26

THIRD-PARTY FUNDING IN INVESTMENT TREATY ARBITRATION

*Nigel Blackaby and Alex Wilbraham**

I. Introduction

26.01 There has been much debate about the use of third-party funding in international investment arbitration. Before we enter that debate, we need to be clear about the object of our study. What is third-party funding?

26.02 The Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) provides a useful definition:

> [T]hird party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.[1]

In truth, the scope of what may be called third-party funding is so broad it can defy any attempt to define it in one paragraph. As Professors Park and Rogers have explained: 'One reason why third-party funding is difficult to define is that economic interests in a party or a dispute can come in many shapes and sizes'.

26.03 We will address the 'many shapes and sizes' below. However, whatever shape or size it may come in, the third-party funding of a litigant's claims has raised challenging questions since antiquity. In ancient times, litigation was personal and a well-aimed lawsuit could destroy a political enemy. Paying others to bring claims was therefore frowned upon by the ancient

[1] Economic and Trade Agreement between Canada and the EU—CETA ch. 8, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (last visited Nov. 15, 2017).

Greeks as *sycophancy* and by the Romans as *calumnia*.[2] In the Middle Ages, the English courts developed the doctrines of maintenance, champerty, and barratry[3] to protect the justice system from abuse[4] by feudal barons who would undermine competitors by paying their tenants to sue them.[5] With third-party funding of litigation outlawed, access to justice was mostly restricted to those who could afford it. As the common law spread with the British Empire, the seeds of champerty and maintenance were sown in legal systems on every continent. By contrast, civil law countries never developed analogous doctrines. *Pactum de quota litis* contracts allowing a third party to share in the proceeds of a lawsuit were, in principle, recognized, although lawyers were supposed to abstain from such arrangements.[6]

26.04 It was the English philosopher and jurist, Jeremy Bentham, who began the attack on champerty and maintenance in the mid-nineteenth century. For him, these doctrines were 'barbarous precautions' restricting access to justice:

> My notion is, that there never was a time, that there never could have been, or can be a time, when the pushing of suitors away from court with one hand, while they are beckoned into it with another, would not be a policy equally faithless, inconsistent, and absurd. But, what everybody must acknowledge, is, that, to the times which called forth these laws, and in which alone they could have started up, the present are as opposite as light to darkness.[7]

26.05 The English courts began to limit the scope of application of maintenance and champerty in the early 1900s.[8] By the end of the twentieth century, the doctrines were only being applied to cases that would 'undermine the ends of justice'.[9] Then, in 2005, the English Court of Appeal declared its support for commercial funding that 'facilitated access to justice', provided that the claimant remains the 'party primarily interested in the result of the litigation and the party in control of the conduct of the litigation'.[10] This opened the door for the development of modern commercial funding in the UK. Lord Justice Jackson, in his review of civil litigation costs completed in 2009 (Jackson Report), concluded that: 'Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third party funding promotes access to justice'.[11]

---

[2] M. Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48, 49 ff. (1935).

[3] Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000) (*quoting* In re Primus, 436 U.S. 412, 424 n.15 (1978)) ('[P]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty'), *cited* by the American Bar Association, *Commission on Ethics 20/20 Information Report to the House of Delegates*, White Paper (2011) 9.

[4] Radin, *Maintenance by Champerty*, *supra* note 2, 48, 65,

[5] Damian Reichel, *The Law of Maintenance and Champerty and the Assignment of Choses in Action*, 10 Sydney L. Rev. 166 (1983).

[6] Black's Law Dictionary (9th ed. B. Garner ed., 2014).

[7] J. Bentham, The Works of Jeremy Bentham (Bowring ed., 1843) III(1) William Tait , A Defence of Usury, Letter XII.7, Maintenance and Champerty.

[8] Lord Neuberger, *From Barratry, Maintenance and Champerty to Litigation Funding*, Speech at Gray's Inn (May 8, 2013) 6 [hereinafter Neuberger], https://www.harbourlitigationfunding.com/first-annual-lecture-2/ (last visited Nov. 15, 2017).

[9] R (Factortame) v. Secretary of State for Transport (No. 8) [2003] QB 381 at 400, *cited in* Neuberger at 18.

[10] Arkin v. Borchard Lines Ltd. [2005] EWCA (Civ) 655 ('Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation') (Lord Phillips MR) *v.* at [40].

[11] Rupert Jackson, Review of Civil Litigation Costs ch. 11 (2009) [hereinafter Jackson].

26.06 By 2013, Lord Neuberger, President of the English Supreme Court, was able to declare that:

> The public policy rationale regarding maintenance and champerty has turned full circle. Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule of law. Now ... the exact reverse of the prohibition is justified for the same reason. The argument ... appears positively to support the development of litigation funding.[12]

26.07 A similar evolution can be traced in the US. Some states have abandoned champerty laws[13] and, in those states that still have such laws, they are rarely applied.[14] In a 2012 white paper, the American Bar Association Committee on Ethics concluded that: 'Given that existing ethical and legal obligations of lawyers and their clients are already supposed to ensure that litigation be conducted in good faith and non-frivolously, it is unclear why the historical concerns of the common law would justify today placing special burdens on litigation funded by third parties'.[15]

26.08 Most other common law jurisdictions, with the notable exception of Ireland,[16] have moved in the same direction. Champerty and maintenance have been limited in their scope of application or abolished altogether.[17] Even Hong Kong[18] and Singapore, which, until recently, had been among the most reticent jurisdictions when it came to third-party funding, have moved to liberalize their laws to ensure they remain competitive as jurisdictions of choice for international arbitration. In a consultation paper issued in June 2016, Singapore's Ministry of Law stated that:

> As a leading centre for international commercial arbitration, Singapore is cognisant of the practices and business requirements of commercial parties, many of whom choose to arbitrate in Singapore despite their dispute having no connection to the jurisdiction. Introducing third party funding in Singapore for international arbitration will allow international businesses to use the funding tools available to them in other centres, and promote Singapore's growth as a leading venue for international arbitration.[19]

---

[12] *See* Neuberger, *supra* note 8, at 21.

[13] For example, in 1997, the Massachusetts Supreme Judicial Court struck down the state's champerty laws, stating that: 'the decline of champerty, maintenance, and barratry as offenses is symptomatic of a fundamental change in society's view of litigation—from "a social ill, which, like other disputes and quarrels, should be minimized," to "a socially useful way to resolve disputes" ': *see* Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997). *See also* Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000) (abolishing champerty under South Carolina law).

[14] Del Webb Communities, Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011), 1156–57 ('The consistent trend across the country is toward limiting, not expanding, champerty's reach').

[15] American Bar Association, *Commission on Ethics 20/20 Information Report to the House of Delegates*, White Paper (Feb. 2012) 9.

[16] In a 2016 case, the Irish High Court made clear that it would continue to enforce a strict interpretation of champerty and maintenance. *See* Persona Digital Telephony Ltd. & Anor v. Minister for Public Enterprise & Ors [2016] IEHC 187, Judgment of Ms Justice Donnelly (Apr. 20, 2016).

[17] For an overview of key third-party funding markets, see L. Bench Nieuwveld & V. Shannon Sahani, Third Party Funding in International Arbitration (2d ed. 2017) [hereinafter Nieuwveld & Sahani].

[18] The Law Reform Commission of Hong Kong Report on Third-Party Funding for Arbitration issued in October 2016 recommended, inter alia, that: 'The Arbitration Ordinance should be amended to provide that Third Party Funding for arbitration taking place in Hong Kong is permitted under Hong Kong law': *see* Law Reform Commission of Hong Kong Third Party Funding for Arbitration Report (October 2016), Preliminary Recommendation 1.11, http://www.hkreform.gov.hk (last visited Apr. 7, 2017)). On December 30, 2016 the Hong Kong government gazetted the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 through which this recommendation would be implemented. *See* http://www.legco.gov.hk/general/english/bills/bill1617.htm (last visited Apr. 7, 2017). Copy of the draft bill, http://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf (last visited Apr. 7, 2017). The draft bill was passed by Hong Kong's Legislative Council on June 14, 2017. *See* D. Thomson, *Third-Party Funding Gets All Clear in Hong Kong*, Global Arbitration Review (June 14, 2017).

[19] Singapore Government, Ministry of Law, Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016, ¶ 4.

Singapore's Civil Law Amendment Bill 38/2016 permitting access to third party funding was passed on 10 January 2017.[20]

26.09 In civil law jurisdictions, the absence of any doctrine of champerty and maintenance has produced differing reactions to the emergence of modern third-party funding. In Germany, the first modern commercial third-party funding enterprise was able to emerge in the late 1980s without impediment from the local courts.[21] In Switzerland, a law prohibiting third-party funding was passed but then declared unconstitutional by the country's Supreme Court on the basis that it restricted economic freedom.[22] The French courts have taken the view that commercial third-party funding contracts are enforceable, even if they are conceptually alien to French law.[23] In May 2017, the council of the Paris Bar issued a resolution declaring that:

> The practice of third-party funding is favorable to the interests of those seeking justice and to the lawyers registered with the Paris Bar, particularly in international arbitration. No provision of French law prevents a party from resorting to the services of a third party to fund an international arbitral proceeding.[24]

26.10 Ultimately, the underlying reason for the sea-change in the approach to funding is quite simple—it promotes access to justice. As the ICCA Queen Mary University London Task Force on Third-Party Funding in International Arbitration (ICCA Queen Mary University Task Force) observed in 2015, facilitating access to justice is of particular importance in the field of investment treaty arbitration because: '[t]he respondent is often alleged of having unlawfully expropriated the claimant, thereby causing claimant's impecuniosity. For this reason, access to justice for claimants can be an even more delicate issue in investment arbitration disputes'.[25] In this sense, funding helps to level the playing field for investors who have been powerless against adverse state action which has wiped out their revenue generating business. Through funding, they can ensure that the state is held to account pursuant to the international standards it has subscribed in the relevant treaty. This situation is reflected in the increasing number of investment arbitration cases in which funding has been used.[26]

---

[20] Singapore's Civil Law Amendment Bill abolishes the common law tort of champerty and maintenance; permits third-party funding in categories of dispute resolution that will be listed in the Civil Law (Third Party Funding) Regulations; permits the imposition of conditions on third-party funders policed by the threat of inability to enforce rights under funding contracts; and permits the recommendation of third-party funders by lawyers to their clients provided lawyers derive no financial benefit from doing so. *See* Civil Law Amendment Bill 38/2016, https://www.parliament.gov.sg/sites/default/files/Civil%20Law%20%28Amendment%29%20Bill%2038-2016.pdf (last visited Apr. 7, 2017).

