Third Party Funding in Arbitration: Breaking down Barriers and Building Bridges

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Third Party Funding (TPF) is developing fast and is increasingly used by parties in international commercial arbitrations. Various kinds of insurance have long been available to assist parties in meeting the costs of bringing and defending claims. Although insurance is ubiquitous in significant commercial sectors, it is rare in investment and projects disputes. In these fields, a lack of familiarity, amongst some practitioners, with the long established practices of insurers has given rise to concerns about the activities of the new TPF providers and to calls for regulation. In order to overcome these concerns, and before a rush to regulation, what is needed is dialogue between parties, lawyers and arbitrators who deal with the many thousands of arbitrations arising from international commerce on one hand and those involved in the relatively newer world of investment and projects arbitrations on the other. It is through a sharing of knowledge and experience that problems will be resolved, allowing the new funders to assist parties to have access to arbitral justice, just as insurers have done for a hundred years and more.

Keywords: Third Party Funding (TPF), After the Event (ATE) and Before the Event (BTE) insurer, maintenance and champerty, confidentiality, security for costs, commercial arbitration, investment arbitration

I. Introduction

On 15 September 2016, a judge in the English Commercial Court decided that an arbitrator in a London seated ICC arbitration was entitled to award, as part of the claimant’s costs, the cost of obtaining third party funding (TPF).\(^1\) That cost was three times the amount of the advance of £647,000 or 35% of damages, whichever was greater. The additional sum which the respondent in the arbitration was obliged to pay was just over £1.94 million (approx. €2.2 million).

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\(^1\) Essar Oilfield Services Limited v Norscot Rig Management Pvt Limited, CL-2016 – 000188, unreported.
The judgment has taken the legitimacy of TPF in commercial arbitration in London to a new level, making it possible for parties who have recourse to funding to recover the costs of obtaining that funding if they are successful in arbitration (and if various other factors are in their favour).

The treatment of TPF in investor–state arbitrations has been quite different. Confronted by the presence of TPF providers, arbitrators in investment arbitrations have formed their own views on them. In his controversial assenting opinion in the state’s application for security for costs in *RSM Production Corporation v Saint Lucia*, Dr Gavan Griffith QC spoke of “the emergence of a new industry of mercantile adventurers” who looked to share the rewards of success but to risk no more than their spent costs, a “gambler’s Nirvana: Heads I win, and Tails I do not lose”.

The new TPF providers have certainly made their presence felt in recent years. There is no doubt that there is both the demand for TPF from claimants and an appetite for arbitration cases amongst funders. International arbitration can offer TPF providers benefits over domestic litigation in terms of the speed of the proceedings, knowledge of the identities of the arbitrators and of their expertise and, of course, the international enforceability of awards under the New York Convention 1958.

As illustrated by the above examples of the contrasting treatment of TPF in a commercial and in an investment arbitration, the new providers have not been universally welcomed.

In an article entitled *Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit*, Gary J Shaw, an attorney with the Foreign Claims Settlement Commission of the US Department of Justice, has expressed the following fear:

“There is nothing to stop a funder from using confidential information acquired in one proceeding against his former ‘client’ in a subsequent proceeding. Nor is there any regulation preventing a funder from funding, and thereby influencing, both parties in a single proceeding in order to maximize profit. After all, third party funders are less interested in justice and more interested in portfolio gains.”

Similarly, in an article entitled *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, Nadia Darwazeh and Adrien Leleu have asserted,

“TPF also increases the risk of exaggerated claims. Empirical data shows that claimants already have a tendency to inflate their claims beyond their actual value. It is not far-fetched to consider that this problem of inflated claims may be exacerbated when a funder, whose sole motivation is financial gain is involved.”

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2 ICSID Case No. ARB/12/10, 13 August 2014.
3 *Arbitration International*, 2016, 0, 12.
4 33 *Journal of International Arbitration*, 2, 2016, 125 – 149 at p. 130.
Without offering any evidence that the new funders do in fact behave in the ways that they suggest they might and without considering whether such behaviour, if it ever occurred, might be corrected by its own commercial consequences and/or by the common sense and experience of the relevant arbitral tribunals, the authors of both these articles call for regulation of TPF in order to deal with their hypothetical scenarios. Other commentators likewise treat TPF as a new and problematic phenomenon in urgent need of regulation.5

