**Topic: The Practice of Third Party Funding in International Commercial Arbitration Proceedings.**

**International Commercial Practice Series.**

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## 1.0. Background.

***1.1.*** Third Party Funding in International Commercial Arbitration is still a common practice as stated by commentators that it is an aid to huge international commercial disputes where third party funders play a major role to ensure that the said disputes are amicably settled but also a danger in a sense that third party funders are not held accountable. ***See: Professor Maya Steinitz, "The Case for Third-Party Funding in International Investment Arbitration" (2017).***

1.2. Day by day and due to international trade and formation of regional and economic blocks, the world is observed as one global village and thus making it inevitable for global commercial disputes to arise.

**1.3.** This paper therefore tackles what constitutes third party funding, the justification of TPF, challenges experienced with the same, the viability of success of a case viz-v TPF, ethical considerations relating to disclosure of TPF Agreements, pros and cons of the same with specific analysis on the way forward and where there is a need for universal law to guide and guard against the same.

***1.4.*** Third party funding in international commercial arbitration proceedings whether before or amidst refers to circumstances on which a party or entity that is not ordinarily part of the arbitration makes choice of funding a certain party of his or their choice in expectation of returns upon success of the arbitration. ***See: Professor Christopher Hodges. "Law and Corporate Behavior: Integrating Theories of Regulation, Enforcement, Compliance and Ethics" (2015),***

***1.5.*** In essence, one would argue that third party funding (TPF) intends to override the doctrine of privity of contract since the funder in the circumstances is not ordinarily part of the contract interparty but only comes in premised on the probability of success of the matter at hand. ***See: International Journal for the Semiotics of Law Review.***

***1.6.*** It is therefore not morally viable since there is no general rule that requires either party to disclose actions of third party in their case and costs of arbitration shall be borne by the losing party wherein the funder will be liable. As such, and in accordance to Third Party Funding for International Arbitration Claims, the practice tip is that a third party amidst arbitration proceedings will constitute un disclosed principal in the face of the law and where the party

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funded does not obtain success, the loss will fall where it lies whereof, if the claim is unsuccessful, the funder will cover up the costs of the proceedings even for the adverse party.

## 2.0. Justification for Third Party Funding.

2.1. Third party funders are guided by their lawyers on the legal principle that costs follow event but are also on the discretion of the tribunal. This being the position, the International Centre For Settlement of Investment Disputes (ICSID) in a plethora of authorities has before dismissed the argument that the successful party should be awarded costs owing to the fact that it already gained from the funder. By implication, the tribunals across the world in determining international commercial disputes are therefore left with the unfettered discretion on costs and fees incurred by a third party so long as there was disclosure. ***See: The Granada case ARB/10/6***

2.2. In principle, the tribunals in different jurisdictions will apply a weighing scale to assess how much was invested by a third party to ascertain how much can be compensated in costs.

***2.3.*** Therefore, Third party funding does not only cover costs that a distressed party is likely to incur in the due course of arbitral proceedings but also deals with risk management in favour of a distressed party which may arise out of the arbitral award and circumstances of enforcement of the same. This is the fallback position. ***See: Professor Rachael Mulheron. "Third Party Litigation Funding: A Risk Management Perspective" (2019),***

2.4. The practice of disclosure in international commercial disputes is that the arbitrators are cautioned to always avail any information relating to their relationship with any third party funder. In this case, the rationale is to avoid or do away with conflict of interest that may arise as was fortified in ***Euro Gas Inc. and Balmont Resources Inc. versus Slovak Republic ICSID ARB/14/14***, the tribunal ordered the claimant to reveal the identity of its third-party funder for purposes of checking arbitrator conflict of interest.

## 3.0. Challenges Associated with TPF.

3.1. The likelihood of conflict of interest which may arise between a third party funder and the arbitrator for example, is where the arbitrator is a party or an associate of law chambers with which the third party funder shares relationship as external Attorney. Such can immensely affect the propriety of the arbitration process in absence of any rules that require a measure of disclosure.

3.2. Disclosure of third party funding whether prior or post disclosure of third party funding, may be fatal at the beginning since it will look as though the other party to the arbitration proceedings is condemned in hardships/poverty. Further, where disclosure is made at the end of arbitral proceedings, it may cause sharp difficulties since there were no rules of disclosure from the onset.

