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Ethics and Transparency in Third-Party Funding: Striking a Balance in International Arbitration

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ABSTRACT

Third-party funding (TPF) in international arbitration leads to ethical problems with integrity, particularly with respect to conflicts of interest, transparency, and procedural fairness. This article attempts to answer whether the advantages of TPF – including better access to justice – have been balanced against risks of bias, a tendency toward arbitrator bias, or undue influence by the funder. In a comparative analysis of the institutional rules (e.g., HKIAC, SIAC) and guidelines (e.g., I.B.A. Guidelines), the article argues that a mandatory disclosure of the identity of the funders without requiring full details of the agreement terms is enhanced ethical risk mitigation while respecting confidentiality. The article concludes with a call for the establishment of standard disclosure obligations in arbitral rules manifesting impartiality and enforceability, hence facilitating the sustainable development of the TPF in the area of international arbitration.

I. INTRODUCTION

Third-party funding (TPF) in international arbitration provides a controversial yet revolutionary means² of transforming dispute resolution for the benefit of truly deserving claims brought by financially needy parties. TPF involves a **third party**, commonly a boutique investment firm, underwriting a party's legal costs to acquire an agreed share of the award or settlement.³ While it democratizes justice and alleviates monetary pressure,⁴ TPF raises serious ethical and procedural concerns⁵ about conflicts of interest, transparency, and the integrity of arbitral processes.

Historically, common law jurisdictions resisted TPF under the **doctrines of champerty and**

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² HUGHES HUBBARD, <https://www.hugheshubbard.com/news/third-party-funding-in-international-arbitration> (last visited Apr. 14, 2025).

³ INDIAN BUSINESS LAW JOURNAL, <https://law.asia/litigation-funding-for-india/>. (last visited Apr. 14, 2025).

⁴ Bhardwaj, M., *Third-Party Funding in Arbitration: A Game-Changer for Access to Justice and Dispute Resolution*, THE ARB. DIGEST (Apr. 14, 2025, 7:00 AM), <https://thearbitrationdigest.com/third-party-funding-in-arbitration-a-game-changer-for-access-to-justice-and-dispute-resolution/>.

⁵ Oblin, K., *Disclosing Dollars, Third-Party Funding in Arbitration*, MONDAQ (Apr. 14, 2025, 4:20 PM), <https://www.mondaq.com/austria/arbitration-dispute-resolution/1601166/disclosing-dollars-third-party-funding-in-arbitration>.

maintenance,⁶ which prohibited third-party involvement for profit. Even with the globalization of arbitration and rising litigation costs, jurisdictions like **Hong Kong, Singapore, and Australia** have been steadily legitimizing and regulating TPF,⁷ each adopting a different approach to oversight.

The ethical conundrums, particularly in the circumstances of disclosure obligations: *whether the parties must disclose their funding arrangements to tribunals and opponents and how far funders can go in influencing the strategy, settlement or even the choice of arbitrators, are still crucial*. What is worse is the **lack of uniform rules across various arbitral institutions**, which indeed opens the floodgates for further inconsistencies that will never achieve procedural fairness in addition to undermining the enforceability of the award.

In India, arbitration under the Arbitration and Conciliation Act, 1996 (**The Act**), is steadily gaining grounds, yet there exists **no explicit regulatory framework for TPF**.⁸ The **2019 amendment**⁹ dealt with confidentiality but completely ignored TPF,¹⁰ leaving the tribunal in every instance to grapple with the ethical quandaries on its own. This article examines the ethical and regulatory implications of TPF, advocating a balanced regime requiring disclosing the identity of the funder to protect the right to a fair trial while maintaining the confidentiality of arbitration proceedings and thus promoting India's agenda in arbitration.

II. ANALYSIS

The emergence of third-party funding in international arbitration exudes far more than just legal innovation; with it comes *an ethical complexity*. While, on the one hand, it is a **great boon-in-access-to-justice**, it poses newer challenges as well, all of which touch on the very core values of **fairness, transparency, and neutrality** in arbitral proceedings. In order to explicate fully the impacts of TPF, this analysis goes into the **fourfold critical dimensions** of arbitrator impartiality, sanctity of the attorney-client privilege, the role of mandatory disclosure as a regulatory tool, and the differing regulatory approaches across jurisdictions. Such aspects provide distinct yet interdependent ethical dilemmas; thus, creating a focus on the emerging discourse as to how best to balance competing interests.

⁶ Muriithi, P., *Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions*, 10 ADRJ 1, 4 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476.

⁷ Jhangiani, S., *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?*, KLUWER ARBITRATION BLOG (Apr. 14, 2025, 4:20 PM), <https://tinylink.info/10a1q>.