[21] P. Pinsolle, *Le financement de l'arbitrage par les tiers*, 2 Revue de l'arbitrage, 385, 389 (2011) [hereinafter Pinsolle] ('On évoque en général la société Foris AG, société cotée en Allemagne, comme l'un des précurseurs de ce système de financement par les tiers').

[22] Bundesgerichtsentscheide 131 I 223, 2P.4/2004 (Dec. 10, 2004).

[23] *See* Pinsolle, *supra* note 21, at 390.

[24] *Rapport sur le financement de l'arbitrage par les tiers* (Ordre des Avocats de Paris, 2 May 2017), *citing Résolution adoptée à la séance du Conseil de l'Ordre du 21 février 2017*, http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-le-financement-de-larbitrage-par-les-tiers (last visited May 11, 2017).

[25] ICCA-QMUL Task Force on TPF in International Arbitration, *Draft Report on Security for Costs and Costs* (Nov. 1, 2015) 14–15. *See also* G. Born, International Commercial Arbitration 2496 (2014) ('Tribunals may conclude, where the facts justify it, that the party seeking security is, at least in part, responsible for its counter-party's financial condition and is therefore not entitled to protection against that condition').

[26] There are at least 18 publicly known examples of investment treaty cases where claimants have received third-party funding. These include S&T Oil v. Romania; Teinver v. Argentina, Fuchs & Kardassopoulos v. Georgia, Oxus Gold v. Uzbekistan, S&T Oil v. Romania, Guaracachi America and Rurelec v. Bolivia, Giovanni Alemanni & Others v. Argentina, Crystallex v. Venezuela; Rusoro v. Venezuela; RSM Production Corp. v. Saint Lucia; Adem Dogan v. Turkmenistan; Alapli Elektrik v. Turkey; EuroGas Inc & Belmont Resources v. Slovak Republic; Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan;

26.11 The growth in commercial third-party funding has nonetheless provoked criticism. The Institute for Legal Reform,[27] set up by the US Chamber of Commerce, has campaigned vociferously against third-party funding. A strong motive for this opposition seems to be a fear among businesses that third-party funding will promote more class action litigation.[28] Perhaps not surprisingly, sovereign states facing claims under investment treaties are reported to perceive such funding as an 'irritant'.[29] Nevertheless, tribunals in investment treaty cases have generally been accepting of third-party funding in cases before them. There have, however, been rare dissenting voices. The words of one arbitrator in a minority opinion describing third-party funding as a 'new industry of mercantile adventurers'[30] are often cited by those critical of commercial funding. The overarching objection most commonly given by those who are opposed in principle to third-party funding is that it can encourage frivolous or meritless claims,[31]or provoke inflated claims.[32] In the following sections of this chapter, we turn first to examine this question of principle before examining the types of third-party funding, regulation of third-party funding, and the positions taken by international investment treaty tribunals on certain key questions relating to third-party funding.

II. Does Third-party Funding Provoke Frivolous Claims?

26.12 When a third-party funder analyses a claim, it necessarily undertakes a thorough due diligence process because its investment is only as good as the litigant's chance of winning. The UK Jackson Report took this view in 2009: 'Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties'.[33] Third-party funders have concurred with this view, explaining that the financing of claims that are frivolous or manifestly without merit would be economically irrational.[34] Others have suggested, however, that an excess of capital supply in the funding market could lead to a funding 'bubble'[35] that would incite funders to chase weak claims. This view holds that any claim, no matter how risky, will find a funder at the right price. Funders suggest, however, that the process of assessing risk is more complex. Mick Smith, founder of funder Calunius Capital, has explained that: '[d]ue diligence is not an exercise

---

Corona Materials LLC v. Dominican Republic; South American Silver Ltd. v. Bolivia; Stans Energy v. Kyrgyzstan; Infinito Gold v. Costa Rica; Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. & Stirling Capital Ltd. v. Kenya; Gabriel Resources Ltd. & Gabriel Resources v. Romania. Full citations are given for these cases where they are referred to below.

[27] *See* J. Beisner, J. Miller & G. Rubin, Selling Lawsuits, Buying Trouble—Third-Party Litigation Funding in the Unites States (2009) [hereinafter Beisner et al.]. *See also* Before the Flood, An Outline of Oversight Options for Third Party Funding in England & Wales (2016).

[28] *See, e.g.*, Beisner et al., *supra* note 27.

[29] G. Kahale, III, *Is Investor-State Arbitration Broken?*, 9(7) Transn'l Disp. Mgmt' 33 (2012) [hereinafter Kahale] ('The fact is that the relatively new phenomenon of third party funding is another unanticipated development and an irritant that is making investor-state arbitration more unpopular than it already has been with states').

[30] *See* RSM Production Corporation v. St Lucia, ICSIDE Case No. ARB/12/10, Decision on Security for Costs (Aug. 14, 2014), assenting reasons of Gavan Griffith, ¶ 14.

[31] *See* Beisner et al., *supra* note 27.

[32] Kahale, *supra* note 29, at 33.

[33] Jackson, *supra* note 11, ch. 11, ¶ 1.2(v).

[34] C. Bogart, *RSM v. St Lucia: Why Griffith Was Wrong on Security for Costs*, Global Arb. Rev. (Sept. 11, 2014).

[35] *See* Corporate Europe Observatory, *Speculating on Injustice: Third-Party Funding of Investment Disputes* (Nov. 27, 2012), https://corporateeurope.org/trade/2012/11/chapter-5-speculating-injustice-third-party-funding-investment-disputes (last visited Nov. 15, 2017).

in identifying only cases without risk; rather a third-party funder in due diligence seeks to confirm that the case carries the right balance of expected return versus expected risk . . .'.[36] Establishing the right balance of risk and reward therefore requires funders to engage in a 'multi-disciplinary and rigorous'[37] due diligence exercise.[38] To date, there is no evidence that this process has led to an increase in meritless claims backed by third-party funders. Indeed, studies suggest that third-party funders ultimately finance only a small proportion of the claims presented to them.[39] Professor Shannon points out that claimants with weak claims often benefit from the advice they receive from funders who explain their reasons for rejecting a claim.[40] If this is the case, third-party funders may sometimes *prevent* weak or frivolous claims from being brought.

26.13 When it comes to investment treaty arbitrations, there are other incentives *not* to fund weak or meritless claims. Article 36(3) of the ICSID Convention allows the ICSID Secretary General to refuse to register claims that are manifestly outside the jurisdiction of the ICSID. Rule 41(5) of the ICSID Rules allows a respondent to seek the early dismissal of claims that are 'manifestly without merit'.[41] Claims that are founded on weak jurisdictional premises can often be weeded out by bifurcating proceedings.

26.14 As for the question of whether third-party funding encourages the inflation of claims, it is important to remember that an arbitration claim is an asset, a *chose in action* in the common law conception. The value of such an asset will ultimately depend on the amount an arbitral tribunal decides the claim is worth—if successful. Clearly, a third-party funder interested in the outcome of the dispute will encourage a claimant to seek the full value of the asset claimed but the same claimant will be just as motivated to seek the same full value if it is self-funding. A decision to claim an *inflated* value for an asset is more likely to be the result of poor expert or legal advice. Third-party funders of international investment treaty claims are usually sophisticated actors whose in-house teams include experts in both the law and financial matters. They are well placed to provide a claimant with a second opinion as to the probable value of a claim. They understand that the credibility of a claim in the eyes of a tribunal can suffer if the value of the claim is inflated.

---

[36] *See* Mick Smith, *Mechanics of Third-Party Funding Agreements: A Funder's Perspective, in* Nieuwveld & Sahani, *supra* note 17, Chapter 2, 33 [hereinafter Mick Smith].

[37] *See* J. von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, 35 International Arbitration Law Library 13 (2016). For a detailed description of a typical due diligence exercise, *see* Mick Smith, *supra* note 36.

[38] C. Bowman, K. Hurford & S. Khouri, *Third Party Funding in International Commercial and Treaty Arbitration—A Panacea or a Plague? A Discussion of the Risks and Benefits of Third Party Funding*, 8(4) TDM 1, 5 (2011). Some funders state that they would only consider cases with a 70% chance or greater success rate. C. Veljanovski, *Third Party Litigation Funding in Europe*, 8 J. Law, Econ. & Pol'y 405, 425 (2011).

[39] V. Shannon Sahani, *The Impact of Third-Party Funders on the Parties They Decline to Finance*, at 1, http://arbitrationblog.kluwerarbitration.com/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/ (last visited Nov. 15, 2017). *See also* C. Veljanovski, *Third-Party Litigation Funding in Europe*, Paper presented to Third Party Financing of Litigation: Civil Justice Friend or Foe? Conference, Searle Civil Justice Institute, Law and Economics Center, George Mason University (Nov. 9, 2011) 31, http://www.masonlec.org/site/files/2011/07/Veljanovski-Third-Party-Funding-of-Litigation-in-Europe-Draft-2-30-October-2011.pdf (last visited May 11, 2017).

[40] *See* Shannon Sahani, *supra* note 39.

[41] Examples of cases in which art. 41(5) of the ICSID Rules has successfully been invoked to strike out a claim are: Global Trading Resource Corp. and Globex International, Inc v. Ukraine (ICSID Case No. ARB/09/11) and RSM Production Corporation and Others v. Grenada (ICSID Case No. ARB/10/6); *see also* K. Yannaca-Small & D. Earnest, *The Fate of Frivolous and Unmeritorious Claims, in* Arbitration under International Investment Agreements: A Guide to the Key Issues ch. 7 (K. Yannaca-Small ed., 2018).

