on TPF forms part of the UNCITRAL Secretariat's July 2022 draft provisions on procedural reform.[113]

TPF and arbitral proceedings

TPF is widely recognised to be an important means of facilitating access to justice in cases that might not otherwise be financially feasible, as well as providing a degree of quality control of funded claims reflecting the funder's independent due diligence. However, TPF does give rise to procedural issues that, although not unique to TPF, nevertheless manifest in particular ways in the context of TPF.

International law does not prohibit TPF and, given the liberalisation of TPF under many national legal systems and its recognition and acceptance in several institutional frameworks, arbitral tribunals have by and large accepted it as part of the arbitration landscape, as long as the integrity of proceedings is respected.

That being said, arbitral tribunals have often examined features of TPF. For instance, in the case of *Abaclat v. Argentina*, the claimants' funder reportedly had a high degree of control over the claims.[114] The respondent argued that this made the claims inadmissible. The tribunal held that, although the TPF arrangement affected the claimants' procedural rights, the claimants had willingly accepted these terms.[115] The tribunal thus found there was nothing to make the TPF agreement invalid and dismissed the admissibility objection.

Although a minority opinion, some arbitrators have expressed disapproval of TPF. In the case of *Teinver v. Argentina*, the tribunal found in favour of the claimants and the award reportedly entitled the funder to receive more than US$100 million under its funding agreement.[116]

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112 UNCITRAL Draft provisions on procedural reform, Note by the Secretariat (op. cit. note 9), [7]. The initial draft on the regulation of TPF and a compilation of comments from interested parties can be found online at UNCITRAL, Third-party funding, Initial Drafts, at https://uncitral.un.org/en/thirdpartyfunding (last accessed 1 September 2022).

113 UNCITRAL Draft provisions on procedural reform, Note by the Secretariat (op. cit. note 9), draft provisions C(3)-(4) and E-1 to E-3, and commentaries at [36], [38]–[40] and [52]–[101].

114 *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 10, 18 June 2012 (*Abaclat v. Argentina*). See also *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, [277].

115 *Abaclat v. Argentina* (op. cit. note 114).

116 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1 (*Teinver v. Argentina*), Award, 21 July 2017, [1146].

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Dr Kamal Hossain, in his dissenting opinion, commented as follows:

> *The BIT is not intended to enable payment of awards to third party funders who are not 'investors' and who have no protected 'investment', and who only come into the situation in the circumstances described above to advance funds in order to speculate on the outcome of a pending arbitration.*
>
> *The practice of TPF investment arbitration continues to be criticized by academics and professionals. The Funder's role in this case may well be characterized as 'champerty', which has long been considered under English common law as being against public policy as it encourages vexatious litigation. A contract may be void for champerty, though it may not strictly amount to criminal offence. The purchase of a law suit by an attorney is champerty in its most odious form.*[117]

Nonetheless, the general view remains that TPF is an accepted part of the arbitration canon, as it has come to be in the courts of jurisdictions such as England and Wales in which it was previously considered anathema.

TPF and confidentiality

Despite the historic aversion to TPF in England and Wales, there is no general presumption in litigation in English and Wales mandating the disclosure of TPF. For example, in the case of *Arroyo & Ors v. BP Exploration Co (Colombia) Ltd*, the High Court of England and Wales noted how there is no general rule for disclosure of financing in court proceedings. In that case, the Court held that 'parties with funding arrangements . . . are entitled to be treated in the same way as other parties to litigation'.[118] Further, the judge observed that '[i]n privately funded litigation there is no obligation on either party to disclose how a case is being funded'.[119]

117 *Teinver v. Argentina*, Award – Dissenting Opinion of Kamal Hossain, 21 July 2017, [72]–[73].

118 *Arroyo and others v. Equion Energia Ltd (formerly known as BP Exploration Co (Colombia) Ltd)* [2016] EWHC 3348 (TCC), [48].

119 ibid., [40].

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However, some tribunals have requested disclosure of the existence of TPF, sometimes through procedural orders.[120] More controversial still is whether any such disclosure should include the terms of the funding agreement.[121]

In the case of *Teinver v. Argentina*, the claimants admitted that they had concluded a TPF agreement with Burford after queries from the respondent, but refused to disclose the terms of the agreement.[122] The respondent argued that Burford had become the real party to the arbitration.[123] The tribunal rejected this argument, noting that the transfer of rights would in any event have occurred after the initiation of the arbitration.[124]

In *South American Silver v. Bolivia*, the tribunal refused to grant security for costs to Bolivia against South American Silver just because the latter had received TPF, but ordered the disclosure of the identity of the funder for purposes of transparency,[125] albeit not the disclosure of the terms of the agreement.[126]

