"SYSTEMIC ISSUES AFFECTING THIRD PARTY FUNDING IN INTERNATIONAL INVESTMENT ARBITRATION"

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INTRODUCTION

We as a global economy are going through a pivotal phase as more and more investors are looking to invest and capitalize on opportunities in Developing and Under Developed nations. It is therefore imperative that a robust International law system of enforcement needs to be in place so as to create a sustainable business environment and ensure parity and consistency. An important component of this puzzle is Third Party Funding. Third party funding is where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed return. Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration. The funder may also agree to pay the other side's costs if the funded party is so ordered, and provide security for the opponent's costs. As the use of third-party funding has increased, so have the number and range of institutions that are prepared to finance litigation and arbitration. In addition to specialized third party funders, insurance companies, investment banks, hedge funds and law firms have also entered the market. As the market has developed, the range and sophistication of funding products and structures available has broadened, as with any other financial funding. There is no one size fits all and the description above is funding at its most basic. Third party funding, or "litigation finance" as it is commonly referred to, has thus evolved considerably in the last few years. Third Party Funding is the inevitable outcome of the exponential increase in Investment Arbitration cases. In addition to funding one-off cases, litigation finance is being used for a broader range of purposes, with the proceeds of the litigation or arbitration being used as collateral. Another recent trend is the development of portfolio funding, where funders provide a funding package that covers a portfolio of cases. The far reaching implications and potential for growth in this area will go on to shape the future of Investment Arbitration as we know it for years to come. How Third Party Funding is dealt with at this juncture when it is still governed by soft law and guidelines is imperative to this growth, this is because of the unique position of one of the Parties in the equation, i.e. the State. When issues of the State are involved, the variables to

address tend to shift dramatically. These variables extent beyond mere monetary stakes as policy decisions by a state affect Investment Arbitration with greater urgency than its Commercial counterpart. The process itself is expected to be more transparent and therefore naturally the factors affecting it under constant scrutiny. The Arbitration Community is desperately trying to address these issues so as to lend more clarity and uniformity to the process.

PRIMARY ETHICAL ISSUES

The primary question regarding third party funding in investment arbitration proceedings is whether a funded party is required to disclose the existence and/or terms of a third-party funding agreement to the arbitral tribunal and the opponent, and when such disclosure needs to be done. The approach adopted towards procedural disclosure of third party funding has a far-reaching impact on international arbitration proceedings as a whole. Since an arbitral tribunal can only render its decisions on the basis of the facts before it, the impact of funding-related facts on arbitration proceedings can only be considered to the extent that disclosure of such facts occurs. [1] Therefore, it is difficult for a tribunal to know when and to what extent a party is funded (if at all) and the onus is on the parties to reveal the same in good faith. Failure to do so may lead to complicated procedural inconsistencies and can also jeopardize the arbitration process as the Third Party Funder may (in rare occasions) then choose to pull out of the arbitration without any consequence to them.[2] The definition and contours of a Third Party Funder has long been debated and has lead to much academic discussion. The most comprehensive report on Third Party Funding to date is the ICCA Queen Mary Task Force Report, which captures the plethora of academic discussion and has taken concerns from all stakeholders into account. It defines 'third-party funder' as any natural or legal person who is not a party to the dispute but who enters into an agreement either with a disputing party, an affiliate of that party, or a law firm representing that party: *a.* In order to provide material support or to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and *b.* Such support or financing is provided either through a donation, or grant, or in return for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute[3] Funding may be sought to cover legal fees, out-of-pocket costs (*e.g.*, expert fees, arbitrator fees, arbitral institution fees, discovery-related fees, etc.), or costs associated with subsequent enforcement actions or appeals and may be structured around a single claim or a portfolio of

[1] Von Goeler, *Third-Party Funding In International Arbitration And Its Impact On Procedure* 564 (2016).
[2] S &T Oil Equipment & Machinery Ltd. v. Romania, ICSID Case No. ARB/07/13, Order of Discontinuance of the Proceeding (July 16, 2010)..For a detailed analysis of the case, see, Bernardo Cremades, *Third Party Litigation Funding: Investing in Arbitration*, Transnatl. Dis. Mgt. 25 (2011).
[3] International Council For Commercial Arbitration*, Report Of Icca-Queen Mary Task Force On Third Party Funding In International Arbitration* 123 (2018).