III. The Different Forms of Funding

26.15 Having addressed the criticisms of the basic concept of funding, it is important to analyse the 'many shapes and sizes' of third-party funding, to use the phrase of Professors Park and Rogers. In essence, it can take the form of: (a) non-recourse financing with repayment contingent on success; (b) financing by lawyers; (c) insurance; (d) equity financing; (e) debtor in possession financing; (f) *pro bono* or charitable funding; and (g) common interest funding.[42]

A. Non-recourse Financing

26.16 Non-recourse financing with repayment being contingent on success is probably the most common form of commercial third-party funding. The funding arrangement usually begins with the funder conducting due diligence on the underlying claim. If the third-party funder decides to proceed, a funding agreement is concluded with the claimant, through which the funder agrees to pay legal and other fees connected with an arbitration in return for a proportion of any sums successfully recovered. Usually, the third-party funder will be kept informed of the progress of the arbitration but control of the arbitration and any decision to settle will remain with the funded claimant. Depending on the jurisdiction in which a funder operates, such a 'hands off' approach on the part of funders may also be mandated by local ethical rules. Non-recourse financing can be provided for single claims, but commercial funders can also provide portfolio financing for multiple claims. Such portfolio financing can be used as a risk management tool by companies with exposure to frequent claims or by law firms who wish to offer their clients alternative financing arrangements.

B. Financing by Lawyers

26.17 Lawyers can finance cases through *pro bono* arrangements or by using contingency fees or conditional fees. Contingency fees ('no-win-no-fee') are contingent on the lawyer achieving a successful outcome in the case. Traditionally, such fees are valued as a percentage of the sums awarded. In such an arrangement, the lawyer assumes the risk of not being paid in the event of an unsuccessful outcome. Conditional fee arrangements commonly involve lawyers offering a discount and then obtaining a refund of the discount and an uplift on their fees in the event of a successful outcome. How these arrangements work or how they are constructed varies from jurisdiction to jurisdiction, depending on the rules of local bar associations. Lawyers in some countries such as the United States have been able to use contingent or conditional fees for a long time. Other jurisdictions, such as the UK, have more recently begun to permit conditional and, more recently, contingency fee arrangements. By contrast, some jurisdictions, such as Hong Kong, prohibit lawyers from working under contingency or conditional fee arrangements.[43] Lawyers can turn to third-party funders to pass on some or all of the risk they incur when they finance a case through a contingency or conditional fee arrangement. Some third-party funders offer law firms portfolio funding, through which a number of cases taken on by the law firm are funded by the third-party funder *en bloc*. This allows law firms to reduce the risk to themselves involved in financing, allowing more cases to be taken on.[44]

---

[42] For more detailed analysis of the different types of third-party funding, *see* Nieuwveld & Sahani, *supra* note 17, at 5–9.

[43] The Law Reform Commission of Hong Kong, Third-Party Funding For Arbitration, Sub-committee Consultation Paper, at 13, http://www.hkreform.gov.hk (last visited Apr. 7, 2017).

[44] *See, e.g.*, 'Portfolio & complex financing', http://www.burfordcapital.com/customers/portfolio-financing/ (last visited May 11, 2017).

C. Insurance

26.18 Under a traditional insurance policy, an insured will be covered for a particular risk—for example the political risk that an asset may be expropriated. If the risk materializes, then the insurer will pay the insured. At this point, the insurer will then assume subrogated rights to control the insured's claim from that time on—although the insured continues to be the claimant in the arbitration. Insurers also provide 'before-the-event' (BTE) and 'after-the-event' (ATE) insurance to cover legal fees and expenses. BTE and ATE insurance does not usually cover an insured for the risk of having to pay a judgment or award. For this reason, BTE and ATE policies do not usually allow insurers to exercise control over a claim. BTE insurance covers the risk that legal fees may have to be incurred in the future if a claim is brought. ATE insurance covers the risk of costs in an already existing dispute. Premiums are usually paid in tranches as fees in an arbitration are incurred. ATE insurance is expensive because the risk insured against (paying the claimant's own legal fees and, potentially, an order to pay the opposing party's fees) is a high probability when the insurance is purchased. As a result, if a claimant is required not only to pay a third-party funder to cover its own fees but also to take out ATE insurance to cover the risk of an adverse costs order, the cost of funding an arbitration can increase considerably.

D. Equity Financing

26.19 A company faced with government measures affecting its key income generating asset may need cash to fund both an arbitration and the day-to-day running of the company until the asset or its value can be recovered through the arbitration. Capital to achieve both of these goals can be obtained by selling shares in the company to an equity investor. To fund a company involved in an arbitration in this way differs significantly from the non-recourse model of third-party funding. The conditions under which such an equity investment is made may or may not include provisions that are dependent on the outcome of the dispute. For this reason, some equity investments made to support a company whose key asset may be the subject of an arbitration might not satisfy the definition of third-party funding cited at the beginning of this section. An equity investor becomes more directly involved with all of the affairs of a company by being exposed to broader risks than simply the outcome of an arbitration. The investor may remain involved in the company after the arbitration is concluded. Depending on the amount of stock purchased and the terms on which it is purchased, the equity investor can receive some representation on a company's board, allowing it to receive information about the conduct of the arbitration and to make contributions to strategy. This differs significantly from the non-recourse financing model where funders prefer, or are obliged, to take a hands-off approach to the conduct of the dispute. The actions of an equity investor's representative on the board of a company will be governed by the complex ethical rules relating to the duties of directors towards the company in question.

E. Debtor in Possession Financing

26.20 Debtor in Possession (DIP) financing is designed for companies under the Chapter 11 bankruptcy process.[45] Such funding can allow a technically insolvent company to continue to function under the supervision of a bankruptcy court, while the company seeks to recover a lost asset or the value of that asset through arbitration. DIP financing usually has priority over existing debt, equity, and other claims.

[45] Debtor-In-Possession Financing: DIP Financing Definition | Investopedia, http://www.investopedia.com/terms/d/debtorinpossessionfinancing.asp#ixzz4LzenUfHs.

F. *Pro Bono* or Charitable Funding

26.21 As the CETA definition of third-party funding suggests, it is possible for a third party to fund a claim through a donation without having a financial interest in the outcome of the dispute. Sometimes, such funding takes place for moral or political reasons—for example, where the Campaign for Tobacco-Free Kids (a body financed by the Bloomberg Foundation) funded the defence of Uruguay against the claim brought by the Philip Morris tobacco company.[46]

G. Common Interest Funding

26.22 In certain cases, claimants in investor-state arbitrations have been funded by third parties who have an interest in the issue underlying the dispute.[47] Such funders may fund 'through a donation or grant' but they do not necessarily benefit from the financial result of the arbitration. Instead, they may be seeking to establish points of principle that could be applicable in other similar cases. Some arbitral rules[48] permit the filing of *amicus curiae* briefs by third parties. It is possible that those filing such briefs may be funded by third parties.

IV. Regulation of Litigation Funding

26.23 The wide variety of funding arrangements identified makes it very difficult to satisfy calls for mandatory regulation of all third-party funding. In fact, each separate approach to funding implies different regulatory requirements. Lawyers financing cases are subject to the ethical rules of the bar where they practise. Insurers must follow rules established by national insurance regulators. Funders buying equity stakes in companies are subject to rules imposed by the securities authorities in the country where a claimant company is incorporated. DIP financers must work under the supervision of the court administering the bankruptcy protection regime. By contrast, commercial funders working under the non-recourse finance model have only recently become subject to voluntary self-regulation or compulsory regulation by national authorities. The Jackson Report recommended, in 2009, that:

> [a] satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.[49]

26.24 In 2012, the Association of Litigation Funders of England and Wales (ALF) issued a Code of Conduct for Litigation Funders. Voluntary compliance with this ALF code is a condition for third-party funders to join.[50] The ALF describes the key aspects of its code of conduct as follows:

---

[46] L.E. Peterson, 'Uruguay hires law firm and secures outside funding to defend against Philip Morris claim; not the first time an NGO offers financial support for arbitration', (2012) IAReporter, *cited in* Pinsolle, *supra* note 21, at 394–95.

[47] *See, e.g.*, two cases in which bondholders were suing Argentina: Giovanni Alemanni and Others v. Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov. 17, 2014); Abaclat and Others v. Argentine Republic, ICISD Case No. ARB 07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011). *See also* Quasar de Valors and Others v. Russian Federation, SCC Case No. 24/2007, Award (July 20, 2012).

[48] *See, e.g.*, the ICSID Arbitration Rules, ICSID Additional Facility Arbitration Rules & the UNCITRAL Rules on Transparency.

[49] Jackson, *supra* note 11, ch.11 ¶ 6.1(i).

[50] L. Bench Nieuwveld & V. Shannon, Third Party Funding in International Arbitration 101 & Appendix I (2017).

> Capital adequacy of funders
>
> The code requires funders to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months.
>
> Termination and approval of settlements
>
> The code provides that funders must behave reasonably and may only withdraw from funding in specific circumstances. Where there is a dispute about termination or settlement, a binding opinion must be obtained from an independent QC, who has been either instructed jointly or appointed by the Bar Council.
>
> Control
>
> Under the code, funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. This is in line with the practice, in England & Wales, of keeping the roles of funders, litigants and their lawyers separate. Because of their interest in the litigation, funders may ask to be kept informed of the progress of the case.[51]

26.25 Hong Kong's new legislation permitting third-party funding for arbitration[52] provides for the Ministry of Justice to appoint an authorized body to issue a code of practice for third-party funders. Singapore's Civil Law Amendment bill passed in 2017 also allows for third-party funding to be regulated.[53]

26.26 National governments and bar associations will continue to debate what kind of ethics should be applied to third-party funding and how the industry should be regulated. However, many of the ethical and procedural issues that arise in the context of the relationship between a funder and the party it funds are not relevant from the perspective of a tribunal in an investment treaty arbitration. It is only in more limited circumstances that the existence of a third-party funder, or the terms on which such a funder has been engaged, may become issues of relevance to an arbitral tribunal. Such issues include: (i) jurisdiction and admissibility; (ii) the allocation of costs and security for costs; and (iii) disclosure of third-party funding agreements. These issues are examined below.