⁸ SINGHANIA & CO, <https://singhanialaw.com/third-party-funding-in-the-indian-arbitration-scenario/> (last visited on Apr. 14, 2025).

⁹ The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019 (India).

¹⁰ SAM, <https://shorturl.at/d4jvC> (last visited Apr. 14, 2025).

A. Impact of TPF on arbitrator impartiality

The involvement of third-party funders in arbitration creates significant risks of conflict of interests, particularly in connection with arbitrator impartiality. The **IBA Guidelines on Conflicts of Interest (2014)**¹¹ address the issue by categorizing funders as entities having a **"direct economic interest"** under **General Standard 6(b)**¹², thus necessitating the disclosure of arbitrators' past relationships with the funders. This is essential since hidden ties, such as **repeat appointments** by the same funder (an **Orange List scenario**)¹³, could justify doubt about an arbitrator's neutrality. An example of these fears is the case *Essar Oilfields v. Norscot Rig Management*¹⁴, where the tribunal awarded costs to a funded party that included the funder's premium, **raising suspicions about how much influence a funder had over procedural decisions**. Absent mandatory disclosure, these conflicts threaten the very society of the case itself, and the enforcement of awards under **Article V(1)(d) of the New York Convention (due to improper tribunal constitution)**.¹⁵

B. Preserving attorney-client privilege and ethical challenges in TPF arbitrations

TPF also subjects the **principles of attorney-client privilege to examination**, as much the ethical standards imposed on those practicing in the field. During due diligence, divulging case-related **confidential information** may inadvertently lead to the loss of privilege¹⁶ and place sensitive information in the public domain by discovery.¹⁷ Additionally, **funders may impose contracts on their funding agreements** whereby they retain undue influence over major issues such as settlement or the appointment of arbitrators. Even though **ABA Model Rule 1.2(a)**¹⁸ would require that the **lawyer promotes the interests of the client**, funders' financial power might act as a smokescreen for such responsibilities. For example, a funder's demand for pursuing high-risk litigation for better returns may directly contradict the client's best interests.¹⁹ Such dynamics create a need for clearly defined ethical parameters that will prevent funders from co-opting the independence of legal representation.

C. Balancing disclosure and confidentiality in TPF

Mandatory disclosure supporters believe the **practice prevents hidden conflicts** and

¹¹ IBA, <https://shorturl.at/vUcBb> (last visited Apr. 14, 2025).

¹² *Id.* at pg. 11.

¹³ NBA, <https://shorturl.at/mZqhX> (last visited Apr. 14, 2025).

¹⁴ [2016] EWHC 2361.

¹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), June 10, 1958, 21 U.N.T.S. 36, <https://tinylink.info/10a0Y>.

¹⁶ KLUWER ARB. BLOG, <https://shorturl.at/Gl8fu> (last visited Apr. 14, 2025).

¹⁷ *Ibid.*

¹⁸ ABA Model Rule 1.2(a), 1 Model Rules of Professional Conduct, <https://rb.gy/rlm94t>.

¹⁹ UNIVERSITY OF LINCOLN, <https://rb.gy/zfgyic> (last visited Apr. 14, 2025).

corresponds with the IBA Guidelines and institutional rules like **HKIAC (Article 44)**²⁰ and **SIAC requiring disclosure of a funder's identity**.²¹ Transparency allows a tribunal and opposing parties early assessments of potential bias, thereby helping maintain procedural integrity. On the other hand, opponents accentuate confidentiality issues, arguing that the terms of funding may indicate a party's financial constraints or settlement expectations to the detriment of that party in negotiations.²² A **more balanced approach** would disclose only the identity of the funder – and not the financial terms of the agreement – so as to mitigate these risks while maintaining fairness. **Early disclosure** to the tribunal and the opposing party would illustrate this balance, as in the case of *Oxus Gold v. Uzbekistan*.²³

D. Comparative Approaches to TPF in the International Arbitration

Since the landmark *Essar case*, Third-Party Funding (TPF) has been a phenomenon in international commercial arbitration, thus making jurisdictions take a direct look at its implications. Singapore and Hong Kong have taken the lead in this development, each further expanding the parameters of TPF in their arbitration practices.

In **March 2017**, **Singapore revised its Civil Law Act**²⁴ to allow for TPF in international arbitration subject to certain restrictions. **Hong Kong** followed suit in **June 2017** by amending its legislation on arbitration and mediation to allow for TPF in arbitration cases.²⁵ Developments are particularly important because a survey revealed that, **in 2015, Hong Kong and Singapore** were rated third and fourth, respectively, in preference for venues for international arbitration.²⁶ The two regions differ, however, in the definition of acceptable funders: **Singapore allows mostly commercial funders in its definition**,²⁷ while **Hong Kong** takes a much broader interpretation, covering any party without a personal interest in the arbitration.²⁸

Other jurisdictions like **Canada** take a more complex view, **allowing for the disclosure of funder identities** only in particular trade agreements such as **CETA**²⁹ and **CCFTA**³⁰, whereas

²⁰ HKIAC, <https://tinylink.info/10a13> (last visited Apr. 14, 2025).