claims. Third Party Funding can give rise to a number of issues regarding the costs of arbitration the most pressing of which is the possibility of frivolous claims. Empirical data shows that claimants have a tendency to inflate their claims beyond their actual value. It is not far-fetched to consider that this problem of inflated claims may be exacerbated when a funder, whose sole motivation is financial gain, is involved.[4] This goes against the grain of investment treaty provisions which emphasis economic and social growth, usually included in the preamble of the BIT's. Frivolous claims, even if most of them fail, can take significant resources and may cause reputational damage, especially when the Respondent is a small country trying to promote International Investment and bring cash flow into the economy. Several scholars have opined that investment arbitration may deter states from enacting socially valuable regulatory measures that may have a positive impact on foreign investors.[5] On the other hand TPF companies, who build a portfolio of claims, have an economic incentive to put money even into weak cases that have at least some chance of high monetary award. Such funders appear to mitigate the risk of potential losses by spreading that risk over many cases; usually a higher return rate could make it worthwhile for a funder to take the risk of funding a frivolous claim even if it isn't the strongest on merits. Consequently, there is an exponential increase in the costs incurred by the states as they will now have to match a claimant benefiting from Third Party Funding as the claimant will now be able to hire counsel and engage in a litigation strategy that it would otherwise not have been able to afford. The respondent in turn shall have to step up its defence and incur additional litigation costs that it would not have incurred otherwise and with possibly lesser prospective of return because of the possibility of insufficiency of assets of the claimant, which may be the cause of the Third Party Funding in the first place, and jurisdictional problems involved with holding the Funder liable. This creates a paradox; can the Respondent truly ever get fairly compensated even in a case of a frivolous claim? The costs borne by the state in the course of such arbitration puts a burden on the exchequer and the tax payee and this is true in some cases of Funding even if the outcome goes in the States favour.

JURISDICTIONAL PROBLEMS

The nature, structure and history of Third Party Funding Agreements make it difficult for an Arbitral Tribunal to order a decision binding the Third Party Funder due to the inherent belief in

[4] Darwazeh, Nadia & Leleu,Adrien, *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, 33(2) Int'l J. Arb. 150 (2016).

[5] J. Bonnitcha, *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections*, *in* Evolution in Investment Treaty Law and Arbitration 117, 134 (C. Brown ed., 2011) (describing the potential for regulatory chill and the difficulties in proving chilling effects "because they require counterfactual evidence about the regulations that would have existed in the absence of the purported chilling").

privacy of the Funder and privity of proceedings. Jurisdiction and admissibility in investment arbitration is premised on requirements that the claimant be an investor within the strict ambit of Investment Treaties, this includes carrying the nationality of one of the contracting parties, and hold a protected 'investment' in the territory of the host state which in itself has to satisfy certain criteria. Out of these requirements, with respect to third-party funders, the question has been raised whether the participation of a funder may change the status of, and therefore disqualify, a claimant from qualifying as an investor. Several cases have addressed various respondent states' objections to the jurisdiction of the tribunals and admissibility of claims in relation to the existence of third- party funding. One case that has addressed jurisdictional issues with respect to a modern commercial funder is *Teinver S.A., Transportes de Cercanítas S.A. and Autobuses Ubanos del Sur S.A. v. The Argentine Republic.*[6] In this case, the claimants concluded a funding agreement, which conferred a percentage of any successful recovery to the funder in exchange for funding of costs for pursuing the arbitration. The respondent state argued that, having transferred their rights to a third-party funder, the claimants were no longer the real parties in interest and that the funder would be "the only party that would seem to potentially benefit in the case of a hypothetical award against Argentina". According to this argument, claimant did not qualify either as an investor in Argentina or as a company organized in Spain, and as such was outside the jurisdiction of the Spanish-Argentine BIT under which the case was brought.[7] In assessing these arguments, the tribunal concluded that jurisdiction is generally assessed as of the date the case is filed. Because the relevant events relating to funding all occurred after the case was filed, the tribunal concluded, the funding agreement did not affect the claimant's standing or, consequently, its jurisdiction over the case. However, there is no known case till date that concluded that the funding or an interest in the final award has any impact on jurisdiction or admissibility. The issue in some jurisdictions is a hesitation to address the issues of Funding because of a long history of not recognizing it, especially in Common Law Jurisdictions due to the principles of Champerty and Maintenance. While these may be considered relics from imperialistic times there remains little doubt that they have influenced Municipal Laws. Without delving into the greater jurisdictional question of whether such civil justice doctrines aimed at preventing practices specifically for litigation would apply in the private world of Arbitration; it is still worth noting that the basis for such considerations continue to hold weight in today's scenario and is applicable both in the context of Investment and Commercial Arbitration as the State may choose to use such provisions as a loop hole in cases of Third Party Funding and may