In last year’s Croatian Arbitration Yearbook, Margareta Habazin said, “The expansion of third-party funding is quietly bringing a new player directly into the arbitral proceedings. The new player has no direct interest in the substantive issues of the proceedings but instead invests in the arbitration for a share of a successful claim, whether by settlement or an award.” She concludes, “in the interest of arbitrators’ independence, arbitrators need to be alerted of the participation of third-party funders and specific arbitral rules that will regulate that a party should disclose if it is being funded by a third-party need to be created.”6

Calls for regulation are a common feature, even an assumption, in discussions about TPF in the international arbitration community. In a chapter entitled Gamblers, Loan Sharks, and Third-Party Funders in her book, Ethics in International Arbitration, Professor Catherine A Rogers, asserts,

“significant challenges exist in determining the best manner and terms by which to regulate third-party funders in international arbitration. First, unlike lawyers, arbitrators, and experts, the presence of third-party funders is a very new phenomenon without clear national precedents or established practices that provide a clear starting point for analysis. The murkiness means that most efforts to understand third-party funding have to date been based on analogical reasoning.”7

For the purpose of studying a “host of ethical and procedural issues” which TPF is said to raise, the International Council for Commercial Arbitration (ICCA) has set up a Task Force on TPF with Queen Mary University of London (QMUL). The Co-Chairs are Professor William W Park, Professor Catherine A Rogers, and Professor Stavros Brekoulakis. The issues which the Task Force is studying include the funders’ relationship with parties and counsel in managing the dispute, allocation


of costs and security for costs, transparency and disclosure, confidentiality, and arbitrator conflicts of interest, all of which are mentioned in the articles cited above. The same issues were raised in a consultation paper issued by Hong Kong’s Law Reform Commission, which has recently conducted an in depth study of TPF in arbitration undertaken by a distinguished committee of practitioners. It has recommended that TPF for arbitration taking place in Hong Kong be permitted under local law. However, it has also recommended that “clear ethical and financial standards” be developed for TPF in Hong Kong and it has invited submissions on issues which it considers relevant to those standards, including “control of the arbitration” by the funder.

In June 2016, Singapore’s Ministry of Laws (MinLaw) opened a consultation on new legislation and regulation to provide a framework for TPF in international arbitration. Alongside amendments to its Civil Law Act, MinLaw envisages amendments to the local legal professional rules together with best practices and guidelines for lawyers and TPF providers. MinLaw looked to move quickly, announcing that its consultation would last just one month.

The rush to legalise and regulate is driven by a dual perception that TPF is both a new phenomenon and one that carries unique risks. This article seeks to examine the sources of this perception and to question it, putting the new TPF providers in the wider context of the funding of commercial arbitrations by insurers. It queries whether it is fair or constructive to single out the new providers for regulation while long established funders are left alone.

II. Defining and describing Third Party Funding

In its broadest definition, TPF is the funding of the costs of bringing or defending a claim by a party which is not itself a party to the arbitration. This would include funding by insurers, such as ‘before the event’ and liability insurers, who regularly stand behind parties in commercial arbitrations and have been doing so for decades in thousands of cases around the world. The ICCA-QMUL Task Force has noted concerns that “ordinary insurers are ubiquitous”.11

However, in the current “debate” around TPF, the term is more usually associated with a narrower and newer group of investors in claims, who include hedge funds, family offices and specialist providers. A handful have attracted attention, partly as a result of the assistance which they have given to class actions pursued in courts by consumers and shareholders against major corporations and partly because of funding which they have provided to claimants in high value investment treaty arbitrations against states.

The new providers’ business model is straightforward. They will fund the costs, or part of the costs, of bringing a claim in an arbitration in return for a share of the proceeds or a multiple of their investment (typically 3x or 4x); nothing will be payable if the claim fails.

The prospect of a high return is one of the attractions of TPF for new investors. They have noted the particular benefits of investing in international arbitration claims, which include the speed and finality of the process in comparison to domestic courts, knowledge of the identities of the arbitrators and of their expertise and, of course, the international enforceability of awards under the New York Convention 1958.

Whilst certain litigation funders have a reputation for pouncing on opportunities for class actions, international arbitrations, more particularly commercial arbitrations, do not generally come to their attention through the media. They are confidential. Before an arbitration is commenced, the existence of a claim, and details about the forum in which it will be determined, may only be known to a small circle, including the claimant’s law firm. Almost all approaches to funders for financial assistance with the costs of an arbitration claim are made by a law firm already instructed by the claimant. Such an approach may be made directly to the funder or through specialised brokers.