V. Jurisdiction and Admissibility

26.27 Over the last two decades, tribunals in investment treaty cases have been asked to consider whether receipt of third-party funding affects the jurisdiction of the tribunal or the admissibility of claims. In *CSOB v Slovakia*,[54] the respondent argued that assignments of the benefit of the claim by the claimant (to the Czech Republic) had:

> [t]ransformed the Czech Republic into the real party in interest because it became, for all practical purposes, the beneficial owner of the disputed claims and because Claimant, as a result, no longer has a real economic interest in the outcome of these proceedings.

---

[51] ALF Code of Conduct, key aspects, http://associationoflitigationfunders.com/code-of-conduct/ (last visited May 11, 2017).

[52] Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 arts. 98O and 98W, http://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf (last visited Apr. 7, 2017).

[53] Article 5(B)(8) permits Singapore's Minister of Justice to make regulations necessary for the implementation of the new rules. *See* Civil Law Amendment Bill 38/2016, https://www.parliament.gov.sg/sites/default/files/Civil%20Law%20%28Amendment%29%20Bill%2038-2016.pdf (last visited Apr. 7, 2017).

[54] Československá Obchondni Banka, A.S. (CSOB) v. Slovak Republic ARB/97/4, ¶ 30, Decision on Jurisdiction (May 24, 1999) [hereinafter CSOB v. Slovakia].

The tribunal rejected the respondent's arguments for timing reasons[55] but observed, *obiter dictum*, that:

> Absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State party or a private party.[56]

Applying this principle, if a claimant decides to assign some or all of the eventual proceeds of an arbitration to a third-party funder, this would not affect that claimant's standing. The claimant would still be the true party at interest.

26.28 More recently, the potential effects of third-party funding on jurisdiction have been examined in a series of cases[57] involving collective claims financed by common interest funders who were supporting the claims of numerous bondholders against Argentina.

26.29 In *Ambiente v Argentina*,[58] the claimants were funded by NASAM, a Luxembourg entity that did not stand to gain financially from its funding arrangement. Argentina argued that this distinguished NASAM from a *genuine* third-party funder (to which Argentina expressed no objection in principle). NASAM was therefore the real party at interest and not the claimants.[59] The tribunal rejected this argument. In *Abaclat v Argentina*, the claimants were funded through a mandate package that required them to cede much of the control of their claims. The respondent argued that this deprivation of the claimants' procedural rights made their claims inadmissible. The tribunal disagreed, holding that:

> It is undeniable that the TFA Mandate Package has the effect to depriving Claimants of a substantial part of their procedural rights, such as the decision on how to conduct the proceedings, the right to instruct the lawyers, etc. However, as mentioned above (see §§ 457-465), the setting of strict boundaries in relation to Claimants' procedural rights has been consciously accepted by Claimants in order to benefit from the collective treatment of their claims before an ICSID tribunal. In addition, the Tribunal did not find that such agreement was affected by any vice which would render it invalid. Consequently, the Tribunal sees no reason to disregard—as a matter of principle—Claimants' conscious choice.[60]

26.30 In *Alemanni v Argentina*, multiple claimants were also funded by NASAM. This led Argentina to argue that the claimants had 'no effective voice over who would represent them' and that they had 'renounced any control over the presentation or handling of their case'.[61] The tribunal rejected this argument on the basis that all that the ICSID Convention and Rules require of a party is consent and authorization. Consent to ICSID jurisdiction is usually made on behalf of a party in a notice of dispute or request for arbitration[62] through counsel duly authorized with a power of attorney. As already explained, the same tribunal went on to

---

[55] *Id.* ¶¶ 31–32.

[56] *Id.*

[57] For a review of these cases, *see* J.-C. Honlet, *Recent Decisions on Third-Party Funding in Investment Arbitration*, 30(3) ICSID Rev. 699 (2015).

[58] Ambiente Ufficio S.p.A. and Others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013) [hereinafter Ambiente v. Argentina].

[59] *Id.* ¶ 186.

[60] Abaclat and Others v. Argentine Republic, ICISD Case No. ARB 07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), ¶ 546 [hereinafter Abaclat v. Argentina].

[61] Giovanni Alemanni and Others v. Argentine Republic, ICSID Case No. ARB/07/8, decision on Jurisdiction and Admissibility (Nov. 17, 2014), ¶ 276 [hereinafter Alemanni v. Argentina].

[62] *Id.* ¶ 277.

observe that the existence of third-party funding itself was no reason to object to the admissibility of a request to arbitrate.[63]

26.31 In *Quasar de Valores and others v Russian Federation*, the claimant (a small investor in Yukos) was funded by Menatep, a company that had its own separate arbitration against Russia that might have benefited from the result of Quasar de Valores' claim. The tribunal rejected Russia's assertion that the claimants had no stake in the claim because they were not the *domini litis* when it came to choosing counsel,[64] holding that:

> [t]here is no reason of principle why [Claimants] were not entitled to pursue rights available to them under the BIT, and to accept the assistance of a third party, whose motives are irrelevant as between the disputants in this case. Ultimately, the Respondent's complaint, in the event its liability is established, can hardly be raised against the Good Samaritan, but rather against its own officials who acted in such a way as to give rise to that liability.[65]

26.32 The tribunal in *RosInvestCo v Russia* emphasized the importance of looking at the definition of investor in a given treaty. Russia had argued that a funding arrangement had made the claimant a mere nominal owner but the tribunal rejected this, declaring that it was required by Article 31 of the Vienna Convention on the Law of Treaties to apply the plain meaning of the broadly worded definition of investor in the applicable treaty.[66]

26.33 The respondent state in *Teinver v Argentina*[67] argued that the claimants had transferred their rights to Burford, a third-party funder, after the commencement of the arbitration. The tribunal refused to hold, however, that this could have any impact on jurisdiction, given that jurisdiction is usually to be assessed as at the date an arbitration claim is filed and not afterwards.[68]

VI. Third-party Funding and Liability for Costs

26.34 Third-party funding has most commonly been raised as an issue with investment treaty arbitration tribunals when it comes to costs. In particular, tribunals have been asked to decide whether a successful party who had to engage a third-party funder to pursue its claim can (i) recover its ordinary arbitration costs; or (ii) recover the additional costs and recovery that it has to hand over to the funder. Where a claimant is funded, tribunals have (iii) also had to wrestle with applications for security for costs from respondent states.

A. The Right to Recover Costs if Successful

26.35 By contrast with the practice of the International Court of Justice,[69] there is no firmly established principle governing responsibility for costs in investment treaty arbitration. Article

[63] *Id.* ¶ 278.

[64] Quasar de Valors and Others v. Russian Federation, SCC Case No. 24/2007, Award (July 20, 2012), ¶ 31.

[65] *Id.* ¶ 33.

[66] RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005, Final Award (Sept. 12, 2010), ¶¶ 322–23 [hereinafter RosInvestCo v. Russia].

[67] Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction (Dec. 21, 2012) [hereinafter Teinver v. Argentina].

[68] *Id.* ¶¶ 255–56.

[69] Statute of the International Court of Justice (Oct. 24, 1945) art. 64: 'Unless otherwise decided by the Court, each party shall bear its own costs' and Statute of the Permanent Court of International Justice (September 1921). *See also* M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, 11(1) TDM 1 (2014).

42 of the UNCITRAL Rules establishes a default rule that 'costs of the arbitration shall in principle be borne by the unsuccessful party'. The ICSID Convention[70] adopts a more neutral approach on this issue by giving tribunals a broad discretion when it comes to awarding costs.[71] As Professor Schreuer explains: 'Neither the Convention nor the attendant Rules and Regulations offer substantive criteria for the tribunals' decision on which party should bear the costs. Possible principles are the equal sharing of costs, the "loser pays" maxim, or the use of costs as a sanction for procedural misconduct'.[72] As a result, the majority of ICSID tribunals have held that parties should bear their own costs, regardless of whether they win or lose.[73] Some have adopted a 'loser pays' approach,[74] but others have applied a hybrid approach[75] by taking into account factors such as the relative success of claims and defences and amounts claimed, as opposed to amounts awarded.[76] The question then arises—should the existence of third-party funding be a factor that is taken into account in this process? The tribunals that have so far examined this issue have concluded that it should not.

26.36 In *Kardassopoulos and Fuchs v Georgia*, the respondent state argued that the successful claimants should not be entitled to recover their costs because they had received third-party funding. The tribunal rejected this argument, declaring that: 'The Tribunal knows 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'.[77] These words were cited with approval by the annulment committees in *RSM v Grenada*[78] and *ATA v Jordan*.[79] In *Siag v Egypt*,[80] the tribunal allowed a claimant who had been funded by its lawyer to recover the fees payable to that lawyer at normal hourly rates.

---

[70] Article 61(2) of the ICSID Convention states that: 'the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid'. Similarly, art. 58(1) of the ICSID Additional Facility Rules establishes that: 'Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne'.

[71] ICCA-QMUL Task Force on TPF in International Arbitration, *Draft Report on Security for Costs and Costs*, *supra* note 25, at 7.

[72] C. Schreuer, The ICSID Convention: A Commentary 1224 (2001), *cited in* Siag and Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶ 616.

[73] *See* L.E.S.I. S.p.A. & ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award (Nov. 12, 2008), ¶ 186. *See also* Alasdair Ross Anderson and Others v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award (May 19, 2010), ¶¶ 62–64.

[74] *See, e.g.*, ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16 Award (Oct. 2, 2006), ¶¶ 531–33. *See also* Gemplus S.A., SLP S.A., & Gemplus Industrial S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 Award (June 16, 2010), ¶¶ 17–22.

[75] *See* Hodgson, *supra* note 69, at 2–3.

[76] *See, e.g.*, Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award (July 3, 2008), ¶¶ 173–74; Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), ¶¶ 873–74; EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), ¶¶ 327–29.