[6] *Teinver S.A., Trasnportes de Cercanitas S.A. and Autobuses Ubanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 254 (Dec. 21, 2012).
[7] Id, Para. 255.

ultimately deter robust enforcement at a municipal level. Firstly, all parties have to comply with lex loci arbitri. Secondly, a municipal court while deciding enforcement can choose not to comply with the award on grounds of it being contrary to Public Policy.[8] On the other hand, even if the prohibitions imposed by champerty and related doctrines would apply to funding agreements that are subject to arbitration, it is still a matter of debate and uncertainty whether these prohibitions would have some, if any, effect on the arbitral proceedings as such or on resulting awards. Usually only mandatory procedural law will have such an effect of nullification; not mandatory substantive law which these principles are considered part of. It is also arguably incorrect to add these within the ambit of *lex loci arbitri*, as that would imply extra territorial application of Municipal Law.[9] The mixed signals that have emerged from the courts of different common law jurisdictions over the years have only served to muddy the waters further in what is an already complex area. However, certain recent cases dealing with the tension between the strictures of the doctrines of champerty and maintenance on the one hand, and the modern approach toward the funding of arbitrations in general on the other have had promising outcomes. The decision of the Hong Kong High Court in *Cannonway Consultants Ltd v Kenworth Engineering Ltd*,[10] where Kaplan J. found that the doctrine of champerty was of no application to the field of arbitration is one such notable instance. However, the Singapore Court of Appeal took a different view in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*,[11] relying on the reasoning that the public policy consideration of the need to protect "the purity of justice and the interests of vulnerable litigants" militated against allowing champertous agreements to prevail, even in an arbitrational context. The role of the doctrines of champerty and maintenance in a modern context received further treatment by the Hong Kong Court of Final Appeal where, in a masterful analysis of the case law in the area, Ribeiro P.J., delivering the judgment of a unanimous bench in *Unruh v Seeberger*,[12] emphasised the need for the public policy considerations upon which the doctrines of champerty and maintenance were pivoted to be evaluated through modern lenses and to be balanced against other countervailing public policy considerations.

[8] Art. V(2)(b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 U.N.T.S. 38.
[9] L. Nieuweld and V. Shannon, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, 76(2) ARB. 208 (2013); Alpen aan den Rijn, *Third-Party Funding in International Arbitration*, Kluwer Law International 13 (2012).
[10] *Cannonway Consultants Ltd v. Kenworth Engineering Ltd.*, [1995] 1 H.K.C. 179.
[11] *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd.*, [2006] S.G.C.A. 46.
[12] *Unruh v. Seeberger*, [2007] 2 H.K.L.R.D. 414.

