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PREFACE

International arbitration has always been an interesting topic to me, from the very beginning of my law career, as it paves the way for the disputing parties to settle or otherwise conclude the disputes through a non-conventional method, which offers effective judgment proceedings before arbitral tribunals with fast and high quality reviews on merit. Therefore, I really wanted to focus on a particular subject that is somehow interrelated to international arbitration in my thesis study. To this end, delving into one of the most trending topics of international arbitration (i.e. TPF) welcomes me with open arms as this topic has been rarely discussed so far in Turkey. I hope, this work could give a little fresh impetus to the concept of TPF, but more importantly, to the forthcoming studies pertaining to international arbitration in Turkey.

I would like to express my sincere gratitude to Asst. Prof. Candan Yasan Tepetaş, who has supervised me over the course of the preparation of this work, for supporting me to determine my thesis subject, and for contributing me with her in-depth knowledge and making sources available to me, in order to write up this thesis. I would also thank Mr. Ahmet Bahadır Erkan, who inspired me in choosing this subject of thesis and helping me to grow ideas on this matter. His high-quality guidance is much appreciated.

I have gained invaluable experience while working on this study, especially from an academic standpoint. With this study, I have started believing that focusing on one subject with its every single detail significantly enriches the effort spent on that way. This is the reason I deem it an important milestone for me to broaden my knowledge on the preparation of academic writings, which I would definitely benefit from, should I proceed with PhD in my future career.

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ABBREVIATION LIST

ADR	:	Alternative dispute resolution
ALF	:	The Association of Litigation Funders
AMLB	:	Hong Kong Arbitration and Mediation Legislation Bill 2016
ATE	:	After-the-event
BTE	:	Before-the-event
CETA	:	EU-Canada Comprehensive Economic and
	:	Trade Agreement
CIARB	:	Chartered Institute of Arbitrators
CLA	:	Singapore Civil Law (Amendment) Act 2017
EAA	:	English Arbitration Act 1996
ECLA	:	English Criminal Law Act 1967
GPB	:	Great British Pound
HKO	:	Hong Kong Ordinance Arbitral Awards
IBA	:	International Bar Association
IBA Guidelines	:	The IBA Guidelines on Conflict of Interest
	:	in International Arbitration 2014
ICSID	:	The International Centre for Settlement of Investment Disputes
ICSID Convention	:	ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ISTAC	:	Istanbul Arbitration Center
New York Convention	:	New York Arbitration Convention on the Recognition and Enforcement of Foreign
QMUL on TPF	:	The ICCA-Queen Mary Task Force on Third-Party Funding
TAA	:	Turkish International Arbitration Act No. 4686

TCPL	**:**	Turkish Civil Procedural Law No. 6100
TPF	**:**	Third-party funding
U.K	**:**	The U.K.
U.S.A	**:**	The United States of America
USD	**:**	U.S. Dollar

ABSTRACT

International arbitration, which has been used in settling international commercial and investment disputes and whose popularity has taken the lead among other alternative dispute resolution methods, no longer suffers from an existential anxiety but seeks to eliminate its on-going drawbacks, in order to provide the optimal level dispute resolution procedures to disputing parties. To this end, one of the most clouded problems of international arbitration is surely arbitration costs that may amount to intimidating levels in many circumstances. Therefore, in order to prevent the decrease on the volume of international arbitration due to the expensive arbitration costs, one may argue that, TPF, which has already been widely practiced in common law jurisdictions, could be an alternative for in international arbitration as well. Accordingly, this has paved the way for application of TPF in international arbitration and, in this thesis work, the background, multi-faceted roles and application of TPF in international arbitration are examined in detail.

Within the scope this thesis, in the first section, each fundamental element of TPF and its differences from the similar funding mechanisms are analyzed throgouhly. Particularly, an insight is provided in this work, regarding the definition of TPF in light of the doctrinal opinions and the precedents. Likewise, the frequently-underlined advantageous and disadvantageous of TPF are also taken into consideration in this work.

In the second section, the trending issues of TPF in practice are explained and assessed. Especially, whether transfer of the privileged documents with the third-party funders are deemed as waiver of privilege, the potential conflict of interest scenarios and TPF's effect on TPF are observed from a legal standpoint. By way of this, the recent position of TPF in international arbitration is introduced, and solutions to each problem are suggested accordingly.

In the third, which is the last, section, a detailed analysis pertaining to the application of TPF in different countries is provided, and by way of this, the subject of the thesis is also examined from comparative law analysis standpoint, and conclusions thereof are made accordingly. Australia and the U.K seem to be the leading countries, in both of which TPF has been widely applied, whereas Hong Kong is one of the first countries which regulated TPF in international arbitration. For Turkey, no market is yet to be established for TPF, however, it is concluded that, it would be reasonable to expect some developments on this matter.

ÖZET

Uluslararası ticari uyuşmazlıklar bakımından, son yıllarda oldukça yaygın bir biçimde tercih edilen ve alternatif uyuşmazlık çözüm yöntemleri arasında popülarite bakımından en üst sıraya tek başına yerleşmiş olan tahkim, artık varoluş mücadelesi değil, eksikliklerini gidererek en optimal seviyede uyuşmazlık çözüm yöntemi sunma arayışına girmiştir. Bu çerçevede, uluslararası tahkimin en önde gelen sorunlarından bir tanesi, hiç şüphe yok ki, korkutucu seviyelere çıkabilen tahkim masraflarıdır. Dolayısıyla, tahkim masraflarının, uyuşmazlığın taraflarınca tahkimin tercih edilebilirliğinin azalmasına yol açmasının önüne geçebilmek için, özellikle Anglo-Sakson yargı sistemlerinde yaygın şekilde uygulanmakta olan dava finansmanın, tahkime uyarlanması fikri öne atılmış ve böylelikle uluslararası tahkimde üçüncü kişi finansmanının önü açılmıştır. İşbu tezde üçüncü kişi finansmanın, gelişimi, uluslararası tahkimdeki yeri ve uygulanma şekilleri detaylı olarak incelenmiştir.

Tez kapsamında, ilk bölümde üçüncü kişi finansmanın ana unsurları, benzer mekanizmalardan farkları, avantajları ve dezavantajları ele alınmıştır. Özellikle üçüncü kişi finansmanının tanımı konusunda doktrin ve yargı kararlarındaki farklı uygulamalara ve bu konuda yapılan çalışmalara ışık tutulmuştur. Benzer şekilde, üçüncü kişi finansmanının doktrinde sıklıkla vurgu yapılan avantaj ve dezavantajları da birinci bölüm altında detaylıca incelenmiştir.

Tezin ikinci bölümünde ise, üçüncü kişi finansmanının uygulama problemleri ele alınmıştır. Özellikle, imtiyaza konu belgelerin üçüncü kişi finansörler ile paylaşılması halinde bunun gizlilikten feragat anlamına gelip gelmeyeceği, üçüncü kişi finansmanı ile ortaya çıkabilecek çıkar çatışması halleri ve yargılama sonucunda dağıtılacak tahkim masraflarına üçüncü kişi finansmanının etkisi üzerinde durulmuştur. Üçüncü kişi finansmanının böylelikle uluslararası tahkimdeki güncel pozisyonuna ışık tutulmuş ve sorunlara çözüm arayışı getirilmeye çalışılmıştır.

Tezin son ve üçüncü bölümünde ise, üçüncü kişi finansmanının farklı ülkelerde nasıl uygulandığına ilişkin detaylı analiz yapılmış ve böylelikle karşılaştırmalı hukuk analizi penceresinden de konu irdelenmiş ve bu yönde çıkarımlarda bulunulmuştur. Özellikle, İngiltere ve Avustralya, davada üçüncü kişi finansmanı konusunda çok gelişmiş ülkeler olarak karşımıza çıkarken Hong Kong ise uluslararası tahkimde üçüncü kişi finansmanı konusunda yasal düzenlemelere başvuran ilk ülkelerden bir tanesidir. Türkiye bakımından ise, üçüncü kişi finansmanının henüz yaygın bir biçimde uygulama alanı bulmadığı ancak ileride bu yönde gelişmelerin beklenmesinin makul olacağı sonucuna varılmaktadır.

INTRODUCTION

In an attempt to eliminate or otherwise minimize the long-standing concern of arbitration (i.e. exorbitant arbitration costs), the international arbitration community recently welcomes TPF, a mechanism in which a third-party funder provides a funded party with financial assistance, on a no-recourse basis, and in return a funded party undertakes to pay previously-agreed percentage/amount of the award, in case of successful result. However, in the absence of regulatory sources on this matter, suggestions on a conceptual definition of TPF by marking the similar mechanism (e.g. insurance or attorney financing) vary significantly, and no conformity is yet to be reached accordingly.

Nevertheless, TPF has undisputedly a growing momentum in international arbitration, by virtue of its particular advantageous. Being an instrument for accessing to justice and top-notch due diligence processes are inter alia conspicuous contributions offered by a TPF relationship. On the other hand, TPF may bring certain disadvantageous as well. Especially, the degree of control that the third-party funders could have and the third-party funders' approach to the arbitral proceeding with pure financially-driven incentives are pointed out as the drawbacks that could endanger the integrity of international arbitration.

Furthermore, together with application of TPF in international arbitration, three critical issues have come forward, and thereby being addressed and argued by the scholars and the arbitral tribunals. To this end, transfer of confidential documents to the third-party funders is one of the most concerned topic, as in principle, such transfer leads a waiver of privilege. Furthermore, the potential relationship between the third-party funders and the arbitrators may lead the arbitrator conflict of interest, which therefore draws the attention of the commentators to this topic as well. Last but not least, the allocation of costs gains importance together with the involvement of the third-party funders into the cases, in so much that, whether the TPF costs should be ordered against the unsuccessful party or the third-party funders should be held liable for the adverse costs, if the case is lost, are two notable questions for which the commentators pointed out in different ways.

Lastly, from a comparative analysis perspective, TPF has been applied mostly in common law jurisdictions. Indeed, the U.K. and Australia are two leading countries, both of which have allowed the application of TPF in litigation beforehand, and TPF in international arbitration thereafter. On the other hand, together with Singapore, Hong Kong has regulated TPF in international arbitration for the first time worldwide. On the other hand, Turkey is yet to show much progress about TPF, however, from a theoretical perspective, no regulation prohibits the application of TPF either in litigation or international arbitration.

In light of the foregoing and current developments in TPF, this thesis shed light onto the foregoing topics in detail, with references to scholars, commentators and courts as well as arbitral tribunals’ decisions thereof.

FIRST SECTION

AN OVERVIEW OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

1.1. Rationale Behind Third-Party Funding in International Arbitration

Before delving into the details of what TPF is and to what extent it is capable of influencing international arbitration, for better and deeper understanding of the subject of this academic work, it would be convenient beforehand to shed some light onto the background of it, and correlatively, its birth and gradual development over the course of time.

1.1.1. Birth of Third-Party Funding

Resolving disputes outside national courts has increasingly been a drawing-attention method, especially for those carrying the element of foreignness, in order for parties to reach effective-driven, and interactive, trial methods that could end up faster and with relatively predictable conclusions. This is the reason, various hetero solution-processes have been visibly evolved, so-called the ADR methods, in the recent times to stay away from or have an allure alternative to national courts' active role, combined with long-standing, but outdated, hence not responsive sovereignty-wise resolution methods.

For sure, one of the most common ADR methods matured significantly is international arbitration, widely recognized in the international sphere, by both common law and civil law jurisdictions. Despite the fact that, many ADR methods are still defined as *to-be-improved methods,* one may conclusively argue that, for today's dispute resolution era, international arbitration is a long-standing reality, hence not a new phenomenon[1]. Deriving from this factual information, international arbitration market's main concern is no longer to establish or familiarize itself to disputants, litigants or counsels; in other words, there is no longer a struggle for existence for international arbitration at the time being. Instead, the main concern has been evidently migrated to ensuring its best-fit size applicability to the widest extent possible, with a purpose of eliminating existing and commonly addressed drawbacks that have appeared or otherwise been pointed out by the practitioners as well as scholars during its implementation.

To that end, one of the main drawbacks of international arbitration, which dissuades parties to prefer arbitration instead of litigation before national courts is the financing of its costly and lengthy procedure, or in other words; the exorbitant attendant costs[2]. As a matter of fact, this issue is deemed as international arbitration's Pandora's Box[3]. Indeed, some academic works emphasize on that parties in dispute concern of the expensive arbitration cost as the first and foremost obstacle to sign an arbitration agreement[4]. This intimidates both the parties who are able to pay the arbitration costs but are unwilling to do so and the parties who are not able pay the arbitration costs but are willing to do so[5].

Having said that, not only have the parties to disputes but also arbitration institutions share the very same concern. For instance, CIARB, which is an

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[1] Bernardo M Cremades Sanz-Pastor, 'Chapter 12. Concluding Remarks' in Antonias Dimolitsa (ed), *Third-Party Funding in International Arbitration (ICC Dossier)* (International Chamber of Commerce (ICC) 2013) p. 153.

[2] E De Brabandere and J Lepeltak, 'Third-Party Funding in International Investment Arbitration' (2012) 27 ICSID Review 379, p. 379; Caroline Dos Santos, 'Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?' (2017) 35 Association Suisse de l'Arbitrage 918, p. 918; Jonas Von Goeler, 'Chapter 1: Introduction', *Third-Party Funding in International Arbitration and Its Impact on Procedure*, vol 35 (2016) 1; Duarte Gorjão Henriques, 'Third-Party Funding: A Protected Investment?' (2017) 2017 Spain Arbitration Review | Revista del Club Español del Arbitraje 100, p. 124.

[3] Ceyda Süral Efeçınar, Ekin Ömeroğlu and Ece Uyanık (eds), Uluslararası Yatırım Tahkimi ve Üçüncü Kişi Finansmanı (1st edn, Seçkin Yayıncılık 2018) p. 74.

[4] Anne-Carole Cremades and Alexandre Mazuranic, 'Chapter 9: Costs in Arbitration' in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition)* (2nd edn, Kluwer Law International 2013) p. 173.

[5] Goeler (n 2) p. 2.

international not-for-profit organization aiming to optimize the use of ADR methods[6], published a report titled *CIArb Costs of International Arbitration Survey 2011*. The report concentrates on what it is that costing too much in international arbitration and how to reduce them significantly[7]. Therefore, high-level arbitration cost still keeps its title of being one of the mostly-concerned topics of international arbitration, and is therefore an on-going debate for today and this is the reason it surely intimidates many of those who may think to arbitrate in order to pursue the claim, instead of filing a lawsuit before national courts.

However, as per QMUL on TPF this does not necessarily mean that, the financially distressed parties are the sole featured actors, being unable to handle excessive arbitration costs, in view of the arbitration community, which ultimately aims to remove the barriers along way the arbitration[8], but those who have financial power to cover arbitration costs, yet wants to minimize the legal budgets or otherwise the inherent risk of arbitration (i.e. unpredictability of result and adverse cost) may also refrain from battling before an arbitral tribunal[9]. It thus shows the fact that, almost every player of international arbitration shares the same concern in regard to the excessiveness of arbitration costs, and this is exactly where all brainstorming has begun on how to overcome this inherent, and stringent, problem.

In view of above, despite the ups and downs, and its controversial background, TPF has somehow succeeded in to be an emerging solution growing up rapidly to

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[6] See Chartered Institute of Arbitrators Policy <https://www.ciarb.org/policy/> accessed 7 January 2019.

[7] 'CIArb Cost of International Arbitration Survey <https://www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIArb-Cost-of-International-Arbitration-Survey.pdf> accessed 7 January 2019.

[8] International Council for Commercial Arbitration, 'Chapter 1: Introduction', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) 20 <www.arbitration-icca.org> accessed 7 January 2019.

[9] Christopher P Bogart, 'Third-Party Financing of International Arbitration' 3, 1, 2; Henriques (n 2) 127; De Brabandere and Lepeltak (n 2) p. 383.

circumvent the arbitration cost in international arbitration. There is an almost unanimity in doctrinal views that TPF's growing momentum[10] is real and this is the reason there is an increasing number of researches and academic works published that purely focus on the rationale behind TPF[11].

While examining how TPF comes to today's prominent position, the commentators suggest different reasons on this matter:

The first reason stems from impecunious parties who suffer financial instability or otherwise have no financial means to cover or impose arbitration costs to pursue/defend the claims before an arbitral tribunal. This category covers both the parties which are in a financial hardship because of internal operational reasons and the parties which are economically stable, yet negatively affected by external reasons such as market turmoil or economic downturns. Basically, this is where TPF exercises its preferred meaning; facilitating access to justice[12]. On that note, the first reason is especially important for investment arbitration as it is where the arbitration costs could reach to enormous amounts so that the investors are usually not in a financial position to declare or maintain a legal war against the states before the arbitral tribunals[13].

The second reason that has triggered the exponential growth of TPF is that particular companies may commercially prefer to always have enough sources for daily business activities, thus prefer not to allocate their sources to legal matters

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[10] Lisa Bench Nieuwveld and Victoria Shannon Sahani, 'Chapter 1: Introduction to Third-Party Funding', *Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2017) 1; De Brabandere and Lepeltak (n 2) 379; Marie Stoyanov and Olga Owczarek, 'Third-Party Funding in International Arbitration: Is It Time for Some Soft Rules?' (2015) 2 BCDR International Arbitration Review 171, p. 171.

[11] See Susan Lorde Martin, 'The Litigation Financing Industry: The Wıld West Of Fınance Should Be Tamed Not Outlawed' (2004) 10 Fordham Journal of Corporate & Financial Law 55; Jason Lyon, 'Revolution in Progress: Third-Party Funding of American Litigation' (2010) 58 UCLA Law Review 41.

[12] Jonas Von Goeler, 'Chapter 4: Disclosure of Third-Party Funding in International Arbitration Proceedings', *Third-Party Funding in International Arbitration and its Impact on Procedure*, vol 35 (Kluwer Law International) p. 122.

[13] De Brabandere and Lepeltak (n 2) p. 379.

even in the presence of claimable receivables[14]. Therefore, they deem it appropriate to delegate the funding of legal matters to a third-party funder and thereby ensuring that the financial year down the road is entirely predictable. One of the main concerns herein rise due to the adverse costs, where the funded party in any case may want to guarantee that they do not suffer from any possibilities that may have negative impact on its accounting balances. In other words, metaphorically, the hunter does not want to become the hunted at the end of the arbitral proceeding.

The third reason that leads the advent of TPF is that big law firms have also found TPF attractive to reach out more clients, offering multiple choices in conjunction with TPF, thereby acting as a bridge between the third-party funders and the funded parties. This basically gives law firms a good opportunity to expand their clientele. Burford Capital, in its newly published report titled *Litigation Finance Survey*, has announced that 42% lawyers interviewed take TPF as an opportunity, beside its other advantages, to win new business, whereas there is almost none who has not heard of the existence of TPF yet[15]. Therefore, the law firms also play an important role on fast growing of TPF market, especially in international arbitration, as it brings a considerable potential to drum up business.

In correlation with the foregoing, the clients correspondingly feel more comfortable or secured, once TPF is encouraged by their long-standing lawyers, so that the disputants become inclined to be party of TPF market by the help of their legal counsels. On top of that, the law firms involving into TPF market have separately increase the awareness of the clients for TPF, such that, according to surveys, clients have built up trust on TPF mechanism and its advantages of course, thus sometimes do not necessarily use law firms as a wing man but

[14] Derric Yeoh, ‘Third-party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?’ (2016) 33 Journal of International Arbitration 115, p. 117; De Brabandere and Lepeltak (n 2) 379; Henriques (n 8) p. 129.
[15] ‘2018 Litigation Finance Survey’ (Burford Capital 2018) <http://www.burfordcapital.com/wp-content/uploads/2018/10/Burford-Capital-2018-Litigation-Finance-Survey.pdf> accessed 9 January 2019.

directly work with the third-party funders[16]. In the end, this basically becomes a win-win situation for each party of TPF[17].

Further to this, the researchers[18] conclude that the more TPF takes place in the arbitration market, the more attractive is it for the third-party funders[19]. So indeed, there has been an emerging market for justice, in which the disputants seek to obtain justice whereas the third-party funders ultimately aim to make profit by taking a side with the funded parties. This being the case, the number of third-party funders has correspondingly increased, which in the end have contributed to growing-trend of TPF[20]. To that end, Burford Capital, a global third-party funder, has recently announced that, in 2017, it made 265 million USD profit by just investing in the cases[21].

Lastly, it is also noteworthy to mention that, by bearing in mind the fact that, for the third-party funders, TPF is a pure investment tool, yet the investment risk is quite uncommonly not related to usual market dynamics of a commercial market such as bond, equities, the economic crisis or currency fluctuations thereof. Therefore, for those investors who want to specialize on non-conventional risk-wise methods, TPF might be also the best fit to go after[22].

However, addressing exorbitant arbitration cost as one and only reason for flourishing TPF would be a mistaken approach. Despite the fact that TPF's

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[16] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) 17 <www.arbitration-icca.org> accessed 7 January 2019.
[17] Nieuwveld and Sahani (n 10) p. 11.
[18] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 17.
[19] Nieuwveld and Sahani (n 10) p. 11.
[20] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 37.
[21] '2017 Annual Report' (Burford Capital 2017) <http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf> accessed 9 January 2019.
[22] Maya Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2010) 95 Minnesota Law Review 72, p. 1284.

preferred meaning is to facilitate an access to justice, some parties may approach TPF for financial maneuver purposes. Such that, when the economic crisis or financial suffering is combined with the inherent uncertainty of arbitration in terms of the direction of the awards, this could dissuade parties from fighting in the lengthy arbitral proceedings in the presence of unpredictability of the award[23]. Therefore, shifting the risk of losing the case together with financial consequences to a third-party funder, which is to fund the case on a no-recourse basis[24], would be a golden opportunity for the disputants in many circumstances[25].