[77] Kardassopoulos & Fuchs v. Republic of Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶ 691.

[78] RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs (Apr. 28, 2011), ¶ 68.

[79] ATA Construction, Industrial & Trading Company v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2 (Annulment Proceeding), Order Taking Note of the Discontinuance of the Proceeding (July 11, 2011), ¶ 34.

[80] Siag and Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (June 1, 2009) [hereinafter Siag v. Egypt].

The 2015 ICC Commission Report on Decisions on Costs in International Arbitration also concluded that costs of an arbitration paid by a third-party funder should be recoverable: **26.37**

> 86. The rationale behind allocating costs to a successful party is that the party should not be out of pocket as a result of having to seek adjudication to enforce or vindicate its legal rights . . .
>
> 87. Where a successful claimant or counterclaimant has been funded by a third party, the third-party funder is usually repaid (at least) the costs of the arbitration from the sum awarded. Therefore, the successful party will itself ultimately be out of pocket upon reimbursing such costs to the third-party funder and may therefore be entitled to recover its reasonable costs, including what it needs to pay to the third-party funder, from the unsuccessful party. The tribunal will need to determine whether these costs were actually incurred and paid or payable by the party seeking to recover them, and were reasonable. The fact that the successful party must in turn reimburse those costs to a third-party funder is, in itself, largely immaterial.[81]

B. Recovery of Funding Costs

Tribunals in investment treaty arbitrations have arrived at different conclusions when it comes to deciding whether the additional costs payable by a successful claimant to a third-party funder should be recoverable. Some, for example, have allowed recovery of administrative costs[82] and others have not.[83] Should the costs payable to a third-party funder be recoverable—and, if so, should they be viewed as part of a costs award or part of the damages claimed? In 2015, the ICCA Queen Mary University London task force suggested, in its draft report, that funding costs should not be recoverable: **26.38**

> It is not appropriate for tribunals to award funding costs (such as a conditional fee, ATE premium, or litigation funder's return), as they are not procedural costs incurred for the purpose of an arbitration. The success portion payable to a third-party funder results from a trade-off between the funded party and the funder, where the funder assumes the cost and risk of financing the proceedings and receives a reward if the case is won. This agreement is not linked to the arbitration proceedings as such. The reasonable legal fees incurred by a funded party should remain recoverable.[84]

In the same year, however, the ICC Commission Report on Decisions on Costs in International Arbitration reached a different view, suggesting that third-party funding costs may, in certain circumstances, be recoverable: **26.39**

> 92. In reality, funding arrangements are rarely limited solely to the costs of the arbitration. Usually, the third-party funder will require payment of an uplift or success fee in exchange for accepting the risk of funding the claim, which is in effect the cost of capital. As a tribunal only needs to satisfy itself that a cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable, it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of the arbitration or loss of use of the funds, may be recoverable.
>
> 93. The requirement that the cost be reasonable serves as an important check and balance in protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders. Tribunals have from time to time dealt with this when

[81] ICC Commission Report, *Decisions on Costs in International Arbitration*, 2 ICC Dispute Resolution Bulletin 87 (2015).
[82] *Id.* at 314.
[83] *Id.*
[84] ICCA-QMUL Task Force on TPF in International Arbitration, *Draft Report on Security for Costs and Costs*, *supra* note 25, at 10.

> assessing the reasonableness of costs in general, sometimes including the success fee in the allocation of costs and sometimes not, depending on their view of the case as a whole.[85]

26.40 There have been few investment treaty decisions to date on the question of whether third-party funding costs should be recoverable. The tribunal in *Siag v Egypt* allowed a claimant to recover the costs it was required to pay to its lawyers in the event of success. This arrangement, however, only involved fees calculated at normal hourly rates.[86] There was no success uplift designed to reward the lawyer for assuming the risk of funding the claimant. The tribunal in *Khan Resources v Mongolia*,[87] however, concluded that the words 'legal and other costs' in Article 40(e) of the UNCITRAL Rules[88] was broad enough to include the fees and the success fee that the winning claimants had to pay to their lawyers who had funded the case. One could argue that, by analogy, the fees payable to a third-party funder under a litigation funding agreement should be recoverable on the same principle. To date, there has been no investment treaty case decided on this point. The issue has, however, been addressed in the sphere of commercial arbitration under the ICC Rules.

26.41 Article 31(1) of the ICC Rules of 1998 and Article 37(1) of the ICC Rules of 2012 include in the definition of 'Costs of the Arbitration', inter alia, 'reasonable legal and other costs incurred by the parties for the arbitration'. In its 2016 decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited*,[89] the English Court of Appeal, reviewing the decision of an arbitrator sitting under the ICC Rules, confirmed that the term 'other costs' in Article 31(1) of the ICC Rules—and similar words in section 59 of the English Arbitration Act 1996, could include the fee payable to a litigation funder under a litigation funding agreement. The Court of Appeal also cited, with approval, passages from the award in which the tribunal made clear that one of the main factors it had taken into account was the egregious conduct of the respondent in the arbitration. As a result of this, the claimant:

> [h]ad no alternative, but was forced to enter into the litigation funding to the full cost of 300 per cent of the sum advanced by the funder or 35 per cent of the sum recovered, whichever was the higher. The funding costs reflect standard market rates and terms for such facility, as evidenced by the expert statement of Mr. Blick, a broker in litigation funding.[90]

The tribunal went on to state that:

> The conduct of the respondent before and during the dispute was a blatant attempt to drive [the claimant] 'from the judgment seat' … They pursued their claims with courage and determination. They undertook a huge financial burden and gamble in entering into the funding arrangement. The claimant's conduct throughout … cannot be faulted. Justice and the merits point in [the direction of the claimant's].[91]

Although this was a commercial case, the logic applied by the tribunal is not dissimilar to that applied by the tribunal in *ADC v Hungary*, which held that the full reparation principle[92]

---

[85] ICC Commission Report, *supra* note 81, at 87.

[86] Siag v. Egypt, *supra* note 80, ¶¶ 604 and 625.

[87] Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v. Government of Mongolia & MonAtom LLC, PCA Case No. 2011-09, Award (Mar. 2, 2015), ¶¶ 445–48.

[88] UNCITRAL Rules (2010) r. 40(e) states that: 'The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable'.

[89] Essar Oilfields Services Ltd. v. Norscot Rig Management PVT Ltd. [2016] EWHC 2361 (Comm).

[90] *Id.* ¶ 22.

[91] *Id.* ¶ 24.

[92] Factory at Chorzów (Claim for Indemnity), No. 13, 1928, P.C.I.J. Rep., Series A, No. 17, Merits (Sept. 13, 1928), 47 (¶ 125) ('reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed').

could be applied to costs: 'Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole'.[93] As Irmgard Marboe points out:

> It is not possible to achieve full reparation if the injured and eventually prevailing party has to spend a large part of the amount awarded for litigation. Also, general preventive reasons speak against this practice because a host State would not face an additional financial disadvantage for its unlawful behavior. In order to remedy this situation, the expenses and costs—at least those outside the arbitral process itself—could be regarded 'damage caused by the unlawful act', and thus as 'consequential damage'. Similarly, a more coherent application of the principle of 'the costs follow the event' or of 'the loser pays' could also lead to better results.[94]

26.42 A claimant in an investment treaty case, reduced to penury by the measures of a respondent state and thus obliged to seek third-party funding, could credibly argue that its funding costs should be recoverable as damages applying the full reparation principle. The ICCA Queen Mary University London task force concluded that funding costs could be claimed as damages 'where permitted by the applicable substantive law'. [95] However, the task force went on to observe that 'It is unclear whether such funding costs would meet the relevant tests for causation and foreseeability'.[96] Arguably, however, this test *could* be satisfied if a claimant were to announce at the beginning of an arbitration that it was receiving funding and to prove that it was forced to seek such funding as a result of the respondent's measures.

26.43 The picture will become clearer as more investment treaty tribunals address this issue. In the meantime, it is likely that tribunals will continue to approach the issue on a case-by-case basis. It is possible that tribunals will not only be required to consider whether claimants should be entitled to recover litigation funding costs but also the cost of any ATE insurance taken out to cover the risk of an adverse costs order. Sometimes, ATE insurance will be taken out by a claimant as an optional risk management tool. It may also be the case that a claimant is ordered by a tribunal to show that it has taken out ATE insurance—as a substitute for providing security for costs. If this is the case, a claimant that is eventually successful in an arbitration will have a stronger argument in favour of recovering its ATE insurance costs because the cost can legitimately be shown to be an unavoidable cost in the arbitration—imposed at the request of an opposing party. How frequently this question arises in investment treaty cases will depend on whether security for costs is ordered.

C. Security for Costs

26.44 In jurisdictions where the 'loser pays' approach to legal costs applies,[97] it has long been possible for parties to apply to courts for an order for security for costs or, in civil law countries,

This passage from the *Chorzów Factory* case was cited by the tribunal in Gemplus v. Mexico to justify its costs award. Gemplus S.A., SLP S.A., & Gemplus Industrial S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 Award (June 16, 2010), ¶ 27.

[93] ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award (2 Oct. 2006), ¶ 533 [hereinafter ADC v. Hungary].

[94] I. Marboe, Calculation of Compensation and Damages in International Investment Law 312 (2009).

[95] ICCA-QMUL Task Force on TPF in International Arbitration, *Draft Report on Security for Costs and Costs*, *supra* note 25, at 10.