DIFFERENT FORMS OF THIRD PARTY FUNDING AND APPROACHES TO DISCLOSURE

Third Party Funding can take a variety of different forms ranging from litigation insurance products, legal fee arrangements and Political Risk Insurance (PRI), to funding directed at interests other than financial return, such as political or social interests, or the pursuit of an alternative commercial interest (such as the pursuit of a decision that would be favorable to the funder's own business at a later point of time i.e. setting a favorable precedent against the state). However the most common type which is also gaining the most popularity and proportionately attracting the most problems is non- recourse funding by a Third Party who has agreed to a certain percentage of share of the funds recovered if the claim is successful. Given the wide variety of third-party funders and arrangements, it is unclear what a potential disclosure obligation should encompass. The limits of the obligation could be drawn in a number of places, from the nature and identity of the funder to the quantum or subject matter of the claim. For example, it could be argued that disclosure should not be required in relation to insurance policies or contingency fee arrangements but instead be limited to third party funding of large commercial claims. However, it is difficult to see why other modes of third party funding should be exempt from disclosure, as it cannot be assumed that no insurance policy or conditional fee arrangement will ever give rise to a conflict of interest.[13] Also there is no telling at what stage a Third Party Funder will get involved and the level of involvement. A Claimant could seek out a Third Party Funder well into the arbitration process on realizing the necessity for the same. Similarly just because a Third Party Funder is involved prior to the commencement of the Arbitration does not automatically presuppose increased control. There is no metric for the extent of Influence exerted by a funder. This varies according to the details and extent of Funding. The Funding agreement could alternatively only encapsulate Arbitration fees, or it could be lawyer fees alone or it could extent to even covering security for costs or adverse costs award (though this is rare) and any combination of the above. This makes it extremely difficult to have one straight- jacket formula that fits all types of Funding.

CONFLICT OF INTEREST

This issue of potential conflicts of interest has now been widely acknowledged by the arbitration community and has recently been addressed in the 2014 revisions of the IBA Guidelines on Conflicts of Interest. The Guidelines now specifically provide that a funder shall be considered the 'equivalent of the party' for conflict check purposes. This in turn has been divided into lists

[13] Marie Stoyanov and Olga Owczarek, *Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?*, 2(1) BCDR Int'l Arb. Rev. 171 (2015).

according to scenarios, some being considered more debilitating than others. For example, in the first scenario mentioned above, if the arbitrator also serves as an advisor to a funder involved in the case, it would appear to fall under the non-waivable red list of the IBA Guidelines. As to the second scenario described above, where the arbitrator's law firm has a significant relationship with the funder, it would appear to fall under the waivable red list. However, given the unique position that arbitrators are in and the general close-knit nature of top arbitrators and Third Party Funders are likely to have constant interaction and communication at many levels. In three cases, the tribunal compelled claimants to disclose the identity of the funders, another sign that we are perhaps on the eve of a general acceptance of this principle in international arbitration. In *Eurogas v. Slovakia*[14], the tribunal chaired by Pierre Mayer ordered claimant to disclose the identity of their funder. The parties exchanged their views on this issue at a hearing and the tribunal ordered disclosure during that hearing, stating only that: 'We think that the Claimants should disclose the identity of the third-party funder.' In *South American Silver v. Bolivia*[15], the respondent requested security for costs and disclosure of the funding agreement. The tribunal chaired by Eduardo Zuleta Jaramillo ordered the claimant in January 2016 to disclose, for 'purposes of transparency', the identity of its funder but refused to compel disclosure of the funding agreement, noting that it was irrelevant since the tribunal had already decided to deny Claimants' request for security for costs. In *Sehil v. Turkmenistan*[16], the only comprehensively reasoned decision to date on the issue of disclosure, the tribunal chaired by Julien Lew initially denied respondent's request for disclosure. However, a year later the tribunal granted a renewed request for disclosure that respondent had filed after the IBA Guidelines had been issued and claimant had changed counsel. The tribunal ordered the disclosure of the identity of the funder as well as disclosure of the 'nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration'. As a result, claimant had to produce its funding agreement. In the order, the tribunal also noted that it was 'sympathetic to Respondent's concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration'. There might be instances where the Funders interest may supersede the interests of the Claimant. As a Third Party Funder the choice of lawyer is obviously of paramount importance, and would therefore have an influence on the case. As a lawyer there is always a natural tendency of primary allegiance lying with the person who pays him. This might lead to cases in which there might

[14] ICSID Case No. ARB/14/14
[15] PCA Case No. 2013-15
[16] ICSID Case No. ARB/12/6

arise a situation of settlement negotiation and the funder may choose to settle rather than drag out negotiations, which would increase costs; but could bring a more satisfactory result for the Claimant. In such a scenario the lawyer may be at odds and what is convenient may not always be what is right for the Claimant. This could potentially be a major red flag and needs to be addressed as development in the field goes further. Therefore clearly as seen from these cases above there is no uniformity in the decisions taken by Arbitral Tribunals. It usually boil down to a case-by-case analysis and in the end is left to arbitrator discretion.