When approached by a claimant’s lawyer and if sufficiently interested in the case, a funder will conduct due diligence on the claim. Usually the claimant’s lawyer will be expected to provide a factual summary and a legal analysis of the case, including analysis of all anticipated defences. The funder’s in-house team and/or its external advisors will review these summaries, together with the essential documents, and will wish to study the legal, evidential and enforcement risks. The realistic size of the claim and of the potential recovery will be critical.

A non-disclosure agreement will be signed between the claimant and the funder to preserve the confidentiality of the documents which are shared with the funder’s assessors. This may be combined with a common interest agreement with a view to preserving legal privilege. These issues of confidentiality and privilege are not
unique to TPF: they arise also in cases in which a claim is taken over by and/or jointly run with an insurer.

In her book, Professor Rogers is flattering about the manner in which funders conduct due diligence: “In assessing claims, funders bring a level of sophistication and precision that is almost shockingly unknown and unmanageable by even large, sophisticated multi-national companies and the world’s most sophisticated law firms.”12 The analyses carried out by assessors of claims for TPF are not beyond the capabilities of international law firms but such firms, less versed perhaps in the ordinary demands of traditional insurers, do not always find it as easy as they should to provide their own calibrated risk assessments or realistic costs estimates.

It is reckoned that funders reject around 9 out of 10 claims submitted to them. Some claims can be rejected quickly whilst others may be superficially strong and interesting, only for it to become apparent that, for example, enforcement will be problematic because the respondent’s assets are difficult to trace.

Funders are usually looking for claims to have a 60 to 70% prospect of success. Whilst they can assist impecunious claimants, only those with good cases should apply. Funders are investors, not gamblers. These are not the odds found at a roulette table. The assessment of claims does not consist in the tossing of a coin: it requires careful analysis, which itself can be expensive for the funders.

A funder's due diligence should result in the rejection of hopeless and frivolous claims. The notion that funders deliberately support bad claims in order to intimidate opponents into acceding to high settlement demands is contrary to commercial common sense as well as damaging to a funder's reputation. On the contrary, the fresh pairs of eyes which the funder's assessors bring to a case can help a claimant to develop strategies appropriate to the realistic prospects of a successful recovery.

III. Comparisons with insurance

An assessment of the kind outlined above would also be conducted by an “After the Event” (ATE) insurer looking to offer terms for “own costs” or “adverse costs” insurance.

Unlike a TPF provider, an ATE insurer does not generally offer to fund any costs during the course of proceedings. Instead, it will help a claimant to limit its own risk, and to keep within its legal budget, by covering costs liabilities which it might incur in the event of losing a case. Its obligation to pay will generally only arise when the arbitration is completed; in the meantime, its insured must pay its

own way or engage a funder. The insurance premium is usually only payable in
the event of success in the arbitration and will be a substantial percentage of the
indemnity.

In its working definition of TPF, the ICCA – QMUL Task Force has combined TPF
and ATE, noting that both the funder and the insurer stand to gain in the event of
a successful recovery:

“The terms ‘third-party funder’ and ‘after-the-event insurer’ refer to any person or entity that is con-
tributing funds or other material support to the prosecution or defense of the dispute and that is entitled
to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.”

ATE insurers are unusual in not actually funding any costs and in collecting their
premium only in the event of an arbitration award in their insured’s favour. How-
ever, these cannot be reasons why ATE insurers should join the new investors in
the Task Force’s working definition of TPF while other types of insurers, who do
fund the costs of bringing and defending claims in arbitration, do not appear there.

Issues such as confidentiality, conflicts, and control of a claim affect arbitrations in
which a party’s costs are funded by a “Before the Event” (BTE) insurer or a liabil-
ity insurer. Indeed, being obliged to pay costs during the course of the arbitration,
these insurers may be more likely than ATE insurers are to take an interest in the
proceedings as they develop.

In the Task Force’s preliminary report, Professors Park and Rogers note that there
was “considerable debate and disagreement on the Task Force about whether this
definition should include ordinary insurers.”

Some members of the Task Force considered that the question of potential arbitrator
conflicts applied also to insurers and should therefore be considered in conjunction
with taking up “the issue of third-party funding”.

Others suggested that “exclusion of traditional insurers was a structural feature
of dispute settlement that should not be tampered with and could be maintained as
separate from the issue of third-party funding”.

