

THIRD-PARTY FUNDING IN COMMERCIAL ARBITRATION IN ASEAN: DEALING WITH CONFLICTS OF INTEREST

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ABSTRACT

Third-party funding is an arrangement where an entity who is not a contracting party provides money or other material support so a disputing party can pursue a dispute resolution proceeding. Besides the benefits third-party funding brings, such as increasing access to justice, many experts are concerned about serious risks that this mechanism can cause, one of which is conflicts of interest. In ordinary cases, conflicts of interest are mostly anticipated to happen between arbitrators and disputing parties. The more types of funders get introduced, the more relationships are made, which means the more grounds for conflicts to arise. If a conflict is discovered late, the arbitration procedure may get extended to appoint a new arbitrator, or the validity of an existing award may be challenged, wasting time and resources in the process.

Third-party funding becomes increasingly popular worldwide and attracts attention of legal community. Even though many literatures have focused on this topic, few mentions the applicability of such regulations in ASEAN or its members. In order to enrich the existing discussion on third-party funding in commercial arbitration, the paper examines conflicts of interest in third-party funding and suggests how to mitigate the risks. The paper proceeds as follows. After giving an overview on third-party funding at the international, national, arbitration rules and guidelines levels, the authors then analyze possible conflicts of interest legal issues in third-party funding agreement and suggests how to minimize the risks. Hopefully this paper will become a stepping stone to a more intensive regulation in ASEAN on third-party funding making TPF more relevant and help people gain access to justice in the future.

KEYWORDS: *third-party funding, ASEAN, commercial arbitration, conflicts of interest*

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I. INTRODUCTION

Third-party funding (hereinafter TPF) is an arrangement where an entity, who is not a contracting party, provides money or other material support so a disputing party can pursue a dispute resolution proceeding. In recent years, the emergence of TPF has drawn attention from academics in law and economics alike. Though simple in definition, TPF is far from a simple phenomenon. Due to its impact on the economy and the benefits it brings to the funded party, TPF has caused reformations of regulations around the world, little by little.¹

Despite consisting of only ten member states, the Association of Southeast Asian Nations (hereinafter “ASEAN”) has a wide variety of traditions and legal systems. ASEAN houses five civil law jurisdictions (Cambodia, Indonesia, Laos, Thailand, and Vietnam), one common law jurisdiction (Singapore) and 4 jurisdictions with the mixed legal system (Brunei, Philippines, Myanmar, and Malaysia). With Singapore International Arbitration Centre (hereinafter “SIAC”) being recognized as one of the top five most preferred seat of arbitration in the world,² ASEAN now has the initiative to spread such attraction to nearby regions, captivating more businesses to resolve disputes in ASEAN countries. Thus, it would benefit ASEAN as a whole if a harmonized and unified legal framework on third-party funding is intensively formulated.

This three-part paper aims to solve the problems created by conflicts of interest involving funders. Part II first explores some of the existing definitions of TPF and then establishes a definition for the purpose of this paper. This is followed by an overview of the current funding structures; each has certain properties that may affect how regulations apply to them. Then, this paper will examine regulations as provided by international treaties, national laws, arbitration rules and guidelines on TPF and other regulations on closely related subjects. Part III classifies conflicts of interest into arbitrator and party conflicts of interest. The authors then reason about the effects that conflicts of interest related to TPF may have on the arbitration procedure and clarifies situations where conflicts arise. This paper then goes through current solutions to the problem of conflicts of interest. Finally, Part IV suggests that there should be three distinct procedures: disclosure of funding contract, disqualification of arbitrator and

¹ Different countries show their piecemeal approach to this issue. For example, in the case of UAE, no national regulations may be found, but Dubai International Financial Centre (DIFC) has *issued Practice Direction No.2 of 2017 on Third Party Funding* (hereinafter “DIFC Practice Direction”). In the case of Brazil, CAM-CCBC has published a brief Administrative Resolution No.18 regulating TPF. Hong Kong now regulate TPF at a national level with the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 but restricted to arbitration only, leaving TPF in litigation still illegal.

² BAKER MCKENZIE (2018), THE BAKER MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK, 11th ed, p. 267.

disclosure of conflicts of interest. The two types of disclosure shall be examined based on three questions: who owes the disclosure duty, what should be disclosed, and when and how one should disclose.

II. AN OVERVIEW ON TPF

A. Definitions and Variations of TPF

1. Definitions

Before articulating a definition of TPF, one issue we may have to deal with is whether defining TPF is necessary at all. Funders are always creative and attempt to restructure the arrangements. Some academics suggest that because funders and funded parties always acknowledge the other's existence, instead of trying to establish a clear-cut definition of TPF, the regulations should take a "know it when you see it" approach³ since they have to disclose regardless of the structure of the arrangement. This is supported by the fact that some arbitration tribunals have regulations on TPF but lack any definition themselves.⁴ While this approach offers flexibility, this may further confuse practitioners and courts because TPF definitions are not unified. For example, the relationship between TPF and litigation expenses insurances is not unified formulated. It is hard to identify whether the two are mutually exclusive,⁵ conjunctive,⁶ or inclusive⁷ without a definition. Even if a party knows they are funded, they cannot be entirely sure whether such funding arrangement falls in to the category of TPF or some other existing phenomena, like insurances. Parties, therefore, may genuinely believe they do not owe a disclosure obligation, which defeats the purpose of regulating TPF.⁸ Thus, formulating a definition should be necessary.

Although several countries recognize third-party funding, not all give a clear-cut definition of TPF. Generally, the traditional view on the concept of TPF is unified, which is where "the funder agrees to pay part or all of the costs of litigation of a claimant in exchange for a percentage in the recovery

³ Sahani, Victoria Shannon (2016), *Judging Third-Party Funding*, 63(2) UCLA LAW REVIEW, p. 409.

⁴ For example, Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, World Intellectual Property Organization (WIPO) Arbitration Rules.

⁵ I.e., no TPF is considered insurances. Barker, George R. (2012), *Third-Party Litigation Funding in Australia and Europe*, 8(3) JOURNAL OF LAW, ECONOMICS & POLICY, p. 451.

⁶ I.e., some insurances are considered TPF. See INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2018), REPORT OF THE ICCA – QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION.

⁷ I.e., all insurances are considered TPF. See Explanation to Standard 6(b) of IBA Guidelines on Conflicts of interest.

⁸ Goeler, Jonas Von (2016), *Third-Party Funding in International Arbitration and Its Impact on Procedure*, 35 INTERNATIONAL ARBITRATION, p. 151.

should the claim succeed.”⁹ This can also be termed as the strict sense of the definition of TPF. Despite the unified view on this concept, variations of the broad term may arise as countries attempt to expand such concepts to encompass the creativity of funders.

First, on the aspect of subjects receiving TPF, jurisdictions generally agree TPF is not only available to claimants but also respondents.¹⁰ One example is the definition given by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 of Hong Kong (hereinafter Hong Kong Ordinance), which provides TPF is:

...the provision of funding under a funding agreement to a funded party by a third-party funder and in return for the third-party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.¹¹

This definition captures both the claimant and the respondent, allowing them to seek for TPF. Although being not “traditional”, TPF on respondent’s side is proven to be virtually the same as it is on claimant’s side.¹² The more preferred source of funding on the respondent’s side, however, would be legal liability insurances, rather than claimant’s traditional TPF.¹³

Second, on the aspect of forms of TPF, different people have different opinion as to whether to include insurances or not. The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (hereinafter IBA Guidelines) provides:

Third-party funders and insurers refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.¹⁴

This broad definition results in the inclusion of liability insurances, both before-the-event (BTE) and after-the-event (ATE) insurances. Opponents to such inclusions suggested the distinguishment of TPF from liability insurance altogether, accepting solely the traditional sense and its respondent counterpart as TPF.¹⁵ The International Council for Commercial

⁹ Timbancaya, Gabriela Victoria A. (2020), *Third-Party Arbitration Funding in the Philippines: Evolving a Local Framework from Global Perspectives*, 93(1) PHILIPPINE LAW JOURNAL, p. 224.

¹⁰ NIEUWVELD, LISA BENCH ET AL. (2017), *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION*, 2nd ed., p. 3.

¹¹ Section 98G of Hong Kong Ordinance.

¹² Nieuwveld, *supra* note 10, p. 3.

¹³ Goldsmith, Aren & Lorenzo Melchionda (2012), *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (but Were Afraid to Ask)*, 2012(1) INTERNATIONAL BUSINESS LAW JOURNAL, p. 59 – 60.

¹⁴ Explanation to General Standard 6(b), IBA Guidelines.

¹⁵ Barker, *supra* note 5, p. 451.

Arbitration (hereinafter ICCA), on the other hand, reasons that ATE insurance should be included but not BTE due to its premium being independent from the outcome of arbitration.¹⁶ This paper accepts the view articulated by the IBA Guidelines as the differences in the way the funder is compensated is argued to be immaterial.

Finally, the return of economic interest is not the only interest the funder might seek. The view from IBA Guidelines received criticisms not only on being over-inclusive but also on being under-inclusive in certain aspects, specifically the potential diversity of funding transactional structures such as “philanthropic” (or “pro bono”) and “economic interest free” funding.¹⁷ This is also the case for most definitions to date. Although many academics agree with the inclusion of such strategic TPF, few succeed in coming up with a suitable definition.¹⁸ Some academics even choose to give an intensive definition to encompass all instances involving TPF.¹⁹ This paper chooses to include such funders since even without recovery on their part, their conduct would not differ from ordinary funders.

Considering all of the above, this paper defines third-party funding as an arrangement where an entity, who is not already a party to the dispute, provides funds or other material support to a party in dispute, directly or indirectly, to further the claim or defense. This definition excludes any parameters concerning the return of the funder’s investment. The reason for this is further analyzed in Section II(A)(2) and Part III. With such a broad definition, this paper suggests the attention should be paid to funders based on the control they may exercise, rather than just their interest in the outcome.