***3.3.*** Condemnation of losing party in costs. The unsuccessful party would argue that they need not be condemned in costs to the extent in which the third-party incurred costs in the arbitration proceedings basing on the common law doctrine of privity of contract that a third party is un known to the contract or arbitration Agreement. ***See: Dunlop versus Selfridge 1915 AC 847***

3.4. The counter argument by a party at loss is that an Agreement cannot infer and confer rights or impose obligations upon any person who is not ordinarily party to the contract since in the premises, it is only contracting parties that can sue and claim damages and costs arising out of arbitration proceedings save for the advent of principles of equity.

3.5. Further, lack of a universal legislation on third party funding. A number of challenges in international commercial arbitration arising out of TPF remains unresolved due to lack of universally accepted law that allows and protects third party participants and based on the doctrine of sovereignty of states, different jurisdictions treat this as champerty in domestic courts/arbitration proceedings and state that it is a contract against public policy.

***3.6.*** It is key to note that, the agreement to facilitate TPF is only brought to the attention of a party agreeable to it but not necessarily to the opponent thus denying the opponent an opportunity of freedom of contract and I beg to state that this defeats the ability of meeting of the minds. Thus, such imbalance in TPF overrides the principles of equality and fairness in arbitration proceedings since a rich party is likely to access justice faster than a party that is financially distressed in as much as international commercial law practitioners have argued that TPF is available to any party to a dispute depending on their capacity to bring a funder on board. ***See: International Bar Association (IBA) Guidelines on Party Representation in International Arbitration.***

## *4.0.* Viability of Success of a case viz-v TPF.

***4.1.*** It is imperative for third party funders to first conduct the necessary due diligence before funding a case on arbitration. Due diligence in the circumstances entails having a check list which should have law chambers, counsel in personal conduct to ascertain the viability of the case, how much instruction fees is required, how long the case will take among others.

***4.2.*** As point of departure, the viability of success vis-à-vis third party funding is not guaranteed or premised on grounds that the funded party shall carry a win at the end of the day since international commercial practice upon disclosure requires recusal of arbitrators who may be colleagues to the funders. Even if arbitrators do not have any relationship with the third party funders, it is more likely to create bias from their end on grounds that the opposite party is condemned in economic hardships. This will necessitate arbitrators to question the legality of the proceedings towards handling an arbitral award. The most stunning legal issue is whether this can be a ground to set aside an arbitral award.

***4.3.*** Recourse made to best practices in international commercial arbitration, courts are granted wide discretion to overturn the decision of arbitral tribunals in respect of arbitral awards on grounds of violation of public policy. Borrowing the commercial jurisprudence in the ***Pacific China Holdings Case ECSCTVI (2012)*** one may argue that TPF un known to the arbitrators if identified by court post arbitration proceedings is a ground that defeats public policy consideration.

***4.4.*** From the foregoing, International and domestic courts practice on setting aside arbitral awards is based on legislation that is crafted in exclusionary terms granting power to courts of law in such circumstances of TPF. This is the likely position in countries like Uganda on application

of *section 34 of the Arbitration Conciliation Act*, which is similar in substance to the position in the *UNICITRAL, Model Law*. The applicability of TPF in several fields of international commercial law and practice is a bit technical save for its relevancy in classical actions like insolvency proceedings. However, in a different perspective, am of the opinion that TPF would require courts/arbitral tribunals to approve their legitimacy.

***4.5.*** Practitioners and Arbitrators have argued the need for disclosure as a matter of good practice and good faith and that such disclosure should become standard practice. In the premises, international commercial arbitration is observed as a dispute resolution process in which parties from different jurisdictions choose to have their disputes decided by one or more arbitrators of a particular country which therefore does not in any way call for third party participation *but* the silence of this definition does not necessarily mean that TPF is bad in law and barred by international best practices.

***4.6.*** Therefore, the viability of any success from TPF in international commercial practice is solely left to the arbitrators' choice of administering justice to the parties' subject of Arbitration Agreement.

## 5.0. Ethical and Legal Concerns on Third Party Funding in ICA.

***5.1.*** Firstly, the *doctrines of maintenance and champerty* at common law were said to be illegal and were prohibited on grounds of morality and public policy because receiving a portion of any judgement when you were not party to the arbitral proceedings has been considered an overriding aspect of litigation in as much as this has been relaxed by statute law and developments in commercial practice. ***See: Trendtex Trading Corp v. Credit Suisse [1982] AC 679 (UK).***

### *5.2.* Counsel's perspective.

***5.3.*** Confidentiality issues arising out of disclosure. Prudent practice which is also a statutory requirement is to the effect that counsel should keep the client's information in respect of a matter confidential and this can only be waived in appropriate circumstances where a funder is brought on board, as a matter of due diligence where a TPF asks on viability of the case. In this vein, Counsel for the client will disclose material facts of the case, which in the face of the law constitutes breach, save for the exceptions.