It is not explained in the report what either side meant by “the issue of third-party
funding” before they had defined what TPF was in the first place. Nor is it explained
how those advocating the exclusion of insurers could justify it simply on the basis
that they were long established. If a “host of vital issues” is raised by TPF, par-
ticipants should not escape scrutiny, and presumably regulation, by dint of their
antiquity and ubiquity.

When identical issues arise in relation to the participation of both old and new funders, it does the international arbitration community no credit to suggest that only the newcomers are potential troublemakers and that only they should be subjected to regulation.

Amongst traditional insurers are the insurers of cargo on merchant ships. Many hundreds of international arbitrations are commenced at seats around the world each year between cargo interests and ship-owners.

According to a survey of international arbitration in London conducted by TheCityUK, members of the London Maritime Arbitrators’ Association (LMAA) received 3,160 appointments in 2015, a number which the organisation’s report finds “far exceeds the number of all other international arbitrations in London.”

Although the LMAA is not itself an institution, it is included in Gary Born’s table of cases filed with leading arbitral institutions between 1993 and 2013 contained in his textbook on international commercial arbitration. Of the 17 institutions listed in that table, the LMAA is the only one whose annual numbers are consistently in the thousands.

The total number of international cases in all of the institutions in Mr Born’s table in the 5-year period 2009 to 2013 inclusive is 42,102. Of these, 18,307 or 43% were with the LMAA. In contrast, the International Centre for Settlement of Investment Disputes (ICSID) had 169 cases (0.4%).

The volume and regularity of disputes arising from the deployment of vessels worldwide have led the shipping industry to develop, over the last century and more, liability and legal costs insurance to fund the costs of bringing and defending claims in courts and arbitration.

In a typical London seated ad hoc international commercial arbitration arising from a dispute under a contract of carriage, a Swiss trading house will have sold a cargo of rice from Thailand to a Ghanaian importer who finds it to be damaged on arrival in Accra. The importer is bound by a London arbitration clause in the bill of lading and must bring its claim against the carrier, a Greek ship-owner, in such an arbitration and not in its local courts.

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17 It should be noted that the LMAA’s statistics are for its members’ appointments as notified to it, not for individual arbitrations, whose numbers would be somewhat lower.
However, the importer will turn first to its cargo insurer. If the insurance claim is
paid, the insurer will be subrogated and will look to pursue the claim against the
ship-owner itself. If the insurance policy was made in London, the English equi-
table doctrine of subrogation will apply. According to this doctrine, the insurer
stands in the shoes of its insured and must bring the claim in the insured’s name,
not in its own name. The party funding the conduct of the claim does not therefore
appear as a party in the notice of arbitration or subsequently in the proceedings
but it is nevertheless this paying party which will have the benefit of a favourable
arbitration award.

Nor will the Greek ship-owner pay for its own defence of the claim brought against
it in arbitration: its Protection & Indemnity Club will cover the costs. Again, the
P&I Club’s details will not appear on the record. The award will name the parties
as the cargo owner and ship-owner but neither of these parties will have paid the
costs of the arbitration. These costs will have been funded by third parties, namely
their insurers.

Ship-owners also have their freight, demurrage and defence clubs (FD&D or De-
fence Clubs), a form of mutual BTE insurance which covers the costs of bringing
contractual claims against charterers, purchasers, suppliers and other parties with
whom they have dealings. Again, such disputes will usually be resolved in arbi-
tration, whether in London or in another seat where international maritime arbitra-
tions are traditionally heard, eg New York, Paris, Singapore, Hong Kong. Whether
or not a claim should be supported by the Club will be a matter for the discretion
of its directors, who in turn are advised by its managers.

In its publicity, the UK Defence Club (established in 1888) says that it can cover:
“The costs associated with bringing and defending proceedings relating to ship op-
eration in any jurisdiction or forum.” Another service is “the provision of security
for costs in the UK and other jurisdictions”. In a section of its website devoted to
“unreported cases” (mainly arbitrations), the club gives examples of the kinds of
contractual claims which it supports, noting that the costs incurred in arbitrations
can run into hundreds of thousands of pounds.

Defence clubs are found around the world. In April 2016, Nordisk Skibsreder-
forening, the Norwegian club established in 1889, published its annual report for
2015, which contains accounts of arbitrations in Oslo, London, Hong Kong and

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18 For a more detailed discussion of funding by defence clubs, see James Clanchy, *Navigating the
cwaters of Third Party Funding in Arbitration*, 2016, 82 Arbitration, 222 - 232
The club registered 2,301 new cases in 2015. It employs 22 lawyers in Oslo and Singapore, who work exclusively on funded cases in court and in arbitration.

