THE MONETIZATION OF INVESTMENT CLAIMS
PROMISES AND PITFALLS OF THIRD-PARTY FUNDING IN
INVESTOR-STATE ARBITRATION

BY JULIEN CHAISSE AND CAN EKEN*

ABSTRACT

This article explores the economic and legal drivers of third-party funding (TPF) and explains the development stages of a major funder with the aim of improving the regulation of such an innovative financing method. This article explains the reasons for this emerging market and clarifies the key legal problems from different aspects. To do so, the article uses Burford Capital, one of the major third-party funders, as an empirical case study to show how the company developed and how it addresses (or not) actual and potential legal problems in its agreements. The Article further explains that TPF arrangements raise cutting-edge legal questions, some aspects of which have been only partly addressed by recent arbitral tribunals. Most of the TPF related legal issues, on the other hand, have been left unaddressed which creates uncertainty for the extent to which the international system can accommodate the monetization of investment claims. The challenges have such a systemic importance that the United Nations Commission on International Trade Law (UNCITRAL) only started working on TPF in 2019 to investigate the new legal problems TPF raises. Fundamentally, this Article offers the first comprehensive roadmap for tribunals and policy makers to address all key legal problems efficiently with the objective to enable TPF to facilitate and increase the monetization of investment claims without jeopardizing the stability and fairness of the actual system.

I. INTRODUCTION ...........................................................................................................115
II. WHAT IS THIRD PARTY FUNDING? QUESTIONS AND
JUSTIFICATIONS .............................................................................................................116
    A. First Empirical Look at Third-Party Funding: Economics, Law
    and Policy ....................................................................................................................117

* Dr. Julien Chaisse is Professor, School of Law, City University of Hong Kong &
  Director, Hong Kong Commercial and Maritime Law Centre. Mr. Can Eken, LLM (LSE,
  London) is a dual-qualified attorney (admitted in California and Turkey), VSR at Stanford
  University (2019/20), and PhD Candidate, Faculty of Law, The Chinese University of Hong
  Kong.
B. Domestic Courts' Role in the Growth of Third-Party Funding.... 122
   1. Courts' attitudes towards champery and maintenance.......... 123
   2. Courts' attitude towards other issues related to third-party funding ................................................................. 125
C. Discoverability of Third-Party Funding: An Outlook in Investment Arbitration ........................................................... 125
D. Third-Party Funders for International Arbitration: A Case Study of Burford Capital .................................................. 126
   1. (i) Table 1. The Development of Burford Capital as third-Party Funder Key Player in Arbitration.................. 127
   E. Lessons ........................................................................ 137
III. EXPLORING THE EMERGING CASE LAW ON THIRD-PARTY FUNDING................................................................. 139
   A. The Issue of Jurisdiction and Admissibility of the Claim........ 140
   B. The Issue of Allocation of Costs........................................ 142
   C. The Issue of Security for Costs.......................................... 143
   D. The Issue of Arbitrator's Challenge.................................. 144
   E. The Issue of Disclosure of Third-Party Funding............... 145
   F. The Issue of Discontinuation of Arbitration...................... 147
IV. FURTHER CONCERNS: MAPPING THE ISSUES
INDIRECTLY RELATED TO THIRD-PARTY FUNDING ............... 149
   A. Tribunals' Attitude Towards Stay of Enforcement of an ICSID Award .................................................................... 150
   B. Tribunals' Power to Order Defaulting State to Post its Share of Procedural Costs ....................................................... 151
   C. Tribunals' Attitude Towards Breach of Freezing Order ......... 152
   D. Tribunals' Attitude Towards Allocation of Costs .................. 154
   E. Tribunals' Attitude Towards Security for Costs ..................... 154
   F. Other Specific Issues ....................................................... 156
V. REFORM OF ISDS AFFECT THIRD-PARTY FUNDING? ............. 157
   A. Third-party funding in the Reports of Working Group III ....... 159
   B. Third-Party Funding in Submissions from the States .......... 160
VI. CONCLUSION ................................................................. 164
I. INTRODUCTION

The use of third-party funding in international arbitration has grown significantly in recent years.\(^1\) Third-party funding refers to the funding of all, or part, of litigation fees and expenses in exchange for an agreed share of any sum recovered from the claim even though there is not a uniform definition for third-party funding.\(^2\) Third-party funding has drawn much attention as a new but already well-established player in investment arbitration. Even though some argue that third-party funding is exploitation of the system,\(^3\) more commonly it is welcomed and has already spread throughout the market.\(^4\) As a result, jurisdictions in which third-party funding was previously not accepted as a valid and legal financing method have changed their opinion and passed legislation on the subject.\(^5\)

Globally, third-party funding has been extensively discussed in the litigation context. In the United Kingdom, for example, Sir Rupert Jackson, in his final report, reviewed this important issue in English courts, and one of his recommendations to tackle the cost issue was third-party funding.\(^6\) However, in investment arbitration, third-party funding sources are rare.\(^7\) While the use of third-party funding is increasing, working groups and compendiums have been set up in International Centre for

---


\(^5\)Hong Kong and Singapore are the two jurisdictions. Garcia, supra note 3, at 2914 n.11.