2. TPF arrangements

In recent years, the world witnessed the explosion of the industry of TPF. TPF is not only extending its scale in number,²⁰ in size,²¹ and in reach,²² but also creating new models to best satisfy the needs of customers. The models of TPF will be clarified and classified as follows.

a) By types of claims funded

Consumer funding

¹⁶ ICCA, *supra* note 6, p. 53 – 55.

¹⁷ Henriques, Duarte G. (2018), *Third-party Funding – In Search of a Definition*, 28(4) THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (ARIA), p. 407.

¹⁸ Goldsmith, *supra* note 13, p. 55.

¹⁹ See KHATIB, IYAD AL (2021), THIRD PARTY FUNDING IN INTERNATIONAL COMMERCIAL ARBITRATION: DISCLOSURE CHALLENGES IN PRIMARY AND SECONDARY MARKETS OF LEGAL-CLAIMS, p. 18.

²⁰ Australia alone contributes approximately 33 funders. Geisker, Jason & Dirk Luff, *The Third Party Litigation Funding Law Review: Australia*, THE LAWS REVIEW (November 22, 2021), <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/australia>.

²¹ The New York City Bar Association suggests the amount is estimated to exceed \$1 billion. Other estimates may provide differently but all indicate a large market. See Steinitz, Maya & Abigail C. Field (2014), *A Model Litigation Finance Contract*, 99(2) IOWA LAW REVIEW, p. 715.

²² TPF is now present in South Africa, Brazil, United Arab Emirates (UAE), Singapore, UK, US, Australia, ... See Nieuwveld, *supra* note 10.

In this model, the funder would invest in relatively low value personal injury claims,²³ such as personal injury and workers' compensation²⁴. This was the first wave of litigation funding in the world.²⁵ Currently, this model is restricted both in regulations²⁶ and in attention.²⁷ Investors are reluctant to conduct consumer TPF due to the lack of hard evidence and the heavy reliance on oral one.²⁸ However, some investors, such as ILF Investors or Redress Solutions, would still consider funding personal injury claims instead of rejecting them immediately.²⁹ The consumer sector of TPF in the US is estimated to be \$1.5 billion.³⁰

Commercial funding

Contrary to consumer funding, commercial funding involves the financing of large businesses or wealthy individuals with a dispute of high value.³¹ A commercial funding agreement generally is much more intricate than the consumer counterpart, featuring a network of contracts serving various purposes.³² This is currently the most dominant model of TPF.³³

The difference between consumer funding and commercial funding lies not only in the way they choose their customers but also in laws applied to them. In the United States, some states may apply the same consumer laws for both consumer and commercial cases, but in some other states, there would be exceptions for commercial disputes over a certain value.³⁴ For the purpose of this paper, commercial funding would be the main focus.

b) By interest in the procedure

Funding with direct economic interest

Direct economic interest is the funder's interest in the arbitration proceedings arising from the funding agreement between the disputing party and the funder.³⁵ Funders may require the returns be paid as a percentage of the proceedings (which typically ranges from 20% to 40% in several European countries, 30% to 60% in Australia)³⁶ or as a multiple of the amount of costs incurred (which can range from 1.5 to six, but

²³ Sebok, Anthony J. (2015), *Should the Law Preserve Party Control - Litigation Investment, Insurance Law, and Double Standards*, 56(3) WILLIAM & MARY LAW REVIEW, p. 842.

²⁴ Steinitz, Maya (2015), *Incorporating Legal Claims*, 90(3) NOTRE DAME LAW REVIEW, p. 1164.

²⁵ *Id.*

²⁶ Consumer litigation investment is prohibited or limited by consumer credit law and usury law in some jurisdictions in the United States. See Sebok, *supra* note 23, p. 842 – 843.

²⁷ Avraham, Ronen et al. (2021), *The MDL Revolution and Consumer Legal Funding*, 40(2) REVIEW OF LITIGATION, p. 145.

²⁸ Chen, Daniel L. (2015), *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46(1) RAND JOURNAL OF ECONOMICS, p. 27.

²⁹ Veljanovski, Cento (2012), *Third Party Litigation Funding in Europe*, 8(3) JOURNAL OF LAW, ECONOMICS & POLICY, p. 419.

³⁰ Avraham et al., *supra* note 27, p. 145.

³¹ Sahani, Victoria (2016), *Third-Party Funding in Dispute Settlement in Africa*, 110 PROCEEDINGS OF THE ANNUAL MEETING.

³² Shannon, Victoria A. (2015), *Harmonizing Third-Party Litigation Funding Regulation*, 36(3) CARDOZO LAW REVIEW, p. 890.

³³ Veljanovski, *supra* note 29, p. 418.

³⁴ Shannon, *supra* note 32, p. 865.

³⁵ See Article 3(a) of the SIAC Practice Note 31/3/2017 (hereinafter SIAC Practice Note).

³⁶ See Veljanovski, *supra* note 29, p. 424.

generally be around three).³⁷ BTE insurances do not fit neatly into this classification (because their revenue comes from paid premiums) and consequentially, the ICCA – Queen Mary Task Force denies BTE insurances to be classified as TPF.³⁸ However, this paper still considers BTE insurances fall in the category of funding with economic interest since their net profit (revenue minus costs) is affected by the outcome of the case, since they do not have to incur further costs when settlement is reached, or not having to pay costs if case is won....

Funding with indirect economic interest

Indirect economic interest can be understood as an interest in the arbitration proceedings through a chain of contracts and/or relationships. The most common form of intermediary in indirect funding is law firm finance.³⁹ In this model, law firms first receive funding from funders, which may also be called specialty finance company. This agreement is often structured like a loan, rather than traditional “no win, no fee” TPF.⁴⁰ Funders in this model may also fund a portfolio of cases instead of a single case. One famous portfolio funder is Burford, as in 2016, 88% of its capital was invested in portfolio and “complex matters”.⁴¹ As discussed below, funding with indirect economic interest would receive not as strict regulations compared to direct economic interest, which may cause funders to structure their funding scheme to escape from such regulations (i.e., using special purpose vehicle (SPV)).⁴²

Pro bono funding

Pro bono funding (or “economic interest free” funding)⁴³ is a type of funding where the funder seeks to receive no direct benefits from the proceedings of a case.⁴⁴ Two primary reasons for an entity to be willing to act so “generously” are that (i) to further a political or social cause associated with the claim, and (ii) in furtherance of a larger commercial interest that transcends the specific claim being funded, though the latter would be more associated with investment treaty arbitration context.⁴⁵ In some circumstances, one may fund for psychological or ethical purposes, or fund one party to seek vengeance on the other.⁴⁶ Legal aid may also be considered a type of pro bono funding where the state funds the party to ensure their access to justice.⁴⁷

Funding with interests not tied to the outcome

³⁷ See Veljanovski, *supra* note 29, p. 437.

³⁸ ICCA, *supra* note 6, p. 94 – 95.

³⁹ Other intermediaries may include brokers. See ICCA, *supra* note 6, p. 20 – 24.

⁴⁰ Sahani, Victoria Shannon (2017), *Reshaping Third-Party Funding*, 91(3) TULANE LAW REVIEW, p. 417.

⁴¹ Santos, Caroline Dos (2017), *Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing*, 35(4) ASA BULLETIN, p. 929.

⁴² ICCA, *supra* note 6, p. 89.

⁴³ Henriques, *supra* note 17, p. 407.

⁴⁴ *Id.*

⁴⁵ Goldsmith, *supra* note 13, p. 62.

⁴⁶ Henriques, *supra* note 17, p. 407.

⁴⁷ Sebok, *supra* note 23, p. 841.

This paper stipulates that there's a fourth kind of interest that a funder may seek, which are interests not tied to the outcome of the case. For example, a lender can provide funds to the borrower on a non-recourse basis or simply a traditional loan structure. If the loan is offered on a non-recourse basis, such agreement would be somewhat similar to a direct economic interest in the award. However, it does not necessarily mean that the funder is seeking interest from the award since the non-recourse nature alone would not constitute such interest.⁴⁸ If a fixed amount is conditioned as repayment, the funder may be considered as not having interest in the outcome at all.⁴⁹ In this second scenario, where a loan is simply traditional, the repayment has no ties to the outcome whatsoever. To clarify, for a loan to amount to TPF, this paper suggests it have to be consistent with the definition and serve the purpose of furthering the claim or defense of disputing parties. This funding model should fall into the category of TPF because the funder can exercise control using the amount funded. Once the funded amount gets proportionally significant, any conflicts that typical funders are subjected to may arise in the same way with lenders.

c) By markets

Primary-market funder

When a funder first made an agreement with a party, said funder is called the primary-market funder. Primary-market funding is the most simple and common arrangement.⁵⁰ Regulations generally focus on primary-market funding⁵¹ as it is the basic case: no funding contracts can exist without first being on the primary market.

Secondary-market funder

This is a relatively new industry, where previous funder(s) trade their securities to new funder(s) without the funded party's involvement.⁵² As claims are now treated more like an asset, businesses are tempted to trade them.⁵³ Insurance companies have been known to practice this.⁵⁴ Unlike primary-market funding, it is difficult to manage secondary-market funding. Funders may trade their investment faster than the parties and arbitrators' ability to acknowledge them.⁵⁵ Despite such complications, special regulations towards secondary-market funder are virtually non-existence.⁵⁶ As the industry continues to grow, the need to regulate this type of funder would inevitably increase.

⁴⁸ Sebok, Anthony J. (2014), *What Do We Talk about When We Talk about Control*, 82(6) *FORDHAM LAW REVIEW*, p. 2944.

⁴⁹ *Id.*, p. 2944 – 2945.

⁵⁰ Khatib, *supra* note 19, p. 14.

⁵¹ *Id.*

⁵² *Id.*, p. 15 – 16.

⁵³ Claussen, Kathleen (2020), *The International Claims Trade*, 41(5) *CARDOZO LAW REVIEW*, p. 1746 – 1747.

⁵⁴ ICCA, *supra* note 6, p. 95. The wording suggests the secondary-market is the exclusive feature of insurances and not TPF in general.

⁵⁵ Khatib, *supra* note 19, p. 15 – 16.

⁵⁶ Khatib, *supra* note 19, p. 16 – 17.