Funding of this kind is very old and has long been an accepted part of the fabric of international commercial arbitration. Although its users could provide valuable insights, it tends to be ignored in the current debate about TPF.

In her article, *Ethical implications of third-party funding*, Valentina Frignati notes that TPF is “distinguished from insurances that cover a party from risks associated with a lawsuit since third-party funders do not merely cover the party’s costs up to a certain amount (ie the coverage cap) but they rather try to get a return from the investment.”

She does not explain why TPF’s different financial model leads its providers to become involved in “complex ethical issues” while traditional insurers, who participate in the same activity but are remunerated differently, do not.

Without examining the practices of insurers, their involvement in managing the claims and defences which they fund in arbitrations, and their relationships with their insured, with counsel and with arbitrators, Ms Frignati asserts, “the influence and control exercised by funders may affect the attorney-client (the funded party) relationship, as well as the independence of arbitrators. Confidentiality, evidentiary privileges, and professional independence are the key ethical concerns that TPF puts in question.”

The notion that “control” alleged to be exercised by the new TPF providers justifies different treatment being meted upon them when they encounter the same ethical issues as traditional insurers is frequently articulated.

Professors Park and Rogers explain in the ICCA-QMUL Task Force’s preliminary report, “before-the-event insurers may be presumed to be less directly involved in the specifics of case management than third-party funders are.” That presumption is false: the new TPF providers normally exercise less control over the conduct of a claim than BTE insurers do.

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IV. The “control” issue: maintenance and champerty

Approaches to funders (and funding brokers) for financial assistance with the costs of a claim in arbitration are generally made by law firms already instructed by claimants. This may not be at the beginning of the case but at a later stage when the claimant’s initial budget has proved to be insufficient. Applications for funding are sometimes made, for example, shortly after the arbitral institution has directed payment of a substantial deposit towards the arbitrators’ fees and its own administrative charges.

Unlike an insurer, a TPF provider will rarely be in a position to dictate the claimant’s choice of counsel because it will usually be the claimant’s counsel who will have approached it in the first place. In contrast, the tradition in the world of BTE mutual insurance in the international maritime community is that the insurer takes charge.

For example, Rule 6 of the UK Defence Club Rules 2015 provides that all lawyers appointed by the club on the member’s behalf, or appointed by the member with the club’s approval, shall be deemed to be appointed on terms that they have been instructed by the member to advise and report to the club, to take instructions from the club, and to produce any documents or information relating to the claim, as if they had been appointed to act on behalf of the club itself.

In contrast, the Association of Litigation Funders of England and Wales has a Code of Conduct which includes a requirement that a funder will “not seek to influence the funded party’s solicitor or barrister to cede control or conduct of the dispute to the funder”.

In practice, funders often take a back seat, sometimes out of a conscious concern not to be accused of maintenance or champerty (see below), sometimes out of deference to the international law firm which has brought the case to them, and sometimes for straightforward commercial reasons, their own share of the overall funding of the costs, alongside the claimant itself, the lawyers’ contingency arrangements and other co-funders, not being sufficient to justify any sort of control.

However, funders will expect to be kept informed of progress and they will wish to know how the funds which they have advanced are being spent. The new funders have adopted from insurers some well-established, and delicately constructed, practices and procedures. Disciplines familiar to parties and lawyers who work on cases funded by insurers, such as compiling and updating risk assessments,

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sharing documents, reporting, and costs budgeting, all contribute to the efficiency of the arbitral process and, critically, to the management of expectations. These disciplines go some way to answering complaints about the speed and cost of international arbitration.

Whilst many international arbitration practitioners are used to complying with the demands and strictures of insurers, it is relatively unusual for insurance to be involved in investor-state and project disputes. The new funders are filling this gap. In these fields, a lack of familiarity with the longstanding practices and ordinary demands of insurers is one of the factors leading to complaints about funders’ “control” of cases and to calls for their regulation.

Fear of control is at the heart of the doctrines of maintenance and champerty, which used to be crimes in England and remain illegal in some other common law jurisdictions. Maintenance is the giving of assistance or encouragement to a party to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference. Champerty is a kind of maintenance in which the maintainer receives a share of the subject matter or proceeds of an action.