Settlement of Investment Disputes ("ICSID") and United Nations Commission on International Trade Law ("UNCITRAL") to address specific issues related to the investment dispute settlement system, inter alia third-party funding.\(^8\)

The goal of this article is to examine third-party funding in major jurisdictions and investment tribunals, and then to analyse the work done by UNCITRAL and ICSID on third-party funding to determine the future developments of the market. Before starting, basic information regarding third party funding is explained to give a general understanding of the subject (section 2). In section 3, decisions on third-party funding before investment tribunals are analysed. The section elaborates on most frequently challenged aspects of third-party funding before investment tribunals. In section 4, further issues raised in the presence of third-party funding agreements of third-party funders are analysed. While in section 3, issues are directly related to third-party funding; in section 4 issues are related to third-party funding in some way. In that section, some further issues have been examined, issues that have not yet been discussed before tribunals, but might be discussed in the near future. In section 5, important work on the Investor-State Dispute Settlement (ISDS) regime and potential reforms of the ISDS mechanism, administered by UNCITRAL Working Group III, are examined.\(^9\) One of the aspects of Working Group III's work is third-party funding and how funding issues should be dealt with in ISDS. The section provides a comprehensive analysis of Working Group III's findings regarding third-party funding. Finally, section 6 concludes the article and provides valuable insights into market developments in the near future.

II. WHAT IS THIRD PARTY FUNDING? QUESTIONS AND JUSTIFICATIONS

Before discussing the courts' and tribunals' attitudes towards third-party funding, a section to show the basic mechanism of third-party funding is important. In fact, there is not one uniform funding method. Funders can choose to fund not only a single case, that is, prototypical


arbitration funding, but also portfolios of cases, that is, funding multiple actions and claims.10

This section consists of five subsections. Under the first subsection, basic mechanics of the funding process, important features of the funding agreement and major funders in the world are examined under the basics of TPF. While the funding market is developing in the world, how courts have assisted this development is the topic of the second subsection. The third subsection further elaborates on the importance of TPF for investment arbitration. The leading funder, Burford Capital, is chosen as a case study to examine the development of a very successful funding company and to highlight the major developments in the fourth subsection. How Burford capital became a leading funding company in just 10 years gives important hints regarding the rapid development of the funding market. Lastly, the fifth subsection lists lessons drawn from the development of Burford and the third-party funding market in general.

A. First Empirical Look at Third-Party Funding: Economics, Law and Policy

Leading litigation funders include Burford Capital (US), Investment, LTD (UK), Omni Bridgeway (NL), Fulbrook Management (US), Calunius Capital (UK), Bentham IMF, Keller Capital, LLC and Juridica Capital Management. Banks, hedge funds, and insurance companies also provide financing for litigation.11 Several factors are considered when calculating the funder's share, such as the amount of damages involved, the length of time until recovery of proceeds, the expected value of the client's claim, and whether the claim settles, proceeds to trial or is appealed.12 Normally, the percentage ranges from 15 to 50 percent of the damages awarded, depending on costs and risks

---

9 See INT’L COUNCIL FOR COMMERCIAL ARBITRATION supra note 2, at 37.
11Other considerations include "inter alia, the prospects of success and enforcement of the arbitral decision, the merits of the dispute, the amount of potential compensation, and the skill and expertise of the legal team representing the claimant." See Gary J. Shaw, Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit, 33 ARB. INT’L, 109, 111 (Mar. 2017).
involved in funding the dispute.13 Funders will normally invest between $3 million and $10 million.14 If the claim fails, the funder receives nothing and remains responsible for the legal fees and the costs incurred by the claimant in the arbitration during the term of the funding agreement.15 Yet, the funder normally need not bear the adverse cost awarded to the non-funded party, subject to the terms in the financing agreement.16