B. Overview on Regulations Worldwide

1. Regulations on TPF

a) International level

Despite the emergence of TPF on a global scale, no international treaties between ASEAN countries nor international treaties between ASEAN and other regions provided any regime to solve the issues posed by TPF. On the other hand, several treaties involving the European Union (EU) have expressed the attention to TPF. Specifically, EU-Vietnam Investment Protection Agreement (hereinafter “EVIPA”),⁵⁷ Comprehensive Economic and Trade Agreement between Canada and the European Union⁵⁸ and European Union’s proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership,⁵⁹ all included provisions on TPF. This has proven that TPF is receiving more attention than ever in the EU. These regulations, however, apply to international investment arbitration rather than commercial ones. Furthermore, regulations set out by these treaties are broad and only “light touch”.⁶⁰ The lack of unified regulations on TPF is a problem that needs to be addressed since commercial funders now search for clients across the world.

b) National law/ State law

Despite the increasing effort to research and regulate TPF, few progress have been made in ASEAN countries. Singapore is an exception⁶¹ due to being the only countries in ASEAN to expressly regulate TPF at the national level, and also being one of few countries in the world to do so. Before 2017, TPF is considered illegal in Singapore.⁶² With the amendment of 3 legislations: Civil Law Act⁶³, Legal Profession Act⁶⁴, and Legal Profession (Professional Conduct) Rules⁶⁵ and the addition of 1 new legislation: Civil Law (Third-Party Funding) Regulations 2017,⁶⁶ Singapore now expressly and directly allows and regulates TPF on several aspects. At first, these regulations only apply to international arbitration but since 28 June 2021, TPF is also allowed in domestic arbitration and court proceedings related to domestic arbitration.⁶⁷ The rules set out by said

⁵⁷ See Article 3.28(i), Article 3.37(1, 2) of EVIPA.

⁵⁸ See Article 8.1, Article 8.26 of Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.

⁵⁹ See Article 1(2), Article 8 of European Union’s proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership.

⁶⁰ ICCA, *supra* note 6, p. 61 – 62.

⁶¹ Singapore Civil Law (Third-Party Funding) Regulations.

⁶² Patoul, Olivia de, *The Third Party Litigation Funding Law Review: Singapore*, THE LAW REVIEWS (November 22, 2021), <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/singapore>.

⁶³ Singapore Civil Law Act (2021).

⁶⁴ Singapore Legal Profession Act (2021).

⁶⁵ Singapore Legal Profession (Professional Conduct) Rules (2015).

⁶⁶ Singapore Civil Law (Third-Party Funding) Regulations (2017).

⁶⁷ In 2021, the Civil Law (Third-Party Funding) Regulations 2021 was established, broadening the scope of permissible funding. See also Singapore Note 10.1.1. See also Patoul, *supra* note 62.

amendments covered several aspects of TPF, including qualifications of funders⁶⁸ and obligations of legal practitioner.⁶⁹ With this movement, Singapore has shown their commitment to promote the growth of TPF.

Since TPF is not common nor regulated in other countries in ASEAN, it is difficult to identify the actual legality of TPF in most ASEAN countries, the process of which is further analyzed in the next part of the paper.

Outside of ASEAN, Hong Kong is the one of the countries that regulates TPF at the national level. In 2017, Hong Kong officially legalized third-party funding when the Hong Kong Ordinance was passed. The scope of the Ordinance stops at arbitration and related proceedings where the place of arbitration is Hong Kong,⁷⁰ and thus, this does not extend to litigation. A non-binding⁷¹ Code of Practice (hereinafter “Hong Kong Code of Practice”)⁷² is also issued shortly thereafter, regulating conducts of third-party funders. Compared to Singapore, although Hong Kong took a more “light touch” approach to regulate TPF, such movement is welcomed by legal professionals and parties.⁷³

Regulations may also be set out by state law. Although Australia regulates at a federal level using the Australian Securities and Investments Commission Act 2001, Corporations Act 2001, and Corporations Amendment (Litigation Funding) Regulations 2020, such regulations mostly set out requirements funders have to meet in order to operate legally. Specific regulatory regimes are instead set out by each state.⁷⁴ Another example on state regulations is the US, where each state has a distinct view on the issue. Some states allow TPF using statutory laws⁷⁵ or case law;⁷⁶ some treat TPF as a loan, applying rate caps to contracts as a result;⁷⁷ some do not regulate it, but TPF is most likely legal;⁷⁸ and some prohibit it.⁷⁹

⁶⁸ See Regulation 4 of the Singapore Civil Law (Third-Party Funding) Regulations 2017.

⁶⁹ See Part 5A of the Singapore Legal Profession (Professional Conduct) Rules 2015.

⁷⁰ See Article 98E of Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

⁷¹ Yun, Irene Lee Wing, *The Third Party Litigation Funding Law Review: Hong Kong*, THE LAW REVIEWS (November 22, 2021), <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/hong-kong>.

⁷² Hong Kong Code of Practice for Third Party Funding of Arbitration 2018.

⁷³ Sahani, Victoria Shannon (2021), *Global Laboratories of Third-Party Funding Regulation*, 115 AJIL UNBOUND, p. 38.

⁷⁴ Baker McKenzie, *supra* note 2., p. 33.

⁷⁵ Arkansas (Arkansas Act 915: To Regulate Consumer Lawsuit Lending, since 2015); Vermont (Chapter 74—Consumer Litigation Funding Companies); Oklahoma (Oklahoma Litigation Funding Agreements Act).

⁷⁶ California, New York, Texas (Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987)), Pennsylvania (Devon It, Inc. v. IBM Corp., Civil Action No. 10–2899, 2012 WL 4748160, (E.D.Pa., September 27, 2012)).

⁷⁷ Colorado, South Carolina, North Carolina, Maryland, Kansas. Therefore, it is virtually non-existent due to the mandatory rate caps. Nieuwveld, *supra* note 10, p. 160.

⁷⁸ Puerto Rico, Idaho, Louisiana. *Id.*

⁷⁹ New Mexico (Reinhardt v. Kelly, 917 P.2d 963, 967 (N.M.App. 1996)), Montana (Montana Code Annotated § 37-61-407 through 37-61-411); Mississippi (Code Annotated §§ 97-9-11 through 97-9-23).

c) Arbitration rules

In ASEAN, specifically Singapore, the SIAC Arbitration Rules (hereinafter “SIAC Rules”)⁸⁰ have their own approach to TPF. Surprisingly, the SIAC Rules have yet provided any new arbitration rules concerning TPF⁸¹ but instead established Practice Note 31/3/2017 to regulate the tribunal’s practice, including maintaining arbitrator’s their impartiality and independence,⁸² and allocating costs⁸³ when a funder is present.

Unlike national laws, arbitration centers around the world have been more accepting to the TPF phenomenon. More and more arbitration centers start to update their arbitration rules to include the event where a funder participates in the proceedings. For example, International Chamber of Commerce (ICC) Rules of Arbitration (hereinafter “ICC Rules”),⁸⁴ Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (hereinafter “HKIAC Rules”),⁸⁵ and WIPO Arbitration Rules⁸⁶ updated their regulations to mandate disclosure by the funded party. HKIAC Rules goes further to established a provision on allocating costs.⁸⁷ Noticeably, UAE joins in the movement to regulate TPF when Dubai International Financial Centre (DIFC) issued Order No.4 of 2019 Mandatory Code of Conduct for Legal Practitioners in the DIFC Court (hereinafter “DIFC Code of Conduct”). The DIFC Code of Conduct set out obligations of lawyers when practicing in the presence of a funder.⁸⁸

d) Guidelines

Aside from binding regulations, organizations may issue guidance notes or guidelines to set out best practices for different entities. In the case of Singapore, The Law Society of Singapore Guidance Note 10.1.1 on Third-party Funding (hereinafter “Singapore Note 10.1.1”) and Singapore Institute of Arbitrators (SiARB) Guidelines for Third Party Funders (hereinafter “SiARB Guidelines”) fall under this category. The difference between these guidelines is that Singapore Note 10.1.1 regulates lawyers,⁸⁹ while SiARB Guidelines regulate funders.⁹⁰

Several non-binding notes and guidelines can also be observed even in jurisdictions where no hard law exists on the subject. For example, Brazil witnesses the publication of CAM-CCBC Administrative Resolution No.18, briefly providing answer to basic legal issues such as definition of TPF,

⁸⁰ SIAC Arbitration Rules (2016).

⁸¹ However, SIAC Investment Rules 2017 has a new Rule 21(l), which allows the arbitral tribunal to order disclosure of the existence of funding agreement, funder’s identity, funder’s interest in the proceedings and adverse cost liability.

⁸² Note 4 of SIAC Practice Note 31/3/2017.

⁸³ Note 9 – 11 of SIAC Practice Note 31/3/2017.

⁸⁴ International Chamber of Commerce (ICC) Rules of Arbitration 2021.

⁸⁵ See Rule 4.3(i), 5.1(g) and 44.1 of Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018.

⁸⁶ See Rule 9(vii), and 11(b) of WIPO Arbitration Rules 2021.

⁸⁷ Article 34.4 of HKIAC Rules.

⁸⁸ Article 12(E), 17(B) of DIFC Code of Conduct 2019.

⁸⁹ Paragraph 2 of Singapore Note 10.1.1.