In this regard, the case of *Zbigniew Piotr Grot and others v. Moldova* is also of note because of the tribunal's response to Moldova's request for information about the existence and identity of a funder backing the claimants. The claimants confirmed that there was a funder and pointedly added that its recourse to funding was the result of Moldova's failure to pay the advance on costs of

120 *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Procedural Order No. 1, 22 April 2020, [22]; *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 1, 29 November 2019, [10.4]; *Latam Hydro LLC and CH Mamacocha SRL v. Republic of Peru*, ICSID Case No. ARB/19/28, Procedural Order No. 2, 13 May 2020, [9.4]; *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Procedural Order No. 1, 11 April 2019, [10]; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Procedural Order No. 1, 19 February 2019, [10.4].

121 Sometimes claimants volunteer this information. See *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015, [127], where Oxus voluntarily disclosed the existence of TPF and revealed details of the funding agreement, which was acknowledged by the arbitral tribunal as having no impact in the arbitration. The principle elaborated by the ICCA-Queen Task Force on the scope of the obligation to disclose is that the 'specific provisions of a funding agreement may be subject to confidentiality obligations as between the parties, and may include information that is subject to a legal privilege; as a consequence, production of such provisions should only be ordered in exceptional circumstances' (ICCA-Queen Mary Task Force Report (op. cit. note 5), 117, B.2).

122 *Teinver v. Argentina*, Decision on Jurisdiction, 21 December 2012, [241].

123 ibid., [245].

124 ibid., [256]–[259].

125 *South American Silver Limited v. Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, [79].

126 ibid., [80].

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the arbitration – which had then to be paid by the claimants. The president of the tribunal commented that 'since Moldova has not contributed to the costs, it is perhaps not unreasonable for the Claimant to have looked elsewhere to top up funds'.[127]

In some cases, arbitral tribunals have requested the disclosure of the identity of the third-party funder to assess whether there may be a conflict of interest. For example, in the case of *Muhammet Çap v. Turkmenistan*, Turkmenistan submitted successive requests for disclosure of the identity of the funder and the terms of the funding agreement on the grounds that disclosure was necessary for various reasons; inter alia, to ensure that no conflicts of interests existed as per the 2014 IBA Rules on Conflicts of Interest in International Arbitration.[128] The tribunal rejected the first request but granted the second regarding the identity of the funder and the nature of the funding arrangement agreed with it.[129] The tribunal's reasoning was based on the need to preserve the integrity of the proceedings and assess conflicts of interest.[130]

However, arbitral tribunals are not usually persuaded by the argument that disclosure of the funding agreement is required to ascertain whether there are any conflicts of interest. For example, in *Guaracachi America v. Bolivia*, Bolivia requested the production of the funding agreement, inter alia, to assess potential conflicts of interest.[131] The tribunal rejected the production of the agreement since Bolivia failed to specify what the conflict of interest created by the funding agreement would be. The tribunal noted how the UNCITRAL Rules only provide for disclosure of conflicts of interest of the arbitrators and declared that its members had no such conflict with the third-party funder.[132]

127 *Zbigniew Piotr Grot and others v. Republic of Moldova*, ICSID Case No. ARB/16/8, Transcript of hearing, 11 December 2017, [16]–[19].

128 *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objections to Jurisdiction, 13 February 2015, [49]–[50]; Procedural Order No. 3, 12 June 2015, [2].

129 ibid., [285].

130 ibid., [2].

131 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17 (*Guaracachi America v. Bolivia*) Procedural Order No. 13, 21 February 2013, [6].

132 ibid., [9].

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Notably, in the case of *Canepa v. Spain*, two members of the tribunal rejected Spain's bid to disqualify an arbitrator because he had previously sat on the investment committee of a funder, finding that neither non-disclosure, nor other considerations, were sufficient to disqualify the arbitrator from the tribunal.[133]

TPF and security for costs

Many arbitral tribunals (most prominently investment arbitration tribunals) have rejected security for costs applications when they are primarily based on the existence of TPF.[134] The predominant reasoning has been that '[t]he fact of having financing alone does not imply risk of non-payment' and that ordering security every time that TPF is established would 'increas[e] the risk of blocking potentially legitimate claims'.[135]

For example, in the case of *Libananco v. Turkey*, Turkey based its security for costs request on an argument that, inter alia, Libananco's claim was funded and that the funder was a fraudster who would not pay for a costs award.[136] The tribunal considered that there was no established ICSID practice in awarding security for costs.[137] It would therefore only be in an extreme case, where an essential interest of a party stood in danger of irreparable damage, that such could be

133 *Canepa Green Energy Opportunities I, S.á.r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Decision on the Proposal to Disqualify Mr Peter Rees QC, 19 November 2019; Decision on the Second Proposal to Disqualify Mr Peter Rees QC, 10 February 2020.