[96] *Id.*

[97] According to a survey carried out by the law firm Lovells (now Hogan Lovells) in 2010, the 'loser pays' approach to costs applied in 49 of the 56 surveyed jurisdictions. *See* Lovells, *At What Cost? A Lovells Multi-Jurisdictional Guide to Litigation Costs* (2010), *cited in* ICC Commission Report, *supra* note 81, at Appendix B.

cautio judicatum solvi. Tribunals in commercial arbitrations under the rules of most major institutions give tribunals the power to order interim measures and those measures have occasionally included orders for security for costs. Similar interim measures powers to issue interim measures are available to tribunals in investment treaty arbitrations under the ICSID Rules,[98] ICSID Additional Facility Rules,[99] or the UNCITRAL Rules.[100] However, tribunals in investment arbitrations have shown themselves to be reluctant to order security for costs, repeatedly holding that only extraordinary circumstances merit such measures. Consequently, to date, security for costs has only been ordered in one investment treaty case: *RSM v St Lucia*.[101]

26.45 The principal basis for a security for costs application is that (a) if the respondent wins it will have a right to recover its costs; and (b) that the claimant will not be in a position to pay those costs owing to impecuniosity. Given the dominance of a 'costs fall where they lie' approach in investment arbitration, it is far from clear that the first supposition (that a winning state will obtain costs) is correct. With regard to the second supposition (impecuniosity), the ICCA–Queen Mary University task force concluded that a third-party funding agreement 'on its own it is no necessary indication that a claimant is impecunious'.[102] Reasons for engaging a funder vary, including the need or opportunity to place capital elsewhere and risk management.[103] The same logic was applied by the tribunal in *South American Silver v Bolivia*, when it held that the existence of a third-party funder does not 'evidence the impossibility of payment or insolvency' or 'imply risk of non-payment'.[104] A similar conclusion was reached in *Guaracachi America, Inc. & Rurelec v Bolivia*.[105]

26.46 More importantly, however, even if a claimant does seek funding because it is impecunious, tribunals in investment treaty cases have held that this alone should not be a reason to order security for costs, owing to the unique nature of investment arbitrations. In the realm of commercial arbitration, the deterioration in the opposing party's financial status is a factor that tribunals may take into account when deciding whether to award security for costs.[106] Parties signing a contract are able to assess the financial standing of a counterparty at the time the contract is signed. This position may have changed by the time a dispute begins. The position is different when it comes to the broad offer of a state in a treaty to consent to arbitration with any qualifying investor, whose financial status will not be tested.[107] This explains why

---

[98] *See* ICSID Convention art. 47 and art. 39(1) of the ICSID Arbitration Rules.

[99] *See* ICSID Additional Facility Rules (2006) art. 46.

[100] *See* UNCITRAL Rules (2010) art. 26(3). See also D. Caron & L. Caplan, The UNCITRAL Arbitration Rules: A Commentary 521–22 (2d ed. 2013). *See also* Encana Corporation v. Ecuador, Interim Award (Jan. 31, 2004), ¶ 13.

[101] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2014) [hereinafter RSM v. Saint Lucia].

[102] ICCA-QMUL Task Force on TPF in International Arbitration, Draft Report on Security for Costs and Costs (Nov. 1, 2015), at 3, 17.

[103] *Id.* at 16.

[104] South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016), ¶¶ 76 and 63.

[105] Guaracachi America, Inc & Rurelec v. Bolivia (PCA Case No. 2011-17) Procedural Order No. 14 (Mar. 11, 2013), ¶ 7 ('Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not').

[106] ICC Commission Report, *supra* note 81, at 89.

[107] ICCA–Queen Mary University London Task Force on Third-Party Funding in International Arbitration, *Draft Report on Security for Costs and Costs* (Nov. 1, 2015), 14–15 ('Unlike the case in commercial arbitration, the respondent State ... has not signed an arbitration agreement with a particular claimant'). *See also* RSM v. Saint Lucia, *supra* note 101, Assenting Reasons of Gavan Griffith, ¶ 2 ('As a general proposition it may be said that a state party to a BIT has prospectively agreed to take claimant foreign investors as it

tribunals in investment treaty cases have commonly decided that a claimant's impecuniosity should not be taken into account when it comes to deciding whether to award security for costs. The tribunal in *South American Silver Limited v Bolivia* summarized the consensus on this point:

> In sum, the general position of investment tribunals in cases deciding on security for costs is that the lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not per se reasons or justifications sufficient to warrant security for costs.[108]

In a similar vein, the UNCITRAL tribunal in *Hesham Tallat M Al-Warraq v Indonesia* underlined that: 'the Claimant is not required to demonstrate sufficient financial standing to meet a possible adverse costs award, or to provide security for such a sum, as a precondition of pursuing an investor-state arbitration'.[109] This is because the only sanction available to enforce such an order is draconian indeed: the dismissal of the claim.

26.47 It is also highly relevant that, in many cases, the financial status of the claimant has been caused by the alleged adverse action by the state. In those circumstances, tribunals have consistently denied requests for security for costs.[110] This situation quite commonly occurs in investment treaty cases where the dispute revolves around allegations that a state's measures have damaged or destroyed the value of an investor's most valuable or only significant asset. For these and other reasons, UNCITRAL[111] and ICSID tribunals alike have consistently held that security for costs is an extraordinary remedy that can only be granted in exceptional circumstances.[112] As the tribunal in *South American Silver Limited v Bolivia* explained:

> the standard to grant [security for costs] is very strict, given that it shall be granted only in case of extreme and exceptional circumstances, for example, when there is evidence of

finds them. That the claimant does not have funds to meet costs orders if unsuccessful is no reason to make orders for security').

[108] South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016), ¶ 63.

[109] Hesham Tallat M. Al-Warraq v. Indonesia, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (June 21, 2012), ¶ 109. *See also* Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg & RSM Production Corporation v. Government of Grenada, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs (Oct. 14, 2010), ¶ 5.19 (holding that it is 'not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award'); Víctor Pey Casado & President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2 Decision on Provisional Measures (Sept. 25, 2001), ¶ 86.

[110] Libananco Holdings Co Ltd. v. Republic of Turkey, ICSID Case No. ARB/06/8 Decision on Preliminary Issues (June 23, 2008), ¶¶ 33(f), 57–59; RSM v. Saint Lucia, *supra* note 101, Assenting Opinion of Dr. Griffith, ¶ 2.

[111] There are four reported cases under the UNCITRAL Rules: Hesham Tallat M. Al-Warraq v. Indonesia, Award on Jurisdiction and Admissibility of the Claims (June 21, 2012); Guaracachi America, Inc & Rurelec v. Bolivia (PCA Case No. 2011-17) Procedural Order No. 14 (Mar. 11, 2013); South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016); and Dawood Rawat v. Republic of Mauritius (UNCITRAL), PCA Case 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures (Jan. 11, 2017).

[112] South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016), ¶ 63; Guaracachi America, Inc and Rurelec v. Bolivia (PCA Case No. 2011-17) Procedural Order No. 14 (Mar. 11, 2013), ¶ 6; Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7) Procedural Order No. 2 (Oct. 28, 1999), ¶ 10. *See also* Commerce Group Corp & San Sebastian Gold Mines, Inc v. El Salvador (ICSID Case No. ARB/09/17) Decision on El Salvador's Application for Security for Costs (Sept. 20, 2012), ¶ 45 (holding that security for costs can only be granted in exceptional circumstances, 'for example, where abuse or serious misconduct have been evidenced').

> constant abuse or breach [of obligations in arbitration] that may cause an irreparable harm if the measure is not granted.[113]

The question of what amounts to extreme and exceptional circumstances was tested in *Libananco v Turkey*. In this case, an application for security for costs was rejected even where the claimant was a shell company whose legal costs were funded by a third party. The arbitral tribunal concluded that: 'it would only be in the most extreme case, one in which an essential interest of either Party stood in danger of irreparable damage, that the possibility of granting security for costs should be entertained at all'.[114] It is notable that the tribunal in *Libananco v Turkey* did not find there was a danger of 'irreparable damage', even though the claimant was subject to a criminal investigation concerning 'financial crime on a massive scale' in two countries.[115] The annulment committee in *Commerce Group v El Salvador* found that the kind of extreme circumstances that would justify the granting of security for costs might exist where 'abuse or serious misconduct has been evidenced'.[116]

26.48 The paradigm of what amounts to abuse and serious misconduct was illustrated in the case of *RSM v Saint Lucia*,[117] the only investment treaty case in which security for costs has been ordered. The 'truly exceptional circumstances'[118] that justified granting security for costs in this case involved a claimant with a notorious history of advancing frivolous claims and repeatedly failing to pay the resulting costs awards.[119] In each case, the claimant had brought claims while benefiting from third-party funding and, in each case, neither the claimant nor the third-party funders had paid the costs awards.[120] The tribunal therefore concluded that security for costs should be awarded because that history of non-compliance showed that there was a material and serious risk that a costs award would not be complied with.[121]

26.49 Tribunals in other cases have rejected requests for security for costs where there has been no history of failure to pay previous costs or arbitral fees.[122] Moreover, in *Hamester v Ghana*, when the claimant (through no fault of its own) was unable to pay an advance on costs, the tribunal held that this was not enough to justify an order for security for costs. The tribunal

---

[113] South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016), ¶ 68.

[114] Libananco Holdings Co Ltd. v. Republic of Turkey (ICSID Case No. ARB/06/8), Decision on Preliminary Issues (June 23, 2008), ¶ 57.

[115] *Id.* ¶ 72.

[116] Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs (Sept. 20, 2012), ¶ 45.

[117] RSM v. Saint Lucia, *supra* note 101.

[118] Dr Gavan Griffith's assenting opinion states that only 'truly exceptional circumstances' would justify security for costs in investment arbitration. See RSM v. Saint Lucia, *supra* note 101, Assenting Opinion of Dr Griffith, ¶ 3.

[119] RSM v. Saint Lucia, *supra* note 101, ¶¶ 78–79. The claimant failed even to pay part of the advance on costs in the prior proceeding, despite representations to the contrary: id. ¶ 78.

[120] This persistent failure by both the claimant and its third-party funders to pay previous costs awards was characterized by the respondent, St Lucia, as 'hit and run arbitration'. This phrase has sometimes been cited as if it had been intended as a label applicable to all third-party funders. *See, e.g.*, J. Kalicki, *Security for Costs in International Arbitration*, 3(5) Transn'l. Disp. Mgmt. 1 (2006). The text of the *RSM v. St Lucia* decision, however, makes clear that it was the involvement of third-party funders in abetting the previous conduct of RSM that had earned them their poor reputation. *See* RSM v. Saint Lucia, *supra* note 101, ¶¶ 32–33.