⁹⁰ Paragraph 1.3 of SiARB Guidelines 2017. See also SiARB Notes to Accompany Revisited SiARB Guidelines for Third Party Funders.

possible conflict of interest and disclosure obligations. In 2016, China called out for consultation on China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC Hong Kong) – Guidelines for Third Party Funding in Arbitration (hereinafter “CIETAC HKAC Guidelines”). The CIETAC HKAC Guidelines set out principles of practice and conduct for both parties and arbitrators. Since the conclusion of public consultation on 19 July 2016, CIETAC Hong Kong has yet to make any further progress, except in their International Investment Arbitration Rules (for Trial Implementation).⁹¹

2. Related issues

a) Third-party funding and Maintenance and champerty

Maintenance is the support (typically financial) of litigation by a non-party who does not have a 'legitimate interest' in that litigation.⁹² Champerty is an aggravated form of maintenance, in which litigation is funded in exchange for a share of the proceeds of that litigation.⁹³ TPF may be considered champertous in nature.⁹⁴ Maintenance and champerty has been considered a crime or a tort in common law jurisdictions.⁹⁵ Hence, without further regulations, unless a funder can prove their legitimate interest in the proceedings (include the funding from shareholders and creditors to the company,⁹⁶ or from an ATE insurer to the insured with the interest being serving the access to justice),⁹⁷ TPF would naturally be considered both a crime and a tort. This was the case of Singapore before 2017.⁹⁸

Although currently, ASEAN has no common law system that invalidates TPF,⁹⁹ the doctrine of maintenance and champerty is still relevant because they can still have certain effects on countries with common law influences. This was the case of Thailand (a civil law jurisdiction with past common law influences) and Malaysia (a jurisdiction with mixed legal system of English common law, Islamic law and customary law). Due to the presence of the maintenance and champerty doctrine in the past, the Thai court now is hesitant to validate a funding contract, reasoning that such agreement is contrary to public policy even when the doctrine is expressly removed.¹⁰⁰ In Malaysia, contingency fees

⁹¹ Article 27 of CIETAC International Investment Arbitration Rules.

⁹² Rogers, Glen (2019), *Litigation Funding, Assignment of Actions and Access to Justice: SPV Osus v HSBC [2018] IESC 44*, 18 HIBERNIAN LAW JOURNAL, p. 94.

⁹³ *Id.*

⁹⁴ David, Capper (2018), *Supreme Court Rejects Litigation Funding*, 41(1) DUBLIN UNIVERSITY LAW JOURNAL, p. 198.

⁹⁵ Kamnani, Pranav V. & Aastha Kaushal (2020), *Regulation of Third Party Funding of Arbitration in India: The Road Not Taken*, 8(2) INDIAN JOURNAL OF ARBITRATION LAW, p. 153.

⁹⁶ As Clarke J stated in *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Limited [2011] IEHC 357; [2011] 3 IR 654*.

⁹⁷ As Hogan J stated in *Greenclean v Leahy [2014] IEHC 314 [10]*.

⁹⁸ Kamnani, *supra* note 95, p. 153.

⁹⁹ Currently, no common law jurisdictions in ASEAN leave TPF unregulated since Singapore is the only country having a common law system.

¹⁰⁰ “Although there is no statutory prohibition on third-party litigation funding, it could be inferred from past Supreme Court judgments that litigation funding [...] is likely to be considered by the

and success fees are prohibited due to champerty.¹⁰¹ Despite not being invalidated directly, TPF would most likely be considered prohibited as a result.¹⁰² Thus, among ASEAN countries, the doctrine of maintenance and champerty shows its prominent effect on TPF in 2 jurisdictions: Thailand and Malaysia. Since Singapore's change in regulations in 2017 and 2021, the applicability of this doctrine in ASEAN is now likely on the decline.

In other regions of the world, the view on maintenance and champerty has a certain number of variations while they try to retain the doctrine of maintenance and champerty. There is not a unified view on whether TPF is considered a legal type of champerty or TPF is no longer champertous. Some documents require an arrangement to 'amount' to champerty, which means the standard of proof for maintenance and champerty are raised very high.¹⁰³ The court in Australia generally determine (i) whether the funder overstepped its bounds with respect to the level of control exercised, (ii) whether the agreement adversely affects the litigation process or (iii) whether the bargain is unfair to the client.¹⁰⁴ On the other hand, some documents instead use a language showing that TPF is considered maintenance and champerty but they may be excluded from the application of such doctrine.¹⁰⁵

b) Third-party funding and Subrogation and Assignment

Subrogation is broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right.¹⁰⁶ Subrogation allows one person to enforce other people's right, or virtually stepping into their shoes to pursue recovery from responsible wrongdoer, after they themselves pay for the victim's injury.¹⁰⁷ This is based on two equity principles: (i) no tort-feasor should escape liability for his wrong; and (ii) no unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.¹⁰⁸ On the other hand, in claim assignment, the original claimholder outright transfers the right to their claim to another party—the assignee.¹⁰⁹ The assignee now has the right to bring the claim in their own name. The difference between subrogation and assignment is that (i) the subrogee is not entitled to more than the amount they paid for the subrogee while the assignee does; and (ii) the subrogee

Thai courts as being contrary to public policy and good morals [...]. See Vajasit, Surasak et al. (2021), *Litigation Funding 2021—Thailand*, LEXOLOGY.

¹⁰¹ Nieuwveld, *supra* note 10, p. 249.

¹⁰² *Id.*

¹⁰³ *Id.*, p. 46.

¹⁰⁴ *Id.*

¹⁰⁵ Article 98K of the Hong Kong Ordinance provides: "The common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to third party funding". See also Article 98L.

¹⁰⁶ Sebok, *supra* note 23, p. 870.

¹⁰⁷ *Id.*, p. 860.

¹⁰⁸ Sadana, Subodh, *India: Conflict Between Subrogation And Assignment In Commercial Supply Transactions*, MONDAQ (September 30, 2015), <https://www.mondaq.com/india/insurance-laws-and-products/430472/conflict-between-subrogation-and-assignment-in-commercial-supply-transactions>.

¹⁰⁹ Sebok, *supra* note 23, p. 873.

shall exercise the subrogor's right in the name of the subrogor, while the assignee shall exercise the acquired rights in their own name.¹¹⁰ For the purpose of this paper, the subrogation contract is considered TPF while the assignment contract is not, since the assignee is no longer a third-party but rather a party themselves, completely replacing the original party.¹¹¹

Insurances are a type of subrogation that arises from contract (i.e., conventional subrogation).¹¹² Unlike traditional models of TPF, insurances are more widely accepted as a legal mechanism.¹¹³ In practice, insurances would frequently require the subrogor to resign their control to the subrogee.¹¹⁴ One might speculate that through subrogation, the insurer would become a party themselves since they are now able to step into the shoes of the insured.¹¹⁵ This is not the case as it does not necessarily mean that the insurer is bringing the claim in their own name (i.e., when subrogation amounts to assignment).¹¹⁶ Control does not play a role in the distinction between subrogation and assignment. Instead, it should be used to decide the equitable measure to protect the original party's right from abuse,¹¹⁷ and, as suggested by this paper, to determine the level of conflicts of interest.

Generally, in commercial arbitration, insurances may cover judgment costs and/or litigation costs, though they are most likely sold together.¹¹⁸ There are 3 types of litigation expenses insurance (hereinafter "LEI") that a party may choose from: (i) BTE insurance; (ii) ATE insurance against liability; and (iii) ATE insurance for costs.¹¹⁹ BTE insurance policy covers future costs or liability associated with future legal claims brought by or against the insured, in exchange for a pre-paid premium.¹²⁰ ATE liability insurances offer coverage for liability on existing claim for a premium.¹²¹ ATE insurance for costs may cover costs to litigation or arbitration, in exchange for a proportion of the indemnity if the insured is successful; otherwise, the insured is covered up to the policy limit.¹²²

¹¹⁰ Singh, Deepak P., *Difference Between Subrogation and Assignment*, TAX GURU (February 05, 2022), <https://taxguru.in/corporate-law/difference-subrogation-assignment.html>.

¹¹¹ Sahani, *supra* note 40, p. 416.

¹¹² Sebok, *supra* note 23, p. 870.

¹¹³ For example, Romania, Portugal, Luxembourg, Japan, Israel and Finland embraced insurances more welcomingly, shown by a better availability, being better promoted or not having regulations as strict as TPF. See Nieuwveld, *supra* note 10, p. 222 – 223, 229 – 231, 248. See also LEVITAN, SHARON & Co (2010), AT WHAT COST? A LOVELLS MULTI JURISDICTIONAL GUIDE TO LITIGATION COSTS, p. 111.

¹¹⁴ Sebok, *supra* note 23, p. 871.

¹¹⁵ Pinheiro, Kaira & Dishay Chitalia (2021), *Third-Party Funding in International Arbitration: Devising a Legal Framework for India*, 14(2) NUJS LAW REVIEW, p. 7 – 8.

¹¹⁶ Sebok, *supra* note 23, p. 881.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, p. 885.

¹¹⁹ Goldsmith, *supra* note 13, p. 60.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*, p. 61.

LEIs are available in several ASEAN countries, including Vietnam¹²³ and Philippines¹²⁴ shown by the availability of such policies in insurance companies.

c) Third-party funding and Contingency fees arrangement

Contingency fees arrangement (hereinafter “CFA”) is a “no win, no fee” type of arrangement where the lawyer does not require the party they represent to pay if they lose.¹²⁵ Otherwise, they will be repaid using a part of the amount recovered. Conditional fees arrangement is similar to contingency fees arrangement, the only difference being conditional fees use a “no win, no fee” rate on top of regular hourly rate.¹²⁶ Compared to a traditional billing method, CFA better aligns the interest of lawyers and their client, since an hourly rate would cause the lawyer to have an incentive to do more work and charge higher fees, regardless of its effect on the case.¹²⁷

One might classify the CFA as a type of TPF.¹²⁸ However, for the purpose of this essay, attorney’s fee arrangements such as contingency fees and conditional fees are excluded from the scope of TPF. Lawyers do not provide funds for a dispute but provide legal services, the process of which are heavily affected by several requirements, rules and regulations and lawyer ethics.¹²⁹ This is also the viewpoint of the Hong Kong Ordinance when it excludes contingency fees agreement from TPF.¹³⁰

In ASEAN, CFA has been deemed illegal in several jurisdictions (e.g., Singapore¹³¹ and Malaysia¹³²) due to the doctrine of maintenance and champerty and the prohibition on fee-splitting between a lawyer and their client.¹³³ In countries where CFAs are not prohibited, such contracts are common and approved by court (e.g., Vietnam¹³⁴, Indonesia¹³⁵, Philippines¹³⁶, and Brunei¹³⁷). Although similar in the way costs are

¹²³ Nieuwveld, *supra* note 10, p. 253.