ARBITRATOR CONFLICT

Even after fierce debate and several opinions including the Queen Mary Report on Third Party Funding no mandatory disclosure obligation as such exists. There are guidelines and best practices however at the end of the day it is left to the discretion of the Funded party. This is problematic for several reasons, the most obvious being the impartiality of the arbitrators. The requirement for an impartial and just arbitrator is contained in every arbitration law and rules and is the cornerstone of International Arbitration. The arbitration community has even created guidelines that codify the "best practice" and are commonly considered to set the relevant standard.[17] These rules, first issued in 2004 and amended in 2014, are meant to assist arbitrators and party representatives to better acknowledge (*a*) what their disclosure obligations are; and (*b*) when a conflict is likely to arise. A situation could arise where a person acts as an arbitrator in a case in which the claimant is financed by the same funder who had also financed a claimant in another case in which the same person (*i.e.* the arbitrator) acted as that claimant's counsel, such instances are common place in the close knit community of International Arbitration.

Further, certain situations such as:

(i) Multiple appointments of the same arbitrator by the same funder.[18]

(ii) an existing relationship between the funder and the arbitrator's law firm

(iii) shares held by the arbitrator in the funding corporation

(iv) Contractually the funder has the power to appoint the arbitrator.[19]

Even though it is quite necessary at this point due to any one of the above mentioned reasons, the need for disclosure could nonetheless arguably constitute an infringement of the freedom to, and confidentiality of, contract between private parties. It raises serious questions arise as to the threshold, timing, and extent thereof. Furthermore, an Arbitrator challenge could happen at any

[17] International Bar Association, *IBA Guidelines on Conflict of Interest in International Arbitration*, IBA Council Resolution dated October 23, 2014 (Oct. 23, 2014).

[18] C. Rogers, *Ethics In International Arbitration* 455 (2014).

[19] Jennifer A. Trusz*, Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, Vol 101.Geo. L. J. 1665 (2013).c

time and with potentially disastrous consequences. Regardless of whether an arbitrator is removed or an award set aside or refused enforcement, the parties and the funder waste time and fees. Even a truly unrelated arbitrator may suffer the embarrassment of having his or her integrity questioned publicly, and potential harm to reputation even if vindicated on the merits. Challenges based on undisclosed conflicts can undermine the integrity and legitimacy of international arbitration as a whole and tends to increase costs and proceeding time significantly. It is indeed interesting to see how this will develop in the near future and reconcile the need for privacy and weighing it against the need for a bias free or at the very least a perceived bias free arbitration process.

COST AWARD

A request for security for costs is typically made by a defendant who wishes to ensure that the costs of the litigation or arbitration will be repaid in the event that the claim is not successful. However the tool of security for costs is not universally accepted, it is nevertheless gradually getting traction to become common practice in international arbitration proceedings.[20] Certain arbitration rules expressly confirm that an arbitral tribunal has authority to order security for costs,[21] whereas other rules do not specifically provide for security for costs but allow the tribunal to order any interim measure it deems appropriate.[22] The involvement of a third-party funder could qualify as a change in circumstances that triggers a security for costs request. This hinges on a potential duty to disclose third-party funding agreements, and, or so the opponents of such a duty may argue, the confirmation of the existence of a third-party funding could be relied on as indicative of a risk that the claimant not be in a position to pay an adverse costs award. Although, this may not necessarily always be the case and there must not exist an automatic presumption of the same. In most cases it depends on the possible agreement of the parties on that subject, the applicable arbitral rules or the national laws at the seat of arbitration. The ICC, LCIA, ICDR, and UNCITRL Arbitration Rules each contain a provision giving the arbitral tribunal the authority to order security for costs. Tribunals ordinarily order security for costs if: (i) the requesting party shows that it has a solid chance of succeeding on the merits; and (ii) that the opposing party does not posses sufficient financial means to satisfy a potential future adverse costs award. The arbitral tribunal will also consider if bad faith was involved in the party's actions when determining to grant security for costs. Unless the parties agree specifically