To that end, it has been suggested that, international arbitration has been in search of a way to find an optimal way in which it could maintain its integrity while being accessible to all of the applicants pursing their claims or defending their rights[26], and ultimately TPF responds this call. In light of the foregoing, the one of the best effective instruments for overcoming arbitration costs is TPF, assisting parties to easily carry out the entire arbitration process without suffering financial loss or otherwise financial risk regardless of the direction of the award[27].

1.1.2. Historical Background of Third-Party Funding

From a historical perspective, even before TPF has appeared in international arbitration scene, it was a hotly-debated topic in litigations filed before national courts. In other words, TPF in international arbitration has actually evolved from TPF in litigation[28] following the emergence of arbitration as an ADR method. In

[23] De Brabandere and Lepeltak (n 2) p. 383; Nieuwveld and Sahani (n 10) p. 11; Steinitz (n 22) p. 1283.
[24] Martin (n 11) p. 55.
[25] De Brabandere and Lepeltak (n 2) p. 383.
[26] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 17.
[27] Goeler (n 2) p. 27.
[28] Nieuwveld and Sahani (n 10) 10; Didier Matray and Sigrid van Rompaey, 'An Introduction to Third-Party Funding' (2018) 2017 175, p. 180.

fact, TPF in litigation dates back to medieval origin and still occupies the most of the TPF activities in the world[29].

TPF in litigation has a long-standing history. Basically, it is defined by Van Goeler as "*capital for dispute resolution by commercial funding institutions disposing of funds dedicated for investing in claims and defenses pursuant to an agreement between funder and the funded party*"[30]. It is mainly structured on two different forms; maintenance and champerty. Maintenance is basically defined as financing a case by an intermeddler, who is not a party to dispute, where the intermeddler assists the litigant pursing the claim, without expecting any reimbursement or otherwise interest in return[31]. On the other hand champerty is the same form of maintenance with expecting return at the end of the case[32]. Both of the foregoing methods, however, had been subject to strict prohibitions in most of the jurisdictions, and therefore practicing those trigger criminal liability of the user, in some jurisdictions, whereas it was a tort in others.

Just because it is a popular subject, this matter has been explained by *the doctrine of maintenance and champerty*, that means of prohibition for bringing frivolous or fraudulent claims with malicious purposes in litigation by the disputants who had benefited from non-interested parties' financial assistance, and thus from leverage as well as the lack of public justice[33]. This doctrine historically dates back to medieval ages, where the landlords had involved in cases, or encouraged others to initiate cases, by providing financial and/or lobbying assistance, without having any direct interest in the case however, with the sole purpose of harming their

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[29] Nieuwveld and Sahani (n 10) p. 1.
[30] Goeler (n 2) p. 2.
[31] Steinitz (n 22) 1287.
[32] Nieuwveld and Sahani (n 10) p. 14.
[33] Aren Goldsmith and Lorenzo Melchionda, 'Third-party Funding in International Arbitration: Everything You Ever Wanted to Know (but Were Afraid to Ask)' 2012 Journal of International Business & Law 53, p. 1; Oliver Gayner and Susanna Khouri, 'Singapore And Hong Kong: International Arbitration Meets Third-party Funding' (2017) 40 Fordham International Law Journal 1033, p. 1034; Steinitz (n 20) p. 1287; Nieuwveld and Sahani (n 9) p. 14.

rivals or get financial benefits from them[34]. However, the commentators note that this is the historical aspect of the prohibitions addressing the champerty and maintenance.

So, it is believed that there are further reasons that paralyze the implementation of maintenance and champerty by legislatures. To that end, Steinitz argues that, the fundamental reasons for champerty, or maintenance, restrictions are more than just its being a medium for the landlords to acquire more property[35]. Champerty also opens a way of bringing frivolous or otherwise unmeritorious claims, driven by financial desires, which would not be otherwise pursued, if there had been no external financial assistance. Moreover, the scholars argue that, maintenance and champerty gave damage the independence of the lawyers' professional judgment due to third-party's direct involvement in the case[36]. This consequently had leaded a protective approach towards those two financing methods. Lastly, it is also pointed out that, maintenance and champerty have posed particular risks for protection of confidential information between the attorney and client once the financiers reach that sort of information, thus should not be allowed for this ground as well[37].

That being the case, from TPF perspective, the foregoing reasons are indeed bad news, given that, because of the said, and well-recognized, doctrine, any third parties' involvement in cases of which they had no direct interest were not tolerated, and thus banned, which historically paralyzes the applicability of TPF in any fields[38]. Over the course of time however, in conjunction with the emergence of formalized legal systems, the strict and conservative approaches towards

[34] Goldsmith and Melchionda (n 33) 1034; Steinitz (n 22) p. 1287.
[35] Steinitz (n 22) p. 1327.
[36] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) 186 <www.arbitration-icca.org> accessed 7 January 2019.
[37] Steinitz (n 22) p. 1327.
[38] Steinitz (n 22) p. 1286.

maintenance and champerty have been eased gradually[39]. In this way, TPF in litigation stroke lucky as it had been no longer a taboo for the legislatures, and has been allowed first, then suddenly become a common-used instrument in many countries, thanks to its inherent advantages attracting many of those seeking to pursue claims[40].

As for the starting point of TPF, Australia and the United Kingdom are the first countries which have used TPF as the financing method of arbitration costs in 21th century[41]. Up until today, TPF has evolved significantly in common law-based systems that, for instance, the United States and Australia, have run extensive funding markets for many years[42]. Likewise, the U.K. is also another example evidencing the exponential growth of TPF in recent years with total market value of 1.5 billion GBP[43]. However, although TPF emerged from common law jurisdictions, civil law jurisdictions conduct a positive approach towards TPF as well, such that, in Europe, Greece and Portugal are two countries only, which are yet to allow the application of TPF[44].

However, despite of such positivity, the applicability of TPF in civil law jurisdictions is not as much as it is under common law. The underlying factors for such differences are that, in civil law systems, state-court jurisdictions are considerably cheap, hence affordable, thereby attracting the disputants' attentions with no need for financial assistance, and on top of that the system of judicial assistance is widely accepted in civil law systems which could be in many circumstance a key instrument to handle the litigation costs. Lastly, in stark

[39] Goldsmith and Melchionda (n 33) p. 55.
[40] Steinitz (n 22) p. 1279.
[41] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 18; Matray and van Rompaey (n 28) 180; Nieuwveld and Sahani (n 10) p. 10.
[42] Louise Barrington, 'Chapter 3: Third-Party Funding and the International Arbitrator' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017) 16; Nieuwveld and Sahani (n 10) 3.
[43] Matray and van Rompaey (n 28) p. 37.
[44] Burcu Osmanoglu, 'Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' (2015) 32 Journal of International Arbitration Kluwer Law International 325, p. 328.

contrast to common law, no punitive damages method is accepted in civil law jurisdictions, meaning that the amount of claims cannot reach to astronomic levels, which thus entails lower cost and expenses with lower risk[45].

1.1.3. Harmonization of TPF and International Arbitration

Together with the dominance of arbitration in ADR methods, TPF has been swiftly dragged into the international arbitration. The transition period was in fact not painful, on the ground that, most of the fundamental principles of TPF in litigation are directly admissible to international arbitration[46].

Indeed, for today, TPF in international arbitration gains the attention of the third-party funders as much as TPF in litigation does. For instance, according to Van Goeler, due to the inherent bi-polar nature of TPF, that is involvement of a third-party in an arbitral proceeding with financial incentives, could potentially lead substantial procedural amendments or otherwise modification in international arbitration rules[47]. To this end, there are basic, but understandable factors, attesting this portrait, detailed in following:

First, the value of the claims is considerably higher in international arbitration than those in litigation, which factually means that international arbitration disputes bring more risk, but even bigger profits to the third-party funders[48]. On top of that, the chance of getting high stakes are not sourced from one-shot cases, meaning that it is quite possible for a third-party funder to fund the same party in different cases in the same or different time. The logic herein is that the players of the international arbitration regularly, and increasingly, make commercial transactions, which eventually lead even more disputes calling for TPF, and this is

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45 Süheyla Balkar Bozkurt and Burak Huysal, 'Milletlerarası Tahkimde Yargılama Masraflarının Hak Arama Özgürlüğüne Etkisi ve Sonuçları' (2015) 10 Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 121, p. 211.
46 Gayner and Khouri (n 33) 1034, 1035; Nieuwveld and Sahani (n 10) p. 1.
47 Goeler (n 2) p. 5.
48 Goeler (n 2) p. 2.

the reason, the disputants of the international arbitration are defined as *repeat players* of TPF industry[49].

Second, the speed of arbitral proceedings, and predictability of timings thereof are for sure at better conditions in international arbitration, compared with the lawsuits filed before national courts, so that the third-party funders could monetize their investments within relatively short period of time[50]. The total period of time spent for a case is especially important for the third-party funders considering the fact that, they invest in cases on a no-recourse basis, so faster is the arbitral proceedings, shorter do they minimize the risk of investment on a no-recourse basis.

Third, the predictability of the direction of the award is much higher in international arbitration than litigation before national courts, given the fact that all documents, facts and evidence are based on written forms, so that the legal risk assessments on a case could be concluded with reasonable assumptions and expectations[51]. Oral testimony, witness statements or other verbal instruments play less effective role in international arbitration and this eases the work of the third-party funders to correctly asses the merits of a case[52].

The last reason is that the recognition and enforceability of foreign arbitral awards is easier than national courts' decisions thanks to New York Convention, so that the third-party funders take courage to invest in the cases in the presence of high chance of collectability of rewards[53]. On top of that, investment arbitration under ICSID Convention[54] is even more attractive for the third-party funders, because as the recognition and enforcement of arbitral awards under ICSID is deemed an

[49] Steinitz (n 22) p. 1307.
[50] Harry T Edwards, 'Advantages of Arbitration Over Litigation: Reflections of a Judge' 14, p. 23.
[51] Edwards (n 50) p. 21.
[52] Steinitz (n 22) p. 1307.
[53] Nieuwveld and Sahani (n 10) p. 11.
[54] Please the Official Gazette of 2 June 1988, No. 19830, https://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc071/kanuntbmmc071/kanuntbmmc07103460.pdf, accessed 28 February 2019.

easy-going process compared to international commercial arbitration, because of the fact that, ICSID awards are accepted as final judgments of national courts' decisions[55] whereas New York Arbitration Convention assumes more ground for annulment of arbitral awards. As a bonus, in investment arbitration, the amount of profit that the third-party funders obtain could be very satisfying as the claims subject to disputes are generally based on mega-projects or its variations, thus the amounts in question could be enormous[56].

Therefore, in the light of the fact that, TPF and international arbitration share the common direction, their harmonization has given particularly good results. On this end, a scholar suggests that, one of first arbitration cases funded by a third-party funder is *Kardassopoulos and Fuchs v. Georgia* case (ICSID) in 2010[57]. In this case, the arbitral award is in favor of the claimants financed by a third-party funder. In regard to the allocation of costs, the respondent argues that the costs arising out of a third-party funder services should not be recoverable by the losing party. The arbitral tribunal focuses on this subject by noting the following, in verbatim: "*It is difficult to see why in this case a third-party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery."* and therefore decided to include the expense arising out of TPF into the overall legal costs to be covered by the respondent[58].

Today, the number of cases in international arbitration, funded by the third-party funders shows remarkably an increasing trend. In 2017, Hong Kong has enacted laws specifically allowing TPF in international arbitration, details of which are

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[55] Article 54/1 of ICSID Convention is as follows in verbatim: "*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state*."
[56] De Brabandere and Lepeltak (n 2) p. 387.
[57] *Kardassopoulos and Fuchs v Georgia* [2010] ICSID ARB/05/18 and ARB/07/15 228.
[58] ibid para. 686.

provided below[59], in order to adapt this growing phenomenon. The third-party funders also attain specific importance to financing arbitration matters, for instance, Burford Capital, Woodsford Litigation Financing and IMF Bentham, all of which are regarded as the leading financing companies, run separate departments for funding of arbitration matters only[60].

In Turkey, TPF has recently drawn the attention of parties, and by way of this, Turkish disputants have benefited from it, especially for the disputes to be filed against the Turkic Republics in ICSID arbitration[61]. For instance, *Ata Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan* case[62] is one among many arbitration matters funded by a third-party funder wherein the arbitral tribunal had to consider it in regard to allocation of costs, by referring the abovementioned *Kardassopoulos and Fuchs v. Georgia* case[63].

In light of the foregoing facts, it is accepted that, TPF in international arbitration is now a growing, and according to some; an exploding, phenomenon in arbitration market, as the market players have been increasing exponentially in parallel with the number of disputants which decide to benefit from TPF[64].

[59] Please see Section 3.4. below.
[60] See Burford Capital's website: <http://www.burfordcapital.com/eu/customers/international-arbitration-eu/> accessed 9 January 2019; see also IMF's website <https://www.imf.com.au/practice-areas/arbitration> accessed 9 January 2019 and Woodsford Litigation Funding's website https://woodsfordlitigationfunding.com/arbitration-funding/ accessed 9 January 2019.
[61] Yusuf Çalışkan, 'Uluslararası Yatırım Tahkiminin Üçüncü Kişiler Tarafından Finansmanı' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 645, p. 646.
[62] *Ata Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan* [2011] ICSID ARB/08/2.
[63] *Kardassopoulos and Fuchs v Georgia* (n 57).
[64] Osmanoglu (n 44) 325; '2018 Litigation Finance Survey' (n 15) p. 4.

1.2. MAIN FEATURES OF THIRD-PARTY FUNDING

1.2.1. Definition of Third-Party Funding

Definition of TPF is a highly vague topic, thus is addressed by different scholars[65], given that there is no one single rule or method on how to execute TPF in international arbitration. Indeed, TPF takes place, in practice, with many different forms in conjunction with parties' interests and needs[66]. Such flexibility, as a matter of course, makes it complicated to reach one unified definition of TPF[67]. To that end, in order to make a sound and conceptual definition of TPF, it would be convenient to understand beforehand the basic mechanics, which TPF provides to the players of this market.

In TPF, with purpose of financing by any means of arbitration costs, a funder basically agrees to cover the expenses of a funded, where the scope of the expenses varies depending on parties' will and negotiations. The nuance herein is that, the funder has no connection or otherwise is particularly interested in the dispute, yet undertakes to burden previously agreed costs, on a no-recourse basis[68]. Therefore, it is a "risk-free" market funding method for the disputing parties[69]. These costs may include, *inter alia*, any arbitration proceedings-related costs, arbitrators' costs, attorneys' costs as well as adverse cost[70]. What a third-party funder expects to benefit from in doing so is that, in case of a favorable result, to receive the agreed percentage of the award, in return. The foregoing gives a very brief snapshot of how TPF works in practice.

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[65] Matray and van Rompaey (n 28); Nieuwveld and Sahani (n 10); Osmanoglu (n 44).
[66] Matray and van Rompaey (n 28) p. 176.
[67] International Council for Commercial Arbitration, 'Chapter 3: Definitions', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) 53 <www.arbitration-icca.org> accessed 7 January 2019.
[68] De Brabandere and Lepeltak (n 2) p. 379.
[69] Henriques (n 2) p. 115.
[70] Nieuwveld and Sahani (n 10) p. 2.

In the presence of different parameters and technics followed in practice, the scholars as well as practitioners suggest various definitions for TPF, which in the end leads vagueness on this subject. In this respect, there are particular reasons why TPF is subject to dissimilar introductions.

To begin with, in TPF, the way of funding to the disputants by the third-party funders may vary considerably. The third-party funders may prefer to take back, for instance two times of the total amount invested in the case or otherwise a specific portion of the award issued[71]. Besides, the third-party funders may, for instance, fund a single case with an expectation of high return, or seek for portfolio funding, consisting of bulk cases.

Timing of funding may also differ case by case such that, a funded party may be in need of a financial support at the beginning of dispute or such need may rise in the middle of proceeding. Furthermore, the funded party shall not be only a financially distressed disputant but could be an affiliate company of that party too or a law firm as well[72]. Therefore, it does not necessarily mean that, the disputant takes the financial assistance at first hand. Likewise, the payment obligation of funded parties might be in different forms including but not limited to premium payment, reimbursement or otherwise a grant[73].

As for the parties benefiting from TPF, the funded party does not always have to be a claimant of the dispute but a respondent may also seek for financial assistance as the case may be[74]. This can occur simply because the respondent may file a counter-claim against the claimant, so that the respondent may follow the very same route, followed by the claimant, for receiving financial assistance from a third-party funder. However, the question comes to mind that whether a

[71] De Brabandere and Lepeltak (n 2) p. 381.
[72] International Council for Commercial Arbitration, ‘Chapter 3: Definitions’ (n 67) p. 50.
[73] International Council for Commercial Arbitration, ‘Chapter 3: Definitions’ (n 67) p. 50.
[74] International Council for Commercial Arbitration, ‘Chapter 2: Overview of Dispute Funding’ (n 14) 23; Cremades and Mazuranic (n 4) 16-17; Steinitz (n 20) 1302; Goldsmith and Melchionda (n 29) p. 59.

respondent could be a funded party if it does not file a counter-claim but just for defense-wise purposes. On this subject, it is remarked that, despite its being uncommon in practice, such type of TPF is also admissible[75]. For example, the case might be annulment or otherwise termination of a license in which the third-party funder is interested in, thus the third-party funder decides to invest in case to have the respondent defend itself successfully[76]. Lastly and understandably from the foregoing, a claimant and a respondent could be technically funded at the same time before the same arbitral tribunal by different funders as well[77]. On a separate note in regard to this subject, the funded parties could be any real or legal persons, or law firms, or even states, as the case may be[78].

In view of above components of TPF, scholars and practitioners give the following different descriptions. Maya Steinitz gives a rough introduction, stating that; "*TPF is a group of funding methods that rely on funds from the insurance markets or capital markets instead of, or in addition to a litigant's own funds*"[79], whereas in practice[80] it is defined as financing of claimant's legal costs. Likewise, Sahani and Nieuwveld's suggestion is the following "*a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award, or judgment rendered against that party, or both*"[81]. Lastly, Jason Lyon focuses on, while defining TPF, a third-party funder being a stranger to dispute[82]. As is seen, each definition is prone to focus on different variables of TPF, both in doctrine and practice, thereby approaching it from different, yet not a generic perspective.

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75 Cremades and Mazuranic (n 4) p. 17.
76 International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 23, p. 24.
77 Cremades and Mazuranic (n 4) p. 16-17.
78 Nieuwveld and Sahani (n 10) p. 2.
79 Steinitz (n 22) 1275, p. 1276.
80 Cento Veljanovski, 'Third-Party Litigation Funding in Europe' (2012) 8 The Journal of Law, Economics & Policy 405, p. 405.
81 Nieuwveld and Sahani (n 10) p. 1.
82 Lyon (n 11) p. 577.

From a regulatory perspective, there has been recently two codes enacted, both of which officially describe TPF as well. First one is CLA, enacted by Singapore National Parliament[83] on January 10, 2017, defining TPF as "*an entity that carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the Third-party Funder is not a party*[84]". Second regulation that defines TPF is from Hong Kong. Article 98G of the HKO[85]; which introduces TPF is as following: "*Third-party funding of arbitration is the provision of the arbitration funding for an arbitration – (a) under a funding agreement, (b) to a funded party, (c) by a third-party funder; and (d) in return for the third-party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement*[86]".

In addition, in view of all doctrinal suggestions combined with practitioners' contribution, and of course taking account of the relative legislation, QMUL on TPF provides a broader definition of TPF in its report as follows, in verbatim;

"*the term third-party refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,*
a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grand or in return for a premium payment[87]."

Therefore, despite the ups and downs on this matter, experts on TPF have recently came a long way to have an inclusive definition. Needless to say, however, by

[83] Singapore Civil Law (Amendment) Act (No. 2 of 2017) 2017.
[84] Singapore Civil Law (Amendment) Act (No. 2 of 2017) 2017, s 2.
[85] Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Ordinance 2017.
[86] Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Ordinance 2017.
[87] International Council for Commercial Arbitration, 'Chapter 3: Definitions' (n 67) p. 50.

virtue of multiple modeling of TPF, each of addressed definitions and the others provided by the scholars would do the job, thus can be taken into consideration, to the extent necessary.

1.2.2. Definition of Third-Party Funder

The definition of third-party funder is important in order to differentiate it from similar litigation funding mechanism (e.g. insurance and attorney contingency fee). Therefore, besides the definition of TPF, there are academic works so as to establish a conceptual definition of a third-party funder as well.

First and foremost, a third-party funder shall have, under no circumstances, legal and direct interest in a dispute to be invested into, thus shall have no capacity to be a party of an arbitration proceeding. As the name suggests, a funder should be deemed as a third-party to a dispute, having no pre-existing expectation from the dispute[88]. A third-party funder may be a natural person or otherwise a legal person. In practice, due to natural consequences of commercial activities, the pre-eminent third-party funders are legal persons[89], most of which are composed of former lawyers[90]. On that note, some argue that, a third-party funder should be a professional entity, specifically focusing on litigation financing market[91].

A third-party funder may enter into agreement with a claimant or a respondent or affiliate companies of both, or a law firm, as there is no limitation on this end[92]. However, entering into agreement with the foregoing does not mean that there is an assignment of debt; to wit a third-party funder does not have to be the owner of

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[88] Rogers Catherine A, 'Ethics in International Arbitration' (2014) 1 Oxford University Press 25 <http://olrl.ouplaw.com/view/10.1093/law/9780198713203.001.0001/law-9780198713203> accessed 9 January 2019.

[89] See the list of globally leading third-party funders <https://www.international-arbitration-attorney.com/third-party-funders-international-arbitration/> accessed 9 January 2019.

[90] Steinitz (n 22) 1276.

[91] Maxi Scherer and Aren Goldsmith, 'Third-party Funding in International Arbitration: Part 1-Funders' Perspectives' (2012) 2 International Business Law Journal 207, p. 210.