¹²⁴ Timbancaya, Gabriela Victoria A. (2020), *Third-Party Arbitration Funding in the Philippines: Evolving a Local Framework from Global Perspectives*, 93(1) PHILIPPINE LAW JOURNAL, p. 233.

¹²⁵ *Id.*, p. 5.

¹²⁶ *Id.*

¹²⁷ Zimmerman, Alan L. et al (2016), *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, 12(3) NEW YORK UNIVERSITY JOURNAL OF LAW AND BUSINESS, p. 657.

¹²⁸ Overgaard, Caroline & Johan Tufte-Kristensen (2020), *Disclosure of Third-Party Funding in Commercial Arbitration*, 2020(2) NORDIC JOURNAL OF COMMERCIAL LAW, p. 5.

¹²⁹ Shannon, *supra* note 32, p. 883.

¹³⁰ Article 98O(1) Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

¹³¹ Nieuwveld, *supra* note 10, p. 252.

¹³² *Id.*, p. 249.

¹³³ Sebok, *supra* note 48, p. 2944 – 2945.

¹³⁴ LOVELLS LLP (HANOI) (2010), AT WHAT COST? A LOVELLS MULTI JURISDICTIONAL GUIDE TO LITIGATION COSTS, p. 191. See also Bản án số 08/2022/DS-PT ngày 22/02/2022 của Tòa án nhân dân tỉnh Phú Yên [trans: Judgment no.08/2022/DS-PT on 22/02/2022 by The People’s Court of Phu Yen].

¹³⁵ Nieuwveld, *supra* note 10, p. 247.

¹³⁶ Timbancaya, *supra* note 124, p. 232.

¹³⁷ Nieuwveld, *supra* note 10 p. 239.

arranged, TPF and CFA may not be legal simultaneously as countries allowing TPF does not necessarily allow contingent fee arrangements.¹³⁸ TPF and contingency fees arrangement often serve the same market, thus, where contingency fees become legal early, TPF's growth tends to be slow¹³⁹ and vice versa.¹⁴⁰

III. CONFLICTS OF INTEREST

With the presence of TPF, arbitration procedures now face several threats such as: conflicts of interest, third-party control and influence, the rise of frivolous claims and confusion in allocating costs and ordering security for costs.¹⁴¹ The issue of conflicts of interest proves to be one of the most troublesome due to the wide variety of detriments it has on procedure. "A conflict of interest occurs when an entity or individual becomes unreliable because of a clash between personal (or self-serving) interests and professional duties or responsibilities".¹⁴² Conflicts of interest are the issues closely associated with TPF since a new entity is introduced to the procedure. Based on the entity having such conflicts, this paper classifies conflicts of interest into arbitrator conflicts of interest and party conflicts of interest.

A. Arbitrator's Conflicts of Interest

1. Effects on procedure

In arbitration, a well-established rule is that the arbitrator owes a duty of exercising impartial and independent judgment.¹⁴³ If an arbitrator fails to ensure their own impartiality and independence, the arbitral award might be unenforceable. Similarly, an arbitrator conflict of interest arising without being acknowledged may still lead to the challenge or removal of an arbitrator or annulment of an award due to lack of independence.¹⁴⁴ Thus, identifying and preventing conflicts of interest is paramount.

2. Circumstances giving rise to conflicts of interest

Conflicts of interest come in all shapes and sizes. Several documents attempt to give a list of potential conflicts of interest. The IBA Guidelines

¹³⁸ E.g., Australia, Singapore. See Chen, *supra* note 28, p. 28.

¹³⁹ For example, South Africa passed the Contingency Fees Act in 1997 but witness a slow growth of TPF. Sahani, *supra* note 31, p. 91.

¹⁴⁰ For example, Australia still considers contingency fees agreement illegal but has the biggest market of TPF. See Geisker, *supra* note 20.

¹⁴¹ Chen, Tsai-fang (2022), *Development in Responses of Arbitral Tribunals to Third-Party Funding in International Investment Arbitration*, 15(1) CONTEMPORARY ASIA ARBITRATION JOURNAL, p. 3 – 4.

¹⁴² Segal, Troy, *Conflict of Interest Explained: Types and Examples*, INVESTOPEDIA (March 24, 2022), <https://www.investopedia.com/terms/c/conflict-of-interest.asp>.

¹⁴³ General Principle 1 of IBA Guidelines on Conflicts of Interest.

¹⁴⁴ Shannon, *supra* note 32, p. 888 – 889.

established four lists: the Non-waivable Red List, Waivable Red List, Orange List and Green List for potential conflicts of interest that may arise during a procedure, each indicating situations with different level of conflicts that requires different measures to deal with. However, General Standard 6(a) provides: “The fact that the activities of the arbitrator’s firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure.” Further, the IBA Guidelines also states that the list is not exhaustive.¹⁴⁵ This suggests facts must be intensively investigated to show the existence of conflicts instead of relying solely on a formulated list.

Similar to a disputing party, if the arbitrator shares a relationship or has direct economic interest with the funder, a conflict of interest may arise. Unlike litigation procedure, arbitration procedures are also prone to “double hat problem”.¹⁴⁶ An arbitrator in a funded case may serve as the counsel in another case, funded by the same funder, regardless the role is played simultaneously or consequentially.¹⁴⁷

3. Level of conflicts of interest

To decide the level of conflicts, General Standard 6(b) of the IBA Guidelines can serve as a decent parameter:

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.

The standard clarifies that such entity may be considered effectively to be the funded party to expand the scope of conflicts.¹⁴⁸ Generally, funders have the “direct economic interest” and the duty to indemnify a party for the award¹⁴⁹ and thus, their interest and duty can be used as a parameter in determining the level of conflicts. However, pro bono funders, funders having indirect economic interest (e.g., funding in portfolio) and funders with interests not tied to the outcome of the case (e.g., agreements structured as a loan) may escape these two conditions.

This is where the third (or more precisely, the first) condition comes into play. The IBA Guidelines does not provide an explanation on the scope of “controlling influence” nor any examples of such cases. In the context of TPF, this paper suggests that “controlling influence” should be understand in a broad sense, capturing any situations where the TPF receive the right to make important decisions either expressly—through an existing relationship, a provision of contract on control, or impliedly—through

¹⁴⁵ IBA Guidelines on Conflicts of Interest.

¹⁴⁶ Sahani, *supra* note 3, p. 430.

¹⁴⁷ Shannon, *supra* note 32, p. 888.

¹⁴⁸ See Explanation of General Standard 6(b).

¹⁴⁹ *Id.*

cumstances where if the funder stopped funding, the funded party would effectively be rendered unable to continue pursuing the claim.¹⁵⁰ Standard 6(b) thus can be applied on funders, even when the funds are provided on a “pro bono” basis, with the level of control the funder has on the procedure can be used to decide conflicts of interest. For funding with indirect economic interest and funding with interests not tied to the outcome of the case, Standard 6(b) still prove to be sufficient, since if they do not seek control, the funder’s participation would be too insignificant to eliminate. Therefore, this paper suggests the regulation vested in Standard 6(b) would be a good example to decide the level of conflicts.

B. Party’s Conflicts of Interest

TPF introduces a new entity to the arbitration procedure. Depending on how the agreements between parties are structured, different conflicts may arise. This fact is asserted by Singapore Note 10.1.1 on Third-party Funding:

Potential conflicts of interest may arise in third-party funding. The risk of conflict is real because:

(a) In many cases, the claimant retains the lawyer but the funder pays the lawyer’s fees; and

(b) Funding agreements may provide that the funder can give input on decisions, even where the lawyer is retained by the claimant.

(c) So, for example, where the claimant wishes to settle but the funder does not, the lawyer may feel pressure to accede to the funder so as to gain repeat business.¹⁵¹

1. Effects on procedure

Unlike arbitrator conflicts of interest, however, party conflicts do not necessarily lead to the challenge of the arbitral award. The Australia Regulatory Guide 248 demonstrates effects that divergence of interests may cause, specifically (a) the recruitment of prospective members; (b) the terms of any funding agreement; (c) a scheme where there are difficulties with the case of the representative party, but not with the cases of the other members of the class; and (d) any decision to settle or discontinue the action.¹⁵² Generally, it can be seen that conflicts of this type do not prove to be too detrimental to the procedure. However, in order to serve the very purpose that legislators accept TPF for, the party seeking funding must make sure the lawsuit is furthered for justice in their best interest.

2. Circumstances giving rise to conflicts of interest

a) Lawyer – Funder relationship

¹⁵⁰ Sebok, *supra* note 23, p. 878.

¹⁵¹ Paragraph 35 of Singapore Note 10.1.1.

¹⁵² Regulatory Guide 248.14 of The Australia Regulatory Guide 248.

The existing relationship between the lawyer and funder may give rise to conflicts on both the lawyer's and the funder's side, thus, may cause the interests of all entities to misalign. At the negotiating stage, if the funder introduces funded party to a lawyer, or vice versa, they may choose each other as the counsel/ funder, bypassing their best reference.¹⁵³ The resulting contract between the funded party and the funder or between the funded party and lawyer, whichever comes second, can put the funded party in a bad position. At the later stage, the counsel may choose to manage the case for the best interest of the funder, instead of their client's.¹⁵⁴

Aside from causes such as the funder and lawyer being shareholders or owners in each other companies, conflicts between funders and lawyers can also arise from a repeat-play situation.¹⁵⁵ Funders and lawyers in such situation would have the incentive to refer to one another to make business. Funding by portfolio may also cause this conflict, since the funds would go directly to the law firms before being offered at a contingency basis to the client.¹⁵⁶ However, this case does not pose too many problems as the funder no longer take an active role in controlling individual cases.

b) Billing structures and Payment schemes

In the absence of lawyers, the funding agreement itself may cause the clashing of interests between entities. Depending on the method of splitting the proceedings, the funder may be in conflict when the situation calls for settlement.