Third-party funding can be summarized in this way using a basic frame without elaborating on various discussions on the definition of third-party funder, or claimants could cover premiums on an insurance policy against the risk of losing the arbitration claim.17 They can also collect an immediate payment from a third-party funder when decision on the arbitral award has not yet been given.18 Thus, as indicated by the New York City Bar Association, third-party funding is a valuable means for a claimant who cannot afford legal fees.19 With the rising cost of international commercial arbitration, which normally involves several million dollars,20 third-party funding can lessen the financial pressure on claimants and law firms. With third-party financing, more parties who do not have adequate financial resources to pursue their meritorious claims can access justice.21 At the same time, law firms can also benefit from the funding.22 They might be unwilling to represent a financially constrained party, even though the claims are worth pursuing. With the external source of funding, firms would be more likely to accept these cases and earn more revenue.

In investor-state arbitration, the cost involved is even higher. A state normally has higher risk tolerance and greater resources than a claimant.23 Even if a financially constrained party can bring a claim against a state, the imbalance of bargaining power between the claimant and the


15Id. at 36.

16Id. at 110.

17See The Law Reform Commission of Hong Kong supra note 4, at 117-18.

18Id. at 117.

19Hayden, supra note 1, at 2.


21See The Law Reform Commission of Hong Kong supra note 4, at 110.

22Id. at 104.

23Id. at 115.
state is likely to skew the terms of settlement.24 In the case of illegal state action, more individuals or claimants could access justice through third-party funding.25 These funding arrangements are supported by some legal ethics because they level the playing field by providing resources for claimants to prosecute "bet the company" type claims against governments or major multinational companies, which only wealthy individuals are able to afford.26

Third-party funding offers not only great opportunities for both businesses and lawyers as an alternative financing method, but also an investment area for potential entrepreneurs and investors.27 In fact, legal financing has always been an option in common law jurisdictions.28 However, the use of financing in international arbitration is a fairly new concept.29 This has created some problems regarding legal proceedings.30 The International Bar Association sees third-party funding as a factor that should be disclosed in its guidelines on conflicts of interest in international arbitration.31 So, the effect of third-party funding on disclosure requirements and potential conflicts of interest which funding arrangements might create between funders and arbitrators are the first issues third-party funding brings to mind.32 Another important issue is how much control third-party funders will have over the proceedings. In the United Kingdom, the Giles v. Thompson case brought some standards to the control of funders in litigation funding.33 Similarly, in international arbitration, the Association of Litigation Funders has rules in its Code of Conduct on control of funders who are members of the Association and

24Id. at 116.
25See The Law Reform Commission of Hong Kong supra note 4, at 68.
26See Maya Steinitz, Whose Claim Is This Anyway?: Third-Party Litigation Funding, 95 MINN. L. REV. 1268, 1303-13 (2011).
27See generally id.
28Id. at 1279.
29Id. at 1278.
30Steinitz, supra note 25, at 1318-25.
32See generally id.
operate in England and Wales. Another very controversial issue is the relation of security for cost orders in the presence of third-party funding arrangements. Regarding this problem, in the first case in ICSID history, a tribunal granted security for costs, and all members had different opinions on how the presence of funders in a case should affect the decision of the security for cost orders. Apart from these major three controversial issues, a full list of the aspects of third-party funding discussed by tribunals can be found in Honlet's article.

However, some concerns have been expressed about third-party funding. The President of the U.S. Chamber of Commerce's Institute for Legal Reform, Lisa Rickard, commented that "litigation financing is a sophisticated scheme for gambling on litigation, and its impact on American companies is unambiguous: more lawsuits, more litigation uncertainty, higher settlement payoffs to satisfy cash-hungry funders, and in some instances, even corruption." It is rebutted that funders will assess the merits and risks of the claims before providing funding, namely the process of due diligence, which normally lasts thirty to sixty days. For instance, in 2010, Juridica reviewed almost 400 cases but only invested in 23 cases. Although third-party funding is likely to increase the number of lawsuits, it is not likely for funded parties to pursue frivolous claims.

The RSM case also mentions and opposes the idea of TPF. Third-party funding arrangements can clash with other legal doctrines, or legal issues may arise from it as well. Third-party funding may, for example, also violate the long-established doctrines of champerty and maintenance. Yet, this allegation has just been rejected by a Delaware court, which held that the third-party financing agreement

---


35 RSM Prod. Corp. v. Saint Lucia, ICSID Case No. ARB/12/10, arbitration decision, assenting reasons ¶ 18–20 (Aug. 13, 2014) (noting how the opinions differ from each other on third-party funding).