[92] Nieuwveld and Sahani (n 10) 2; International Council for Commercial Arbitration, 'Chapter 3: Definitions' (n 67) p. 50.

the claim[93]. However, some also argue that, full transfer of claims is also possible under TPF[94].

In light of these factors, QMUL on TPF defines a third-party funder as follows:

"*The term "third-party funder" refers to any natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:*
a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases and
b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment[95]."

Further to this, in *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* case, by Court of Appeal of Australia the functionality of a third-party funder is introduced in as "*A litigation funder … does not invent rights. It merely organizes those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law*"[96]. The court deems a third-party funder, having no effect on the claim pursued but as a bridge gathering justice and the disputant together. This case could also be a good counter-argument for the objections addressing the dark side of TPF, which is a way of bringing vexatious claims, in a way that the arbitral tribunal clearly concludes that the third-party funder does not create a conflict between the parties, but just involves in the pre-existing one, for financial purposes.

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[93] Matray and van Rompaey (n 28) p. 178.
[94] Yeoh (n 14) p. 116.
[95] International Council for Commercial Arbitration, 'Chapter 3: Definitions' (n 67) p. 59.
[96] Campbells Cash and Carry Pty Ltd v Fostif Pty Limited [2006] HCA S514/2005 to S520/2005.

To that end, a third-party funder, as the key player of the litigation financing market, plays a unique role for TPF and is different from insurers or attorney-financing cases.

1.2.3. Similar Funding Methods and Comparison

It is true that TPF has grown exponentially in recent period; however, TPF is not the sole instrument in litigation financing market. There are other, and long-standing but also overlapping methods, which have been actively used, even before the emergence of TPF. To that end, insurance, loans, attorney financing as well as assignment of claims are four key methods frequently used in litigation financing market, all of which have similarities with as well as difference from TPF[97].

1.2.3.1. Insurance

Insurance is one of the long-standing and widely recognized funding methods in, litigation financing market[98]. It is a way of insuring an insured party from any potential or current liabilities, damage or award etc.[99] Insurance is generally based on a premium-payment-based methods, in which the insured party makes a premium payment and in return the insurer takes the risk of covering by any means of legal costs to be agreed previously by and between the parties.

Insurance has its own unique types in practice, speaking of which are, the most commonly, BTE insurance and ATE insurance. BTE insurance is a typical insurance method, in which the insured party insures, in advance, its potential litigation risks in return for premium payment, which takes annually in most of

[97] Goeler (n 2) p. 2.
[98] James Clanchy, 'Navigating the Waters of Third-party Funding in Arbitration' (2016) 82 The International Journal of Arbitration, Mediation and Dispute Management 222, 232; Nieuwveld and Sahani (n 9) p. 4.
[99] Nieuwveld and Sahani (n 10) 4; International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 33.

the cases[100]. Therefore, the insurer in BTE is not interested in whether the award is favor or against[101], as the fee arrangement does not based on return from the successful award. From this perspective, BTE radically differs from TPF[102]. The mere point in regard to an award that concerns the insurer is the adverse cost, if any, based on the type of arrangement between the parties.

ATE insurance is quite different from BTE and has radical similarities with TPF. ATE insurance takes place after the appearance of a dispute in which an insured is party to, and the insurer is interested in the direction of the award at this time, given that the insurer is promised to, ATE insurance, contingent premium in case of a successful award[103]. On that note, the scholars argue that, ATE insurance and TPF are almost identical[104]. To that point, it is even argued that whether insurance activities should be included into the definition of third-party funding. It is accepted that, however, there are two fundamental differences between ATE and TPF; first one is the financing method that the insurer provides one bulk payment whereas a third-party funder finances the funded party over the course of arbitration proceeding, as the need arises[105]. Lastly, the following categorization is also accepted by the commentators; ATE or BTE is an insurance method, whereas TPF is an investment[106].

1.2.3.2. Attorney Financing

From a structural perspective, attorney financing, where the parties agree on a contingency payment or otherwise conditional fee payment, is another method

[100] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 34.
[101] Matray and van Rompaey (n 25) p. 178-179.
[102] De Brabandere and Lepeltak (n 2) p. 382.
[103] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 35; Veljanovski (n 80) p. 403.
[104] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 35.
[105] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 35.
[106] Veljanovski (n 80) 417; De Brabandere and Lepeltak (n 2) p. 382.

that resembles TPF[107]. In this financing, an attorney undertakes to bear all costs and expenses and, in return receives a formerly agreed share of the award, only if the award is in favor. Therefore, not only in terms of the financing method, but also for remuneration mechanics, attorney financing and TPF resemble each other[108]. To that end, in order to make emphasize on this similarity, Cremades defines TPF as "*a modern twist of on the classic contingency fee agreement*"[109].

For contingency fee arrangement, an attorney covers all the costs and expenses beforehand, thus do not receive any payment as long as the award is favorably received[110]. On the other hand, for conditional fee payment arrangement, the attorney receives a specific portion of legal fee before the awards is issued, and agree to receive further as a share, so-called *success fee*, from the award, if the case is won. However, in the latter scenario, the attorney makes discount on the legal fees, which is to be compensated by the additional return arising out of the expected successful award[111]. The fundamental difference between these two methods is that in contingency fee, the entire financial risk is mitigated to the attorneys whereas in conditional fee arrangement, the attorneys and the clients share the risk of loss[112].

The commentators also refer to another attorney financing method that the attorneys generally involve into; pro bono financing. In pro bono cases, attorneys cover the legal expenses and costs of an indigent party and expects no profit in return, other the attorney fees they may receive from the counter party if the related legislations allow so[113].

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[107] Osmanoglu (n 44) p. 331.
[108] Steinitz (n 22) p. 1293.
[109] Cremades and Mazuranic (n 4) p. 2.
[110] Nieuwveld and Sahani (n 10) 5; Steinitz (n 22) p. 1292.
[111] Veljanovski (n 80) p. 409.
[112] Nieuwveld and Sahani (n 10) p. 5.
[113] Nieuwveld and Sahani (n 10) p. 4.

As for the differences between attorney financing and TPF, attorney financing is, as the name suggests, provided by the attorneys only, whereas third-party funders could be, as explained above, any legal or real person, specializing on the litigation market[114]. On top of that, while an attorney is financing the funder, he also represents the funder, a legal service, as his client before the arbitral tribunal. However, in TPF, the third-party funder does not represent the funder but purely invests in an asset[115], in despite of the fact that it controls and generally leads every single transaction during the course of arbitration. Not carrying the attorney title give another advantages to the third-party funders that they are not obliged to obey with or act in line with the professional and ethic duties assigned to lawyers specifically[116]. Another difference stems from the structure of the third-party funders and the law firms. Third-party funders use the advantage of having board of directors, for instance, easily penetrating into various commercial activities, for instance; acquiring shares in return for financing the case[117]. Lastly, in attorney financing, the client retains all the control in terms of management of the dispute whereas, in TPF, the funder dominantly takes the wheel and manage the entire process[118]. On this matter, this nuance is referred by the scholars as a two-fold division; passive funding and active funding. Passive funding is the funding method in which the funder does not have active control over management of the case, whereas in active funding the funder is the sole manager of the arbitral proceeding. While attorney financing is a typical example of passive funding, TPF falls under the scope of active funding methods[119].

[114] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) 36; Nieuwveld and Sahani (n 10) p. 7.
[115] Steinitz (n 22) p. 1294.
[116] Steinitz (n 22) p. 1294.
[117] Steinitz (n 22) p. 1294.
[118] Nieuwveld and Sahani (n 10) p. 7.
[119] Veljanovski (n 80) p. 408.

1.2.3.3. Loans and Donations

As is commonly used, loan is defined as money borrowed, but to be unconditionally paid back in the end, according to Cambridge dictionary. Loan does not assume a conditional payment, which based on, for instance, a favorable award[120]. Therefore, if a disputant receives loans to cover its arbitration costs, he would not shift the risk of losing the case, neither burdening arbitration costs[121]. Therefore, loan is an entirely different mechanism from TPF.

In practice, loans are generally provided by the banks or otherwise the affiliate company of the disputant. In return, regardless of the direction of the award, the borrower shall return the payment. Therefore, the debtor, as a disputant, assumes all the risk, but just paves the way of arbitrating to purse its claim. In the presence of a loan arrangement, different from TPF, the debtor retains all the control over the case in terms of management, whereas the creditor's mere obligation to transfer the money in due time.

From a general perspective, loan is again different from TPF. One scholar suggests that, lenders do not generally want to agree on a return from a positive result, yet prefer to agree on a precise maturity date with precise amount of money in return[122]. To that end, the risk taken by third-party funders differentiates from the risk taken by the lenders as well, and this is the reason, unlike the lenders, third-party funders conduct a detailed due diligence analysis to make sure that the risk against which they bet is correctly assessed.

Donations on the other hand are defined as providing one-way financial assistance without expecting any return that a scholar prefers to call it *not-for-profit* TPF[123].

[120] Nieuwveld and Sahani (n 10) p. 14.
[121] Nieuwveld and Sahani (n 10) p. 6.
[122] Bernardo M Cremades, 'Third-party Funding: Investing in Arbitration' (2011) 8 Transnational Dispute Management p. 2.
[123] De Brabandere and Lepeltak (n 2) p. 382.

However, being donated by a third-party does not necessarily mean that there is TPF in that dispute, because of the definitional reasons, as a third-party funder seeks remuneration or a return at the end of the dispute.

Donations could be experienced in international arbitration as well. One of the most important examples of donation is *Philip Morris Brand Sarl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* case[124]. In this case, the claimants applies to arbitration, claiming that regulation enacted on tobacco packaging policy in Uruguay breaches the agreement signed by and between Uruguay and Switzerland. In order to fund the respondent, the Campaign for Tobacco-Free Kids organization provided financial assistance, but not investment-oriented, as a third-party to a dispute. However, needless to say, donations with its entirety and structure are deemed as different from, but as an alternative of, TPF[125].

1.2.3.4. Assignment of Claims

Assignment of claims is the transfer of the ownership of that right from one party to another, to be pursued before the courts/execution offices or arbitral proceedings[126]. There are different ways for execution of an assignment of a claim. It is experienced in practice that, for instance, the creditor receives an amount lower than the original receivables from the buyer, and the buyer files the execution proceeding or otherwise the necessary legal proceedings to obtain the total amount of receivables, and this works under the principle of freedom of contract[127]. While the difference between the total amount and the amount paid to the seller is the profit for the buyer, the buyer also assumes all the risk of failing to collect the money from the debtor in the end[128].

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[124] *Philip Morris Brand Sarl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* ICSID ARB/10/7.
[125] De Brabandere and Lepeltak (n 2) 383; Goldsmith and Melchionda (n 33) p. 62.
[126] Steinitz (n 22) p. 1296.
[127] Steinitz (n 22) p. 1297.
[128] Nieuwveld and Sahani (n 10) p. 11.

In practice, this does not necessarily occur in a legal way of transferring the right of claim, but might be in way that, for instance in Turkey, the attorneys file the execution proceeding on behalf of the client, based on the power of attorney granting right to pursue the claim, and collect all the money for their own account.

1.2.4. Advantages and Disadvantages of Third-Party Funding

1.2.4.1. Advantages

As one of the fastest growing market, litigation financing has been evolving exponentially[129], and thus seeks alternative which could help this growth most. Up until now, TPF seems to be positively responsive, from the doctrinal view of perspective, and this is why TPF's advantages are an important topic detailed and discussed[130]. To that end; in this article, the following four main advantageous of TPF are reviewed as well as detailed; facilitating access to justice, arbitrating comfortably, due diligence processes and early settlements possibilities.

1.2.4.1.1. Facilitating Access to Justice

Before delving into how TPF is attributable to access to justice, it would be convenient beforehand to shed some light into its functional evolvement over the course of time.

TPF has always been targeted by critical approaches in its long-standing history, even before its rising presence in international arbitration. The preferred means of TPF is for sure to provide one of the parties with a financial ease, so that funded could be more easily pursue the claim. However, in doing so, a third-party which has no interest in the respective dispute may have a considerable control over the

[129] De Brabandere and Lepeltak (n 2) p. 383.
[130] Osmanoglu (n 44); De Brabandere and Lepeltak (n 2); Scherer and Goldsmith (n 91); Matray and van Rompaey (n 28).

file, which might not be a desired outcome to be seen in judicial processes. This is the reason, as referred above, TPF in litigation had not been allowed in most of the jurisdictions and even today, TPF is still prohibited in particular countries[131]. The underlying reason why TPF suffered from considerable restrictions factually stems from the doctrine of champerty and maintenance[132]. The maintenance is defined as "*the action of wrongfully aiding and abetting litigation*" whereas champerty is a particular type of maintenance in which the funder aims to profit eventually[133]. Expectedly, this doctrine aims to knock down the involvement of intermeddles, the pathological profiteers[134], from triggering disputes, for financial purposes, which ultimately may pose risk to public interest and paralyze the ultimate aim of judicial system; ensuring the justice, thereby dragging it under the shadow of financially driven matters. This is the reason, especially in common law jurisdictions, *the doctrine of champerty and maintenance* had been strictly followed for many years. To that end, TPF, which directly breaches this doctrine[135], had its own share and were prohibited correspondingly. Over the course of time however, a strict approach to champerty and maintenance had been gradually eased[136], for instance, in Australia and in the U.K., this doctrine has been abolished with the emergence of liberalized judicial system with enhanced systems minimizing the risk of intermeddles' malicious purposes[137]. Consequently, TPF has suddenly gained importance, in the absence of direct prohibition addressing it. At this point, in Australia, the birth place of TPF, in the *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited case*[138], an attention-grabbing decision has been rendered, which is of crucial importance for the development of TPF[139]. The appeal court investigated whether the third-party funder's aim is tricking the jurisdiction and whether such funding breaches the

[131] Osmanoglu (n 44) p. 328.
[132] Lyon (n 11) p. 579.
[133] Lyon (n 11) p. 579.
[134] Matray and van Rompaey (n 28) p. 180.
[135] Lyon (n 11) p. 579.
[136] David S Abrams and Daniel L Chen, 'A Market for Justice: A First Empirical Look at Third-party Litigation Funding' (2013) 15 University of Pennsylvania Journal of Business Law 1083.
[137] Abrams and Chen (n 136) p. 1083.
[138] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (n 96).
[139] Goeler (n 12) p. 118.

public interest. The court decided that, the funder's purpose is not necessarily malicious and litigation finance is no longer against the public interest in the absence of any laws blocking it. Likewise, in *Pirelli & C SPA v. Licencing Project SL* case[140], the court decided that exorbitant arbitration costs could paralyze the access to justice[141]. In this way, the discussions on TPF have migrated from the concerns on its existence to concerns whether TPF is really necessary.

Whether TPF in international arbitration is a useful instrument is sound subject to discuss. Different from TPF in litigation, TPF in international arbitration is deemed more important as an instrument for accessing to justice[142]. The rationale behind this idea comes mainly from the facts that, the funding is even more necessary in international arbitration considering the exorbitant arbitration costs, and also the return is even higher for the third-party funders, and the predictability of the direction of the decision is relatively high based on the written evidence dominating the entire arbitral proceedings, and lastly the existing smooth process of recognition and enforcement of foregoing arbitral awards.

Therefore, despite the odds, TPF is now regarded as an alternative to overcome the cost problems and ensure that a battle of equal could arbitrate fairly[143]. The underlying reason is that, settling through arbitration is possible if only parties agree so. Meaning that, arbitration takes place upon parties' mutual will on it, hence discretionary. Therefore, if both parties to the agreement decide to go for arbitration for the disputes they may have, it may also have the meaning of opting out the state-court's competence. In this case, while parties may limit themselves to solve the dispute only before arbitrators, at the other end of the spectrum they take the risk of suffering from one and only but a compelling path (i.e. exorbitant arbitration cost) to seek the contractual receivables or otherwise compensation.

[140] *Société Licencing Projects SL v Société Pirelli* [2011] Paris Court of Appeal 09/24158.
[141] Matray and van Rompaey (n 25) 188; Efeçınar, Ömeroğlu and Uyanık (n 3) p. 77.
[142] Matray and van Rompaey (n 28) 187; Dos Santos (n 2) 919; Henriques (n 2) p. 122.
[143] Dos Santos (n 2) 919; Yeoh (n 14) 119; De Brabandere and Lepeltak (n 2) p. 384.

Bearing mind in this, for example, if a party to an agreement, which intends to pursue a contractual claim against the counterparty but who has no financial power to cover the arbitration at this moment may not claim its contractual receivables, even the chance of success is high. At this point, it is also of important to remind that, there is no judicial aid system in arbitration where a disputant may apply for. By way of this, a party is disabled to seek for justice, just because the arbitration costs are expensive.

As for this matter, academic researches emphasize on the attention-grabbing dilemma; if the arbitration is reflection of parties' contractual agreement more than its being ADR, there is no wrong with arbitration costs blocking either party to access justice as the parties foresee and agree the potential consequences of it, whereas if the arbitration is naturally an ADR and its capacity of being an agreement comes second, its own mechanism shall not prevent any party from accessing justice, as the otherwise would be contradicting its ultimate purpose i.e. obtaining the justice. Therefore, in order to save arbitration from this eternal struggle, it is concluded that TPF is best fit method for disputants, hence necessary.

From the arbitrators' perspective, TPF plays an important role as well. The reason is that, there is an on-going discussion based on the *competence-competence doctrine*. First of all, this principle suggests that each arbitral tribunal has power and shall give decision on any matters lying under its jurisdiction. Based on these principles, it is argued that, in case of the foregoing dilemma, the tribunal shall duly resolve this problem or otherwise the resolution may subject to annulment or otherwise unenforceability objections. On this point, *Société Lola Fleurs v Société Monceau Fleurs*[144] case provides the very same conclusion, imposing arbitral tribunal to ensure that parties to disputant have access to justice during the course entire arbitration period. From this point of view, for arbitral tribunals too, TPF is

[144] *Société Lola Fleurs v Société Monceau Fleurs* [2013] Paris Court of Appeal 12/12953.

an all-purpose element to eliminate any possible dilemma pertaining to parties' accessing to justice.

From a doctrinal perspective, TPF is also deemed to be an instrument for international arbitration serving the purpose of ensuring justice to disputants[145]. To that end, it is argued that TPF should be promoted, especially for the financially distressed or otherwise the cash-strapped parties, on the ground that it ensures to pursue a claim that would be otherwise not possible if TPF had not been there[146]. Likewise, it is pointed out that, TPF increases the possibility of triggering an arbitration procedure in which one party has receivables from the other[147]. In Turkey as well, TPF is regarded as an important leverage against the dominance of arbitration costs[148]. The scholars eventually argue that, it would be a wise choice to give up a specific portion of the reward, through TPF, instead of receiving no award at all[149].

Allowing TPF in international arbitration seems to be an incentive for the countries as well. The Singaporean Government has officially regulated and enacted the law, which explicitly allows third-party funding, and it has been announced that the rationale behind this legislative approach is to make Singapore a central place for international arbitration[150].

A good practical example of TPF is provided by Jonathon Molot, one of the founders of Burford Capital, a prestigious third-party funder, stating that, Burford Capital involved in a case in which a litigant had failed pay the legal fee of the law firm, thus the law firm was about the withdraw the case, putting the litigant in

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145 Goeler (n 12) p. 121.
146 Munir Maniruzzaman, 'Third-Party Funding in International Arbitration - A Menace or Panacea?' (*Kluwer Arbitration Blog*, 2012) <http://arbitrationblog.kluwerarbitration.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/> accessed 9 January 2019.
147 Steinitz (n 22) p. 1299.
148 Balkar Bozkurt and Huysal (n 45) p. 201.
149 Henriques (n 2) p. 128.
150 Henriques (n 2) p. 118.

a bad position. Burford Capital financed the disputant by covering the attorney's legal fees and so that the case was smoothly proceeded[151].

In terms of third-party funders, financing a party in international arbitration could be the best-fit among other types of dispute resolution methods. The reason is that, while parties are arbitrating, everything goes in written form through evidence-based system. Therefore, in the absence of oral testimony where the funders have otherwise no ability to examine and control over the case, TPF in international arbitration draws the attention of third-party funders as well[152].

However, despite of all those positive theoretical approach, there is one nuance in practice to carefully take into account of; third-party funders, the most essential player of TPF market, do not involve in the case, and fund them, with the purpose of ensuring that disputants could have access to justice, but they do because they ultimately and merely aim to have considerable profit in the end[153]. In other words, third-party funders are not interested in justice at all. This is the reason, there are many cases, in which a disputant seeks funding yet cannot find any, because of the fact that the case is not found as profitable as the funders desire[154]. To that end, according to researches, statistics are intimidating, such that, funders' rejection rate is at least 90%[155]. Put differently, nine of ten disputants in need of financial assistance cannot benefit from TPF in international arbitration, which brings reasonable doubts in mind that TPF is an ultimate solution to overcome arbitration costs. Likewise, third-party funders do not fund the cases, if the

[151] Jonathan Molot, 'Theory and Practice in Litigation Risk' Burford Capital 8 <http://www.burfordcapital.com/wp-content/uploads/2015/01/Booklet-Theory-and-Practice.pdf> accessed 9 January 2019.
[152] Abrams and Chen (n 136) p. 15.
[153] Matray and van Rompaey (n 28) p. 190.
[154] Goldsmith and Melchionda (n 33) p. 56.
[155] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 25.

amount of dispute is not more than 20 USD million[156]. Therefore, in order to use TPF for accessing justice, the market players should first consider it suitable[157].

Another opposing opinion regarding TPF's function of accessing to justice is that it may pave the way for frivolous claims, thereby considerably leading workload for the arbitral tribunals. This possibility is particularly emphasized for investment arbitration to be filed before states[158]. However, this argument is strongly rebutted by the mechanics of TPF, in which the funders make due diligence reviews and, as explained above, and ultimately refuse most of the cases on the basis of low chance of success or otherwise low return rate. Therefore, it is highly likely that, frivolous claims or unmeritorious claims will be eliminated by the funders[159]. In investment arbitration specifically, there is already a mechanism in order to eliminate the unmeritorious claims. ICSID has announced Rule 41/5[160] in its Arbitration Rules, which gives both parties an opportunity to claim, at the very beginning of the proceedings, that the claim is manifestly without merit[161].