134 See, for example, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, 23 June 2015; *South American Silver Limited (Bermuda) v. Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016 (*South American Silver v. Bolivia*).

135 *South American Silver v. Bolivia* (op. cit. note 134), [75]–[77]. See also D Chan, 'Three "Pitfalls" for the Unwary: Third-Party Funding in Asia', Kluwer Arbitration Blog, 15 December 2018.

136 *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008 (*Libananco v. Turkey*), [35].

137 See also *Guaracachi America v. Bolivia* (op. cit. note 131), Procedural Order No. 14, 11 March 2013 and Award, 31 January 2014; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3, 12 April 2017, [37].

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ordered.[138] The tribunal thus rejected the application.[139] A similar approach was taken in the case of *Hamester v. Ghana*, where the tribunal found that 'there was a serious risk that an order for security for costs would stifle the Claimant's claims' and that there was no evidence that the measures requested were necessary and urgent.[140] Even in more recent cases, tribunals have confirmed that the existence of TPF per se is not determinative as to whether or not security for costs must be granted.[141]

The high standard to grant security of costs – at least in the sphere of investment treaty arbitration – has only exceptionally been met. The first such case was *RSM v. Saint Lucia*, in which a combination of three factors led to the then unprecedented decision to order security for costs: (1) RSM's history of non-compliance with costs orders; (2) RSM's admission of having limited financial resources; and (3) the admission of funding by an unknown funder.[142] The decision was not unanimous, however. Notably, assenting arbitrator Gavan Griffith KC went further and held that, once TPF is revealed, 'the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs should not be made'.[143]

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138 *Libananco v. Turkey* (op. cit note 136), [57]. See also *Jochem Bernard Buse v. Republic of Panama*, ICSID Case No. ARB/17/12, Decision, 5 November 2019; *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, [377]–[379]; *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia*, UNCITRAL, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, [147]; *Sural v. Trinidad and Tobago*, Ruling on Respondent's Application for Security for Costs, 3 June 2014, [32].

139 *Libananco v. Turkey* (op. cit note 136), [59].

140 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, [17]. See also *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, [25], [31], [35], [42]–[52].

141 See, for example, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4, Decision on Respondent Application for Security for Cost, 12 May 2021, [69]; *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia*, PCA Case No. 2018-39, Procedural Order No. 15, Decision on the Claimants' Application for a Partial Award and the Respondent's Second Request for Security for Costs, 12 November 2021, [73].

142 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, [86].

143 ibid., Assenting Reasons of Gavan Griffith QC, 12 August 2014, [18].

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In the case of *García Armas v. Venezuela*, the terms of the funding agreement were relevant to security for costs being directed. The claimants had disclosed the existence of TPF and the tribunal had (unusually) ordered the production of the funding agreement to protect the integrity of the proceedings.[144] As per the terms of the agreement, the funder did not have an obligation to cover an award for costs, so the tribunal asked the claimants to prove that they could cover such an award.[145] The claimants were unable to do so and the tribunal granted security for costs.[146]

It should be noted that respondents (including states) in international arbitrations may also benefit from TPF, and this may have implications on any request for security of costs that they make. This is illustrated in the case of *Interocean v. Nigeria*, in which the tribunal ordered Nigeria to disclose how it was funding its defence of the arbitration, to determine whether it was incurring any costs that would support its application for security of costs. After it became clear that the government's local legal counsel was paying for the costs of the defence, the tribunal held that there was no basis for granting Nigeria's request for a security-for-costs order in the case.[147]

The general reluctance of arbitral tribunals to award security for costs solely based on the existence of TPF is broadly aligned with the approach taken in the English courts. For example, in *Progas Energy v. Pakistan*, the Commercial Court, in the context of a challenge to an UNCITRAL award, rejected the argument that the existence of a commercial funder should make any difference when deciding whether to grant security for costs. The judge failed to see how it was relevant that third-party funders were involved: 'the fact that the challenge has been made with funding . . . ought not to mean, without more, that security . . . should be ordered'.[148]

144 *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018, [1]–[3].

145 ibid., [242].

146 ibid., [261].

147 *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Procedural Order No. 5, 15 October 2016, [96]; Procedural Order No. 6, 1 February 2017, [33]–[43].

148 *Progas Energy Limited, Progas Holding Limited, Sheffield Engineering Company Limited v. The Islamic Republic of Pakistan* [2018] EWHC 209 (Comm), [78].