### *5.4.* The effects of Disclosure.

***5.5.*** Breach of a party's privacy, which is because the mode in which a party decides to fund his or her claim is a private matter that does not necessitate interference or public domain thus the need to keep the third party funding agreement a secret/ confidential.

***5.6.*** Further, the confidentiality in the TPF may equally bar/estop disclosure so; the breach of the same automatically grants a right to a funder to institute an action against the disclosing counsel for breach of a TPF Agreement. This is based on principles of non-disclosure/ confidentiality

rule. ***See: Tournier versus National Provincial & Union Bank of England (1924) 1 KB. 461 on the confidentiality rule.***

***5.7.*** In the alternative but without prejudice to the above, disclosure of a TPF Agreement to the opponent would actually help them know how much the funded party can settle for. This will therefore help the opponent to avoid un necessary arbitration proceedings and may end up in a consent settlement.

5.8. Disclosure of TPF Agreement to the arbitrators and parties subject of arbitration is equally a determinant of both legal costs as remedy that may be granted by arbitral tribunal and security for costs that can be sought by a party who justifies that the action brought by the adverse party is based on malafides, frivolous and vexatious with limited or no chances of success. This is why the adverse party brings on board the third party funder. **See:** ***Standard 7 (a) of IBA Guidelines***

***5.9.*** It is though important to note that from a spectrum of English law decisions, which provide that existence of a third party funder is not a ground for allowing security for costs as may be requested by the respodent, there must be other justifiable grounds.

***5.10.*** On costs, the arbitrator may hugely condemn the funded part on grounds that they have a backup of a third party funder. The claimant may also plead as such that since the respodent has a funder it is prudent that huge costs be borne thereof.

***5.11.*** Influence on Attorney Client Relationship. This kind of relationship calls for high professional conduct from the Attorney not to take advantage of the client. This is because through due diligence conducted by a funder, the Advocate may decide to over scale even when it is not worthy. The practice of a funder in conducting due diligence should solely be premised on how the case is viable but not necessarily a platform for counsel to take advantage of the client's case.

***5.12.*** Professional misconduct inferred. Where counsel does not comply with rules of confidentiality and recognize the Attorney client relationship, it will be good to state that counsel fell below the required standards of an Attorney amidst TPF arbitration proceedings.

## *6.0.* The Arbitral Tribunal Perspective.

***6.1.*** Impartiality and independence of arbitrator. The arbitrator must disclose circumstances likely to give rise to justifiable doubts about the arbitrator's independence as a matter of a sound judicial system and the urge to administer justice in international commercial arbitration proceedings.

***6.2.*** Forexample, in arbitration X1, where A is counsel of a claimant funded by funder M, and in another un related arbitration Y2 where one of the parties is funded by the same funder M, A is the presiding arbitrator. The fact that A's fees in X1 are paid by M and that A is likely to have significant contact with M on the basis of the funding Agreement, makes it in appropriate for A to sit as an arbitrator in Y2, because A is unlikely to be impartial and independent vizvis the claimant in Y2.

***6.3.*** Finally yet importantly, a conflict of interest with the appointed administrator may arise in instances when (i) the funder has overtime made multiple appointments of arbitrators (ii) the arbitrator has control and management in the corporation and (iii) where there is a certain degree of relationship between the funder and the arbitrator's law firm.

### 6.4. Conclusions.

**6.5.** It goes without saying that Third party funding is taking shape right away from the harshness of the common law position that does not encourage champerty contracts however, sovereign states in different jurisdictions alive to the emerging trends of international trade and sea borne commerce have opted to its applicability to fasten the process of arbitration in case of any dispute which in the due course may call for a first and practical settlement arising out of consent of the parties at dispute.

6.6. The general position being that the capacity of a party in arbitration proceedings to attract or call on board a funder does not in any way deter the adverse party from having one in as much as the issue that arises is one of disclosure. Therefore, the role played by third party funders under international commercial arbitration cannot be underestimated but the practical question is ***"whether there is need for a universal law on Third Party Funding?"***

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