[20] W. Kirtley and K. Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third- Party Funding?*, 30(1) J. INT'L. ARB. 19 (2013).
[21] Art. 25.2, London Court of International Arbitration Rules; Art. 24.1(k), Singapore International Arbitration Centre Rules.
[22] Art.28.1, International Chamber of Commerce Rules of Arbitration; Art.47, ICSID Convention Arbitration Rules.

arbitral tribunals generally have a broad discretion on the issue of allocation of costs in international arbitration. The most commonly applied rule is that of 'factor dependent' approach where either party is liable depending on the level of success. In instances where the claimant's claim is not entirely successful on all issues, then the tribunal could decide that some of the costs should be covered by the respondent. The Thunderbird Gaming case is a good example of this approach. In this case, the claimant had to pay the costs of the respondent state because the tribunal ruled that certain claims were frivolous and that the proceedings were conducted in bad faith.[23] In the case of *Libananco v. Turkey* the tribunal stated 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."[24] Similarly, the tribunal in *RSM v. Grenada* noted that "it is simply 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."[25] Further, in the case of *Guaracachi American and Rurelec v. Bolivia*,[26] the arbitral tribunal declined a request for an order requiring the claimants to post security as a condition for continuing their claim, despite allegations that one of the claimants was a shell company and the other was financially unstable, and continuing proceedings with the aid of third-party funding. The tribunal emphasized the nature of such orders as rare and exceptional and found Bolivia had failed to meet the burden of proof as the mere presence of third-party funding did not demonstrate that the claimant would be unable to meet any eventual costs order. One possible solution is adoption of a presumption that security for costs would be posted in every case, and a parallel presumption that the costs of that security (i.e., the cost of funding, the cost of ATE insurance premiums, or the cost or a bank guarantee) would be shifted at the end of the case, along with other costs. Under this proposal, each party would be made financially whole at the conclusion of the case – if the state prevails it would be sure to recover on any costs award, and if the investor prevails it would recover not only its legal costs, but also costs associated with security. Arguably, however, each side would also benefit by the reduction or elimination in the often costly and time-consuming process for applying for and resisting an order for security for costs.[27]

[23] *International Thunderbird Gaming Group v. United Mexican States*, UNCITRAL, Award, 26 January 2006.
[24] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 57 (June 23, 2008).
[25] *RSM et al v. Grenada, Tribunal's Decision on Respondent's Application for Security for Costs*, 5.19 (Oct. 14, 2010).
[26] *Guaracachi America, Inc. & Rurelec Plc v. Plurinational State of Bolivia*, PCA Case No. 2011- 17, Procedural Order No. 14 (Mar. 11, 2013).
[27] ICCA Queen Mary Report on Third Party Funding, April 2018 pg. 224-225 result of Roundtable Discussion as a result of opinions on the ICCA Queen Mary Draft Report on Third Party Funding.

IS THERE A POSSIBILITY FOR UNIFORMITY IN APPLICATION OF RULES?

The IBA Guidelines nor the recommendation of the Queen Mary Report are formally binding on parties or their counsel. Even the ICC Guidance note is simply advisory.[28] Meanwhile, the SIAC Investment Arbitration Rules 2017 expressly authorize arbitral tribunals to require disclosure of third party funding. The only mandatory disclosure requirements that apply to international arbitration appear to be the national legislative reforms in Hong Kong and Singapore, and the new CIETAC International Investment Arbitration Rules.[29] ICSID has recently announced that it will be considering rules governing disclosure of third party funding as part of its process of updating its rules and regulations.[30] It will indeed be very interesting to see whether ICSID and other institutions will mandate systematic disclosure of the existence of funding and the identity of funders or, consistent with the approach of the SIAC Investment Arbitration Rules, simply authorize arbitrators to order such information.