36 Honlet, supra note 19.


39 Id.

40 Id.


42 See Lloyd, supra note 37, at 4.
concerned did not violate the prohibition. Moreover, Hong Kong and Singapore passed legislation and abolished those doctrines for the purpose of arbitration and international arbitration respectively. Therefore, two ancient doctrines, champerty and maintenance, will not affect the legality of third-party funding in domestic and international arbitration in Hong Kong and Singapore.

Disclosure of the name of the funder, details of funding and the information provided to the funder for the purpose of due diligence is another concern. Yet, there are detailed guidelines laid down by tribunals in such cases, namely when and what financial interests are to be disclosed. There is also a common-interest privilege protecting communication between attorneys and a client's insurer, though it is unclear whether the privilege would extend to communication between attorneys and third parties. There are also cases related to this.

Third-party financing has also been criticized for causing conflicts of interest. When a funder is a party connected to one of the tribunal members and yet the other parties do not know of the existence of third-party funding in the proceedings, a tribunal may rule in favour of the funded party. In view of this concern, the International Bar Association has laid down guidelines on when and which financial interests are to be disclosed. Conflicts of interest also arises between arbitration counsel and the funder. Even though it is the funder who pays the counsel, arbitration counsels must be accountable to their clients.

It is argued that the existence of third-party funding may affect the calculation of awards, yet no evidence shows that a higher award will be given to parties with third-party funding. No cases have suggested that claimants have to bear an adverse cost due to the existence of the funding.

---

42Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6, (2017), §98E; Republic of Singapore Civil Law Act Amendment, No. 2, (2017), §5A.
43See id.
44Hayden, supra note 1, at 3.
45See IBA Guidelines on Conflicts of Interest in International Arbitration, supra note 30, at 6.
46See Hayden, supra note 1, at 3.
47Id.
48See generally The Law Reform Commission of Hong Kong, supra note 4.
The funder is not obliged to bear adverse cost either, since an arbitration tribunal is also not empowered to order a third party to pay. A joint task force on third-party funding formed by the International Council for Commercial Arbitration (ICCA) and the Queen Mary University of London has also suggested that the existence of funding shall not be a relevant factor when determining the amounts of awards and costs. However, a proportion of the award received by the funded party is another major concern because since the funder may take advantage of its bargaining power by requesting an unreasonably high rate of return and insist on incorporating unfair terms into the funding agreement.

Third-party funding is also criticized as being a legal no-man's land. In August 2015, Senate Judiciary Committee Chairman, Charles Grassley (R-Iowa), and Senate Majority Whip, John Cornyn (R-Texas), expressed their concern over third-party funding and stated that this " burgeoning industry" was "largely unregulated and operated with no licensing or oversight." In response, Tennessee, Maine, and Ohio have passed laws to regulate litigation funding. However, there is a gray area on prohibition against usury, since it does not apply to nonrecourse loans provided by third-party litigation funders.

These are the basic mechanics of third-party funding, its current status, and the controversial issues surrounding it. More detailed analyses on those problems and how tribunals have addressed those issues are explored in the following sections.

B. Domestic Courts' Role in the Growth of Third-Party Funding

The more domestic courts that accept third-party funding as a valid financing method and decide that third-party funding does not violate the law, the more third-party funding will be accepted and used.
In this section, different courts' attitudes towards third-party funding are analysed and discussed to elaborate on the various views regarding third-party funding and its alleged breach of two common law doctrines: champerty and maintenance. It is clear that many courts do not apply those ancient doctrines in a strict sense anymore and adjust them towards today's different conditions and the needs of the market. However, there are still a few examples where some courts view third-party funding as an illegal arrangement and do not give legal effect to third-party funding arrangements.

Hong Kong and Singapore were two such countries in which third-party funding was illegal, but both countries have recently adapted their laws and third-party funding is now valid in both countries. Therefore, we can accept that the few countries which still reject TPF might change their legal system and accept third-party funding as a valid financing method. The more countries that accept and legalize third-party funding in their domestic courts, the more the idea of third-party funding loses its uncertainty and international courts and tribunals can accept TPF as well.