[121] RSM v. Saint Lucia, *supra* note 101, ¶¶ 77–82.

[122] South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016), ¶ 66 ('[t]here was no evidence of failure to comply with by [claimant] before third parties, nor breach of obligations in this or other arbitrations, nor clear evidence that [claimant] does not want or cannot pay'). *See also* EuroGas Inc & Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14 Procedural Order No. 3, Decision on Requests for Provisional Measures (June 23, 2015), ¶¶ 122–23.

went on to state that: 'there was a serious risk that an order for security for costs would stifle the Claimant's claims'.[123] It seems, therefore, that for a tribunal to find that a failure to pay costs or arbitral fees amounts to extreme circumstances, an element of abuse or bad faith must exist. Such bad faith was characterized by the ICCA–QMU task force as follows:[124] '[s]ituations where the claimant company was deliberately created as a mere procedural shell to collect money if the case is won, and frustrate the respondent's costs claim if the case is lost'.[125] The same task force went on to explain that: 'By contrast, mere recourse to third-party funding by a claimant that has become impecunious cannot readily be characterized as carrying an element of abuse, and cannot of itself be taken as a reason for tribunals to award security for costs'.[126] This synthesis is consonant with the conclusion of all the tribunals in bilateral investment treaty cases that have come to consider this issue, including *Libananco v Turkey, Guaracachi America, Inc & Rurelec v Bolivia*,[127] and *EuroGas v Slovak Republic*.[128] The majority of the tribunal in *RSM v St Lucia* did not diverge from this position when granting security for costs to St Lucia.[129] However, one member of that tribunal, Dr Gavan Griffith QC, expressed the dissenting view that the mere existence of third-party funding should put the onus on a claimant to prove why security for costs should *not* be ordered.[130] His reason for this conclusion was that third-party funders who gamble on the rewards of success should not be protected from the risk of an adverse costs order in the event of failure.[131] Cases of security for costs being granted for reasons similar to those in *RSM v Saint Lucia* will be, as one commentator has put it, 'few and far between'.[132] Tribunals will probably continue to grant security for costs only in cases where the use of third-party funding is, in some way, abusive.[133]

26.50 There are states who have begun to press for changes to what is emerging as a consensus approach to this question. In September 2016, Panama sent a memo to the General Secretary of ICSID asking for the issue of 'improved protection for respondent states against judgment-proof claimants' to be put on the agenda for the annual meeting of the ICSID Administrative

[123] Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24 Award (June 18, 2010), ¶ 17.

[124] ICCA–Queen Mary University London Task Force on Third Party Funding in International Arbitration, Subcommittee on Security for Costs and Costs, draft report (Oct. 5, 2015), at 16–17 ('[e]xtreme circumstances may involve an element of abuse or bad faith').

[125] *Id.*

[126] *Id.*

[127] Guaracachi America, Inc. & Rurelec v. Bolivia (PCA Case No. 2011-17) Procedural Order No. 14 (Mar. 11, 2013), ¶ 7 ('Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not').

[128] EuroGas Inc. & Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14 Procedural Order No. 3, Decision on Requests for Provisional Measures (June 23, 2015), ¶ 123 ('The Tribunal is of the view that financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs').

[129] ICCA–Queen Mary University London Task Force on Third Party Funding in International Arbitration, Draft Report on Security for Costs and Costs (Nov. 1, 2015), at 15.

[130] RSM v. Saint Lucia, *supra* note 101, Assenting Reasons of Dr. Gavan Griffith QC, ¶ 18 ('[o]nce it appears that there is third party funding of an investor's claim, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made').

[131] *Id.* ¶¶ 12–14.

[132] *RSM v. Saint Lucia: Why the Tribunal Is to Be Applauded for Security for Costs Order*, Global Arb. Rev., (Sep. 11, 2014), http://globalarbitrationreview.com/article/1033695/rsm-v-st-lucia-why-griffith-was-wrong-on-security-for-costs (last visited Mar. 29, 2017).

[133] W. Kirtley & K. Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs*, 30(1) J.Intern'l Arb. 17 (2013) ('[t]hird-party funding should not impact the arbitral tribunal's decision on security for costs unless a respondent can show that third-party funding is being used abusively').

Council.[134] It remains to be seen if this will lead to structural changes in the current regime. In the meantime, some countries have inserted provisions in new bilateral investment treaties giving tribunals more latitude when it comes to security for costs. Article 22 of the draft investment chapter of the EU–Vietnam Free Trade Agreement allows a tribunal to order the claimant to post security for costs if there are 'reasonable grounds to believe that the claimant risks not being able to honor a possible decision on costs issued against the claimant'.[135] Article 11(3) of the same chapter provides that: 'When applying Article 22 (Security for Costs), the Tribunal shall take into account whether there is third party funding'.[136] Such provisions, if they become common, could restrict access to justice by impecunious claimants. For this reason, the tribunal in *South American Silver v Bolivia*, while finding that the existence of third-party funding could be one of a number of factors taken into account when considering whether to grant security for costs—held that it could not be the *only* factor:

> If the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims.[137]

26.51 For the moment, it seems more likely than not that tribunals in investment treaty cases will continue to be reluctant to order claimants to pay security for costs.[138] Absent significant changes in the applicable institutional rules or more extensive changes in treaty wording, the high threshold established in numerous cases, and met only once in *RSM v Saint Lucia*, will probably continue to be applied.

VII. Disclosure of Third-party Funding

26.52 The next question to be addressed by arbitral tribunals is whether a claimant should be obliged to declare the existence of third-party funding? If so, should the terms of that funding be disclosed as well? These questions are frequently asked in investor-state disputes today and have been addressed in a number of awards, in changes to the IBA and ICC Guidelines on conflicts of interests, and in the text of recent bilateral and multi-lateral treaties.

A. Disclosure of a Third-party Funder's Identity

26.53 As explained in section V, tribunals in bilateral investment treaty cases have consistently refused to consider third-party funders as the real party at interest in arbitrations. From a jurisdictional perspective, therefore, the way in which a claimant funds itself is largely irrelevant unless the terms of a particular treaty contain specific terms requiring the identification of those funding or controlling a claim. Indeed, there is nothing unusual about a company

[134] Effective Protection for Respondent States Against Judgment-proof Claimants, Memorandum to Meg Kinnear, Secretary General, International Center for Settlement of Investment Disputes from I. Zarak Acting Minister of Economy and Finance, Republic of Panama (Sept. 12, 2016), https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=17450 (last visited Mar. 29, 2017).

[135] Draft investment chapter of the EU–Vietnam Free Trade Agreement, Section 3, Resolution of Investment Disputes, art. 22(1), http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (last visited Dec. 11, 2017).

[136] *Id.* art. 11(3).

[137] South American Silver Ltd. v. Bolivia (PCA Case No. 2013-15) Procedural Order No. 10 (Jan. 11, 2016), ¶ 77.

[138] Some authors have been critical of the reluctance of tribunals in international arbitrations to grant security for costs. *See* A. Redfern & S. O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32(3) Arb. Int'l 397 (2016).

obtaining funding in order to protect and develop its assets. Companies are liable for any debt they underwrite in the course of their business and fund themselves from a mix of equity and debt. In many ways, third-party funding is just another form of company borrowing secured on a particular asset of the company (i.e. its claim). As a consequence, recent arbitral decisions on whether the existence of third-party funding arrangements should be disclosed have focused on (a) whether the funding relationship might generate potential conflicts of interest between arbitrators and third-party funders and (b) its relevance for claims for security for costs.

26.54 The tribunal in *Guaracachi America & Rurelec v Bolivia*[139] decided not to order the claimant to disclose its agreement with a third-party funder. The issue was partly moot because the identity of the funder was already known, but the tribunal also observed that the UNCITRAL Arbitration Rules placed the onus on the arbitrators not the parties to disclose circumstances that might create a conflict of interest.[140] In September 2016, the ICC included the following recommendation to arbitrators when completing their statement of acceptance, availability, impartiality, and independence: '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'.[141] Naturally, a newly nominated arbitrator will not be in a position to declare any relationship with a third-party funder involved in a case if the identity of that funder has not been declared. Some tribunals have therefore concluded that it makes sense for claimants to be required to declare the existence and names of funders. In *Muhammet Çap v Turkmenistan*, the tribunal held that:

> First, the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder. In this respect the Tribunal considers that transparency as to the existence of a third-party funder is important in cases like this.[142]

Similarly, in January 2016, the tribunal in *South American Silver Limited v Bolivia* also ordered disclosure of the name of the third-party funder.[143]

26.55 States have also sought to make disclosure of the existence of third-party funding obligatory by adding requirements to new bilateral investment treaties or fair trade agreements. The Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), signed at the end of 2016, provides at Article 8.26 that:[144]

> 1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.
> 2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

---

[139] Guaracachi America, Inc. & Rurelec v. Bolivia, PCA Case No. 2011-17, Procedural Order No. 13 (Feb. 21, 2013).

[140] *Id.* ¶ 8.

[141] ICC, International Court of Arbitration, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (Sept. 22, 2016), ¶ 24.

[142] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015), ¶ 9.

[143] South American Silver Ltd. (Bermuda) v. Bolivia (UNCITRAL), Procedural Order No. 10 (Jan. 11, 2016).

[144] Comprehensive Economic and Trade Agreement between Canada and the EU-CETA ch. 8, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (last visited Dec. 11, 2017).