In overall, however, there are many scholars arguing that TPF's contribution to international arbitration in respect to accessing to justice overweigh its negative sides and for each actor of international arbitration, parties and tribunal as well as for funders as well, TPF should be widely regulated for benefit of all[162].

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156 Matray and van Rompaey (n 28) p. 192.
157 Dos Santos (n 2) p. 921.
158 Henriques (n 2) p. 101.
159 De Brabandere and Lepeltak (n 2) 384; Matray and van Rompaey (n 28) 193; Lyon (n 11) 593.
160In verbatim: "(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit."
161 Eric De Brabandere, 'The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration' (2012) Manchester Journal of International Economic Law 22, p. 24.
162 Martin (n 11) 57; Maniruzzaman (n 146).

1.2.4.1.2. Arbitrating Comfortably

In the existence of grim reality of exorbitant arbitration costs, many claim-holders would go into dilemma whether to pursue a claim before arbitral tribunal, if not, give up to do so at the first place. At this point, TPF comes in as savior of many, with its feature of being a no-recourse basis; so that the disputants start thinking nothing of legal costs but focus on arbitrating[163]. In other words, TPF's one of the main advantages is to courage the parties to battle before the arbitral tribunal.

TPF is deemed a useful instrument, not only because it covers the anticipated costs that may arise out before or otherwise during the arbitral proceedings; but also because it eliminates the risk of unpredictable, but potentially astronomic, costs as well. A typical example for the latter is the adverse cost, in which the funded party would be imposed on, in case of a negative award, if no funder had financed the case.

As explained above, there are different types of players who may prefer to be funded by a third-party funder. First one is a disputant who is financially struggling, thus cannot afford the arbitration cost to pursue its claim. Second type is a disputant who has good financial condition, yet is reluctant to cover the arbitration cost that may impact its financial position afterwards and third type is a disputant who expects economic slowdown and just does not want to jump into the inherent unpredictability of length arbitral proceedings[164].

In each scenario three, the primary objective is to hedge the risk of all present and potential negative burden of arbitral proceeding to a third-party. This is the reason, TPF has grown exponentially in the presence of great demand to arbitration, as its advantages with respect to arbitration cost, in which the

[163] Henriques (n 2) p. 128.
[164] De Brabandere and Lepeltak (n 2) p. 383-384.

disputants do not have to have concern on the cash flow while arbitrating is front and center in the arbitration market.

Additionally, TPF seems to be a useful instrument for the law firms too on the ground that the essential element of engagement letter to be signed between the attorney and client i.e. the legal fees becomes no longer a negotiation topic, as it will take between the third-party funder and the law firm. Surely, the third-party funder's approach to a law firm focuses on the quality of the legal services and the qualifications of the lawyers assigned to the to-be-funded case, to wit the money is not a primary issue, which is, of course a good development for the law firms. On that note, it is emphasized on the fact that, this would work only for top-tier law firms, as the third-party funders do not general approach to the law firms not being well-known or referenced in the market[165].

1.2.4.1.3. Due Diligence Analysis

Whereas TPF is an exit door for disputants to pursue their claims before the arbitral tribunal, which would not be otherwise possible in the absence of financial assistance, it is a pure investment item for the third-party funders after all. Therefore, on the one hand disputants desire to initiate the arbitral proceedings, on the other hand the third-party funders want to make profit at the same time. As a consequence of such two-wing system, the case to be funded significantly benefits from detail examination, so-called due diligence analysis, on the file.

Needless to say, a claim-holder considers all of the possibilities, facts as well as evidences before filing a lawsuit. The ultimate risk is not to have a positive result, plus the arbitration costs. On the other hand, for the third-party funders, a review on the file is even more important, as they are edge of a dead investment, if they mistakenly review the case. Indeed, considering a no-recourse basis method of

[165] Molot (n 151) p. 3.

TPF, the third-party funders may receive nothing in the end, but are obliged to pay the adverse costs together with the already paid arbitration costs.

This is the reason; the third-party funders conduct a very comprehensive due diligence analysis which may have different steps insomuch that the review is first went through a legal review[166]. This examination consists of *inter alia* enforceability and collectability of award, merits of the case, powerfulness of the claims and counter-claims, facts list, the disputant and counter party's legal teams' experience and the potential length of arbitration[167]. In practice, it is accepted that, an ordinary due diligence analysis takes between 30-60 days depending on the size and the complexity of the subject of the dispute[168].

But more importantly, the financial review of the case is conducted in detail, which pertains to damages, costs as well as returns. At the end of the well-rounded examination on the file, the authorized board or otherwise the committee of the third-party gathers together to officially decide whether to fund or retrieve[169]. All of these efforts in fact are to determine whether the case is winnable and the return is profitable, and ultimately the case is investible.

From a practical perspective, due diligence processes have two different phases, following each other. The first phase is an internal examination conducted by the third-party funder itself. If the third-party decides that the case is promising in terms of investment, it makes an offer to the disputant party. Upon the agreement, the third-party funder appoints an external counsel, which is supposed to provide a detailed due diligence report. The second phase is generally the moment in which the third-party seeks for exclusivity, so that the funder shall not approach to another funder while the first third-party funder starts consuming time and money

[166] Cremades (n 122) 15; Çalışkan (n 61) p. 350.
[167] International Council for Commercial Arbitration, 'Chapter 3: Definitions' (n 67) p. 71.
[168] Cremades (n 122) p. 15.
[169] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 25.

on the case at hand[170]. To that end, as the due diligence process is vital for the third-party funders while deciding whether to invest or not, some third-party funder may require appointing a new legal team of their own choice, in order to make sure that nothing falls through the crack while during their own watch[171].

In view of above, and in a nutshell, the third-party funder draws a detailed picture of the case before the battle begins, where the disputant may substantially benefit from in terms of predicting the potential consequences of the case and the direction of the award. This allows the disputant to have reliable forecast in regard to whether the claim to be pursued is meritorious or not[172].

1.2.4.1.4. Early Settlement Possibilities

Another advantage of TPF pertains to increase on settlement possibilities. In view of the above advantages, the counter party loses its leverage in the dispute, if any, once a third-party funder involves in. By way of this, a funded party enjoys being an equal with the other party in terms of financial powers. Correspondingly, gaining a financial powers give another advantages; bargaining power[173]. This indeed changes the bargaining dynamics between the parties, where the cards are redistributed once and for all[174]. In other words, this means that the parties are about enter into the battle of equals. Therefore, the incentive or triggering that the other party has in order to arbitrate may no longer exist, as the that party is no longer able to intimate the other party with its financial power or the counter party's financial weakness.

Further to this, from the counter party's perspective, being aware of the fact that the counter party collaborates with a third-party funder, this gives him another

170 International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 31.
171 Goldsmith and Melchionda (n 33) p. 57.
172 Brabandere (n 161) p. 384.
173 Stoyanov and Owczarek (n 10) p. 191.
174 Steinitz (n 22) p. 1271.

indicator. So, assuming that the counter party knows that the opposing party benefits from the financial assistance by a third-party funder, it actually means that, the facts of the case are well-evaluated by the both opposing party and its funder, to with they should believe that the chance of success in this case is considerably high, as otherwise, the third-party funder would not invest in this case. This might give a direct message to the counter party in a way that the funded party has indeed a strong case.

In view of the above assumptions, a scholar suggests that the settlement possibility of the parties is inclined to increase once the third-party funders come in[175].

On this matter, however, it should be noted that, in case of a dispute in which a third-party involves in, a settlement is realistic only if three parties (i.e. the claimant, the respondent and the third-party funder) collectively agree to do so. This means that, for instance, even if the claimant and respondent are willing to settle with each other, the third-party funder, who retains the control over the file, may be reluctant to do it[176], due to the fact that the case is strongly winnable and the amount of return to be received in case of a settlement might be lower than the amount of return to be received in case of positive award as per the contractual terms[177].

The other way around is a highly likely scenario in international arbitration as well. For instance, a third-party funder may intend to settle at the middle of the proceeding, after getting a strong prediction that the chance of success is low, so that he can secure relatively low, but a certain, return that comes with the settlement amount, whereas the funded party may still wish to push the case all

[175] Matray and van Rompaey (n 28) p. 190.
[176] Matray and van Rompaey (n 28) 192; Brabandere (n 161) 385; Goldsmith and Melchionda (n 33) p. 57.
[177] Stoyanov and Owczarek (n 10) p. 191.

the way through[178]. This is why it would be convenient to conduct a skeptical approach while arguing that TPF could trigger an early settlement between the parties, because it would be possibly vice versa.

1.2.4.2. Disadvantages

1.2.4.2.1. Retaining Control Over the File

As an expected result of investing in a case by taking a considerable risk[179], one may strongly argue that, the funder rightfully wants to manage the entire arbitral proceedings with free hands and makes sure that the strategy followed during the arbitral proceeding invested keeps them on the right track to get positive result.

The scope of this control varies of course and there is no sky limit on to what extent the third-party funders could retain the control. It may, for instance, include the authority of choosing the legal counsels, the arbitrator, evidence to be submitted or facts to be emphasized on or authority to give the green-light if the settlement option is on the table. At first appearance, it seems that, what the funder is capable of doing over the course of an arbitral jurisdiction is the natural consequences of depositing bulk of money into a case without knowing how it goes eventually.

However, the foregoing brings two fundamental problems along with it, both of which are experienced and are concerned in practice accordingly. To this end, the first matter is the potential disagreement scenarios between the third funders and the funded parties, especially those appearing in the middle of the arbitral proceeding, and the second matter is emergence of bizarre situations in which a party, acting as funder, have excessive control over the file, yet is not even a party to dispute.

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[178] Steinitz (n 22) p. 1313.
[179] Brabandere (n 161) p. 382.

As for the first issue, while at the first place it seems that the funded and the third-party funders are in the same boat, it does not always have to be in that way, to wit, based on the course of events occurred during the proceeding, the funded and the third-party funders may start pursuing different interest on the same subject, which eventually triggers the disagreement between the parties[180]. This is in fact a dangerous situation for both parties, given that if the funded party does not keep receiving financial assistance by the funder, it may no longer keep pursuing its case, whereas if the funder stops financing the case, it may not eventually have its expected remuneration from the final award. This is called in practice as *abuse of process*[181] or *TPF's inherent risk of affecting the arbitral proceeding*[182]. Some suggests that, such abusing stems from the funder's financial power over the funded party, and by way of this, the funder may prefer to force the funded by using its leverage[183].

These concerns are not purely theoretical, it seems, as there are examples in the practice that clearly shows how far the disagreement between the funded and the funder could negatively affect the direction of the case. To that end, *S&T Oil Equipment & Machinery Ltd v Romania*[184] case gives us a victim of TPF. In this case, the third-party funder stops financing the funded party following the major disagreements on the case strategy and does not pay the cost advances to the secretariat. Just because of this reason, the claimant could not continue the arbitral proceedings[185]. This case is one of the most intimidating examples of TPF, in terms of how devastating it could be, if the funded party does not play along with the third-party funders.

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180 Brabandere (n 161) p. 385.
181 Brabandere (n 161) p. 385.
182 Brabandere (n 161) p. 380.
183 Dos Santos (n 2) p. 924.
184 *S&T Oil Equipment & Machinery Ltd v Romania* [2010] ICSID ARB/07/13.
185 Brabandere (n 161) p. 386.

The second problem that comes with TPF is the third-party funders' high-level control over the file. This is actually not a newly-born issue and has been concerned by the commentators in complexity. Indeed, a third-party's involvement in the case is at the origin of *the doctrine of maintenance and champerty*, which dates back to medieval England. It is basically argued that, the dispute shall be only kept between the disputants with no involvement of a third-party having purposes irrelevant to the case. As of today, despite the fact that, the conservative approach towards *the doctrine of maintenance and champerty* has been eased, for TPF, a third-party funder's control over the file is still at the forefront of the debates. For instance, being nourished from this historical background combined with practical experiences, the U.S. Chamber of Commerce still claims that a third-party funding is "*a clear and present danger to impartial and efficient administration of civil justice in the United States*"[186]. According to the report prepared by the U.S. Chamber of Commerce, the third-party funding is medium for abusive litigation, in which the funders want to retain high control over the file[187].

However, it is also important to note that this subject has been recently approached by hetero perspectives. From the court's view, a third-party funder's retaining the control is not a necessarily an evil thing. In *Campbells Cash and Carry Pty Ltd. v Fostif Pty Limited* case[188] and *Mobil Oil Australia Pty. Ltd. v Trendlen Pty. Ltd.* case[189], the courts ruled that it is not an unusual thing to expect from a third-party funder to have control over the case, as it is a natural cycle of a third-party funding relationship and this is not contrary to public interest. This shows the fact that, the approach to the third-party funders control over the file

[186] 'Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation' (The US Chamber Institute for Legal Reform 2012) 1 <https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf> accessed 9 January 2019.
[187] 'Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation' (n 186).
[188] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (n 96).
[189] *Mobil Oil Australia Pty Limited v Trendlen Pty Limited* [2006] HCA S523/2005.

has shifted to a relative flexible standing. The scholars also provide supportive thesis that the third-party funders should obtain the control[190].

From a doctrinal perspective, it is argued that, the third-party funders' taking over the control is not that much tolerable thing in litigation, because of mainly two concerns, first of which arise from the doctrine of champerty and maintained and second of which stems from the belief that the claimholders shall keep their absolute discretion on their claims, whereas the third-party funders' taking over the control in international arbitration is actually much more tolerable, as the public policy driven concerns are no longer admissible in such type of disputes[191].

From the third-party funders' view, they bring a totally different perspective. Indeed, one of the founders of Burford Capital says that, as a funding company, they do not prefer to take the wheel but deem convenient to remotely control the file. In fact he says; those are the funded parties willing to give the control of the file to the funders[192]. This also could be the case that the third-party funders may appear only in strategic decisions, such as choice of counsel or settling, which is called as *enhancement services*[193].

On that note, however, it is argued that, this funder's control over the file might illusive when looking from the outside. For instance, according to the researches, many third-party funding agreements are drafted in a way that the third-party funders have no control over the file, and at the first glance, it seems that the funded party retains the control. However, when considering the other articles of the third-party agreements, it is understood that, the third-party funders hold termination right or otherwise a right to stop funding, triggered by numerous circumstances, thus have a considerable leverage, meaning that there is an indirect

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190 Maya Steinitz, 'The Litigation Finance Contract' (2013) 12–11 University of Iowa Legal Studies Research Paper p. 455-456.
191 Goldsmith and Melchionda (n 33) p. 58.
192 Molot (n 151) 5.
193 Goldsmith and Melchionda (n 33) p. 58.

control of the third-party funders, as the funded party somehow act in consistent with the third-party funders the for the sake of continuation of the third-party agreement[194]. This illusion might be a product of the third-party funders' deliberate intent in doing so, as the high control over the file also brings the risk of third-party cost orders against the third-party funders, as explained in detail below, where the third-party funders might be obliged to pay the opposing party's costs[195].

In this regard, QMUL on TPF adopts a neutral manner, stating that control over the file is either good or bad thing for players in this market, but it is just a way of evaluating how similar TPF is with other financing methods[196]. This report also suggests that, there is no uniramous opinion on TPF whether the third-party funder's control over the file is a good thing or not.

1.2.4.2.2. Bringing Questionable Claims Before Arbitral Tribunals

It is previously argued in this academic work that, the criticism against TPF in regard to its function of paving the way for filing frivolous or otherwise unmeritorious claims could be rebutted on the ground that the third-party funders never invest in a case that will not highly likely bring considerable profit[197].

However, the objections against TPF within this framework still revive, going a step further, and address that the third-party funders' approach to to-be-invested cases is purely financial, thus they may prefer funding the case, which they secretly know of the facts, and also know it is not rightness thing to do from a legal point of view, yet profitable from a financial point of view. By way of this, they supposedly serve the access to justice, which the preferred meaning of TPF,

[194] International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 28; Goldsmith and Melchionda (n 33) p. 58.
[195] Henriques (n 2) p. 120.
[196] International Council for Commercial Arbitration, 'Chapter 3: Definitions' (n 67) p. 74.
[197] International Council for Commercial Arbitration, 'Chapter 3: Definitions' (n 67) p. 74.

while in fact, they care nothing about it, thereby investing in a party which is not the prevailing one according to laws, and support them win the case in order to just make profit[198].

To that end, the one of the most attention-grabbing case that supports this criticism is the *Ecuador v Chevron case*[199], where the funder, Burford Capital, which provided financial assistance to claimant, had been allegedly already aware of the fraudulent actions of the funded parties' attorneys during the respective arbitral proceeding, for the sake having large sum of return at the end of the case. This correspondingly has increased the level of criticism against TPF, in terms of its being used to bring questionable claims before arbitral tribunals, and is thus argued that the justice mechanism of international arbitration is operated under the shadow financial purposes in such circumstances.

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[198] 'Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation' (n 186).
[199] *Chevron and Texaco Petroleum v The Republic of Ecuador* [2018] PCA 2009–23.

SECOND SECTION

THE EVERLASTING CONTROVERSIES IN THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

2.1 The Future of the Attorney-Client Privilege under the Shadow of Third-Party Funding

Despite its perceived advantages, TPF brings a complex, and currently unsolved, issue in regard to circulation of confidential documents as well as information, which seems to entail risk not only for the funded parties, but also for the attorneys for the funded parties too[200]. The problem comes from the fact that disclosing any information protected under the privilege to a third-party (e.g. third-party funder) is deemed as waiver of privilege, though not all circumstances[201].

The concern herein is that the third-party funders obtain documents and information, which are not meant to be disclosed to others, yet there is no regulation keeping away the third-party funders from doing so[202]. Ultimately, in the TPF mechanism, the foregoing concern is something that the disputants could not possibly avoid from, due to reasons detailed in below.

2.1.1. The Origin of the Problem

As for the background of this subject; the attorney-client privilege is simply defined as the protection of any kind of verbal or otherwise written communication, document, information and facts that may be produced and/or shared by the attorney and the client, where the third parties, including the courts

[200] Steinitz (n 22) p. 1309.
[201] Steinitz (n 22) p. 1309.
[202] Stoyanov and Owczarek (n 10) p. 173.

and arbitral tribunals shall not seek its submission to a particular extent[203]. When TPF is on the table, however, it is an inevitable concern to overcome on how to duly benefit from TPF while the attorney-client privilege plays as the gatekeeper of the document, which are however to be sought, and requested, by the third-party funders.

Indeed, obtaining documents, information, facts as well as evidence are the key stages for the third-party funders, as they do examine those instruments and ultimately decide whether to invest in a case or not[204]. Indeed, reviewing the list of instruments is an absolute must for the third-party funders, as this is the securest way, thus widely applied in the practice, in order to correctly asses the chance of success and the risk thereof[205]. On the other hand, the information and the documents requested by the third-party funders from either the funded parties or their attorneys may be subject to privilege as it may contain confidential information and/or communication produced/shared under the attorney-client relationship.

To that end, the clash between the attorney-client privilege and the funder's expectations drags the disputants into an infinite loop in respect of receiving financial assistance through that the party either gives up, or so called, waives the privilege by disclosing the documents to the third-party funders or refrains from providing the documents with the third-party funders, which presumably ends up with no-go decision by the third-party funder[206]. Therefore, the risk suddenly peaks in TPF even in the very beginning of the funding process, given the fact that, third-party funders' first thing to do is to conduct a detailed due diligence

[203] See Javier H Rubinstein and Britton B Guerrina, 'The Attorney-Client Privilege and International Arbitration' (2001) 18 Kluwer Law International p. 587.
[204] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) 118 <www.arbitration-icca.org> accessed 7 January 2019.
[205] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 128.
[206] International Council for Commercial Arbitration, 'Chapter 1: Introduction' (n 8) p. 25.

process, during which they need bulk of information and documents that might be expectedly subject to confidentiality[207].

That being the case, as commonly experienced in practice, the parties are prone to choose the prior option, thereby putting the attorney-client privilege in jeopardy[208]. By relying on this tendency in TPF market, and the fact that the attorney-client privilege is a long-standing, a widely-recognized and an esteemed principle in both civil and common law jurisdictions, some scholar suggests that breaching, softening or otherwise circumventing this principle in order to find a way of effective implementation of TPF might not be a reasonable thing to do[209].

The content of the risk herein has a two-fold aspect: the confidential information between the attorneys and the clients is either under the risk of being disclosed to others and used for different cases by the third-party funders or under the risk of being sought by the arbitral tribunals in which the production of document cannot be prevented in the presence of waiver.

With regards to the first aspect, in principle, it is opined that the third-party funders do not render legal services but act as the businesses seeking profit, thus are justifiably not bound by, contrary to practicing attorneys, professional secrecy or otherwise professional ethical rules[210]. Therefore, in the absence of any regulation or rules prohibiting the third-party funders from using or sharing the information and/or the documents with other parties, the funded parties put themselves in risk in terms of disclosure of confidential information, for the sake of benefiting from TPF, given that it would be up to the third-party funders'

207 International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding' (n 16) p. 42.
208 Matray and van Rompaey (n 28) p. 191.
209 Matray and van Rompaey (n 28) p. 191.
210 International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 117.

discretion to keep the documents/information obtained or use/circulate it if commercially need be[211].

With regards to the second aspect, what arbitral tribunals should do is a vague area, as there is no clear prevailing international set of rules concerning this issue, but just leaving it to the arbitrators' discretion[212]. In this context, it is accepted that, the arbitral tribunals would apply the domestic/local rules, the one that has the closest connection to the dispute, yet according to the researches, the domestic laws also remain silent in those cases in which the third-party funder involves[213]. Correspondingly, this mechanism is exposed to some criticism in a way that, considering the level of importance of this subject, exercising TPF may ultimately cause irreparable harm, if the funders' information and documents subject to confidentiality are not well-protected in TPF processes[214].