1. Courts' attitudes towards champerty and maintenance

Delaware courts have rejected the claim that a third-party funding agreement would violate the prohibition against champerty and maintenance. It appears that the Delaware courts are not hostile to this mode of financing. In one, a judge of the Superior Court of Delaware found that a third-party financing agreement was not improper because the claimant remained the bona fide owner of the claims, and the funder had no right to bring the action. A funder cannot be the de facto controller of the litigation, nor an "officious intermeddler," when a funder has not "stirred up" litigation, forced a party to pursue litigation, or controlled the litigation for "purposes of continuing a frivolous or unwanted lawsuit." The Superior Court of Delaware has found that a freely negotiated agreement does not constitute maintenance. Yet, a third-party funding

---

59 See infra Sections I.B.i, I.B.ii.
60 See infra note 35 and accompanying text.
61 See infra notes 36-37 and accompanying text.
63 See LaCroix, supra note 42.
64 Id.
65 Id.
agreement may still be found improper if the funding agreement assigns the ownership of the claims and the unfettered right to settle the arbitration or litigation to the financier.\textsuperscript{66}

In England and Wales, litigation and arbitration funding are very common.\textsuperscript{67} After Lord Justice Jackson's report, the Association of Litigation Funders (ALF) was established and has published guidelines for litigation funders.\textsuperscript{68} In addition to the common practice of TPF, champerty and maintenance have been abolished as criminal offences in England and Wales since 1967.\textsuperscript{69} Unlike in the United Kingdom, third-party funding is illegal in Ireland and champerty remains dominant.\textsuperscript{70} Australia is similar to England and Wales, where third-party funding became legal with the abolishment of the maintenance and champerty doctrines.\textsuperscript{71} In Singapore, third-party funding has been legal since March 1, 2017.\textsuperscript{72} In Hong Kong, third-party funding has only been legal since February 1, 2019.\textsuperscript{73} In the United States, third-party funding is common, with four different trends varying across the states.\textsuperscript{74}

\textsuperscript{66}Id.
\textsuperscript{69}Criminal Law Act, 1967, c. 58, §§ 13–14 (UK).
\textsuperscript{70}Persona Dig. Telephony Ltd. v. The Minister for Pub. Enter. [2016] IESCDET 106, ¶¶ 33, 51 (Ir.).
\textsuperscript{71}Maintenance, Champerty and Barratry Act 1993 (NSW) No. 88 (Austl.).
\textsuperscript{73}Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6, (2017) 2 O.H.K., § 3(98K).
2. Courts' attitude towards other issues related to third-party funding

Because third-party funding is accepted and used widely in England and Wales, courts also discuss funding agreements in various other aspects, such as: the possibility of recovering the success fee, whether the funded party has to pay the funder when the funded party wins the case, or whether the funder is liable to pay adverse costs or not.75

If the funded party wins litigation, they may have to pay a certain amount of the award to the funder depending on the agreement; this fee can be called a success fee or funder's premium.76 In England and Wales, the high court decided that TPF costs can be recovered and the losing party has to pay the success fee the funded party would owe the funder.77 If this were always the case, the main critique against third-party funding would fail, because the funded party ultimately gains access to justice without fronting expensive litigation costs.

Regarding the liability of a funder to pay adverse costs, the Court of Appeals of England and Wales decided that the third-party funder has to pay adverse costs without the limitation of the Arkin Cap.78 Before this decision, the third-party funder's liability was limited to the amount they invested, called the Arkin Cap.79

Can these decisions be used as a precedent for investment arbitration where tribunals side with the national courts on the issue, or will they express an alternative approach altogether? This is a question that must be answered by tribunals in the near future, especially considering how third-party funding has now spread from national courts to arbitration tribunals.

C. Discoverability of Third-Party Funding: An Outlook in Investment Arbitration

Third-party funding has emerged as a necessity in the international investment arbitration market where the high costs of the dispute

75See discussion infra Section I.B.ii.
77See Essar Oilfields Servs. v. Norscot Rig Mgmt. Pvt Ltd. [2016] EWHC (Comm) 2361, [68]-[72], (Eng.).
78See Excalibur Ventures, LLC v. Texas Keystone, Inc., [2016] EWCA (Civ) 1144, [41]-[47], (Eng.).
79See Arkin v. Borchard Lines Ltd. [2005] EWCA (Civ) 655, [41], (Eng.).
settlement system in the current investment regime have been brought about by many different platforms.80

The United Nations Commission on International Trade Law ("UNCITRAL") Working Group III has noted that "the amount of costs per proceeding averaged US $8 million."81 These high costs are "difficult to justify for developing States,"82 and "limit the access of small and medium-sized enterprises to the ISDS mechanism."83 Again, in its other session, the European Union submitted that "significant costs" are one of the concerns, and this situation is "potentially prohibitive for a significant number of smaller and medium sized investors."84 This being the case, the difficulties which parties encounter have resulted in a new market for investors, and financing of investment cases has increased dramatically.