Similar provisions are to be found in the drafts of the now moribund TTIP[145] and the EU–Vietnam Free Trade Agreement.[146] Article 24(l) of the 2017 SIAC Investment Arbitration Rules goes even further, giving tribunals the power to:

> l. order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability;[147]

26.56 This clear trend in favour of requiring disclosure of the identity of a third-party funder can also be identified in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines). General Standard 6(b) of the IBA Guidelines states that:

> 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.[148]

General Standard 7 of the IBA Guidelines goes on to establish the following duty for both parties and arbitrators:

> (a) A party shall inform an arbitrator, the Arbitral Tribunal the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.[149]

26.57 If disclosure of relationships between arbitrators and third-party funders becomes the norm, what kind of relationships would preclude an arbitrator from serving on a tribunal? There are no public investment treaty decisions in which an arbitrator has been successfully challenged because of a relationship with a third-party funder. If the IBA Guidelines are used as a yardstick, some relationships between arbitrators and third-party funders are clear 'red list' items that would preclude an arbitrator from being able to accept an appointment—for example, where an arbitrator sits on the board of a third-party funder[150] or his or her law firm regularly advises that third-party funder.[151] In such circumstances, the notion that a third-party funder bears the identity of a party makes sense because the potential arbitrator has a clear interest in promoting the financial success of the third-party funder. More nuanced issues are raised by the following 'orange list' items in the IBA Guidelines:

---

[145] EU–U.S. Transatlantic Trade and Investment Partnership (TTIP) Negotiations: draft ch. II Investments, art. 8, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last visited Dec. 11, 2017).

[146] Draft investment chapter of the EU–Vietnam Free Trade Agreement, Section 3, Resolution of Investment Disputes, art. 11, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (last visited Dec. 11, 2017).

[147] SIAC Investment Arbitration Rules (Jan. 1, 2017), http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf (last visited May 11, 2017).

[148] IBA Guidelines on Conflicts of Interest in International Arbitration (October 2014), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited May 12, 2017).

[149] *Id.*

[150] IBA Guidelines art. 1.2: 'The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration': *id.*

[151] IBA Guidelines art. 1.4: '1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom': *id.*

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.[152]

26.58 If, according to General Standard 6(b) of the IBA Guidelines, a third-party funder is deemed to bear the identity of a party—does this common identity extend from one case to another? In other words, if an arbitrator has just been appointed by party A funded by third-party funder X and the same arbitrator has, in the past three years, been appointed by parties B, C, and D—all of whom were funded by the same third-party funder X, has the arbitrator effectively been appointed by the same party? Ultimately, this is an issue that tribunals will need to decide if the matter is raised by an opposing party. The fact that an item is included on the 'orange list' does not automatically preclude an arbitrator from accepting an appointment. It simply requires the arbitrator to declare the information so that the parties can raise timely objections if they wish.[153] In view of this, it makes practical sense for an arbitrator to declare—upon nomination—any previous appointments over the past three years in which third-party funders were involved and to provide the name of any third-party funder involved. Naturally, this process requires parties to be open about any third-party funding they receive. If parties are not open, an arbitrator may be ignorant of the fact that a party who appointed him or her received third-party funding or not know the identity of the funder. If information about other appointments emerges involving the same third-party funder later in the proceedings, this might become the pretext for a challenge. It is doubtful, however, that such a challenge would succeed. The multiple appointments rules relating to arbitrators and counsel[154] are designed to shield arbitrators from the suspicion that they might be beholden to a party or a law firm who frequently appoints them. To be beholden, however, one must logically know to whom one is beholden. This cannot be the case where an arbitrator does not know that a third-party funder is funding an appointing party.

B. Should the Terms of Funding Agreements be Disclosed?

26.59 The institutional rules most commonly applied in investment treaty arbitrations all give tribunals the power to order disclosure.[155] Parties and tribunals usually agree on a methodology and a standard to be applied in deciding what should be disclosed. Often, the standard applied is that set out in Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration,[156] which allows a party to request disclosure of documents that

[152] *Id.* arts. 3.1.3 & 3.1.5.

[153] IBA Guidelines Pt II: Practical Application of the General Standards, art. 3: 'The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a)': *id.*

[154] *See also* art. 3.3.8 of the IBA Guidelines, which includes the following in the 'orange list': 'The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm': *id.*

[155] *See, e.g.*, ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules 2006) r. 34(2)(a); ICSID Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat (Additional Facility Rules 2006) art. 41(2); UNCITRAL Arbitration Rules (2013) art. 27(3); ICC Rules of Arbitration (March 2017) art. 25(5).

[156] IBA Rules on the Taking of Evidence in International Arbitration 2011 art. 3(3)(b), http://ibanet.org.

are 'relevant to the case or material to its outcome'. As the Swiss arbitrator, Laurent Levy, puts it:

> Importantly, funding legal proceedings should not constitute a circumstance that is directly or sufficiently 'relevant to the case or material to its outcome'. This assertion does not mean that the third-party funding agreement will not influence the funded party's conduct in the arbitration. Neither does it mean that third-party funding will not be relevant for the determination and allocation of the arbitration costs. What it does mean is that third-party funding should have no impact on the merits of the case. Perhaps this explains (at least partly) why no generally accepted rules or practice in international arbitration require that a party disclose the way in which it is funding its claim or defence.[157]

It follows that, a priori, the *terms* of a third-party funding agreement ought not be disclosed[158] unless there is a specific reason for disclosure, usually related to an issue such as security for costs. Indeed, the terms of the funding will necessarily reveal material which would be privileged, such as likelihood of success. As a consequence of (a) the lack of materiality to the merits of the dispute; and (b) the possible disclosure of perceptions of strengths and weaknesses through the terms agreed, tribunals have been reluctant to order the disclosure of funding terms.

26.60 In *Muhammet Çap v Turkmenistan*,[159] the tribunal ordered the claimants to disclose whether third-party funders were involved, the name of the funder, and the terms of the funding.[160] The tribunal made clear, however, that one of its reasons for making this order was that the claimants had failed to satisfy a costs order in a previous case.[161] This raised the possibility that the kind of exceptional circumstances identified in *RSM v Saint Lucia* as justifying a grant of security for costs *might* be applicable in that case. By contrast, in *South American Silver v Bolivia*,[162] there was no evidence of failure by the claimant to satisfy previous costs orders[163] and, consequently, no exceptional circumstances to justify the granting of security for costs.[164] The tribunal therefore ordered the claimant to disclose the existence and name of its third-party funder but declined to order disclosure of the agreement concluded with the third-party funder.[165]

26.61 A claimant seeking to recover the costs of funding from a respondent state may need to disclose details of its funding agreement to satisfy the requisite burden of proof. In *Khan Resources v Mongolia*[166] the claimant produced a redacted copy of the success fee arrangement

---

[157] L. Lévy and R. Bonnan, *Third-party Funding: Disclosure, Joinder and Impact on Arbitral Proceedings*, *in* Dossier X: Third-party Funding in International Arbitration 79 (B. Cremades & A. Dimolitsa eds., 2013).

[158] The same logic applies to respondents as well. The tribunal in *Dawood Rawat v. Republic of Mauritius* refused to order disclosure of documents by the respondent State that had been requested by the claimant in order to allow the claimant's prospective third-party funder to carry out its due diligence prior to deciding to fund. *See* Dawood Rawat v. Republic of Mauritius (UNCITRAL), PCA Case 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures (Jan. 11, 2017), ¶¶ 114–15.

[159] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No.3 (June 12, 2015).

[160] *Id.* ¶ 8.

[161] *Id.* ¶¶ 10–11.

[162] South American Silver Ltd. v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016).

[163] *Id.* ¶ 66.

[164] *Id.* ¶¶ 80–81.

[165] *Id.* ¶¶ 77–81.

[166] Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC, PCA Case No. 2011-09, Award (Mar. 2, 2015).

it had agreed with counsel. The tribunal was satisfied that this amounted to 'sufficient detail and evidence' of the arrangement.[167]

26.62 It is important that claimants be able to communicate freely with third-party funders during the course of an arbitration. When legal advice is transferred to a third-party funder, this can raise the question of whether privilege has been waived on such advice. There is no recorded decision by a tribunal in an investment treaty case finding that privilege has been waived because legal advice has been passed to a third-party funder. Decisions on what can amount to waiver vary from jurisdiction to jurisdiction. The English courts have found that privilege extends to third parties, such as insurers, receiving 'legal advice which that person needs to know by reason of a sufficient common interest between them'.[168] A less clear position on the application of this 'common interest' exception has emerged from the US courts.[169] However, even in those cases where common interest protection was held not to extend automatically to communications and documents shared with funders, the US courts have been willing to recognize that the conclusion of a non-disclosure agreement between a third-party funder and its funded client can be used to extend the protection relating to attorney work product privilege (i.e. documents prepared in anticipation of litigation).[170] Commonly therefore, third-party funders will conclude a non-disclosure agreement with a funded party to protect against attempts to argue that privilege has been waived.

VIII. Concluding Remarks

26.63 Third-party funding is now an established part of the investment arbitration landscape. Despite criticism in some quarters, tribunals and international arbitral bodies have tended to favour the view that third-party funding promotes access to justice, rather than encouraging frivolous claims. Tribunals have consistently held that receipt of third-party funding is unlikely to affect a claimant's position from a jurisdictional perspective and will not affect a claimant's ability to recover legal costs in cases where tribunals make costs awards. The costs of third-party funding itself may be recoverable in some circumstances. There is a growing tendency among tribunals to require disclosure by funded claimants of the existence and identity of third-party funders. It is, however, unlikely that claimants will commonly be required to disclose the terms of any funding agreement except in rare cases when security for costs is being considered. If tribunals continue to follow the principle established in *RSM v Saint Lucia*, awards of security for costs in cases involving third-party funders will continue to be rare and limited to situations of historic abuse.

[167] *Id.* ¶¶ 445–48.

[168] Svenska Handelsbanken v. Sun Alliance and London Insurance plc [1995] 2 Lloyd's Rep. 84 at 88.

[169] Some U.S. courts have held that litigation funding agreements and communications are protected by attorney client privilege and the doctrine of common interest. *See, e.g.*, Walker Digital LLC v. Google Inc. (D. Del., Feb. 12, 2013); Devon IT, Inc. v. IBM Corp., (E.D. Pa., Sept. 27, 2012); Xerox Corp. v. Google Inc. (D. Del., Aug. 1, 2011). Other U.S. courts have held that common interest protection could not be extended to a third-party funder because the funders interest was commercial rather than legal. *See* Miller UK v. Caterpillar (N.D. III, Jan. 6, 2014).

[170] Miller UK v. Caterpillar, *supra* note 169.