Consequently, TPF is not whither than white, as it brings particular complexities to the international arbitration community. One of the most noticeable issue is that how to deal with protection of the confidential document and information, obtained by third-party funders, in the absence of any regulation precluding the third-party funders from disclosing them to other parties.

2.1.2. Is it Possible to Find a Solution?

Considering that TPF's reflection on the attorney-client privilege is an issued that should not be neglected, the scholars give their though to this, thereby offering specific solutions, all of which derive from different reasoning to possibly eliminate the TPF's drawback.

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[211] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 118.
[212] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 118.
[213] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 126.
[214] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 128.

2.1.2.1.Dominant Purpose Test

The first solution offered by the scholars is the Dominant Purpose Test. The Dominant Purpose Test is one of the alternatives discussed so far to possibly expand the applicability of privilege to the third-party funders, especially for the cases in which the documents shared by the third-party funders are sought by the arbitral tribunals[215]. The idea of this test is to spot whether it is executable in international arbitration to eliminate one of most concerned issues of TPF[216].

The aim of this test is to understand the actual (dominant) purpose of sharing the documents to the third-party funders, and accordingly, if it is spotted that the documents are just provided to the third-party funders as otherwise the third-party funders could not possibly decide to invest in case or not in the absence of sufficient information, sharing documents with the third-party funders will not be deemed as a disclosure, hence no waiver[217]. By application of the Dominant Purpose Test, there will be the *funded-funder privilege* as an extension of the attorney-client privilege. In other words, if the dominant purpose of providing documents to the third-party funders is to give adequate data to the third-party funders, by solely hoping to receive financial assistance, these documents then will be kept under the privileged. By way of this, with this test, the applicability of privilege is aimed to be extended to the third-party funders, where the funded parties could protect the disclosure of confidential documents, during or after the arbitral proceedings, once the third-party parties obtain it.

At first appearance, the Dominant Purpose Test seems to be a useful instrument, by leveling-up the privilege's effect and include the third-party funders in the

[215] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 131.
[216] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 129.
[217] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 131.

scope, yet it has major two drawbacks in its nature, thus could not be an ideal solution on this matter:

The first drawback is that, this test does not apply to the cases where the third-party funders decide not to invest in case, and no funded-funder relationship is established accordingly[218]. To that end, for instance, if a party intending to file an arbitration against the opposing party provides a third-party funder with all confidential document and information, hoping to receive financial assistance, but that third-party funder decides that the chance of success is low and therefore gives a no-go decision, no funding relationship between the parties will establish and there will be no legal impediment to stop a third-party funder from using or benefit from these information in other cases thereafter. In this example, the disputing party asking for financial assistance meets each of the Dominant Purpose Test's criteria, as the disclosure of the confidential documents and information is merely limited to providing sufficient ground for examination by the third-party funder. However as no TPF relationship is established between the parties, this test finds no applicability at all.

The second drawback is that, the criteria for the Dominant Test Purpose has been subject to some restrictions imposed by local courts on the ground that if the Dominant Purpose Test is applied to the entirety of a case, then all relevant or irrelevant documents and information disclosed to a third-party could benefit from the protection provided by this test, where the courts in these cases are paralyzed to seek any documents from the disputing parties to enlighten the facts of the case[219]. Therefore, the application area of this test, according to the courts, should be interpreted in a narrower sense. To that, it is argued that, the courts should be able to request the submission of any documents and information which are

[218] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 140.
[219] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 140.

directly to merits of the case whereas the same courts should order redaction to protect the confidential information to the extent possible[220].

In overall, the Dominant Purpose Test is a method derived from common law jurisdictions and is subject to discussion for its applicability to TPF in international arbitration, to avoid any negative consequences of circulation of documents and information following the involvement of a third-party funder in a case.

2.1.2.2. Common Interest Concept

Apart from the Dominant Purpose Test, as a second alternative, it is suggested that, the common interest doctrine could do the job so as to eliminate the risk of disclosure. This doctrine suggests that if a third-party funder whom the confidential information is provided have the same interest with the owner of the information, such sharing would not constitute a waiver[221]. As for the meaning of the same interest, it is sharing the same interest in the protection of communication's confidentiality. Likewise, the scholar define it as "*as it has the common interest of pursuing litigation or arbitration in much the same way an insurer does*"[222]. In doing so, once an attorney or a funded party provide the third-party funders with the confidential information, such disclosure will not end up with a waiver, meaning that the third-party funders will be obliged to keep all of those information confidential, while at the same time it would help them to readily access information flow with no impediment stemming from the attorney-client privilege.

[220] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 132.
[221] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 133.
[222] Meriam N Alrashid, Jane Wessel and John Laird, 'Impact of Third-party Funding on Privilege in Litigation and International Arbitration' (2012) 6 Dispute Resolution International 101, p. 108.

The drawback of the common interest concept is similar to the Dominant Purpose Test's. This concept could be indeed applicable during the arbitral proceedings, but it raises doubt during the pre-investment phase, as the third-party funders should not be reasonably expected to share to same interest with the disputing party before doing a due-diligence and coming up with a conclusion that the case is investible[223].

On the other hand, the difference between Dominant Purpose Test and the common interest concept is that the common interest concept approaches to the matter from the third-party funders' perspective and ask whether the third-party funders seek the same interests that funded parties do whereas Dominant Purpose's standpoint is different that it considers what the funded parties share with the third-party funders are the core documents for the third-party funders to make their final decisions to invest or not. Thus basically, the Dominant Purpose Test's starting point is the funded parties, and oppositely, the common interest concept's starting point is the third-party funders.

2.1.2.3. The Attorney-Work Product Doctrine

The attorney-work product doctrine is another wing that is attributable with TPF in international arbitration. This doctrine is principally to protect any kind of document, work, materials or verbal/written opinions prepared and delivered directly by or in association with the attorney(s) for one or more than particular cases or otherwise matters[224]. The listed foregoing materials are also endangered in the presence of TPF, where the third-party funder may access those, which consequently deemed as a waiver[225].

[223] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 134.
[224] Goldsmith and Melchionda (n 33) p. 66.
[225] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 129.

The attorney-work product doctrine here provides a narrower protection than the foregoing two alternatives. It is suggested that, any communication established for the dispute in which the third-party funder invests keep their privileged, though shared with the third-party funder.

A nuance herein is that, as suggested by the commentators, the waiver mentioned under this doctrine is less likely to occur compared to the attorney-client privilege, on the ground that, in order to mention a waiver under the attorney-work product doctrine, it shall be the case that that the materials will be likely accessed by the attorneys' opponents[226]. However, in any case, this approach may at least find a partly solution to prevent the disclosure of attorney products by the third-party funders to the other parties.

2.1.2.4. Confidentiality Agreements

It is argued that the funded party and the third-party funder shall agree on to what extent the information provided by the funded party could be used by the third-party funder[227]. This agreement should be in written and based on confidentiality clauses[228].

Signing separate confidentiality agreements or drafting specific confidentiality terms under the TPF agreements is therefore another suggestion, and commonly favored in practice, in order to contractually bind the third-party funders to keep any information or documents confidential starting from the due-diligence process to be lasted forever[229].

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[226] Goldsmith and Melchionda (n 33) p. 66.
[227] Maya Steinitz and Abigail C Field, 'A Model Litigation Finance Contract' (2014) 99 Iowa Law Review 711, p. 745.
[228] Çalışkan (n 61) p. 652.
[229] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 135.

Compared to the foregoing common law-driven alternatives, the confidentiality agreements seem to be the best-fit for protection of the confidential communications. However, this alternative has also a significant handicap. Indeed, even in this scenario, the scholars conclude that TPF eventually lead to waiver of attorney-client privilege anyway[230], meaning that drawing up a confidentiality agreement or clause does not prevent the occurrence of waiver, so that, the arbitral tribunals could still seek for the submission of these documents or even the details of TPF relationship between the parties[231].

Apart from those, Steinitz argues that, in order to eliminate TPF's drawbacks that jeopardize the attorney-client relationship, it would be convenient to expand such type of relationship and the obligations thereof to the third-party funders, via regulations[232]. By way of this, especially in terms of confidential documents as well communications, the funded party will hold a securer position and also third-party funders may smoothly access the necessary information and documents, which in this case the information symmetries will enhance as well, and this surely increases the quality as well as effectiveness of first examination phase of TPF, to be conducted by the third-party funders[233].

2.2. Disclosure of Third-Party Funding

Another ambiguous issue that comes along with the emergence of TPF pertains to the disclosure of the TPF relationship before arbitral tribunals. With involvement of the third-party funders into the arbitration disputes, there have been multifaceted relationships established, not only between the third-party funders and the funded parties but also potentially between the third-party funders and the arbitrators. Accordingly, when it comes to the arbitrators who could be in relation to third parties taking role in the arbitral proceedings with financial purposes, their

[230] Steinitz and Field (n 227) p. 740.
[231] Steinitz and Field (n 227) p. 740.
[232] Steinitz and Field (n 227) p. 740.
[233] Steinitz (n 22) p. 1328.

being impartiality and independency comes to the forefront in the same vein[234]. In this respect, some argue that, disclosure of TPF is necessary for the integrity of international arbitration[235] whereas others deem it unnecessary on the ground that third-party funders are not a party to dispute[236]. However, it should be noted that, the prevailing view favors the former one, arguing that TPF triggers conflict of interest, thus disclose should be made accordingly[237].

On the other hand, it is also argued that, disclosure of TPF is necessary not only for spotting the conflict of interest, but also for correct determination of allocation of costs. Indeed, *in RSM Production Corporation v. Saint Lucia case*[238], the arbitral tribunal requested from the parties to disclose whether TPF existed in the case. Similarly, in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Lti. V. Turkmenistan* case[239], the court summarizes the factors that require the disclosure of TPF relationship as such; *(i)* eliminating conflict of interest, *(ii)* ensuring transparency by correctly determining the actual parties to the dispute, *(iii)* correct allocation of costs and, *(iv)* in case of security application for costs, *(v)* ensuring the confidentiality of the documents appeared during the course of arbitral proceedings.

Therefore, the disclosure of the TPF relationship catches the attention due to different aspects. In this study however, the disclosure of TPF will be examined in aspect of conflict of interest, as this is the mere topic bearing complexity on which thus there are different approaches with different suggestions.

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234 International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) 331 <www.arbitration-icca.org> accessed 7 January 2019.
235 International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’ (n 234) p. 87.
236 International Council for Commercial Arbitration, ‘Chapter 5: Privilege and Professional Secrecy’ (n 204) p. 131.
237 International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’ (n 234) p. 87.
238 *RSM Production Corporation and Saint Lucia* [2014] ICSID ARB/12/10 22.
239 *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Şti v Turkmenistan* [2015] ICSID ARB12/6 Procedural Order No. 3.

2.2.1. Independence and Impartiality of the Arbitrators

As one of the most recognized principle of international arbitration, the arbitrators, whose roles are adjudicatory, shall naturally hold objective stance to the parties, and keep it, with no exception under whatsoever reasons[240]. This is a requirement for the sake of ensuring the principle of due process of international arbitration[241]. Likewise, an arbitrator's independency is yet another significant requirement, or a duty instead, in which an arbitrator shall not have any past or ongoing relationship with the party that may negatively affect the judgment capacity of such arbitrator as well as the credibility of arbitral proceedings as well as arbitral awards[242].

This matter is attached significant importance by the entire international arbitration community, and this is the reason, there are wide-range national and international efforts to regulate this matter in detail. Indeed whereas every national arbitration laws introduce at least one article on this matter[243], there are also comprehensive guidelines in international level, albeit non-binding, such as the IBA Guidelines, which is the first organization that concerns TPF in aspect of conflict of interest, New York Convention or the United Nations Commission on International Trade Law Model Law. As this matter bears critical gravity, violating this principle instinctively brings weighty consequences, such as inter alia invalid constitution of arbitral tribunals, removal of the arbitrators or even annulment of the awards[244].

In view of above, independency and impartiality are two key duties of the arbitrators to be followed at the outset, till the end of the proceedings, in

[240] International Council for Commercial Arbitration, 'Chapter 1: Introduction' (n 8).
[241] Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' 749 American University International Law Review 789, p. 789.
[242] Osmanoglu (n 44) p. 331.
[243] See Article 7 of Turkish International Arbitration Act No. 4686.
[244] International Council for Commercial Arbitration, 'Chapter 4: Disclosure and Conflicts of Interest' (n 234) p. 87.

international arbitration[245]. However, fulfilling this duty might be become even harder once the third-party funders come in invisibly, yet with dominant roles over the proceedings. Indeed, the third-party funders are intrinsically well-connected organizations, getting in touch with numbers of counsels and building professional relationships thereof, where those counsels might be however the arbitrator of the disputes in which the same third-party funders make investment. In those circumstances, it is argued that, arise of conflict of interest is highly likely as the arbitrators might be open to direct or indirect influence of the third-party funders[246]. To this end, for better understanding of this subject, it would be convenient to list some of the practical examples where there is a conflict of interest due to the relationship between the third-party funders and the arbitrators.

2.2.2. The Possible Scenarios Which Could Create Conflict of Interest

The conflict of interest may occur in international arbitration due to different types of relationship between the arbitrators and the third-party funders. This does not mean that, however, every single relationship between said parties leads to conflict of interest, but only those who impair the independency and/or impartiality of the arbitrators[247]. Therefore, it could be concluded that the deeper mutual contact they get into, the less impartiality and/or independence the arbitrators have.

The most obvious scenario that ends up with conflict of interest could be that, the arbitrator appointed by one of the disputing parties, which is funded by a third-party funder, is a shareholder/stakeholder of the same third-party funder[248]. By way of this, it is beyond the doubt that, the arbitrator has a financial interest in a

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[245] Osmanoglu (n 44) p. 332.
[246] Nicolás Costábile and Anthony Lynch, 'Applicable Law in Arbitrations Involving Third-Party Funding Agreements' (2017) 2017 Spain Arbitration Review | Revista del Club Español del Arbitraje 12, p. 177.
[247] International Council for Commercial Arbitration, 'Chapter 4: Disclosure and Conflicts of Interest' (n 234) p. 98.
[248] Osmanoglu (n 44) p. 334.

dispute in which he serves a judicatory role, as the third-party funder company will have reimbursement, from which the arbitrator monetizes accordingly. In this scenario, whether the third-party funding relationship is established before the appointment of the arbitrator or not should bear no importance, considering the level of close relationship between the arbitrators and the third-party funders. In each scenario, it is accepted that the arbitrator shall disclose the relationship and refuse the appointment at his earliest convenience[249]. To this end as per the IBA, such relationship is listed under the Non-Waivable Red List, therefore, in case the disputing parties take the IBA Guidelines as a reference, the other party who knows of the existence of such conflict shall not give green-light to the arbitrator to hold his place, to wit the other party does not have any discretion in this scenarios at all[250].

Another type of relationship that could constitute conflict of interest might be that, a counsel who is appointed as an arbitrator in one dispute in which one of the disputing parties benefit from TPF, represents a party in a different arbitration where his client is funded by the same third-party funder. In this case, despite the fact that, for the second dispute, there is no conflict of interest at all, in the first dispute, it is difficult to argue that the arbitrator can act independently from the third-party funder, as the same third-party funder pays the legal fees to him for the second dispute[251]. Some argue that this is the most typical example experienced in practice[252]. It is also argued that, if the counsel, who acts as an arbitrator in one dispute in which one of the disputing parties uses TPF, works at a law firm in which collaborates with the same third-party funder, but with different arbitrators, could also trigger conflict of interest[253]. However, there are some opposing

[249] International Council for Commercial Arbitration, 'Chapter 4: Disclosure and Conflicts of Interest' (n 234) p. 83.
[250] See IBA Guidelines on Conflicts of Interest in International Arbitration 2014.
[251] Osmanoglu (n 44) p. 333.
[252] Osmanoglu (n 44) p. 333.
[253] Osmanoglu (n 44) p. 333.

stances against this approach, as it would mean, according to them, excessively wider interpretation that over protects conflict of interest mechanism[254].

Lastly, if an arbitrator is appointed by the same third-party funder in different cases, this will ultimately raise doubt on the impartiality and independency of the respective arbitrator[255]. The repeat appointments do not necessarily have to be made through the same disputing parties, but it could also lead conflict of interest, if the third-party repeatedly forces different disputing parties to appoint the same arbitrator. This is called as repeat appointment and is again regulated under the Orange List of the IBA Guidelines as one of the incidents that may cause conflict of interest[256].

2.2.3. Is There an Obligation to Disclose?

As referred above, no unanimity is yet to be reached by the international arbitration community whether TPF should be disclosed and if so, how, when and by whom it should be disclosed. Despite the fact that the majority of views support the notion that, in many circumstances, it is necessary to disclose the presence of TPF relationship in order to eliminate the negative consequences of conflict of interest, as a matter of fact, this matter recently keeps rising controversy due the lack of neither international nor domestic regulation on this matter. Although IBA Guidelines tries to refer this matter in a particular scope, there is no global rule requiring from parties, arbitrators or otherwise the third-party funders to disclose the existing TPF relationship[257]. Therefore, the international arbitration community tries to have a solution in light of the doctrinal opinions on this matter.

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254 Bogart (n 9) p. 2.
255 Stoyanov and Owczarek (n 10) p. 187.
256 See IBA Guidelines on Conflicts of Interest in International Arbitration 2014.
257 Costábile and Lynch (n 246) p. 87.

It is reported that the many litigation funders try to keep their existence secret[258], and act invisibly because of various operational reasons and it would be therefore convenient to apply this fact to international arbitration that the third-party funders may not prefer to disclose the TPF relationship before the arbitral tribunals. Indeed, in most of the TPF agreements, there are detailed and strict confidentiality clauses which prohibit the funded parties from leaking the TPF relationship to third parties. Thus, it would be therefore advisable to assume that, the third-party funders, though not all, are against the mandatory or otherwise voluntary disclosure of TPF at all[259].

The third-party funders, however, are not the only actors, which argue that disclosure of TPF is unnecessary, but also some scholars suggest that, a third-party funder would be forced to disclose the information which it wants to keep confidential, to the arbitral tribunal in a dispute to which it is not even a party[260]. Likewise, once the funded parties are forced to disclose the TPF relationship, it would be presumably breaching the confidentiality and non-disclosure clauses set forth under the TPF agreement. On top of that, it is also pointed out that, the rationale behind funding activities have no relevance with the merits of the dispute[261]. Moreover, disclosure of TPF would pave the way of frivolous and unmeritorious claims against the arbitrators regarding the conflict of interest, or against the third-party funders regarding the allocation of costs. Accordingly, the arbitral tribunal would have to deal with increasing procedural work load density, albeit ungrounded[262]. Lastly, the commentators also articulate that, as long as the

[258] International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’ (n 234) p. 86.
[259] International Council for Commercial Arbitration, ‘Chapter 2: Overview of Dispute Funding’ (n 16) p. 29.
[260] International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’ (n 234) p. 85.
[261] International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’ (n 234) p. 85.
[262] International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’ (n 234) p. 85.

conflict of interest is unknown, the conflict of interest cannot be a basis for a disqualification of an arbitrator or an annulment for the arbitral award[263].

However, QMUL on TPF concludes that, opposition against the disclosure has been faded away, as the surveys suggest that 76% of the survey attendants support that the disclosure of TPF is not only necessary but also should be mandatory[264]. The factors that led this statistic vary in different aspects. To this end, the scholars suggest that disclosure of TPF is necessary, albeit unknown, as it could be possibly known at any stage of the arbitral proceeding, which ultimately ends up far-reaching consequences, such as challenge of the arbitrator or the award[265]. For instance, in certain jurisdictions, particular listed companies are legally required to disclose the relationship, so that, despite both parties refrain from disclosing TPF, they are forced to do it due to external reasons. Likewise, if a funded party is represented by a top-tier law firm, which it had not apparently afforded if there would be no TPF, this would be a strong indicator that the respective party benefits from TPF in the dispute[266]. Or the scenario could be that a third-party funder and a funded party have conflicts at the middle of the dispute, where the third-party funder may no longer fund the case, which eventually bring the existence of TPF to the surface. Therefore, it is argued that, unknown situation of TPF does not suffice to deem it as an exoneration, as there are number of circumstances that directly or indirectly result in the disclosure of TPF before the arbitral tribunals[267].

In view of above, there are certain regulations, supporting the prevailing opinion, all of which have already recognized that the disclosure of TPF is necessary. To begin with, in Singapore, Amendments to the Legal Profession (Professional

[263] International Council for Commercial Arbitration, 'Chapter 4: Disclosure and Conflicts of Interest' (n 234) p. 86.
[264] International Council for Commercial Arbitration, 'Chapter 4: Disclosure and Conflicts of Interest' (n 234) p. 83.
[265] International Council for Commercial Arbitration, 'Chapter 4: Disclosure and Conflicts of Interest' (n 234) p. 341.
[266] Goeler (n 12) p. 129.
[267] Osmanoglu (n 44) p. 331.

Conduct) Rules 2015[268] mandates that the legal practitioners must close the existence of any TPF agreements together with the identity of the third-party funder. Likewise, in Hong Kong, pursuant to the AMLB[269], TPF relationship and the identity of the third-party funder shall be disclosed to the arbitral tribunal. CETA, signed by and between the European Union and Canada is another example, which officially identifies TPF combined with specific clause for disclosure. To this end, Article 8.26 of CETA mandates the following "*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.*[270]"

Apart from the binding legislations or otherwise the international agreements, IBA Guidelines concerns this issue as well. It introduces in General Standard 6(b) the following;

"*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.*"[271]

The foregoing mandates that if a party has a direct economic interest or an obligation to remunerate any party for the award, it can be considered as a party to the dispute, thus the conflict of interest will be taken account of, as if a third-party funder is party to a dispute. Nevertheless, it is still argued that, the referred regulations are narrow and at minimal level, being unable to safeguard the completeness of international arbitrations, thus further studies are required[272].