The demand seems to continue increasing. Since it is neither attractive nor easy for companies to cover high litigation and arbitration fees, third-party funding provides an effective solution for the business. To understand this development, one should look at the drivers behind the third-party funding. Once those drivers are understood, the issues arising from third-party funding can be properly addressed. The next section of this article uses Burford Capital, the largest third-party funder in the market, as a case study.

D. Third-Party Funders for International Arbitration: A Case Study of Burford Capital

Burford, one of the largest third-party litigation and arbitration funders, is traded on the London Stock Exchange and has over three billion dollars committed to the legal market.85 It focuses on large-scale commercial litigation and has a team of over 120 people in North America, Europe, Asia, and Australia.86 It specializes in investment treaty arbitration, and normally funds plaintiffs instead of States.87 There are two

---

80 See discussion infra Section I.D.
82 Id. at ¶ 40.
83 Id. at ¶ 41.
86 Id.
business segments in Burford Capital, namely litigation investment and litigation finance. It invests in a wide range of legal assets in many different ways. Paul M. Barrett has commented that Burford Capital has helped promote litigation funding and push it forward, but its investment in the tortious claim about oil pollution against Chevron in Ecuador was the "most notorious – and least successful – investment."

Burford later sold off its interest in the lawsuit and accused the Plaintiffs' attorney of fraudulently misleading Burford to enter into the financing agreement after the oil company "persuaded a U.S. judge that the Ecuadorian suit involved coercion, bribery and fabricated evidence." Another story, a success story this time, in June 2010, a Burford-funded client was awarded $110 million U.S. dollars and, as a result, Burford recovered nearly nine times its investment.

Here, the development of the leading third-party funder has been examined since its inception in 2009. The following chart has been comprised of the news and announcements, mostly in Burford's website, but also any other relevant journals, books or articles announcing related developments. The purpose of this chart is to provide an overview of the development of the leading third-party funding company. This will help us to understand the dynamics of the funding market and how funders adapt to changes.

1. (i) Table 1. The Development of Burford Capital as third-Party Funder
   Key Player in Arbitration

<table>
<thead>
<tr>
<th>Stage</th>
<th>Development</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

88 Id.
89 Id.
ging.
91 LaCroix, supra note 42.
<table>
<thead>
<tr>
<th>Date</th>
<th>Burford Capital, headquartered in St. Peter Port, Guernsey, was founded by Christopher P. Bogart and Jonathan T. Molot.93</th>
<th>Both founders are lawyers, a litigation attorney and law professor respectively.</th>
</tr>
</thead>
<tbody>
<tr>
<td>October 2009</td>
<td>Burford Capital raised 80 million pounds through its IPO on the London Stock Exchange.94</td>
<td>*Largest capital raising ever for dispute finance.</td>
</tr>
<tr>
<td>December 2010</td>
<td>Burford Capital raised another 110 million pounds through secondary placing of equity on the London Stock Exchange.96</td>
<td>Shows the gradual expand of Burford's capital.</td>
</tr>
<tr>
<td>June 2010</td>
<td>Burford Capital advanced $5 million to Gray Development Group in exchange for 33 percent of any settlement and 40 percent of any judgment. It ultimately received $44 million from Gray Development Group, approximately 880 percent on its investment. 97</td>
<td>An example of a very successful investment, a very large portion of profit in a short time, around one-year.</td>
</tr>
<tr>
<td>November 2011</td>
<td>Burford Capital provided $4 million in funds to Ecuadorian Nationals for a tort claim against Chevron. It later sold the investment to another third-party funder a month later.99</td>
<td>Shows that funders do not need to wait for the award to profit. They can opt-out of the funding.</td>
</tr>
</tbody>
</table>