If the return is calculated independently from the award, funder may be prioritized to receive any compensation from the other party (first-dollar rule). Such arrangements may leave the claimant with the risk of receiving nothing despite being the prevailing party when the funder pressure the claimant to settle, since the return on the funder's side is already calculated and guaranteed.¹⁵⁷ Furthermore, by settling early, funders can better make use of their capital and keep their investments consecutive.¹⁵⁸

On the flip side, if the return was not pre-determined (e.g., by dividing any reimbursement they receive), the funder may want to settle at the optimal time. This would normally align with the interests of the funded party. However, in the event the claimant no longer wishes to proceed because the procedure proves to be a burden, their interest may come to misalignment.

c) Funding Model

Aside from the funding relationship, the way the funder chooses its client can also give rise to conflicts. Namely, if the funder funds in portfolios of cases, they may seek to distribute their resources in a way that best benefit their portfolio, which does not necessarily resonate with

¹⁵³ Steinitz, *supra* note 21, p. 736.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, p. 739.

¹⁵⁷ Seidel, Selwyn et al. (2016), *Panel 1: Litigation Funding Basics*, 12(3) NEW YORK UNIVERSITY JOURNAL OF LAW AND BUSINESS, p. 524.

¹⁵⁸ Steinitz, *supra* note 21, p. 716.

benefits of the funded party.¹⁵⁹ The way funders choose their client also houses several controversial conducts which would likely get troublesome if remain unregulated (e.g., the funder may invest in both the claimant and respondent to secure their return).¹⁶⁰

IV. THE WAY FORWARD: ELIMINATING CONFLICTS OF INTEREST

A. Arbitrator Conflicts of Interest

After identifying arbitrator conflicts of interest, the next problem is how to deal with it to ensure the resulting award's enforceability. This paper identifies three measures to eliminate arbitrator conflicts of interest: disclosure of funding contract, disqualification of arbitrator and disclosure of conflicts of interest.

1. Disclosure of funding contract

a) Why disclose at all

Another opinion is that the funded party should not be bound by new mandatory disclosure regime since it would be impractical and unnecessary.¹⁶¹ It is argued to be impractical because (i) the funded party may not know if their funder is falls under the third-party funder category or not, (ii) because multiple funding sources may be present simultaneously and (iii) the private nature of arbitration contradicts with disclosure obligation.¹⁶² It is argued to be unnecessary because if they fail to disclose what they should disclose, "good faith" can be used as grounds to sanction funded parties, thus, existing arbitral regulations (such as on good faith of parties) would be sufficient.¹⁶³ This argument is self-contradictory because if the funded party cannot tell their funding status, not only they would not be capable to disclose any information voluntarily, but they would also have no interest in discovering whether the funder is considered TPF or not, virtually allowing them to evade the "good faith" test. By imposing a direct obligation on the funded party, the tribunal now has a solid ground to sanction a funded party for non-disclosure, and allows the "good faith" test to apply better. Further, the private nature of arbitration is already compromised by the very introduction of third-party funders to the proceedings, since they likely would need to receive information on the case to decide whether to fund a case or not. It is only reasonable that the arbitrator and opposing party should be allowed to know who is peering into their business¹⁶⁴ and whether certain information is still privileged.¹⁶⁵

¹⁵⁹ *Id.*, p. 739.

¹⁶⁰ Steinitz, *supra* note 24, p. 1168.

¹⁶¹ Goeler, *supra* note 8, p. 150.

¹⁶² *Id.*, p. 151.

¹⁶³ *Id.*, p. 154.

¹⁶⁴ See ATTRILL, WAYNE (2009), ETHICAL ISSUES IN LITIGATION FUNDING, IMF, p. 7.

¹⁶⁵ AMERICAN BAR ASSOCIATION (2011), COMMISSION ON ETHICS 20/20 – WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE, p. 23.

The identity of the funder has to be disclosed to prevent any detriments resulting from late revelation.¹⁶⁶ Disclosure of funding contract serves more than just notifying the arbitral tribunal of potential conflicts of interest and reducing the risk of having to incur the challenge procedure. It also allows the tribunal to decide more suitably on security for costs, allocation of costs and allows the funder access to certain confidential information of the proceedings.¹⁶⁷

b) Who should disclose, and to whom

Since the funding contract is between the funder and the funded, the first question is who should be subjected to the disclosure obligation out of the two. Most regulations state that the funded party should be one to disclose.¹⁶⁸ This paper shares the same opinion, since they are the disputing party and bound by the arbitration agreement. The disclosure obligation should also be independent from the structure of the funding agreement.¹⁶⁹

On the side note, some documents show that the funder should take a supportive role concerning the funded party's obligation of disclosure. For example, the Hong Kong Code of Practice and the SiARB Guidelines provide respectively:

The third-party funder must remind the funded party of its obligation to disclose information about the third-party funding of arbitration under sections 98U and 98V of Cap. 609.170

The Funder should cooperate with the Funded Party and its legal practitioner regarding the disclosure to an arbitral tribunal or court of any information concerning the funding if any applicable rules or order of arbitral tribunal or court so require.¹⁷¹

The difference between these regulations seems to lie in whether the funder is obligated to perform certain actions or not. However, these two provisions have more in common than differences. For Hong Kong Code of Practice's regulation, the use of the word "remind" can be interpreted in two ways: (i) the funder has to notify the funded party of the existence of a disclosure obligation and/or (ii) the funder has to make subsequent reminders so that disclosures can be made on time. Whichever the true intentions of legislators are, this provision shows a mechanism to ensure a timely disclosure of funding contract (though it is unclear what the consequences for the breach of this obligation are). On the other hand, instead of mandating the funder, the SiARB Guidelines set out best

¹⁶⁶ Sahani, *supra* note 3, p. 401 – 402.

¹⁶⁷ Overgaard, *supra* note 128, p. 10 – 11.

¹⁶⁸ See HKIAC Rule 4.3(i), CAM-CCBC Resolution Article 5.

¹⁶⁹ Overgaard, *supra* note 128, p. 16.

¹⁷⁰ Article 2.10 of Hong Kong Code of Practice.

¹⁷¹ Section 8 of SiARB Guidelines.

practices of funders in the process of disclosing. While a mandatory provision like in Hong Kong Code of Practice would make sure the funded party can comply with the new rules; a “softer” approach like SiARB Guidelines can best benefit funded party as they have a better view as to what to disclose. Thus, the authors suggest both kinds of provisions should be imposed as they complement each other nicely.

The next question is that who should be disclosed to. The target of the disclosure is not agreed upon, for there are 2 main opinions: (i) the funded party only has to notify the tribunal, not the other parties and (ii) the funded party has to notify both. Many scholars suggest applying the former is sufficient¹⁷² since the obligation of disclosing to the other party would infringe on their own right to choose the evidentiary and privilege rules.¹⁷³ This is evidenced in the Australia Federal Court Practice Note Class Actions (hereinafter “Australia GPN-CA”) 2019. The Australia GPN-CA suggests that there be two distinct disclosure procedures: Confidential Disclosure to the Court and Disclosure of Litigation Funding Agreements to the other parties. However, only the disclosure procedure to the court serves as the primary obligation as the disclosure to other parties happens later and subject to various privileges.

In reality, most regulations and arbitration rules prefer the latter viewpoint, where the funded party must notify both.¹⁷⁴ The reason for this might be that it would be more convenient and allow the opposing party to investigate the situation more actively. The drawback of this argument is that disclosure to the opposing party would serve no significant purposes as the entities subjected to conflict (i.e., funders and arbitrators) would know better whether conflicts exist or not.¹⁷⁵ Further, the opposing party would likely anticipate the arbitrators’ resolve before carrying out investigations to save time and costs.

Thus, this paper agrees with the former opinion: the funded party should only notify the tribunal. This is not to say the existence of TPF should be hidden forever from the non-funded parties’ view, as the award will eventually assert problems such as allocation of costs, which requires the identity of the funder. Rather, this suggests that disclosure to the non-funded party should not be included in the disclosure of funding contract procedure but disclosure of potential conflicts of interest.

c) What should be disclosed

Regulations up to date generally requires the disclosure of existence of the funder, either through direct mentioning of “existence”,¹⁷⁶ or by requiring certain information from the funding contract (e.g., requiring

¹⁷² Sahani, *supra* note 3, p. 421.

¹⁷³ Sahani, *supra* note 3, p. 421.

¹⁷⁴ See Article 98U Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017; Article 27 CIETAC 2017 International Investment Arbitration Rules (For Trial Implementation); Rule 14.1 of HKIAC Rules.

¹⁷⁵ Sahani, *supra* note 3, p. 409.

¹⁷⁶ Article 4 DIFC Practice Direction.

“identity”).¹⁷⁷ However, this is where the common ground ends as each document have their own unique regulations. For example, the Hong Kong Ordinance¹⁷⁸ requires as little as a mere existence and name of the funder. The Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (hereinafter “ICC Practice Note”)¹⁷⁹ and HKIAC Rules¹⁸⁰ set the standards slightly higher, requiring not the name but the identity of the funder, which encompasses information to correctly identify said funder. The SIAC Practice Note goes further and allows the arbitrator to order the disclosure of existence, identity, interest in the outcome and adverse cost liability.¹⁸¹ The EU-Vietnam Investment Protection Agreement does not only require the existence, name and address of the funder but also the nature of the funding agreement.¹⁸²

Some academics suggest only the existence and identity of the funder would be sufficient.¹⁸³ However, due to the vast number of varieties of funding agreement and the need of the tribunal to allocate costs, such information may not suffice. For example, in order to treat a funder as a party that is subjected to IBA Standard 6(b), the funded party may need to provide certain provisions of the agreement on the amount of control a funder can have on the case, their interest in the award or the extent of the duty to indemnify.¹⁸⁴ The clause on the amount of funding might be necessary so that the arbitrator can order a reasonable security for costs.¹⁸⁵ Further, the clause on liability for costs is necessary in deciding the extent that the funder and funded party are liable, since TPF may provide funding in whole or in part. If the tribunal does not directly allocate costs to the funder, the prevailing non-funded party’s interest may be compromised.¹⁸⁶ Although the tribunal is not guaranteed to be able to assert all issues concerning the funder, they would still be able to anticipate any obstacle to the procedure, not restricted to conflicts of interest. Thus, this paper suggests the disclosure of the funding contract may be necessary for the procedure.