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[268] See Legal Profession (Professional Conduct) Rules 2015, Part 5A Rules Applicable to Third-Party Funding.
[269] See Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Bill 2016.
[270] Article 8/26 of CETA http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
[271] IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 6(b).
[272] Henriques (n 2) p. 116.

According to QMUL on TPF, there are particular principles to be followed in case of TPF used in a dispute. The first principle is that, the funded parties should disclose TPF relationship, at the outset of the arbitral proceeding or, at the earliest convenience once the agreement is signed. The second principle is that the arbitral tribunals should have power to request from the parties to provide information on TPF, if any, but limited to the existence and the identity of the third-party funders. Lastly, the third principle is that following the disclosure, the arbitral tribunal should assess whether there exists a conflict of interest for the case at hand[273]. Therefore, QMUL on TPF also supports to notion that TPF requires a disclosure to make sure that any conflict of interest possibilities could be duly handled with.

All of the foregoing references support the view of disclosing TPF before arbitral tribunals. However, they also split in opinion regarding the frequency of the disclosure. Whereas some argue that, the disclosure should be systematic, as a matter of course, and without assessing prima facie the possibility of conflict of interest, each funded party should disclose TPF[274], others argue that, the disclosure is not needed if it is beyond the doubt that there is no conflict of interest[275]. The latter one is however relatively subjective, on the ground that who will ultimately conclude the non-existence of conflict of interest is a grey area. However, this divergence is not likely to be eliminated at all, as long as there is a universal acceptance that comes with globally-recognized rules on this matter.

The rationale behind supporting the disclosure of TPF mainly derives from the potential negative consequences of non-disclosed or lately disclosed TPF relationship. It is argued that, first of all, non-disclosure of TPF may have professionally unfavorable results for the arbitrators. Indeed, if an arbitrator is

[273] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 112.
[274] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 112.
[275] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 111.

disqualified from the arbitral tribunal due to the conflict of interest, which he has already known, this might be deemed unprofessional, thereby doing harm his reputation and ultimately lead a downfall in his career. On top of that, an arbitral award could be challenged and annulled at all, by the courts, if the level of conflict is undeniable and real. In other words, the parties may expectedly have interest in making sure that the award at the end of the arbitral proceeding is recognizable and enforceable without any reservations[276]. Ultimately, any arbitral award rendered under the shadow of conflict of interest, does harm the integrity and credibility of international arbitration, thus this should not be allowed under whatsoever reason, the commentators suggest[277].

Other than this, disclosure of TPF does not have to be beneficial only for procedural reasons but might be used for tactical reasons as well. Indeed, some of the funded parties may prefer to make other party be aware of the existence of TPF, so that this could intimidate the other party, by giving a message that they will fight on an equal footing before the arbitral tribunal. On top of that, it could be an indirect message that, it has a strong merit on the dispute at that, as the third-party funder goes in the case[278].

2.2.4. The Procedure on Disclosure of Third-Party Funding

The commentators also discuss how to disclose the existence of TPF before arbitral tribunals. Especially, by whom, to what extent and when the disclosure should be made are three critical questions addressed by the doctrinal opinions[279]. Once again, there are no binding rules on the exact procedure for the disclosure of TPF, but by using analogy, some of the fundamental principles in regard to the

[276] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 111.
[277] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 111.
[278] Goeler (n 12) p. 127.
[279] Osmanoglu (n 44) p. 344.

conflict of interest are meant to be used, while finding an answer to the foregoing questions.

As for by whom the disclosure should be made, it is suggested that, a third-party funder is not party to a dispute, thus is not obliged to make a disclosure by legal means[280]. Therefore, it would be not advisable to impose the disclosure obligation on the third-party funders. However, IBA Guidelines brings a different perspective on this issue, stating in General Standard 6(b) that the third-party might be deemed as bearing the identity of a funded party. Therefore, in case the parties agree to execute the foregoing, it might be a topic to discuss, whether the third-party funders, bearing the identity a party to a dispute, should be expected to disclose the case[281]. However, apart from the IBA Guidelines, it is a common approach that, the obligation to disclose is not on the third-party funders. That being said, the funded companies are the obliged parties which should make the disclosure of the TPF relationship, whereas the arbitrators should conduct the necessary inquiries in order to make sure about the existence of TPF[282].

As for the timing of the disclosure, there is no intense debate on this matter and it is accepted that, the disclosure should be made at the earliest opportunity[283], preferably at the outset of the proceeding. Those who support that, systemic disclosure should be secured, argue that, the exact deadlines for the disclosure should be set by the regulations[284]. In any scenario, it rationally makes sense that, earlier the disclosure is made, faster the conflict of interest issues is resolved. Therefore, as long as disclosure of TPF remains as the prevailing opinion, the disclosure should be ideally made at the earliest convenience of the parties.

[280] Osmanoglu (n 44) p. 345.
[281] Osmanoglu (n 44) p. 345.
[282] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 111.
[283] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 110.
[284] International Council for Commercial Arbitration, 'Chapter 5: Privilege and Professional Secrecy' (n 204) p. 111.

2.3. What is Third-Party Funding's Role in Allocation of Costs

2.3.1. Importance and Type of Allocation of Costs

Allocation of costs is an essential part of international arbitration that takes place at the end of the arbitral proceedings, where the arbitral tribunal award the costs on the disputing parties, based on different factors. This phase bears importance to the both parties, but more likely for the losing party from the financial standpoint, as the monetary consequences of an arbitral award could be intimidating at all[285]. Likewise, it is the part in which the prevailing party finally sees what it is entitled to receive and to what extent the costs incurred during an arbitral proceeding could be imposed on the counter party. Therefore, awarding of costs is always deemed as an important subject of international arbitration[286].

As for how to allocate the costs, the unanimously recognized view is that, regardless of which way is preferred for awarding of costs, an arbitral tribunal has wide range of discretion to set the principles applicable to the case at hand[287]. Indeed, for instance, in investment arbitration, ICSID Convention regulates this issue, unlike many other international conventions, basically introducing that the tribunal shall decide how to allocate the costs, unless the parties agree to otherwise[288]. Nevertheless, in practice, there are three main methods followed by the arbitral tribunals for awarding of costs:

The first method is called *costs-follow-the-event*, where the costs are basically awarded against the failing party[289]. By way of this, the party against whom the decision is rendered has to bear all of the costs incurred by the successful party during the arbitral proceeding. This is a common method used by the arbitral

[285] Brabandere (n 161) p. 388.
[286] De Brabandere and Lepeltak (n 2) p. 388.
[287] De Brabandere and Lepeltak (n 2) p. 380.
[288] Brabandere (n 161) p. 388.
[289] Brabandere (n 161) p. 389.

tribunals, owing to, for instance, some specific laws or regulation mandating so. Indeed, Section 61 of the EAA introduces that as long as the parties mutually set another method, costs should be awarded based on *costs-follow-the-event* principle. This principle is also named as *loser-pays principle*[290]. It is suggested that, applying this method does also dissuades parties from filing arbitration with unmeritorious or malevolent claims, as in the end, there exists significant risk of bearing substantial amount of costs[291].

The second method used in international arbitration for allocation of cost is pay-your-own method. This method assumes that, each party should bear its own cost equally. Therefore, independent from the direction of the arbitral awards, the administrative costs are borne to parties on an equal basis, whereas the parties bear their own expenses arising out of the arbitral proceeding. This method is called as pay-as-you-go method[292].

The-factor-dependent method is the third route, which could be followed by the arbitral tribunals, if they deem it appropriate to distribute the costs based on level of success[293]. In other words, the costs are imposed on both parties, by taking account of the each party's degree of success set forth under the award[294]. Therefore, this is where an arbitral tribunal enjoys its discretionary power while awarding the costs on the parties.

It is argued that, none of the foregoing three principles are independently borne and applicable[295]. Aside from the true discretionary power of the arbitral tribunals, which change, mix or otherwise combine any of the three methods with each other, the arbitral laws and arbitral rules may also guide the arbitral tribunals to

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290 Brabandere (n 161) p. 389.
291 Brabandere (n 161) p. 389.
292 Brabandere (n 161) p. 389.
293 Brabandere (n 161) p. 389.
294 Brabandere (n 161) p. 389.
295 Brabandere (n 161) p. 389.

follow particular principles. For instance, Article 16/D of TAA[296] assumes three different alternatives for allocation of costs. It states that, the parties may agree on in which way the parties bear the cost, or if not, costs should be imposed on the losing party unless both parties are partly unjustified at the end of the proceeding. In this case, the costs should be allocated on pro-rata basis.

2.3.2. Should Third-Party Funding be Integrated into Allocation of Costs?

Existence of TPF is a topic inevitably discussed by the scholars as well as the arbitral tribunals so far, as it could be, in many circumstances, directly interrelated to awarding of costs[297]. It is argued that, TPF could be on the table in international commercial arbitration, yet it is more likely to be in international investment arbitration[298]. This is the reason, many arbitral awards that consider TPF while allocating the costs have been rendered in ICSID cases[299]. This statistic sounds reasonable as according to the research, in investment cases, the approximate legal costs borne by either party is 8 million USD[300]. To this end, it is important how to approach the presence of TPF on this topic, as it could even eventually raise the third-party funders' responsibility to bear the adverse costs, if particular circumstances details of which are discussed below are met.

To this end, TPF is focused on by different aspects to shed sufficient light into the subject, when it comes to allocation of costs. On the one hand, it is important to set the details of a scenario in which the funded party prevails and accordingly requests from the arbitral tribunal to order the costs arising out of the TPF relationship it has entered with the third-party funder on the counter-party, on the

[296] Article 16/D of Turkish Arbitration Act No. 4686.
[297] De Brabandere and Lepeltak (n 2) p. 388.
[298] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 151.
[299]See *Kardassopoulos and Fuchs v Georgia* (n 57); *Waguih Elie George Siag and Clorinda Vecchi vs The Arab Republic of Egypt* [2009] ICSID ARB/05/15; *RSM Production Corporation and Saint Lucia* (n 238).
[300] See Gaukrodger, D. and K. Gordon 'Investor-State Dispute Settlement: A Scoping Paper for the Invesment Policy Community' (2012) OECD p. 23.

other hand, the question grabs considerable attention, that whether the third-party funders could be held responsible for the costs, if the funded party is unsuccessful at the end of the arbitral proceeding. Lastly, it is also worth mentioning the possible scenarios in case of security requests for costs, raised by the respondents.

2.3.3. Do the Third-Party Funding Costs Fall under Adverse Cost?

If the funded party succeeds at the end of the arbitration proceeding, the recoverability of the expenses incurred by the funded party within the context of the TPF relationship comes into prominence for both disputing parties. That is to say, this issue bears importance for the funded party given that the third-party funder becomes entitled to receive the success fee, reimbursement etc. along with the arbitration costs (e.g. arbitrators' costs, advance cost or other administrative costs) it has covered during the course of the arbitral proceeding[301]. This would mean that, in a sense, the funded party's winning the case simultaneously triggers its obligation to pay the previously agreed contractual amount and, presumably the expenses as well, to the third-party funder. At this point, not surprisingly, the funded party, which prevails eventually, may have reasonable expectation to compensate those expenses from the losing party, as the losing party is assumed to be the fundamental reason forcing the funded party to suffer from the TPF expenses[302].

In view of above, it should be clarified whether the costs arising out of a TPF relationship is recoverable or not. In doing so, it is important beforehand to understand what arbitration costs actually means and whether the TPF costs fall under the arbitration costs. As of today, most of the arbitral laws and rules remain silent on this issue, whereas some provides guidance, by the help of the arbitral

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[301] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 146.

[302] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) p. 154 <www.arbitration-icca.org> accessed 7 January 2019.

tribunals' interpretation thereof[303]. This is the reason, it is concluded that the arbitral tribunals, either in institutional or ad hoc arbitration, are generally not willing to poke this issue up[304] but award the cost relying on their discretions[305].

However, particular regulations allow the international arbitration community to put the TPF costs in adverse costs. For instance, in s. 59(1)(c) of the EAA listed what falls under the costs in arbitration and that list contains the phrase of "other costs" [306]. Based on this, in *Essar Oilfield Services Ltd. v. Norscot Rig Management* case[307], the arbitral tribunal concluded that, the rationale behind defining "other costs" under the same code is specifically for the circumstances in which contains a TPF relationship. By way of this, the costs related to TPF were included into the arbitration costs, where the losing party had to bear them accordingly[308].

Having said that, this does not have to be the same in each case, as the arbitration rules applicable to the disputes could vary significantly. For instance, the TAA introduces no article on this matter, thereby leaving it to the arbitral tribunals' discretion[309]. Therefore, in the absence of one uniform rule concerning this issue, finding solution on this matter eventually falls into the arbitral tribunals' hands on case-by-case basis.

Furthermore, QMUL on TPF concludes that, considering TPF's application in international arbitration market and the arbitral tribunals' tendency, the costs of TPF should be fall under the scope of arbitration costs[310]. This would be a correct approach in a sense that, inherently, the origin of TPF costs is no different from

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[303] De Brabandere and Lepeltak (n 2) p. 380.
[304] De Brabandere and Lepeltak (n 2) p. 380.
[305] Gary Born, *International Commercial Arbitration*, vol 3 (2nd edn, Kluwer 2014) 3095.
[306] S. 59(1) of English Arbitration Act
[307] *Essar Oilfields Services Ltd vs Norscot Rig Management Pvt Ltd* [2016] Queen's Bench Division (Commercial Court) EWHC 2361.
[308] *Essar Oilfields Services Ltd. vs. Norscot Rig Management Pvt Ltd.* (n 306).
[309] Turkish Arbitration Act No. 4686.
[310] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 155.

the other costs defined under the rules and laws. Ultimately, they all appear as the losing party does not do its previously agreed own part (e.g. fulfilling its contractual obligations) and thereby pushing the funded party to suffer from the TPF costs, provided that the funded party succeeds at the end of the arbitral proceeding.

Incurring legal costs due to the TPF relationship could possibly occur in two different ways. Both ways could be preferred in the TPF agreements, subject to the contracting parties' commercial decisions and are indeed widely-used in international arbitration market[311].

The first alternative is that, the third-party funder may cover the counsels' legal fees, where the fees are however invoiced by the funded party. In this case, at first glance, it seems that the funded party incurs no cost at all, however, in most of the TPF agreements, the total amount paid by the third-party funders to the counsels are recoverable from the funded party, in case of successful award. Therefore, it is suggested that, the TPF costs incurred in this scenario should be in the scope of the legal costs, as the third-party funder will eventually take it back from the funded party, thus can be recoverable thereafter by the funded party from the losing party[312].

The second alternative is that, the funded party may pay the counsels' fee directly by invoicing the amounts, and afterwards the third-party funder recovers the amount. In this mechanism too, the costs are attributable to TPF costs, taking account of the fact that, from an accounting standpoint, counsels' fees are fees incurred during and for the arbitral proceeding and fall under the scope of legal costs accordingly[313]. Therefore, it is argued that the result is same in both

[311] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 155.
[312] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 155.
[313] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 155.

scenarios, that the amount which the third-party funders are entitled to take back from the funded party should be treated as legal costs same as the costs regulated under or otherwise recognized by the laws, rules or doctrine[314].

Nevertheless, it is also worth mentioning that, regardless of how the TPF costs are incurred, it is opined that, deeming the TPF costs among adverse costs bring multi-sided concerns, in terms of the amount and the consensual nature of a TPF agreement, which under whatsoever reason should not trigger the financial responsibility of the unsuccessful party, which is a non-signatory party to the TPF agreement[315].

2.3.4. Can Funded Party Recover its Third-Party Funding Costs?

Having said that, just because the TPF costs fall under the scope of legal costs does not mean, according to the scholars, at least as of today, that it is per se recoverable from the losing party[316]. On this matter, various doctrinal approaches combined with different solutions have been suggested:

The first approach is that, the TPF costs should be borne by the counter-party as long as the counter-party is objectively vicious in the dispute at hand. This would mean that, if the parties fight before the arbitral tribunal have their own justifiable reasoning on equal footing, where each party reasonably thinks that it prevails eventually, the losing party, whichever it is, should not be punished financially, just because of the reason that the prevailing party benefits from TPF. Prima facie, this approach may have its own logic, yet how to determine whether the losing

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[314] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 155.
[315] Stoyanov and Owczarek (n 10) p. 195.
[316] 'Decisions on Costs in International Arbitration – ICC Arbitration and ADR Commission Report' (ICC) para 92 <https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf> accessed 28 February 2019.

party is egregious is a byzantine problem, conceiving ever more complex issues. According to QMUL on Task Force, this is setting the bar too high[317].

The second approach is that, the TPF costs should not be fall under the scope of adverse costs, as this would do harm the preferableness of international arbitration, as it has already struggled from exorbitant arbitration costs, and recognizing the TPF costs collectible from the counter party would make international arbitration even more intimidating[318]. On top of that, as explained above in this study, the adopted meaning of TPF is to make international arbitration more accessible to the parties. However, assuming that the TPF costs are entirely collectible from the unsuccessful party, international arbitration would not be welcoming for the losing party, as it starts bears the risk of suffering from considerable amount of adverse costs escalated by the TPF costs.

The third approach is the one which has been adopted by QMUL on TPF[319]. It suggests that, if the funded party has a reasonable cause to use TPF, it should be rewarded with an opportunity to request the TPF costs under the name of adverse cost from the other party. For a transparent application of this suggestion, it is argued which circumstances ensure that the funded party has reasonable cause to enter into the TPF relationship. To this end there are three different prerequisites, introduced by the commentators and this is collectively called as the test of reasonableness.

The first pre-condition of the test of reasonableness is to spot whether the funded party is objectively forced to enter into a TPF agreement. In other words, if the actual intention of the funded party is to avoid the unbearable arbitration costs where TPF is used for its preferred meaning (i.e. access to justice), then it is

317 International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 157.
318 Goeler (n 12) p. 387.
319 International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 158.

deemed that the funded party has no other option but seeking financial assistance to handle the arbitral proceeding. The rationale behind the foregoing is that, the test of reasonableness intends to exclude those funded parties which have financial power to bear the arbitration costs, but commercially prefers to hedge the risk to the third parties. As shifting the risk of adverse costs to the third-party funders is a common practice, the idea is that the solvent parties should not be reasonably in a position to recover the costs incurred because of non-compelling commercial reasons (i.e. hedging the risk). Therefore, it is suggested that, the financially distressed party should be one and only actors who pass the first phase of the test of reasonableness[320].

The second pre-condition is that, the losing party should lead the impecuniosity of the funded party, by its actions (e.g. non-fulfillment of contractual obligations) and consequentially, the funded party has suffered from financial distress, and thereby filing the arbitration. Therefore, the losing party's misconduct should trigger the chain of events, where the prevailing party appeals to arbitration, but is obliged to seek for financial assistance due to its financial conditions, most of which has been damaged by the losing party[321].

The third pre-condition is that the prevailing party should disclose the existence of the TPF relationship before the arbitral tribunal, so that, the counter-party is provided to an opportunity to be informed and assess the potential financial consequences of adverse costs to be increased significantly by the adding up the TPF costs. It is suggested that, the disclosure should be made from the outset of the arbitral tribunal, or at the earliest stage possible, once the TPF relationship is established by and between the third-party funder and the funded party[322].

[320] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 159.
[321] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 158.
[322] International Council for Commercial Arbitration, 'Chapter 7: Best Practices in Third-Party Funding Arrangements' (n 301) p. 159.

2.3.5. Recoverablity the Third-Party Funding Costs

It is also another matter of debate that to what extent the TPF costs should be requested from the counter party under adverse cost. Expectedly, it is reasonable to assume beforehand that the legal costs other than the TPF costs are inter alia categorized as the arbitrators' cost, administrative cost, and expenses for by any means of (expert) examination and other legal costs that may appear as occasion requires. There is no difference of opinion on this subject matter, that the foregoing types of costs are inherently recoverable from the losing party, as long as the disputing parties agree to otherwise[323].

The crucial point is, together with the widely-recognized arbitration costs, whether the success fee, reimbursement or otherwise the specific ratio of amount awarded, any of which could be contractually agreed to be paid back to the third-party funder in case of successful award, are recoverable from the losing party in international arbitration. To this end, in *Essar Oilfield Services Ltd. v. Norscot Rig Managament Pvt Ltd*. case[324], the arbitral tribunal urged the losing party to cover the near full TPF costs incurred the funded party. Likewise, QMUL on TPF suggests the following "*... for illustrative purposes, other types of third-party funding, including traditional funding on a recourse basis, may not be a considered a basis for denying an award of costs for the successful party.* [325]" thereby promoting the view that, the principle amount to which the funded party is obliged to pay the third-party funder should be compensated from the counter party at the end of the arbitral proceeding. However, this method and particular *Essar Oilfield Services Ltd. v. Norscot Rig Managament Pvt Ltd*. case[326] has been criticized by the doctrine, which share the reasonable concern that this lead unjust enrichment[327]. Indeed, in practice, the third-party funders are entitled to receive

323 Cremades and Mazuranic (n 4) p. 174.
324 *Essar Oilfields Services Ltd. vs. Norscot Rig Management Pvt Ltd.* (n 306).
325 International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 155.
326 *Essar Oilfields Services Ltd. vs. Norscot Rig Management Pvt Ltd.* (n 306).
327 Henriques (n 2) p. 120.

30%-50% of the total amount awarded, which would be according to foregoing case, added into legal costs, to be recovered from the losing party. By way of this, while the losing party covers the award itself, it shall also compensate additional 30%-50% of reimbursement to be paid to the third-party funders[328].