In 1967 the Law Commission recognised that the prevalence of insurance, as well as trade union funded litigation, had changed the picture. The present position under English law is that a contract for the funding of litigation should only be struck down if it is contrary to public policy or otherwise illegal or improper (e.g. if it confers disproportionate control of the claim upon the funder).

In Singapore, maintenance and champerty have remained both a crime and a tort. The Singapore Court of Appeal, in Otech Pakistan Pvt Ltd v Clough Engineering Ltd, considered whether the doctrine of champerty applied in both arbitration and court proceedings. It decided that it did:

“As we see the position, the purity of justice and the interests of vulnerable litigants are as important in such proceedings as they are in litigation…. The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation.”

The Singapore Court of Appeal noted Lord Denning’s comments on champerty in Re Trepca Mines Ltd (No 2): “The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.”

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26 [2007] 1 SLR 989.
27 [1963] Ch 199.
In international arbitration, funders who indulged in such practices would be found out by any competent arbitral tribunal and would be unlikely to survive commercially in the long term. These traditional fears of champerty do not tend to be seriously pursued by those who advocate the regulation of TPF. Instead, their focus is on the issues outlined above, currently being studied by the Hong Kong Law Reform Commission and by the ICCA-QMUL Task Force, and which are common to insurance.

The draft legislation which the government of Singapore proposes to adopt would see the abolition of the tort of maintenance and champerty and would provide that in international arbitrations, third party funding agreements would not be contrary to public policy or illegal.

Interestingly, the definition of third-party funder would, in principle, include a BTE insurer: it is somebody who “carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the Third-Party Funder is not a party”. Whilst their underwriting might be carried out in London or Oslo, the principal business which Defence Clubs carry out through local branches or subsidiaries in Singapore is the funding of claims brought by their members in court or in arbitration in that jurisdiction.

Alongside the new legislation, it is proposed that rules governing the legal profession would impose on lawyers a duty to disclose the existence of a third party funding contract and the identity of the third party funder to the arbitral tribunal and to every other party to the proceedings, as soon as practicable. In this regard, the Singapore government has explicitly drawn reference from the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (2014), which provide at General Standard 6(b):

“If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or 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.”

V. Conflicts of interest

Whilst the proposed Singapore definition of TPF may include BTE insurance which, as noted above, can involve high levels of control and influence upon the
insured’s conduct of the proceedings, General Standard 6(b) of the IBA Guidelines, cited above, does not, ironically, cover BTE insurers.

The Explanation to General Standard 6 says:

“Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms ‘third-party funder’ and ‘insurer’ refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.”

A BTE insurer receives a premium but has no direct economic interest in (eg a share of) the award. Its remuneration does not depend on the outcome of the case. Nor does a BTE insurer have a duty to indemnify its insured for the award; this is the role of a liability insurer.

It might be considered that a BTE insurer controls a claim but it could not normally be suggested that it controls the claimant itself. An insurer of this type would not therefore fall within the first limb of General Standard 6(b). As the Explanation makes clear, the TPF providers and insurers which the Standard seeks to bring into the IBA conflicts regime are those which fulfil the criteria in the second limb of the Standard.

General Standard 7(a) requires a party to disclose to the arbitral tribunal, the other parties and the arbitral institution any direct or indirect relationship between the party and the arbitrator or between the arbitrator and any third party as set out in General Standard 6(b) quoted above and which the Explanation confirms will be third party funders and insurers (but not BTE insurers).

The ICC’s Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (22 September 2016) reproduces the wording of General Standards 6(b) and 7(a) in addressing disclosures which arbitrators should make: “Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.”

Insurers standing behind parties far outnumber TPF providers in international commercial arbitrations. They have been (often undisclosed) participants in arbitrations around the world for decades. Indeed, some liability insurers (eg the P&I clubs) have been supporting parties in arbitrations since the nineteenth century. The new IBA and ICC guidelines requiring disclosure of the involvement of insurers represent a major step towards greater transparency in international arbitration.