POSSIBLE SOLUTIONS

In order to adopt such a practice, a change in the institutional rules would not be necessary. Indeed, in the past, institutions have adopted practices that were not reflected in the rules, and where the rules were subsequently adapted during their revisions.[31] The obligation of disclosure should not be limited to the identity of the funder. It should also include key terms of the funding service agreement, if not the agreement itself in certain circumstances. For instance, claimants should be required to inform respondents whether the funder has agreed to satisfy an adverse costs order by the tribunal. Only if these systemic changes are brought about by Arbitral Tribunals around the world can both Investors and States alike have more clarity as to the direction and norms surrounding Third Party Funding. This will bolster investment and will encourage states to act more responsibly as Investors who are the victims of treaty breaches such as FET and MFN clauses are not left without a remedy to address their claims and should not have to choose between investing in further ventures and fighting for their claim. States or

[28] International Chamber Of Commerce, Note To Parties And Arbitral Tribunals On The Conduct Of The Arbitration 5 (2016), https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/ (last visited June 21, 2019).

[29] China International Economic And Trade Arbitration Commission, Hong Kong Arbitration Center, Guidelines For Third Party Funding In Arbitration, https://hkarbitration.files.wordpress.com/2016/05/cietac-draft-guidelines-17-may-16.pdf (last visited June 21, 2019).

[30] M. Kinnear, *ICSID Secretary General's Top Priorities for Reform*, G.A.R., May 3, 2015, http://globalarbitrationreview.com/ article/1140847/icsid-secretary-generals-top-priorities-for-reform (last visited June 25, 2019).

[31] In 2009, the ICC Secretariat introduced the practice requiring arbitrators to disclose information regarding their availability, when this was not foreseen by the 1998 ICC Rules. This practice was subsequently memorialized in the revised 2012 ICC Rules (Art. 11(2)). By the same token, the ICSID Secretariat requested as a matter of practice that a juridical person filing for arbitration, provide evidence that it had proper authorization to commence arbitration.

parties, as the case may be, could expressly provide for such rules in the Treaty or contract containing the arbitration agreement. In fact, in the recent draft proposal released for the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP), the European Union inserted a provision requiring disclosure of TPF.[32] Also, arbitral institutions could play a key role in the push for such transparency. It would be immensely beneficial if they would make it part of their practice to ask for this information at the outset. This need not be officially included in the rules, however at the time of acknowledging receipt of the notice or request for arbitration, the institution could ask for such information, specifying that such disclosure is required for the purposes of establishing the independence and impartiality of the arbitrators and to make a decision on adverse costs order and the same should occur before the arbitrators accept their appointment. The same must be strictly enforced and there should be a mechanism to discourage non-adherence to the same, this could be done either through a penalty mechanism or through limiting access to the tribunal in further cases.

CONCLUSION

Third Party Funding and related issues in Investment Arbitration is a complex interplay of several issues and opinions. This paper has identified certain systemic Issues central to Third Party Funding in Investment Arbitration. However, for change to take place all the stakeholders need to contribute positively and understand the risks and pitfalls of not doing so. The Queen Mary Report is a great step towards identifying its many facets and documenting expert opinions on the matter. There is an urgent need to act on Third Party Funding to protect the nature and independence of the Arbitration process and for more independent research to ascertain other areas of concern. In this age of Globalization; International Investment is growing at an unprecedented rate. Investment Treaties are present for the sole purpose of capitalizing on this boom. While the terms of treaties have become more uniform and well defined the redressal process of Arbitration is still playing catch up. There must be a system in place that encourage meritorious claimants from approaching tribunals and a necessity to render certainty to such cases which would in turn increase Investments and is beneficial to the State as well. This can only be achieved by a change in Arbitral Rules and uniformity in practice by increased recognition of the problems and working towards a solution to the systemic Issues affecting Third Party Funding in International Investment Arbitration.

[32] European Commission, *Draft of Chapter II (Investment) of the Transatlantic Trade and Investment Partnership* (17 Sep. 2015), Art. 8(1),