Because the disclosure of the funding contract may cause certain confidential information in the funding agreement to surface, this paper suggests a counter measure the funded party should be entitled to is the objection to disclose. Regulations in this regard can be observed in the

¹⁷⁷ See WIPO Arbitration Rules.

¹⁷⁸ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

¹⁷⁹ Article 20 of ICC Practice Note.

¹⁸⁰ Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (HKIAC Rules).

¹⁸¹ Singapore International Arbitration Centre Practice Note 31/3/2017.

¹⁸² Article 3.37(1) EU-Vietnam Investment Protection Agreement.

¹⁸³ Overgaard, *supra* note 128, p. 16.

¹⁸⁴ IBA Standard 6(b).

¹⁸⁵ Kim, Se-Jin & Dae-Jung Kim (2019), *Third Party Funding in International Arbitration and Its Most Current Development in Asia - Issue of Security for Costs and Its Main Cases*, 29(4)

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¹⁸⁶ See *Harcourt v. FEF Griffin*.

Australia Federal Court Practice Note Class Actions (GPN-CA). The GPN-CA provides different procedures for the disclosure obligation. For disclosure to the court, the practice note requires the cost agreement and litigation funding agreement,¹⁸⁷ though the lawyers may object in whole or in part to make such disclosure on a basis of privilege, prejudice and other detriments.¹⁸⁸ Thus, if parties have any information that falls into existing defense mechanism, they may instead object to disclose certain parts of the agreement.

d) When and how

Generally, regulations are unified on when a party should disclose. The specific regulations may diverge: some take a general approach, providing that the party should disclose “timely”,¹⁸⁹ “at the earliest opportunity”;¹⁹⁰ while some take a more clear-cut approach, requiring disclosure when the party receives funding if they already given notice of arbitration, or when the party gives notice of arbitration if they are already funded.¹⁹¹ However, the actual difference between them is only trivial. This paper follows the same regulatory approach, obligating the funded party to disclose when the party receive funding or at the commencement of arbitration, whichever comes after.

2. Disqualification of arbitrator

When a conflict of interest is discovered and the arbitrator found out that they are no longer qualified, they must step down from the position based on the rule of impartiality and independence. This is a rule widely accepted around the world.¹⁹² The IBA Guidelines provides that:

An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.¹⁹³

Thus, it only requires the arbitrator’s subjective doubts to their ability to be impartial and independent to disqualify themselves.

However, Standard 2(a) alone would be insufficient because arbitrators may be confident even when they are unsuitable for the role. To identify whether the arbitrator should resign or not, the IBA Guidelines implemented a more “objective test” manifested in Standard 2(b):

The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant

¹⁸⁷ Paragraph 6.1 Australia GPN-CA.

¹⁸⁸ Paragraph 6.6 Australia GPN-CA.

¹⁸⁹ Guidance 59 of Australia Regulatory Guide 248.

¹⁹⁰ Article 4 CAM-CCBC Administrative Resolution No. 18.

¹⁹¹ See HKIAC Rules, Hong Kong Ordinance, DIFC Practice Direction.

¹⁹² Article 11.1 of ICC Rules 2021, SIAC Rule 13.1, HKIAC Rule 11.1.

¹⁹³ General Standard 2(a) of The IBA Guidelines.

facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.¹⁹⁴

The test suggests the arbitrator should be disqualified only if the situation give rise to justifiable doubts from the view of a reasonable third party.¹⁹⁵ Although the test can be rather loose, it certainly allows a unified ground for arbitrators to reason whether they are impartial and independent or not. The test is based on "objective" grounds and thus has certain independence from the views of the parties, as opposed to the disclosure of conflicts mentioned below. This paper would recommend the same approach as to how to decide the need to disqualify an arbitrator. After taking into account the situation and the level of conflict, the arbitrators may proceed to disqualify themselves or if they would like to continue to serve as the arbitrator, they may choose to disclose the conflicts instead. It is worth noting that the IBA Guidelines allow arbitrators with conflicts of interest to remain in their position if parties choose to waive such conflicts.¹⁹⁶ However, IBA also stated their stance on the limitations to the right to waive conflicts of interest,¹⁹⁷ meaning certain conflicts should not be waivable.

3. *Disclosure of potential conflicts of interest*

a) Who should disclose/ be disclosed to

The purpose of disclosure is to investigate any potential conflicts of interest and answer whether or not the arbitrator would be impartial and independent. Thus, it all comes down to the arbitrator to show his/her impartiality and independence. The IBA Guidelines on Conflicts of Interest and several regulations around the world¹⁹⁸ give clear instructions to solve problems concerning conflicts of interest. If the arbitrator finds clear evidence that they are not qualified for the position, rules require them to decline to accept the appointment or refuse to continue to act as an arbitrator, depending on the time of discovery.¹⁹⁹ However, if only potential conflicts of interest are found or the arbitrator would like to remain in their position, the arbitrator shall disclose such facts or circumstances to parties and their co-arbitrators (if any).²⁰⁰ Thus, if an arbitrator discloses, it is implied that they consider themselves qualified.²⁰¹

¹⁹⁴ General Standard 2(a) of The IBA Guidelines.

¹⁹⁵ Zuleta, Eduardo & Paul Friedland (2015), *The 2014 Revisions to the IBA Guidelines on Conflicts on Interest in International Arbitration*, 9(1) DISPUTE RESOLUTION INTERNATIONAL, p. 57.

¹⁹⁶ Standard 4(a) of The IBA Guidelines on Conflicts of Interest.

¹⁹⁷ Mullerat, Ramon (2010), *Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration*, 4(1) DISPUTE RESOLUTION INTERNATIONAL, p. 57.

¹⁹⁸ Article 11.3 ICC Arbitration Rules 2021, SIAC Rule 13.4, HKIAC Rule 11.4.

¹⁹⁹ See General Standard 2 of IBA Guidelines on Conflicts of Interest.

²⁰⁰ See General Standard 3(a) of IBA Guidelines on Conflicts of Interest.

²⁰¹ IBA Guidelines Art. 3c, ICC Practice Notes Art. 25.

b) What should be disclosed

While the disclosure of funding contract is unique to TPF, the disclosure of conflicts of interest remains the same as with other types of conflicts. Thus, the arbitrator would have to disclose any facts or circumstances that potentially give rise to conflicts (e.g., their relationship with the funder).

Some argue that were the identity of the funder not disclosed, the arbitrator would not acknowledge the conflicts and they would be able to maintain their impartiality and independence (this phenomenon is known as “see-no-evil”).²⁰² This argument is unconvincing because the arbitrator has the duty to disclose of the conflicts regardless of the way they learned about the identity of the funder.²⁰³ If the arbitrator learned about the potential conflicts but proceeded not disclosing it because the funded party did not give prior disclosure, the arbitrator should be held liable, not the funded party.²⁰⁴ The disclosure from the funded party thus serves as a guarantee that if conflicts were hidden from parties, the arbitrator would be held liable for non-disclosure himself.

This paper further suggests when it is revealed that one party receives funding from a third party, the arbitrator must disclose at least the identity of the funder to the other party. Some may argue that the non-funded party should not be disclosed to if the arbitrator finds no conflicts of interest.²⁰⁵ This paper’s counter-argument is that arbitration is a confidential procedure, thus, the non-funded party should have a clear view on whether their information is being shared to a third party or not. Even when no conflicts may be found, the non-funded party should be able to discover any breach to the agreement to arbitrate.

c) When and how

Although disclosure of funding contract is necessary for the arbitrators to find out conflicts of interest, disclosure of potential conflicts of interest should not be viewed as dependent on the disclosure of funding contract. Rather, the arbitrator must disclose any potential conflicts even when no disclosure has been performed by the funded party.²⁰⁶ Thus, this paper suggests the same, that the arbitrator should disclose as soon as they learn of the facts and circumstances that may give rise to doubts as to the arbitrator’s impartiality and independence.

As to when the arbitrator has doubts to their impartiality and independence, the IBA Guidelines also implemented a “subjective test”:²⁰⁷

If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or

²⁰² ICCA, *supra* note 6, p. 87.

²⁰³ Khatib, *supra* note 19, p. 24.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Rules do not require parties’ disclosure to precede arbitrators’ disclosure. See Article 11.3 ICC Arbitration Rules 2021, SIAC Rule 13.4, HKIAC Rule 11.4.

²⁰⁷ Zuleta, *supra* note 195, p. 57.

independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so, required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.²⁰⁸

Contrary to the grounds for arbitrator disqualification, the disclosure obligation requires the arbitrator to view the facts and circumstances *in the eyes of the parties*. The number of situations that calls for disclosure would thus be much more than that of disqualification due to the circumstances no longer requires justifiability.²⁰⁹ If the situation would give only a spur of doubt in the eyes of the parties, the arbitrator should disclose immediately. This is also one of the reasons why the IBA Guidelines hold on to the Green List: to add certain threshold for the arbitrator to base their conduct on.²¹⁰

B. Party Conflict of Interest

It should also be noted that the measures proposed in this section does not imply that the arbitrator should deal with this type of conflicts of interest upon learning about them. Rather, this section aims to protect the disputing parties from misconducts of lawyers and funders. If misconducts are found, the party can have a claim against their counsel or funder.

1. Lawyer's fiduciary duties

Unlike funders, lawyers are subject to intensive regulations embodied in codes of professional responsibility.²¹¹ When countries attempt to regulate TPF, one simple approach to prevent any abuses of process is to impose obligations on lawyers, by amending existing codes. For example, in 2017, Singapore amended its Legal Profession Act and the Singapore Legal Profession (Profession Conduct) Rules 2015, preventing legal practitioners from receive any interests from third-party funders, except fees and disbursement or expense payable by the client.²¹² UAE is another country that made similar progress when the DIFC Court introduced DIFC Code of Conduct.