Having said that, passing the test of reasonableness does not suffice to redress the entire TPF costs from the unsuccessful party. In all reason, the TPF costs eventually stems from the private contractual relationship between two parties other than the unsuccessful party, to wit how far the TPF costs could accumulate is up to the contracting parties' mutual wills[329]. Therefore, in order to protect the losing party from exorbitant, and mostly unnecessarily boosted, TPF costs, it is suggested that, the amount within the scope of TPF costs should be in any case at reasonable level[330]. For correct determination of whether the TPF costs requested by the funded party are at reasonable amount, it is argued that, this should be determined on case-by-case basis, by the arbitral tribunals, which should consider whether the costs in question are "reasonably incurred". If the arbitral tribunals see it fit, it is possible for the funded party to recover all of the outlay stemming from the TPF relationship, from the unsuccessful party[331].

2.3.6. Could Adverse Costs be Imposed on the Third-Party Funders?

While the foregoing evaluations concern the possible scenarios where a funded party prevails with a positive arbitral award, it is also of importance to consider the alternatives where a funded party is the unsuccessful party and thereby bearing the adverse costs. The discussion gathers around the question whether the adverse costs could be borne on the third-party funders, along with the funded parties.

[328] Henriques (n 2) p. 128.
[329] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 161.
[330] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 158.
[331] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 159.

For shedding light onto this matter, the scholars first look back the litigation funding, where in particular jurisdictions, it is possible to hold the third-party funders responsible for the litigation expenses. For instance, Hong Kong as well as the U.K set a principle that if a funding party significantly retain the control of the file and have economic interest in the court's final decision, it is not absurd to order the adverse costs against that funding party[332].

In view of above, based on the litigation funding practices, it is argued that, in international arbitration too, the third-party funders might be held responsible for bearing the adverse costs. The idea herein is that, the third-party funders who have an opportunity to financially benefit from the positive award should also lay on the line for undertaking the potential adverse costs. In other words, this should not be one-way drive but could be end up with either way, according to the commentators[333].

At this juncture, in the absence of arbitration laws or rules allowing the prevailing party to trigger the third-party funders' accountability in as aspect of adverse costs, the question gains prominence whether in international arbitration, it is possible to order the adverse costs against a business, which is not a party to the arbitration[334]. In light of the long-standing principle that, an arbitral tribunal has no jurisdiction over the third parties, including the third-party funders, it is procedurally not possible to order against/for the third-party funders. This is the reason, the arbitration community is yet to reach a consensus on how to proceed in these circumstances[335].

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332 International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 160.
333 International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 161.
334 International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 161.
335 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (The Law Reform Comission of Hong Kong 2015) 41 <www.hkreform.gov.hk> accessed 28 February 2019.

The international arbitration community yet suggests that, the underlying reason for holding the third-party litigation funders responsible for the litigation expenses is perfectly applicable to the international arbitration[336]. Therefore, the third-party funders should take the risk of being imposed to adverse costs, if they plunge into the international arbitration pool for benefiting from its financial opportunities. It is also proposed that, in order to eliminate the uncertainty, there should be regulatory studies to enact laws or otherwise rules on this issue[337].

As a side note, QMUL on TPF argues that, the third-party funders' being responsible for adverse costs have two benefits for international arbitration[338]. First one is that, it could make international arbitration even a securer path, as the counter-party which does not benefit from TPF would be sure that, in case of a successful award, there are two different bodies, each of which could be held responsible for adverse costs, which markedly ease the collection of the legal costs. Second advantageous is that, the funders would be forced to even more diligently consider investing in arbitration, taking account of the fact that, at the end of the proceeding, they may suffer from bearing significant adverse costs, not to mention that they would be contractually not entitled to receive any reimbursement or amount in return, if the funded parties fail to have a positive award[339]. However, on this matter, there should be second thoughts, as this would lead preserve effect that the party funders would be intimidated from the non-negligible risk of bearing adverse costs, thus eventually refrain from funding the cases, that may significantly reduce the applicability of TPF in international arbitration.

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[336] 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (n 334).
[337] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 162.
[338] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 162.
[339] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 163.

2.3.7. Security for Costs and It's Reflection on Third-Party Funding

2.3.7.1. The Status of Security for Costs

Security for costs is a type of request, raised by the respondent-side in order to secure the collectability of adverse costs from the claimant, based on the assumption that the financial situation of the claimant poses risk that, at the end of the arbitration, the claimant may not be able to cover the adverse costs at all[340]. This is also called as *caution judicatum solvi*. There are particular arbitration rules and law that allow for awarding security for costs, whereas some others remain silent on this issue. Nevertheless, it is suggested that, even in the absence of explicit rules introducing the security for costs, the arbitral tribunal should have power to award it for the sake of ensuring the integrity of international arbitration[341].

Security for costs is a recognized method in international arbitration and could be experienced in arbitration cases in many occasions. However, many scholars suggest that, security for costs is and should be exceptional method in international arbitration, given the fact that, awarding security for costs would impair the claimant's access to international arbitration, thus justice[342]. Therefore, the delicate balance between the claimant's access to justice and the respondent's right to recover adverse costs should be maintained diligently. On the other hand, Gary Born argues that, despite that the arbitral tribunals have power to award security for costs, they had not preferred to do so until recently, yet as of today, the favoring such requests have been gradually increased[343].

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[340] Weixia Gu, 'Security for Costs in International Commercial Arbitration' (2005) 22 Journal of International Arbitration Kluwer Law International 167, 167; Stoyanov and Owczarek (n 10) 192.
[341] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 170.
[342] See Yves Derains and Eric Schwartz, Guide to the ICC Rules of Arbitration (2nd edn, Kluwer Law International 2005);. J. Lew, L. Misteslis and S. M. Kroll, Comparative International Commercial Arbitration (Kluwer 2003)
[343] Born (n 304) p. 2494.

Nevertheless, the prevailing view in international arbitration community is that, security for costs should be awarded only in exceptional circumstances[344]. To this end, the scholars suggest that, if the claimant (or about to) goes into insolvency or if the claimant is in a significant financial distress, the request for security for costs should be assessable. On top of that, it is also argued that, if the claimant's financial position does not visibly change due to the unforeseeable events, since the execution date of the arbitration agreement between the parties, then the respondent should not be able to request for security costs, as it has already undertaken the bear the risk of battling before an arbitral tribunal, in case of a dispute[345].

In a nutshell, the majority of the arbitral decisions support the view that awarding security for costs should be entertained in rare circumstances, where the claimant is objectively impoverished so that risk of being unable to handle potential adverse cost is real[346]. Deriving from this conclusion, the referrals pertaining to the TPF relationship have been shaped in the same vein, concluding that the mere existence of a TPF relationship does not suffice to award for security for costs[347].

2.3.7.2. The Third-Party Funders and Security for Costs

Awarding security for costs is, as pointed out above, suggested to be subject to particular pre-conditions. Each of the requirements sought for awarding security pertains to the financial disability or difficulty of the claimant against whom the award is sought. To this end, it is a question of debate, whether the claimant's using TPF means that the claimant is too poor to cover the adverse costs, so awarding security for costs becomes justifiable.

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[344] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 166.
[345] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 168.
[346] *Libananco Holdings Co Limited v Republic of Turkey* [2008] ICSID ARB/06/8.
[347] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 171.

There are particular, not a lot though, views that the existence of the TPF relationship per se confirms that the claimant is in financial conditions disabling it to bear the adverse costs[348]. However, application of this view could bring particular disadvantages to international arbitration, and this is the reason, it would be convenient to approach this issue skeptical and with narrow-scoped implementation technics.

First of all, TPF is not preferred by the financially distressed parties only, but also for those which are solvent but prefers hedging the risk of legal procedures. Therefore, assuming per se that, the execution of TPF relationship confirms that the funded party is financially constraint could be of no relevance at all[349]. Secondly, vesting right to a non-funded party to rightfully request for security for cost could pave the way of malevolent and frivolous claims, for the purpose of lengthening or sabotaging the arbitral proceeding[350]. Third, especially in investment arbitration, it is likely to be a scenario that, the claimant becomes financially week, just because the respondent (i.e. the contracting state) has not fulfilled its contractual obligation and this could be the reason for the claimant to enter into a TPF agreement to finance the arbitration. In these type of cases, the respondent, whose conducts have led the impecuniosity of the claimants should not be reasonably request from the arbitral tribunal to award security for costs[351].

In light of the foregoing, in many investment arbitration cases, the requests for security for costs were rejected by the arbitral tribunals[352]. The rationale behind

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[348] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 170.
[349] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 170.
[350] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 170.
[351] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 170.
[352] *BSG Resources Limited v Republic of Guinea* [2015] ICSID ARB/14/22; *Emilio Agustín Maffezini v Kingdom of Spain* [1999] ICSID ARB/97/7; *Victor Pey Casado and President Allende Foundation v Republic of Chile* [2001] ICSID ARB/98/2.

these decisions gather around the fact that such request based on the existence of a TPF relationship is not sincere and the awarding it would impair the funded parties' access to justice and a systematic basis for the respondent in international arbitration to be granted for security of costs.

However, the foregoing does not necessarily mean that, the existence of TPF could not be possibly a reason for awarding security for costs. Indeed, in particular circumstances, the TPF relationship may provide concrete prediction that the claimant would presumably fail to cover the adverse costs. These circumstances might be that, the claimant should be objectively poor to be not able to cover the adverse costs and at the same time the TPF agreement does not urge the third-party funder to cover the adverse costs. Likewise, should the TPF agreement contain a free-exit clause for the third-party funder without presenting a justifiable ground at the middle of the arbitral award, this might be a convincing sign for the arbitral tribunal to award security for costs, provided that the same arbitral award is sure that the claimant is (almost) insolvent[353].

Having said that, even in these scenarios, the TPF agreement may give suffice information for the arbitral award that each criteria for awarding security for costs are met in the case at hand. Indeed, in *RSM production v. St. Lucia* case[354], the arbitral award recognized the existence of the foregoing criteria separately in its decision, but more importantly, emphasized on the fact that the claimant has reneged its obligation of paying adverse costs, which could not be disproven by the claimant itself, and it substantially increases likelihood of a scenario that the claimant will not cover the adverse costs, if it loses the case[355]. As a matter of fact, *RSM production v. St. Lucia*[356] is accepted as the first investment arbitration case, in which the arbitral award awarded security for costs, and this the reason, it

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[353] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 171.
[354] *RSM Production Corporation and Saint Lucia* (n 238).
[355] International Council for Commercial Arbitration, 'Chapter 6: Costs and Security for Costs' (n 36) p. 177.
[356] *RSM Production Corporation and Saint Lucia* (n 238).

is deemed as landmark decision in terms of awarding security costs. Since then, there are particular decisions which have been rendered in light of *RSM production v. St. Lucia* case, where the arbitral tribunals sought for cumulative fulfillment of each criteria discussed in the same decision[357].

Consequently, awarding security for costs have been recognized as a request that should be awarded in rare circumstances by the arbitral tribunals. In saying so, the presence of the TPF relationship does not automatically mean that the claimant is poor, thus should not be a base reasons for awarding security for costs, but in particular cases, such relationship could give adequate foresight that the claimant is likely to fail to cover adverse costs. The arbitral tribunals further examine the history of the claimants in terms of honoring adverse costs obligation, if any, and take it into account as well, while deciding whether to award security for costs or not.

[357] *Ata Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan* (n 62); *EuroGas Inc and Belmont Resources Inc v Slovak Republic* [2015] ICSID ARB/14/14.

THIRD SECTION

COMPERATIVE ANALYSIS OF THIRD-PARTY FUNDING IN DIFFERENT JURISDICTIONS

3.1. Introduction

As the application of TPF in litigation and international arbitration has increased gradually over the years, particular jurisdictions could not look aside this growing popularity and have started regulating it in different forms and context. While Australia and the U.K. are two leading countries which have already allowed the applicability of TPF in litigation, Hong Kong has recently enacted its TPF law for international arbitration. As for Turkey, there is no particular legislation pertaining to this issue, which regulates neither TPF in litigation nor TPF in international arbitration. To this end, from a comparative analysis standpoint, below is the snapshot of how TPF plays role in different jurisdictions in the world.

3.2. Third-Party Funding in the U.K.

The U.K is recently one of the leading countries that hosts the application for TPF both in litigation and international arbitration[358]. Indeed, the world's biggest global third-party funders are mostly located in the U.K, providing funding services in various fields of law[359]. From a regulatory perspective, the government is yet to enact any particular law on TPF, and this is the reason, it is deemed as a "self-regulatory" field by the help of the ALF and the ALF's regulations thereof[360]. Likewise, there are particular studies focusing on TPF, to monitor and

[358] Stoyanov and Owczarek (n 10) p. 175.
[359] See the approved list of the third-party funders in the U.K., http://associationoflitigationfunders.com/membership/membership-directory/, accessed February 28, 2019.
[360] 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (n 334) p. 34.

promote TPF activities in the U.K., which have attracted the attention of the international arbitration community for their studies on TPF[361].

3.2.1. Background

As for the background, the U.K was one among many countries that prohibited the maintenance and champerty at the first place, until 1967. However, together with the enactment of the ECLA[362], the doctrine of maintenance and champerty[363] has been gradually abolished, and over the course of time, the courts in the U.K. have given green-light to the application of TPF. For instance, in *Giles v. Thompson* case[364], the court emphasized that the U.K.'s judicial system is strong enough to eliminate the malicious purposes that may come along with litigation funding practices, thus prohibiting its application entirely would not be a sound decision. On top of that, in 2004, in *Gulf Azov Shipping Co. Ltd. v. Idisi* case[365], the court emphasized on the advantageous of TPF that it could serve to promote access to justice. Therefore, along with the ECLA, the courts of the U.K. have also started explicitly allowing the practice of TPF in litigation.

In aspect of international arbitration, there is no specific clause allowing the utilization of TPF in international arbitration. Therefore, it is suggested that, in case the TPF relationship violates the public policy of the U.K., the TPF agreement with its consequences may be invalidated by the courts[366]. On the other hand, the ALF plays significant role in application of TPF in international arbitration in the U.K. It defines litigation funding as "*Litigation funding is the provision by a third-party of finance to a party to litigation or arbitration, which is used to pay for the legal costs of the dispute, in exchange for the funder taking*

[361] Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (The Stationary Office 2009).
[362] Article 13 of Criminal Law Act 1967.
[363] See for further details of Maintenance and Champerty Section 1.1.2.
[364] *Giles v Thompson* [1993] United Kingdom House of Lords AC 142.
[365] *Gulf Azov Shipping Co Ltd v Idisi* [2000] Court of Appeal EWCA Civ 21.
[366] Stoyanov and Owczarek (n 10).

a share of the proceeds in the event of a successful outcome[367]." thereby explicitly admitting that it involves in arbitration cases as well. Indeed, most of the eminent third-party funders are members of the ALF as of today. On top of that, the ALF introduced the Code of Conduct for Litigation Funders, last of which was revised on January 2018, which sets the professional principles that the funders should abide by[368].

Apart from the ALF, another important study referred by the commentators is Final Report on the Review of Civil Litigation Costs, published by Lord Justice Jackson[369]. In this report, Jackson suggests particular reasons why he favours the application of TPF in the U.K., and in terms of regulating TPF states the following in verbatim:

"*At the present time, parties who use third-party funding are generally commercial or similar enterprises with access to full legal advice. In the future, however, if the use of third-party funding expands, then full statutory regulation may well be required, as envisaged by the Law Society*[370]."

3.2.2. Controversial Issues

As for the disclosure of the TPF relationship in the U.K., it is pointed out that, disclosure of presence of TPF is necessary, and the funded party therefore should disclose the relationship, name and address of the third-party funder[371]. However, the TPF agreement is in principle not among the documents that should be disclosed[372]. Furthermore, together with the decision rendered by Lord Jackson, the success fees, so-called *uplift or waterfall amount*, are excluded from the

[367] See the relevant link, http://associationoflitigationfunders.com/litigation-finance/, last accessed February 28, 2019.
[368] See the full text, http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf, last accessed February 28, 2019.
[369] Jackson (n 360).
[370] Jackson (n 360) p. 119.
[371] Stoyanov and Owczarek (n 10) p. 175.
[372] Stoyanov and Owczarek (n 10) p. 175.

adverse costs, thus is no longer recoverable from the counter-party. Accordingly, the disclosure of the TPF relationship thereof is not necessary in aspect of allocation of costs[373].

In aspect of adverse costs, there is a landmark decision rendered in 2005, (i.e. *Arkin v. Borchard Lines Ltd.* case[374]) in which the court decided that the third-party funders should be liable for adverse costs, as following: "*a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided*[375]." Therefore, the third-party funder could be potentially held responsible for the legal costs of the successful party, pursuant to the U.K. laws, yet the nuance is that, according to the same decision, the third-party funder should retain the control over the file to be responsible for adverse costs, to wit if the third-party's mere role is, for instance, nothing more than providing financial assistance, this should not be reasonably a ground for ordering adverse costs against the third-party funder[376]. Deriving from this fact, it is opined that, the U.K discourages the third-party funders to have great influence over the funded party, the case strategy and the counsels[377].

As for the attorney-client privilege, the scholars argue that, providing documents under the attorney-client privilege to the third-party funders lead to waiver of privilege, on the ground that, there is no specific codification mandating the otherwise[378]. However, in practice, it is suggested that the confidentiality agreements or the third-party funders' explicit undertakings that transfer of documents does not considered be waiver of privilege could be an alternative to

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[373] Jackson (n 360).
[374] *Arkin v Borchard Lines Ltd & Ors* [2005] English Court of Appeal EWCA Civ 655.
[375] *Arkin v Borchard Lines Ltd & Ors*
[376] Stoyanov and Owczarek (n 10) p. 175.
[377] Costábile and Lynch (n 246) p. 173.
[378] Stoyanov and Owczarek (n 10) p. 175.

protect the confidentiality documents of the funded party or the attorney-products of the attorneys for the funded party[379].

Consequently, the U.K is one of the leading jurisdictions that welcomes the practice of TPF, mainly in litigation. Despite the fact that there is no regulation on the application of TPF in international arbitration, in practice, there are numbers of third-party funders which have already funded number of cases in international arbitration[380]. Nevertheless, it is reasonable to expect that, in the future, there will be particular codification activities to regulate TPF in international arbitration under the laws, in order to keep pace with TPF's growing trend in international arbitration.

3.3. Third-Party Funding in Australia

Australia is home to one of the biggest TPF markets in the world, where there are numerous cases in different types of lawsuit funded by the third-party funders[381]. According to the researches, the total amount of transaction completed within the context of TPF is 21.1 billion USD as of 2018[382]. Similar to the U.K., there is no particular code that regulates TPF in litigation or international arbitration, and the TPF market has been evolved in light of the courts' landmark decisions rendered over the course of time[383]. Australia also hosts particular giant third-party funders such as IMF Bentham Ltd., which has currently dominated the TPF market in Australia[384].

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379 Stoyanov and Owczarek (n 10) p. 176.
380 See '2017 Annual Report' (Burford Capital 2017) <http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf> accessed 9 January 2019.
381 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (n 334) p. 51.
382 'The Third Party Litigation Funding Law Review - Australia' (2018) 2 The Law Reviews <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-2/1176815/australia> accessed 28 February 2019.
383 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (n 334) p. 52.
384 See more detail, https://www.imf.com.au/about, accessed February 28, 2019.

3.3.1. Background

As for the background of TPF in Australia, until 2006, maintenance and champerty had been strictly prohibited which paralyzed the involvement of the third-party funders in cases. However, in 2006, a landmark decision, *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Limited* case[385], the court decided that TPF does not pose a risk to public policy or is a kind of abuse of process. Therefore, with this decision, the current position in Australia is that, TPF is no longer deemed within the scope of the doctrine of maintenance and champerty[386]. On top of that, another important decision regarding the usage of TPF is *QPSX Limited v. Ericsson Australia Pty Ltd.* case[387], where the court decided that TPF does not have to serve to access to justice, but could be an instrument for achiving budget efficiency- driven purposes as well. By way of this, TPF in Australia has been widely recognized not only as a tool for promoting access to justice but also a tool for hedging the risk of legal costs to a third-party. In furtherance, the recent litigation finance survey conducted, 70% of the respondent stated that TPF is now an essential market for growing business[388].

As for the regulatory aspect, there is no law that concerns the application of TPF in Australia. However, it is stated that, the third-party funders are subject to provision of Australian Securities and Investments Commission Act 2001, prohibiting unfair contract terms against the funded parties[389]. This code, however, does not bring particular obligations or requirements for the third-party funders, such as minimum capital required to run the company. As of today, the main driving factor in terms of the setting the principles for TPF are the landmark decisions rendered by the courts in Australia[390].

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[385] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (n 96).
[386] 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (n 334) p. 52.
[387] *QPSX Limited v Ericsson Australia Pty Ltd* [2005] High Court of Australia FCA 933.
[388] 'The Third Party Litigation Funding Law Review - Australia' (n 381).
[389] 'Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration' (n 334) p. 62.
[390] 'The Third Party Litigation Funding Law Review - Australia' (n 381).

3.3.2. Controversial Issues

In regard to the third-party funders' controlling over the file, in *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Limited* case[391] again, the court ruled that the third-party funders do reasonably expect to retain the control, to be awarded for what it is invested, therefore such degree of control should not be necessarily prohibited. However, there must be always a room for the legal representative of the funded party to act independently before the courts and in line with the professional ethics applicable. That is to say, any level of control enjoyed by the third-party funders, who could potentially lead an abdication of the counsels might be against the public policy. Therefore, according to the court, the balance between the professional integrity of lawyers and the level of control by the third-party funders should be maintained cautiously[392].