97 Cremades, Jr., supra note 91, at 14.
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>February 2012 – Burford's total income increased 18%.(^{100})</td>
<td>Burford Capital acquired Firstassist Legal Expenses, (a UK-based litigation insurance provider, particularly after-the-event insurance). Restructuring brings the fund external advisor into the company to unite capital and operations in one structure.(^ {101}) An increase in the operations of Burford.</td>
</tr>
<tr>
<td>2013</td>
<td>March 2013 – Burford's profit before tax increased 25% when compared to 2012.(^ {102})</td>
<td>In view of the changing need and the Jackson reforms, Burford Capital launched new products, namely offering funding of legal fees and disbursements and provisions of litigation (after-the-event) insurance.(^ {103}) With market development, the variety of funding agreements are also increasing.</td>
</tr>
<tr>
<td></td>
<td>June / July 2013 – Burford Capital became 16% shareholder in Manoletie Partners, the UK's leading insolvency litigation financier.(^ {104})</td>
<td>Burford acquires some shares of another financier.</td>
</tr>
<tr>
<td></td>
<td>November 2013 – Issuance of $40 million US dollars contingent preference shares by a wholly owned subsidiary of Burford Capital was fully subscribed.(^ {105})</td>
<td>More investors agree to provide up to $40 million US Dollars additional capital.</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Relevant Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 2014</td>
<td>Retail bond issuance raised $150 million US dollars on the London Stock Exchange.</td>
<td>With this increase, Burford's asset base proceeds to a half billion dollars.</td>
</tr>
<tr>
<td>2014</td>
<td>Commencement of recourse lending.</td>
<td>More variety in funding.</td>
</tr>
<tr>
<td>June 2014</td>
<td>Burford Capital advanced $15 million to Rurelec PLC, a publicly traded owner, operator and developer of power generation capacity internationally and received $26 million in return. Rurelec PLC used its pending arbitration claim to obtain an innovative full-recourse loan at a lower interest rate than other loans provided in the debt market. *Burford's CEO is of the view that &quot;this is a good demonstration that the benefits of litigation financing go far beyond that of simply helping to pay legal fees, and in many cases can provide an effective alternative method of financing to help companies achieve their strategic goals.&quot;</td>
<td></td>
</tr>
</tbody>
</table>

2015 – Burford's operating profit increased 27% when compared to 2014. Reported revenue of Burford Capital climbed 26% to more than $100 million US dollars in 2015 as it accelerated its shift from investing in single lawsuits to purchasing entire portfolios of litigation from big law firms and corporations. Only 13% of new investments of Burford in 2015 were single matters.

---

108 Id.
<table>
<thead>
<tr>
<th>Month</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 2015</td>
<td>Burford Capital acquired Focus Intelligence Ltd., a business intelligence firm that specializes in asset tracing and judgment enforcement, for $1.5 million US dollars. It intends to provide a better global judgment enforcement for both lawyers and clients.</td>
<td></td>
</tr>
<tr>
<td>February 2015</td>
<td>Burford Capital launched a new product to provide funding for UK claimants to pursue claims valued from 25,000 pounds to 500,000 pounds. It aims to help small claimants to gain better access to justice. Burford also cooperated with leading funding and insurance brokers to provide clients with both a solicitor's conditional fee agreement and adverse costs insurance.</td>
<td></td>
</tr>
<tr>
<td>July 2015</td>
<td>Burford Capital formed a joint venture with Chilmark Partners, a bankruptcy and restructuring firm, to create Bankruptcy Litigation Funding. It aims to provide financing services for claims brought in connection with winding-up and bankruptcy cases in the US, including providing funding and advisory services to litigation trusts.</td>
<td></td>
</tr>
<tr>
<td>August 2015</td>
<td>Burford Capital established a branch in Hong Kong.</td>
<td></td>
</tr>
<tr>
<td>October 2015</td>
<td>Burford Capital signed a 30 million Euro agreement with German competition law firm</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>October 2015</td>
<td>Burford provided new products to protect against arbitration cost, such as paying a party's adverse costs if the arbitral award so requires.</td>
<td>Burford adapts to change and announces a new product.</td>
</tr>
<tr>
<td>January 2016</td>
<td>Burford Capital signed a $45 million financing agreement with a FTSE 20 company.</td>
<td>A large finance agreement.</td>
</tr>
<tr>
<td>February 2016</td>
<td>Burford Capital expanded litigation financing offering to intellectual property in response to clients demand</td>
<td>Burford adapts market demands.</td>
</tr>
<tr>
<td>March 2016</td>
<td>It signed a $100 million financing agreement with an unnamed &quot;major global law firm&quot; with a wide range of legal assets</td>
<td>Portfolio funding arrangement with a major law firm.</td>
</tr>
<tr>
<td>19 April 2016</td>
<td>Burford Capital raised $144 million US dollars in bond issue on the London Stock Exchange</td>
<td>Burford's litigation finance investment</td>
</tr>
</tbody>
</table>