²¹ Acuity Law, <https://tinyurl.com/26rhca4t> (last visited Apr. 14, 2025).

²² Brazil, W., *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTING LAW JOURNAL 955, 960 (1988), <https://tinylink.info/109Yt>.

²³ IIC 779 (2015).

²⁴ SINGAPORE STATUTES ONLINE, <https://sso.agc.gov.sg/Acts-suppl/2-2017/#:~:text=This%20Act%20is%20the%20Civil,by%20notification%20in%20the%20Gazette.&text=5A.,known%20to%20the%20common%20law> (last visited Apr. 14, 2025).

²⁵ HFW, <https://tinylink.info/109YE> (last visited Apr. 14, 2025).

²⁶ Prasad, P., *Arbitration in Singapore and Hong Kong*, CHICAGO UNBOUND (Apr. 14, 2025, 10:30 AM), <https://tinylink.info/109YL>.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ JUSTICE LAWS WEBSITE, <https://tinylink.info/XfEn>, (last visited Apr. 14, 2025).

³⁰ JUSTICE LAWS WEBSITE, <https://tinylink.info/10a1b>, (last visited Apr. 14, 2025).

the **Argentina-United Arab Emirates Agreement**³¹ prohibits TPF from its dispute resolution mechanisms altogether on the basis of alleged risks posed by external funding.

Recent commentators have stated that one should be transparent about regulatory frameworks as to whether funding fees are legitimate costs of arbitration.³² The **ICSID 2022 Arbitration Rules**³³ propose a wide definition for TPF disclosure but not recovery of funding fee – an indication that some consider **could be harmful to state parties in investor-state arbitrations**. The strengthening of TPF in a jurisdiction opens avenues for claims previously thought impossible to pursue, particularly in investor-state disputes. Thus, not all parties may prefer arbitration seats like Singapore or Hong Kong to avoid TPF-related ambiguities.

Going forward, Hong Kong, Singapore, Australia, and Ireland will need to change their laws to ensure that TPF does not create an undesirable impact on arbitral practice. This includes **rules on the recoverability of the TPF premium and success fees** since commercial parties should anticipate modifying the relevant contractual provisions to reduce unexpected third-party funding costs' liabilities.³⁴

III. CONCLUSION

Third-party funding thus acts as a **catalyst in international arbitration** bringing improved **access to justice** for litigants with insufficient means to pursue the claims. However, increasing occurrences of TPF also bring in advanced sets of **ethical and procedural questions** where **impartiality, transparency, and funders' interference**³⁵ with the arbitral proceedings arise. The analysis underlines the need for a proper regulatory framework that should mandate the disclosure of funder identities, enhance transparency, and protect the confidentiality of any funding agreements.

When compared with other jurisdictions³⁶, including Hong Kong and Singapore, the need for establishing and adopting **common rules** for TPF at the international arbitration landscape has been accentuated. The imposition of **disclosure obligations**, in a consistent manner, will grant ethical insight into the practice of TPF and would encourage fairness and enforceability of

³¹ EDIT, <https://tinylink.info/109Zy> (last visited Apr. 14, 2025).

³² Blavi, F., *It's About Time To Regulate Third Party Funding*, KLUWER ARB. BLOG (Apr. 14, 2025, 10:30 AM), <https://tinylink.info/10a0r>.

³³ ICSID, <https://tinylink.info/XfEE> (last visited Apr. 14, 2025).

³⁴ Kuhn, W., *Recovery of third-party funding in international arbitration*, IBA (Apr. 14, 2025, 10:30 AM), <https://tinylink.info/10a0P.2>

³⁵ *Third-Party Funding In International Arbitration: Devising A Legal Framework For India*, NULJ LAW REVIEW (Apr. 14, 2025, 10:30 AM), <https://tinylink.info/10a1k>.

³⁶ PINSENT MASON'S, <https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration> (last visited Apr. 14, 2025)

arbitration awards.

As the international arbitration sphere continues to evolve in its responses to contemporary complexity in disputes, cooperation toward refining the **regulatory frameworks** and establishing **clear guidelines** protecting all interested parties is an option that can positively be reinforced for TPF as a meaningful contributor toward just outcomes for all concerned without infringing on the values of impartiality and **procedural integrity**.