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TPF and costs

An important consideration regarding TPF is what constitutes a recoverable cost. In the case of *Kardassopoulos v. Georgia*, Georgia argued that since the claimants' costs were borne by a funder, it was questionable whether they were recoverable.[149] The tribunal disagreed and held that it knew of 'no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs'.[150] This was particularly true considering the terms of the Georgia–Greece and Georgia–Israel BITs, which provide that the contracting parties shall not raise as an objection to the fact that the investor has received compensation or an indemnity under an insurance contract.[151] Thus, the tribunal concluded that it would be 'difficult to see why in this case a third party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery'.[152] Similarly, in *Khan Resources v. Mongolia*, the tribunal concluded that the phrase 'legal and other costs' in Article 40(e) of the UNCITRAL Rules was broad enough to include the fees that the claimants had to pay to their lawyers, who had funded the case.[153]

However, in *Quasar de Valores v. Russia*, the tribunal denied the claimants recovery of their costs because the funder had funded the entirety of the costs of the proceedings and had no contractual right regarding the claimants for reimbursement of these costs.[154]

In the English court case of *Essar Oilfields Services Ltd v. Norscot Rig Management PVT Ltd*, the sole arbitrator adjudicating the dispute under the ICC Rules and the UK Arbitration Act 1996 made a costs award against Essar, which included funding costs as 'other costs'. Essar brought proceedings in the High Court of England and Wales to challenge that award, arguing that 'other costs' should not include litigation funding costs. The Court decided that the real test is whether the costs relate to the arbitration and are for the purposes of the arbitration, and whether the costs are reasonable.[155] In the court's view, both conditions

149 *Kardassopoulos v.* Georgia, ICSID Case No. ARB/05/18, Award, 3 March 2010, [686].

150 ibid., [691].

151 id.

152 id.

153 *Khan Resources Inc., Khan Resources BV, CAUC Holding Company Ltd. v. Government of Mongolia & MonAcom* LLC, PCA Case No. 2011-09, Award, 2 March 2015, [445]–[448].

154 *Quasar de Valores SICAV and others v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, [223].

155 *Essar Oilfields Services Ltd v. Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm), [58], [68].

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were met in Norscot's case, thus concluding that arbitrators potentially have the power to award funding costs in appropriate circumstances,[156] an advantage over English litigation where such a possibility does not exist.

In addition to whether the costs of TPF are recoverable (from the respondent) in the event that the claim holder wins the case, another question that may arise is whether the funder can be held liable to pay the respondent's costs in the event that the claim holder loses the case (assuming the 'loser pays' principle applies). This is something that in the litigation context has been admitted by domestic courts, notably in England.[157] However, the situation is different when it comes to arbitration. Arbitration is a creature of agreement. The arbitration agreement defines the limits of the arbitral tribunal's jurisdiction. Normally, a funder funding an arbitration claim is not privy to the arbitration agreement in place between the claim holder and the respondent. It follows that, ordinarily, an arbitral tribunal will not have jurisdiction to issue a cost award against the funder.[158]

Conclusions

Significant legal and regulatory developments liberalising TPF during the past decade or so have paved the way for its burgeoning development in the law and practice of international arbitration. However, a deepening and broadening of the funding pool and its greater visibility have also been accompanied by enhanced academic, institutional and jurisprudential scrutiny of particular features of TPF and arguments about whether it merits exceptional regulatory treatment. Irrespective of the evolution of this discourse, TPF seems destined in practice to remain a salient – and increasingly prominent and important – feature of the international arbitration landscape (including M&A arbitration).

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156 ibid., [69]–[72].

157 See, for example, *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* [2014] EWHC 3436 (Comm). A debated point before the English courts is whether the '*Arkin* cap' (deriving from *Arkin v. Borchard Lines Ltd* (Nos. 2 and 3) [2005] EWCA Civ 655, [2005] 1 WLR 3055) applies (i.e., whether the funder should be liable to pay the costs incurred by the opposing only to the extent of the funding provided). In a 2020 decision (confirming a decision by the English High Court), the English Court of Appeal found the *Arkin* cap to be inapplicable to the case before it. See *Chapelgate Master Fund Opportunity Ltd v. Money* [2020] EWCA Civ 246.

158 In this sense, see ICCA-Queen Mary Report (op. cit. note 5), 160 *et seq.*

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APPENDIX 1

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Hussein jointly leads the firm's international arbitration team and leads the firm's public international law team. He is a solicitor-advocate of the Senior Courts of England and Wales and of the Eastern Caribbean Supreme Court, British Virgin Islands. His experience comprises working on international legal and dispute resolution matters in London, Paris, New York and South Africa for more than 15 years.

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Hussein's public international law practice includes advising governments and international organisations on international investment law, constitutional and human rights matters, sovereign immunity, energy and natural resources, international humanitarian law, sanctions, the law of the sea and treaty and legislation drafting.

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