30 Paragraph 24 of the Note.
However, instead of hailing such a major change to the treatment of insurers after more than a hundred years of their involvement in arbitrations, commentators have tended to focus on, and to welcome, the imposition of new obligations on the far smaller group of TPF providers.\textsuperscript{31} The ICC’s initiative in its Note has been seen as a direct response to “the challenges of transparency associated with TPF in international arbitration.”\textsuperscript{32}

The lack of curiosity about insurers amongst the commentators, the omission of BTE insurance from the IBA Guidelines, the (possibly accidental) presence of BTE insurance and the absence of other types of insurance in the Singapore government’s proposed definition of TPF for the purposes of new regulations there, and the erroneous presumptions made by the ICCA-QMUL Task Force about the involvement of BTE insurers in the specifics of case management, all indicate that those who seek to regulate the activities of the new TPF providers are unfamiliar with claims and defences backed by insurance in commercial arbitrations.

If guidelines are needed in relation to the disclosure of the participation of a third party which funds costs of bringing or defending a claim, including perhaps payment of the arbitrator’s own fees, and whether or not the third party could properly be said to be exercising “control”, then such guidelines should apply, without discrimination, to all such third parties, regardless of the method or amount of their remuneration, and regardless of how long they have been in the business of funding costs in arbitrations.

The potential for conflicts in such a situation, and from repeat appointments involving the same funder, is a real concern. It makes no sense, and does the international arbitration community no credit, to single out only the new TPF providers for regulation in addressing this issue. Nor is it constructive to include insurers of one kind or another within the scope of such regulations without first enquiring how such issues are handled in arbitrations in which insurers participate as funders.

Before they rush to regulate, practitioners who have encountered TPF in investment and project disputes should enter into dialogue with practitioners who work with insurers in arbitrations arising from international commerce. It is in this way that concerns and misapprehensions could most usefully be addressed and guidelines appropriate to all arbitration users could best be formulated.

\textsuperscript{31} For example, Nadia Darwazeh and Adrien Leleu, Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding, 33 Journal of International Arbitration, 2, 2016, 125 – 149 at p136; and Valentina Frignati, Ethical implications of third-party funding in international arbitration, Arbitration International, 2016, 32, 505 – 522, at p. 515.

VI. Other issues: security for costs and confidentiality

The ICCA – QMUL Task Force has published a draft report from its subcommittee on security for costs and costs. The report does not contain a definition of TPF but it is clear from the cases cited in it, and from the focus on investor-state arbitrations, that it was the new TPF providers, and not long established insurers, that the subcommittee was seeking to study. The report makes a number of carefully considered recommendations. For example, it considers that mere recourse to TPF cannot of itself be taken as a reason to award security for costs. However, the report does not refer to the ways in which the various issues are treated in arbitrations in which insurers stand behind one or more parties.

For example, as noted above, P&I and Defence Clubs are regularly called upon to provide guarantees as security for costs. This is a service which they are happy to advertise but will only provide if a case warrants it. There is a considerable body of case law, practice and experience in relation to security for costs in maritime arbitrations.

In a blog post about the less often discussed issue of TPF and confidentiality in arbitration, Jonas von Goeler acknowledges that P&I Clubs are amongst a wide range of third parties who may benefit from exceptions from confidentiality obligations. He submits that as a general rule, disclosures to TPF providers should be possible. However, he goes on to make proposals for the way in which such disclosures should be carried out without comparing those proposals to the ways in which such matters are already handled in the insurance context and without explaining why any different approach should be adopted in relation to TPF.

Again, the arbitration community as a whole would benefit from dialogue between the users of insurance in international commercial disputes and the users of the new forms of TPF, particularly in investment and project disputes. It is in this way that best practice could be shared and the reputation of international arbitration could thereby be enhanced.

VII. Conclusion

Returning to the English judgment endorsing an ICC arbitration award mentioned at the beginning of this article, both the sole arbitrator and the Commercial Court judge in that case had no hesitation in finding that the respondent in the arbitration had deliberately behaved in an exploitative manner towards the claimant, setting out to cripple it financially and to force it to abandon its claims. The arbitrator concluded that the claimant had no alternative but to enter into a funding agreement in order to have the resources necessary to pursue its claims. In other words, and in the result, the TPF provider gave the claimant access to justice.

However, TPF has not been universally welcomed and it is currently under scrutiny by the ICCA-QMUL Task Force, as well as by the Hong Kong Law Reform Commission and elsewhere. Those studies ought to take account of the long history of the participation of insurers in funding the costs of bringing and defending claims in arbitration and of the ways in which various issues have been handled in such cases. Misapprehensions and concerns should be capable of resolution through dialogue in the international commercial arbitration community, particularly between the users of insurance and the users of the new forms of TPF.

Meanwhile the new funders do assist parties to have access to arbitral justice, just as insurers have done for a hundred years and more.