IV. REFERENCES

- Justice Laws Website, <https://laws-lois.justice.gc.ca/eng/acts/C-1.6/FullText.html>, (last visited Apr. 14, 2025).
- EDIT, <https://edit.wti.org/document/show/ae056cf9-4278-4718-8981-63408218d642> (last visited Apr. 14, 2025).
- ICSID, <https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/introductory-note> (last visited Apr. 14, 2025).
- Kuhn, W., *Recovery of third-party funding in international arbitration*, IBA (Apr. 14, 2025, 10:30 AM), <https://www.ibanet.org/recovery-of-third-party-funding-in-international-arbitration>
- Justice Laws Website, <https://laws.justice.gc.ca/eng/acts/C-4.8/>, (last visited Apr. 14, 2025).
- Prasad, P., *Arbitration in Singapore and Hong Kong*, Chicago Unbound (Apr. 14, 2025, 10:30 AM), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1056&context=international_immersion_program_papers.
- Blavi, F., *It's About Time To Regulate Third Party Funding*, Kluwer Arb. Blog (Apr. 14, 2025, 10:30 AM), <https://arbitrationblog.kluwerarbitration.com/2015/12/17/its-about-time-to-regulate-third-party-funding/#comments>.
- Brazil, W., *Protecting the Confidentiality of Settlement Negotiations*, 39 Hasting Law Journal 955, 960 (1988), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2944&context=hastings_law_journal.
- HFW, <https://www.hfw.com/insights/third-party-funding-bill-legislative-change-bolsters-hong-kongs-standing-in-international-arbitration-space-june-2017/> (last visited Apr. 14, 2025).
- Acuity Law, <https://acuitylaw.co.in/the-revised-2025-siac-arbitration-rules-a-step-towards-efficient-and-transparent-arbitration/> (last visited Apr. 14, 2025).
- HKIAC, <https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#14> (last visited Apr. 14, 2025).

- Singapore Statutes Online, <https://sso.agc.gov.sg/Acts-suppl/2-2017/> (last visited Apr. 14, 2025).
- Poorooye, A., *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, Harvard Negotiation Law Review 275, 299 (2017), http://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/HNR203_crop-1.pdf.
- University of Lincoln, https://www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf (last visited Apr. 14, 2025).
- ABA Model Rule 1.2(a), 1 Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/.
- Frignati, V., Ethical implications of third-party funding in international arbitration, 32 Oxford Academic 505, 512 (2016), https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/19_Financiamento_Arbitragem/Frignati_-_ethical_implications_Arb_International_36_-2016-.pdf.
- Kluwer Arb. Blog, <https://arbitrationblog.kluwerarbitration.com/2016/07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/> (last visited Apr. 14, 2025).
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), June 10, 1958, 21 U.N.T.S. 36, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>.
- NBA, http://nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf (last visited Apr. 14, 2025).
- IBA, <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> (last visited Apr. 14, 2025).
- SAM, <https://www.amsshardul.com/insight/arbitration-and-conciliation-amendment-act-2019-key-amendments/> (last visited Apr. 14, 2025).

- The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019 (India).
- Singhanian & Co, <https://singhanialaw.com/third-party-funding-in-the-indian-arbitration-scenario/> (last visited on Apr. 14, 2025).
- Jhangiani, S., *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?*, Kluwer Arbitration Blog (Apr. 14, 2025, 4:20 PM), <https://arbitrationblog.kluwerarbitration.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/>.
- Muriithi, P., *Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions*, 10 ADRJ 1, 4 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476.
- Oblin, K., *Disclosing Dollars, Third-Party Funding in Arbitration*, MONDAQ (Apr. 14, 2025, 4:20 PM), <https://www.mondaq.com/austria/arbitration-dispute-resolution/1601166/disclosing-dollars-third-party-funding-in-arbitration>.
- Bhardwaj, M., *Third-Party Funding in Arbitration: A Game-Changer for Access to Justice and Dispute Resolution*, The Arb. Digest (Apr. 14, 2025, 7:00 AM), <https://thearbitrationdigest.com/third-party-funding-in-arbitration-a-game-changer-for-access-to-justice-and-dispute-resolution/>.
- Indian Business Law Journal, <https://law.asia/litigation-funding-for-india/>. (last visited Apr. 14, 2025).
- Hughes Hubbard, <https://www.hugheshubbard.com/news/third-party-funding-in-international-arbitration> (last visited Apr. 14, 2025).
- Third-Party Funding In International Arbitration: Devising A Legal Framework For India, NULJ Law Review (Apr. 14, 2025, 10:30 AM), <https://nujlawreview.org/wp-content/uploads/2021/10/14.2-Pinheiro-Chitalia-2.pdf>.
- Pinsent masons, <https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration> (last visited Apr. 14, 2025).