The courts in Australia may conduct a strict approach regarding the disclosure of the TPF relationship. Indeed, not only are the courts able to seek for the disclosure of the TPF relationship and the TPF agreement, it could also intervene it, if deemed necessary. For instance, in *Earglow Pty Ltd. v. Newcrest Mining Ltd.* case[393], the court opined that the courts should have an authority to, for instance, reduce the commission entitled by the third-party funders, if the funded party wins the case. On the other hand, the dominant purpose test is applied in Australia, where the courts do not see transfer of confidential documents to the third-party funders as waiver of privilege[394]. According to dominant purpose test, if it is spotted that the confidential documents are provided to the third-party funders as otherwise the third-party funders could not possibly decide to invest in case or not in the absence of sufficient information, sharing documents with the third-party funders will not be deemed as a disclosure[395]. Therefore, the courts in Australia

[391] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (n 96).
[392] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (n 96).
[393] *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] Australian Federal Court FCA 1433.
[394] 'The Third Party Litigation Funding Law Review - Australia' (n 381).
[395] See for further details Section 2.1.21.

conduct relatively flexible approach in regard to the protection of confidential information under the TPF relationship.

In terms of adverse costs, another landmark decision was rendered in Australia; *Knight v. FP Special Asset Ltd.* case[396]. The court decided that, the third-party funders can be held responsible for the adverse costs ordered against the funded parties[397]. In other words, the court showed a less strict view for the consensual natural of the TPF relationship and decided that a business, which is not a party to a dispute, should be held liable if the case is lost. However, the nuance is that the court set a pre-condition that, in order for the courts to order the adverse costs against the third-party funders, the TPF agreements shall contain an article imposing an obligation on the third-party funders to cover the adverse costs, if the case is lost.

In a nutshell, Australia is one of the biggest TPF markets in the world, hosting numerous TPF practices so far. Despite that there is no specific code regulating TPF, the courts' precedents have been the leading actors that shape the practice of TPF in there. However, alike as the U.K., it would be reasonable to assume that, there will be particular codification process in the future to officially regulate TPF, if need be.

3.4. Third-Party Funding in Hong Kong

From a regulatory standpoint, Hong Kong is one of the most renewed countries in terms of TPF, as in 2016, it has officially enacted the HKO that regulates TPF in international arbitration. To this end, an amendment law has been come into force to amend the AMLB, by adding up Article 10A which contains detailed articles

[396] *Knight v FP Special Asset Ltd* [1992] High Court of Australia HCA 28.
[397] *Knight v. FP Special Asset Ltd.* (n 395).

regarding the TPF[398]. The AMLB introduces particular definitions, restrictions and rules regarding TPF, details of which are elaborated below.

3.4.1. Background

Article 98E of the AMLB states that the purpose of this code is to exclude TPF from the doctrine of maintenance and champerty and to provide particular measures addressing the application of TPF[399]. From a legal point perspective, this purpose has two-fold effects; one is that TPF is explicitly allowed to be practiced in Hong Kong, second is that the doctrine of maintenance and champerty is still applied in Hong Kong. This regulation differs from the U.K. in a sense that, in the U.K., the popularity of TPF follows the abolishment of the doctrine of maintenance and champerty, whereas Hong Kong prefers to keep the said doctrine in force, yet holds TPF separate due to its rising popularity. Likewise, as per Article 98K of the AMLB, it is explicitly introduced that practicing TPF is not a tort either[400].

Article 98G of the AMLB defines TPF and brings one important limitations. The definition is as follow in verbatim:

"*(1) Third-party funding of arbitration is the provision of arbitration funding for an arbitration—*
(a) under a funding agreement;
(b) to a funded party;
(c) by a third-party funder; and
(d) in return for the third-party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.[401]"

[398] Hong Kong Arbitration and Mediation Legislation Bill 2016.
[399] Article 98/E of Hong Kong Arbitration and Mediation Legislation Bill 2016.
[400] Article 98K of Hong Kong Arbitration and Mediation Legislation Bill 2016.
[401] Article 98G of Hong Kong Arbitration and Mediation Legislation Bill 2016.

The foregoing is similar to what other institutions and bodies define it. To this end the definition contains fundamental requirements of a modern TPF in international arbitration. The AMLB, on the other hand, makes a clear distinction in Article 98G(2) that, the third-party funder shall not be a person practicing law in Hong Kong or elsewhere, so that the attorneys all around world are prohibited from acting as a third-party funder under the AMLB[402].

3.4.2. Controversial Issues

The AMLB urges the parties of a TPF agreement to include particular clauses. As per Article 98P, a TPF agreement shall include (i) the level of control to be retained by the third-party funder, (ii) whether the third-party funder is liable for adverse costs, security for costs or other financial liabilities, (iii) the termination right of the parties[403]. Thereby, the legislature wants to make sure that the AMLB responds one of the most current unresolved problems of TPF in international arbitration i.e. the allocation of costs.

The AMLB also regulates the privilege of confidential information and disclosure of the TPF relationship before the arbitral tribunal. According to Article 98/S, the transfer of documents to the third-party funders shall not be deemed as waiver, and the third-party funders shall not communicate or disclose the document it obtains from the funded parties to another parties due to any grounds other than specified in the same article as exceptions. Furthermore, Article 98/T requires from a funded party to disclose the existence of TPF relationship and the name of the third-party funder[404]. Therefore, as per the AMLB, the TPF agreement is not among the documents that shall be disclosed before the arbitral tribunal. Moreover, as per 98U of AMLB, if the TPF agreement is terminated, this shall be notified to the arbitral tribunal as well[405]. As for the timing of the disclosures,

[402] Article 98G(2) of Hong Kong Arbitration and Mediation Legislation Bill 2016.
[403] Article 98P of Hong Kong Arbitration and Mediation Legislation Bill 2016.
[404] Article 98T of Hong Kong Arbitration and Mediation Legislation Bill 2016.
[405] Article 98U of Hong Kong Arbitration and Mediation Legislation Bill 2016.

before or at the outset of the arbitral proceeding or, if made after the commencement of the arbitration, the disclosure shall be made within fifteen days as of the date on which the TPF agreement is executed.

Moreover, Article 98O of the AMLB states that the code of practice could be prepared in order to set the application principles of TPF in international arbitration[406]. To this end, on December 7, 2018, the Code of Practice for TPF of Arbitration has been published, that came into effect on February 1, 2019. It details inter alia, the minimum capital requirements, disclosure procedures, and, the content of the third-party funders' control over the file and conflict of interest situations. Accordingly, as per the Code of Practice for TPF, in overall, the third-party funders are required to (i) diligently consider the possibility of the conflict interest over the course arbitration proceedings, (ii) to avoid from any steps leading the counsels to breach the professional ethics and duties, (iii) to remind the third-party funders to disclose the TPF relationship and (iv) not to include any arbitrary termination rights in favour of the third-party funders. Together with the enactment of the Code of Practice, one may argue that Hong Kong becomes the leading country in terms of regulatory activities addressing TPF.

Consequently, the AMLB and the Code of Practice has brought great impetus to the development of TPF in international arbitration for Hong Kong. The regulation activities in Hong Kong pertaining to TPF do shows the fact that, TPF is indeed a growing phenomenon that, the countries have started giving green-light to regulate this issue in detail in order to catch the trend in international arbitration community.

3.5. Third-Party Funding in Turkey

Litigation or arbitration funding is not an established market in Turkey, nor recognized by the regulations. While in practice, particular law firms might

[406] Article 98O of Hong Kong Arbitration and Mediation Legislation Bill 2016

encourage their clients to benefit from TPF, the total transaction volume is not significant. However, there are recently particular conferences held and books published on this issue, which might accelerate the TPF's popularity in Turkey[407].

From a regulatory perspective, the TCPL No. 6100 and the TAA are two laws, which regulate arbitration and might be related to TPF in Turkey. To this end, the TCPL regulates the fundamental principles of civil procedural law and domestic arbitration and there is no single article that directly or indirectly related to third-party funding in litigation. On the other hand, Article 25 of the TCPL states that a party which has absolute right on the matter in dispute keeps it during the course of litigation. Based on this, one may argue that, the level of control retained by the third-party funders brings no binding effect before the court, such that the funded party's procedural transactions will remain valid, despite that it violates the TPF agreement. Other than this, no article seems to be interrelated with the TPF mechanism. Likewise, the TAA brings no article regarding TPF either. Lastly, it is suggested that, Article 17 of the Decision No. 32 on Protection of the Value of Turkish Lira could be related with TPF. The article states that any credits taken by Turkish residents from abroad shall be made through a bank, meaning that, the third-party funders could finance the third-party funders, which are resident in Turkey, through banks only.

Due the absence of any articles under the said laws addressing TPF, as of today, TPF in Turkey is just a theoretical subject of matter to be discussed. Nevertheless, it is worth mentioning that, the doctrine of maintenance and champerty is not applicable in Turkey, therefore, TPF should be technically exercisable as long as it does not violate the public policy by any means. However, as of today, there is no known decision rendered by the courts about this matter.

As for the doctrinal studies, on May 10, 2018, a conference was held in Istanbul, addressing the international investment arbitration and TPF. In this conference,

[407] See Balkar Bozkurt and Huysal (n 45); Efeçınar, Ömeroğlu and Uyanık (n 3); Çalışkan (n 61).

the different aspect of TPF was taken into consideration and evaluated[408]. It is also reasonable to expect that, in near future, ISTAC may conduct studies on TPF to provide guidance thereof.

Consequently, in terms of TPF, Turkey does not offer attention-grabbing practices, as of today at least. However, as arbitration is a growing trend in Turkey, it would be convenient to expect that, TPF will possibly enter into arbitration market in Turkey as well.

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[408] See Uluslararası Yatırım Tahkimi ve Milletlerarası Tahkimde Üçüncü Kişi Finansmanı, held on May 10, 2018 at Istanbul Kadir Has University, https://www.konferanstakibi.com/uluslararasi-yatirim-tahkimi-ve-milletlerarasi-tahkimde-ucuncu-kisi-finansmani-paneli, accessed 28 February 2019.

CONCLUSION

In conclusion, TPF is inarguably a rising instrument for international arbitration community, as it opens a door to circumvent the grim reality of expensive arbitration costs. With involvement of the third-party funders, bearing the legal costs of entire arbitral proceedings, the cash-strapped parties have started getting an opportunity to file arbitration before the arbitral tribunals to claim their receivables. However, it is also worth mentioning that TPF is also a good commercial opportunity for the solvent parties to hedge the risk of legal costs to a third-party, with a no-recourse basis. Therefore, one may argue that TPF responds all player of international arbitration, and this is the underlying reason it has gained significant popularity in recent times.

TPF is similar to different funding mechanisms, such as insurance or attorney financing, and consequently many suggestions have been introduced by the commentators for a sound definition of TPF, yet no unanimous one is reached so far. However, the absence of a conceptual definition does not conceal the advantageous of TPF in practice. As many would suggest, TPF's preferred meaning is to facilitate an access to justice, whereas it also leads a way of detailed due-diligence processes by the third-party funders on the merits of the case. Nevertheless, TPF is not a perfect mechanism, and brings particular drawbacks, one of which is the situation where the third-party funders retain high-level of control over the files, to which they are not a party. This surely intimidates those taking care of the integrity of international arbitration and thereby paving a way of criticism against TPF.

In addition to the foregoing, there are particularly important controversies, all of which stem from the application of TPF in international arbitration. To this end, allocation of costs in TPF, conflict of interest situations between the third-party funders and the arbitrators and the protection of the privileged documents in case of transferring those to the third-party funders are three key topics, that have been discussed by the doctrine and the arbitral tribunals. Ultimately, the best efficient solution seems to be initiating regulatory activities by enacting laws and/or rules addressing these topics specifically, so that the topics concerned by the international arbitration community could be eliminated.

Lastly, TPF has already been applied for litigation for many years in the U.K. and Australia. Deriving this long-standing experience on TPF, both countries have successfully adapted it to international arbitration as well, albeit no precise regulations thereof. On the other hand, Hong Kong has exclusively enacted a law for TPF in international arbitration, thereby becoming one of the leading countries in TPF. For Turkey, TPF is not mature market, yet could have potential to be pointed out by the scholars in near future, on the basis that no regulation is in force, that directly or indirectly prohibiting the application of TPF.

BIBLIOGRAPHY

Articles

Abrams DS and Chen DL, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15 University of Pennsylvania Journal of Business Law 1075

Alrashid MN, Wessel J and Laird J, 'Impact of Third Party Funding on Privilege in Litigation and International Arbitration' (2012) 6 Dispute Resolution International 101

Brabandere ED, 'The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration' (2012) Manchester Journal of International Economic Law 22

Catherine A R, 'Ethics in International Arbitration' (2014) 1 Oxford University Press <http://olrl.ouplaw.com/view/10.1093/law/9780198713203.001.0001/law-9780198713203> accessed 9 January 2019

Clanchy J, 'Navigating the Waters of Third Party Funding in Arbitration' (2016) 82 The International Journal of Arbitration, Mediation and Dispute Management 222

Cremades BM, 'Third Party Funding: Investing in Arbitration' (2011) 8 Transnational Dispute Management

Cremades A-C and Mazuranic A, 'Chapter 9: Costs in Arbitration' in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition)* (2nd edn, Kluwer Law International 2013)

De Brabandere E and Lepeltak J, 'Third-Party Funding in International Investment Arbitration' (2012) 27 ICSID Review 379

Costábile N and Lynch A, 'Applicable Law in Arbitrations Involving Third-Party Funding Agreements' (2017) 2017 Spain Arbitration Review | Revista del Club Español del Arbitraje 12

Dos Santos C, 'Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?' (2017) 35 Association Suisse de l'Arbitrage 918

Gayner O and Khouri S, 'Singapore AndHong Kong: International Arbitration Meets Third Party Funding' (2017) 40 Fordham International Law Journal 1033

Goeler JV, 'Chapter 1: Introduction', *Third-Party Funding in International Arbitration and Its Impact on Procedure*, vol 35 (2016)

Goldsmith A and Melchionda L, 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (but Were Afraid to Ask)' 2012 Journal of International Business & Law 53

Hascher D, 'Independence and Impartiality of Arbitrators: 3 Issues' 749 American University International Law Review 789

Henriques DG, 'Third-Party Funding: A Protected Investment?' (2017) 2017 Spain Arbitration Review | Revista del Club Español del Arbitraje 100

Lyon J, 'Revolution in Progress: Third-Party Funding of American Litigation' (2010) 58 UCLA Law Review 41

Martin SL, 'The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed' (2004) 10 Fordham Journal of Corporate & Financial Law 55

Osmanoglu B, 'Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' (2015) 32 Journal of International Arbitration Kluwer Law International 325

Rubinstein JH and Guerrina BB, ‘The Attorney-Client Privilege and International Arbitration’ (2001) 18 Kluwer Law International 587

Sanz-Pastor BMC, ‘Chapter 12. Concluding Remarks’ in Antonias Dimolitsa (ed), *Third-Party Funding in International Arbitration (ICC Dossier)* (International Chamber of Commerce (ICC) 2013)

Scherer M and Goldsmith A, ‘Third Party Funding in International Arbitration: Part 1-Funders’ Perspectives’ (2012) 2 International Business Law Journal 207

Steinitz M, ‘Whose Claim Is This Anyway? Third-Party Litigation Funding’ (2010) 95 Minnesota Law Review 72

——, ‘The Litigation Finance Contract’ (2013) 12–11 University of Iowa Legal Studies Research Paper 455

Steinitz M and Field AC, ‘A Model Litigation Finance Contract’ (2014) 99 Iowa Law Review 711

Stoyanov M and Owczarek O, ‘Third-Party Funding in International Arbitration: Is It Time for Some Soft Rules?’ (2015) 2 BCDR International Arbitration Review 171

Veljanovski C, ‘Third-Party Litigation Funding in Europe’ (2012) 8 The Journal of Law, Economics & Policy 405

Yeoh D, ‘Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?’ (2016) 33 Journal of International Arbitration 115

Books

Balkar Bozkurt S and Huysal B, 'Milletlerarası Tahkimde Yargılama Masraflarının Hak Arama Özgürlüğüne Etkisi ve Sonuçları' (2015) 10 Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 121

Barrington L, 'Chapter 3: Third-Party Funding and the International Arbitrator' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017)

Born G, *International Commercial Arbitration*, vol 3 (2nd edn, Kluwer 2014)

Çalışkan Y, 'Uluslararası Yatırım Tahkiminin Üçüncü Kişiler Tarafından Finansmanı' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 645

Derains Y and Schwartz E, *Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005)

Edwards HT, 'Advantages of Arbitration Over Litigation: Reflections of a Judge' 14

Efeçınar CS, Ömeroğlu E and Uyanık E (eds), *Uluslararası Yatırım Tahkimi ve Üçüncü Kişi Finansmanı* (1st edn, Seçkin Yayıncılık 2018)

International Council for Commercial Arbitration, 'Chapter 1: Introduction', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

International Council for Commercial Arbitration, 'Chapter 2: Overview of Dispute Funding', *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

International Council for Commercial Arbitration, ‘Chapter 3: Definitions’, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

International Council for Commercial Arbitration, ‘Chapter 4: Disclosure and Conflicts of Interest’, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

International Council for Commercial Arbitration, ‘Chapter 5: Privilege and Professional Secrecy’, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

International Council for Commercial Arbitration, ‘Chapter 6: Costs and Security for Costs’, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

International Council for Commercial Arbitration, ‘Chapter 7: Best Practices in Third-Party Funding Arrangements’, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, vol 4 (International Council for Commercial Arbitration 2018) <www.arbitration-icca.org> accessed 7 January 2019

Jonas V. Goeler, ‘Chapter 4: Disclosure of Third-Party Funding in International Arbitration Proceedings’, *Third-Party Funding in International Arbitration and its Impact on Procedure*, vol 35 (Kluwer Law International)

Gu W, ‘Security for Costs in International Commercial Arbitration’ (2005) 22 Journal of International Arbitration Kluwer Law International 167

Matray D and van Rompaey S, ‘An Introduction to Third-Party Funding’ (2018) 2017 175

Nieuwveld LB and Sahani VS, ‘Chapter 1: Introduction to Third-Party Funding’, *Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2017)

<u>Cases</u>

Arkin v Borchard Lines Ltd & Ors [2005] English Court of Appeal EWCA Civ 655

Ata Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan [2011] ICSID ARB/08/2

BSG Resources Limited v Republic of Guinea [2015] ICSID ARB/14/22

Campbells Cash and Carry Pty Ltd v Fostif Pty Limited [2006] HCA S514/2005 to S520/2005

Chevron and Texaco Petroleum v The Republic of Ecuador [2018] PCA 2009–23

Earglow Pty Ltd v Newcrest Mining Ltd [2016] Australian Federal Court FCA 1433

Emilio Agustín Maffezini v Kingdom of Spain [1999] ICSID ARB/97/7

Essar Oilfields Services Ltd vs Norscot Rig Management Pvt Ltd [2016] Queen’s Bench Division (Commercial Court) EWHC 2361

EuroGas Inc and Belmont Resources Inc v Slovak Republic [2015] ICSID ARB/14/14

Giles v Thompson [1993] United Kingdom House of Lords AC 142.

Gulf Azov Shipping Co Ltd v Idisi [2000] Court of Appeal EWCA Civ 21

Kardassopoulos and Fuchs v Georgia [2010] ICSID ARB/05/18 and ARB/07/15 228

Knight v FP Special Asset Ltd [1992] High Court of Australia HCA 28

Libananco Holdings Co Limited v Republic of Turkey [2008] ICSID ARB/06/8

Mobil Oil Australia Pty Limited v Trendlen Pty Limited [2006] HCA S523/2005

Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Şti v Turkmenistan [2015] ICSID ARB12/6 Procedural Order No. 3

Philip Morris Brand Sarl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay ICSID ARB/10/7

QPSX Limited v Ericsson Australia Pty Ltd [2005] High Court of Australia FCA 933.

RSM Production Corporation and Saint Lucia [2014] ICSID ARB/12/10 22

Société Licencing Projects SL v Société Pirelli [2011] Paris Court of Appeal 09/24158

Société Lola Fleurs v Société Monceau Fleurs [2013] Paris Court of Appeal 12/12953

S&T Oil Equipment & Machinery Ltd v Romania [2010] ICSID ARB/07/13

Victor Pey Casado and President Allende Foundation v Republic of Chile [2001] ICSID ARB/98/2

Waguih Elie George Siag and Clorinda Vecchi vs The Arab Republic of Egypt [2009] ICSID ARB/05/15

Internet Sources

Catherine A R, ‘Ethics in International Arbitration’ (2014) 1 Oxford University Press <http://olrl.ouplaw.com/view/10.1093/law/9780198713203.001.0001/law-9780198713203> accessed 9 January 2019

Maniruzzaman M, ‘Third-Party Funding in International Arbitration - A Menace or Panacea?’ (*Kluwer Arbitration Blog*, 2012) <http://arbitrationblog.kluwerarbitration.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/> accessed 9 January 2019

Molot J, ‘Theory and Practice in Litigation Risk’ Burford Capital <http://www.burfordcapital.com/wp-content/uploads/2015/01/Booklet-Theory-and-Practice.pdf> accessed 9 January 2019

‘Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation’ (The US Chamber Institute for Legal Reform 2012) <https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf> accessed 9 January 2019

‘The Third Party Litigation Funding Law Review - Australia’ (2018) 2 The Law Reviews <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-2/1176815/australia> accessed 28 February 2019

‘Third Party Funding For Arbitration Sub-Committee Consultation Paper - Third Party Funding For Arbitration’ (The Law Reform Comission of Hong Kong 2015) <www.hkreform.gov.hk> accessed 28 February 2019

Reports

‘2017 Annual Report’ (Burford Capital 2017) <http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf> accessed 9 January 2019

‘2018 Litigation Finance Survey’ (Burford Capital 2018) <http://www.burfordcapital.com/wp-content/uploads/2018/10/Burford-Capital-2018-Litigation-Finance-Survey.pdf> accessed 9 January 2019

‘CIArb-Cost-of-International-Arbitration-Survey.Pdf’ <https://www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIArb-Cost-of-International-Arbitration-Survey.pdf> accessed 7 January 2019

‘Decisions on Costs in International Arbitration – ICC Arbitration and ADR Commission Report’ (ICC) <https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf> accessed 28 February 2019

Jackson R, ‘Review of Civil Litigation Costs: Final Report’ (The Stationary Office 2009)