One controversial ethical issue is whether or not an attorney may refer their clients to funders.²¹³ The reason is that a lawyer owes a fiduciary duty to their clients; if they now have shared financial interest (relating to the outcome of the case) or non-financial interest (maintaining good business) with another party, their fiduciary duty would be compromised. Thus,

²⁰⁸ Standard 3(a) of IBA Guidelines on Conflicts of Interest.

²⁰⁹ Zuleta, *supra* note 195, p. 57.

²¹⁰ Mullerat, *supra* note 197, p. 57.

²¹¹ Steinitz, *supra* note 24, p. 1160.

²¹² Rule 49B Singapore Legal Profession (Profession Conduct) Rules 2015.

²¹³ Shannon, *supra* note 32, p. 873.

several codes of conduct prohibit the lawyer to introduce their client to a funder or to have any financial interest with the funder. Part B of Singapore Note 10.1.1's explanation on Article 107 of Singapore Legal Profession Act provides that a lawyer must not directly or indirectly hold any share or ownership interest in a funder which they refer their client to, or is funding a client of their practice. It is worth mentioning that the law does not give any provision on the agreement on waiver of conflicts between the lawyer and their client. Thus, the lawyer cannot refer their client in said circumstances, regardless any agreement between them.

If such conflicts of interest are already present, some regulations would disqualify the lawyer from representing the client.²¹⁴ The ABA Model Rules of Professional Conduct establishes that the lawyer shall not represent a client if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.²¹⁵ The scope of this rule would likely extend to funders due to them being "a third person or by a personal interest of the lawyer".

For other conducts of the lawyer, the regulations would allow the conflicts to remain, but require the lawyer to not be swayed from their duties to the client. The DIFC Code of Conduct provides that:

For the avoidance of doubt, the Practitioner shall not be swayed from his or her duties to the client by any conflicts between the instructions or interests of the client and the instructions or interests of any involved Funder (as defined in Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC), unless the client has authorized the Practitioners in writing to take instructions from the Funder rather than the client.²¹⁶

Thus, if no written authorization was established, even when the entire claim was subrogated, the practitioner is required to follow the instructions and interests of the client.²¹⁷ This rule is well-established, though it is still subject to heated arguments.²¹⁸

2. *Funder's obligation*

Since the participation of third-party funder can damage party's control of the case, some academics speculate that the impact of indirect regulation on funders can prove to be insufficient.²¹⁹ Although the existence of a funder is most likely followed by the existence of a lawyer, it should be noted that even when there are no lawyers, the funders themselves may

²¹⁴ See also Article 13(B) DIFC Code of Conduct.

²¹⁵ ABA Model Rules 1.7(a)(2).

²¹⁶ Article 12(E) of DIFC Code of Conduct.

²¹⁷ Sebok, *supra* note 23, p. 879.

²¹⁸ *Id.*

²¹⁹ Kamnani, *supra* note 95, p. 162.

cause conflicts of interest. For example, suppose the funding agreement is structured so that the funder would be the first to receive any interest from the proceedings,²²⁰ when the opposing party proposes to settle, the funder may urge the funded party to accept the proposal so they can recover the costs sooner, potentially leaving the funded party with little to no redemption.²²¹ Thus, imposing an obligation directly on funders is necessary to protect party's right.

The UK Association of Litigation Funders (ALF) Code of Conduct for Litigation Funders 2018 (hereinafter "UK ALF Code of Conduct") takes a new approach to the problem, imposing obligations directly onto funders (unlike the SiARB Guidelines, which only provide best practices). This has attracted a great amount of attention, both for and against. Opponents of the ALF Code of Conduct argue that the code being non-binding and ambiguous renders it impractical to apply.²²² Other arguments are that the Code is self-imposed, possible attorney's conflicts due to the implication of funder and the absence of protection for the other party.²²³ However, since it is hard to deny the need for regulating the funders' conduct, the ALF Code of Conduct nonetheless show a new way to solve the problem.

This paper investigates two solutions to funder's conflicts of interest: by providing security for costs and by avoiding and managing conflicts of interest.

a) Providing security for costs

Generally, the mentioning of security for costs in the context of TPF refers to the protection of the opposing party's right.²²⁴ However, from a conflicts of interest viewpoint, the funded party should also be able to order security. As the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") arbitral tribunal suggested, three factors should be taken into account before ordering security for costs or any other provisional measure:

- (1) that a right in need of protection exists and
- (2) that the circumstances require that the provisional measures (here, tribunal's order for security cost) be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party's right to be protected.
- (3) Moreover, the tribunal in recommending provisional measures must not prejudge the dispute on the merits.²²⁵

²²⁰ Howie, Rachel & Geoff Moysa (2019), *Financing Disputes: Third-Party Funding in Litigation and Arbitration*, 57(2) ALBERTA LAW REVIEW, p. 479.

²²¹ Seidel, *supra* note 157, p. 524.

²²² Osmanoglu, Burcu (2015), *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, 32(3) JOURNAL OF INTERNATIONAL ARBITRATION, p. 6.

²²³ *Id.*

²²⁴ *See* Kim, *supra* note 185, p. 85.

²²⁵ *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10)—Decision on Saint Lucia's Request for Security for Costs, p. 13

On the first account, the right in need of protection is the funded party's right of access to justice—the very reason why TPF is accepted. This is because one of the ways a funder may exert influence on the funded party is to refuse any further payment, regardless the funded party is in breach or not.²²⁶ Consequentially, this may leave the funded party unable to continue in the procedure nor withdraw from it, causing “irreparable” harm.²²⁷ However, the authors acknowledge that this right does not call for absolute protection, which leads to the answer of the second account. Funder's security for cost should only be provided for the purpose of allowing the funded party to afford maintaining the claim or defense temporarily, while searching for another way to finance their claim or defense. This only aims to soften the funder's blow on the procedure because after . Since the funded party is separated from the dispute, the third account would most likely be satisfied. Thus, the claimant should have legitimate grounds to order security for costs.

One obstacle this measure may face is whether the tribunal can order security for costs from a non-disputing party because it has been established that the arbitrator should not interfere with the contractual relationship between the funder and the funded party. However, in this case, the paper suggests if the funded party file a request for security payment from the funder, the arbitrator should be able to grant it.²²⁸ The reason is that the funder is already having certain degree of control over the procedure without being a party to the agreement to arbitrate. Thus, an order for security of costs being based on that very control should not be considered “out of nowhere”. Further, the security for costs does not interfere with the contractual relationship between the funder and the funded party; it instead set out a completely separated obligation.

In short, by imposing a duty to provide security for costs, the arbitrator can shield parties to the arbitration agreement from the full effect of the withdrawal of the funder, so that the funded party can seek another funder or have access to other measures to remain in the procedures.

b) Avoiding and managing conflicts of interest

Similar to lawyers, the funders is required not to create situations giving rise to conflicts of interest. However, since funders are not lawyer, the lawyer's fiduciary duties do not apply. Thus, a different set of regulations is formulated instead.

Up to date, regulations for third-party funders are lacking in numbers. Despite that, several documents have agreed that the funders should not seek to influence the funded party's lawyer.²²⁹ For example, the Hong

²²⁶ Goeler, *supra* note 8, p. 144.

²²⁷ Arbitration Rules generally do not allow withdrawal from arbitration procedure once the case is registered. See Rule 8 of ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (2006).

²²⁸ Goeler, *supra* note 8, p. 144 – 145.

²²⁹ See also Note 2 SiARB Notes to Accompany Revised SiARB Guidelines for Third Party Funders, Article 9 UK Code of Conduct for Litigation Funders.

Kong Code of Practice provides: “The third-party funder must not take any steps that cause or may cause the funded party's legal representative to act in breach of its professional duties”²³⁰. This rule does not actually deal with existing conflicts of interest. Instead, it only officially prohibits bad conducts from the funders. The mechanism to deal with the breach of this rule is not established so its actual practicality is unknown.

V. CONCLUSION

Third-party funding may not be an entirely new phenomenon to legal scientists, yet the wide variety of trouble caused by its emergence to arbitration procedure proves that it is far from gentle. A mere introduction of a third-party funder shattered the stability in the existing relationships among disputing parties, their counsel and arbitration tribunal. Although the access to justice is being improved, it merely shifts the spotlight to legislators to deal with conflicts of interest. With ASEAN being on the rise for hosting favorable seats of arbitration, it is high time we revised our existing regulations and coped up with the ever-changing dynamics in arbitration.

Third-party funding as an arrangement where an entity, who is not already a party to the dispute, provides funds or other material support to a party in dispute, directly or indirectly, to further the claim or defense. Recent years arbitration procedures witnessed various funding schemes, in terms of types of claims funded, interests in the procedure and markets of funding agreement. Thus, regulations on TPF should be consistent and unified. Regulations in ASEAN on TPF, however, remain scarce and distributed mostly in Singapore. Although other ASEAN states have no direct regulations on TPF, regulations on maintenance and champerty, subrogation and assignment, and contingency fees arrangements can shed light on aspects of the availability of TPF.

With a consistent definition, legislators can have a clear view on conflicts of interest concerning third-party funder. Conflicts of interest can happen with arbitrator or within the funded party, each have a different impact on procedures. While arbitrator conflicts of interest threaten the enforceability of the arbitral award, party conflict of interest may damage disputing parties' right. This paper points out situations where conflicts may arise as well as the corresponding level of conflict of interest.

Once the conflicts are determined, the question is how we should deal with it. For arbitrator conflicts of interest, this paper follows three solutions: disclosure of funding contract, disqualification of arbitrator and disclosure of conflicts of interest. Specifically, parties should disclose the funding contract to the arbitrator; the arbitrator shall decline the appointment or refuse to continue to act as an arbitrator following their

²³⁰ Section 2.6(3) of Hong Kong Code of Practice.

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disqualification; and the arbitrator shall disclose and facts or circumstances that give rise to doubts to their impartiality and independence. For party conflict of interest, this party suggest the enforcement of professional conduct rules for both lawyers and funders, to impose liability on them should they ever misconduct.

This paper hopes to shed light on why and how ASEAN should develop a legal framework to identify and eliminate conflicts of interest. Doing so would not only attract entities to choose to arbitrate in ASEAN for their disputes but also promote the growth of the third-party funding industry.