117 Id.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 May 2016</td>
<td>Burford agreed to provide 9 million British Pounds to Grant Thornton, the trustee in bankruptcy, for an insolvency agreement, covering all claims by and against an estate, other legal fees and administrative costs. It is the first third-party funding in an insolvency claim. Nick Wood, a partner at Grant Thornton, commented &quot;[w]hat Burford provided is a significant step away from traditional third-party funding and towards a bespoke financing arrangement that is tailored to the needs of the estate.&quot;</td>
<td>*breakthrough Burford's first funding in an insolvency claim.</td>
</tr>
<tr>
<td>16 June 2016</td>
<td>Burford Capital grew in London. To meet increasing demand in the UK, Europe and Worldwide, Burford Capital expanded its team in London.</td>
<td>Demand of third-party funding increases, the team of Burford grows alongside.</td>
</tr>
<tr>
<td>2017</td>
<td>Third-party funding market grows in the world. Hong Kong and Singapore passed legislation in TPF to legalise funding in arbitration and international arbitration respectively. Consequently, Burford opens a new branch in Singapore.</td>
<td></td>
</tr>
<tr>
<td>14 March 2017</td>
<td>Burford Capital delivered 75% increase in net profit after tax.</td>
<td>Burford's profit increases dramatically.</td>
</tr>
<tr>
<td>30 June 2017</td>
<td>Burford announced that it financed its first Singaporean arbitration matter and it is thought to be the first Singaporean-seated</td>
<td>Singapore passed a legislation and legalised funding in arbitration and</td>
</tr>
</tbody>
</table>

---

123Id.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 July 2017</td>
<td>Burford Capital secured $500 million in funds for its new complex finance strategies</td>
<td>Apart from being a financer, Burford will act as principal with new funds.</td>
</tr>
<tr>
<td>2 August 2017</td>
<td>Burford signed a multi-million-pound portfolio agreement with a top 100 UK law firm. This is the first of its kind, offered by a top law firm and a major funder.</td>
<td>Burford signs another portfolio funding agreement.</td>
</tr>
<tr>
<td>3 October 2017</td>
<td>Burford Capital opened in Singapore. With this move, Burford aims to increase its finance business in the Asia-Pacific region following increased demand from Asia.</td>
<td>Since funding became legal in Singapore, Burford extends to Singapore.</td>
</tr>
<tr>
<td>12 December 2017</td>
<td>Burford won a Financial Times Award for innovation. &quot;The award recognizes Burford, along with Buchwald Capital Advisors and Stevens &amp; Lee, for the unprecedented use of legal financing to solve a common problem faced by bankruptcy estates.&quot;</td>
<td>Innovative solutions Burford provides are recognised by Financial Times.</td>
</tr>
</tbody>
</table>

2018 Burford's both profit and capital continues to increase

---


131 *Id.*


133 *Id.*
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 March 2018</td>
<td>Burford announced new insurance business to address adverse costs risk. Burford Capital started its own insurance Company to address adverse costs issues.</td>
<td>Since adverse costs raise a concern and a critic against funding, Burford develops solutions to address it.</td>
</tr>
<tr>
<td>11 October 2018</td>
<td>Burford Capital launches The Equity Project to help close the gender pay gap in law. Burford Capital started a project to increase women's involvement with commercial litigation and arbitration matters.</td>
<td>An example of the gender equality project Burford launched.</td>
</tr>
<tr>
<td>17 October 2018</td>
<td>Burford Capital research shows that litigation financing is growing rapidly. 2018 Litigation Finance Survey results show that the use of financing is increasing, as is awareness in the market.</td>
<td>Third-party funding market continues to grow and more practitioners are becoming aware of funding options.</td>
</tr>
<tr>
<td>19 December 2018</td>
<td>Burford Capital secured funding for $1.6 billion in new litigation investments. The new, nearly one billion USD fund will support Burford's own $633 million Capital for investment. This huge fund shows the</td>
<td>Burford's capital reaches an enormous number and Burford</td>
</tr>
</tbody>
</table>

---

136 See id.
137 Id.
139 See id.
140 Id.
142 Id.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 March 2019</td>
<td>Burford capital announced its financial results for 2018.(^{146}) Compared to the previous year, net profit after tax increased 24% and Burford Capital continues to grow its business.(^{147}) Burford's net profit continues to increase.(^{148})</td>
<td></td>
</tr>
<tr>
<td>9 April 2019</td>
<td>Burford Capital closed a new $300 million post-settlement investment fund.(^{149}) The new fund will be used for post-settlement investments.(^{150}) Post-settlement investments increase in Burford's budget.(^{151})</td>
<td></td>
</tr>
<tr>
<td>24 June 2019</td>
<td>Burford Capital announced that it has sold a further 10% of its entitlement in the Petersen matter into the secondary market it has been developing, leaving Burford with 61.25% of its original entitlement.(^{152}) An example of Burford's profit from an ongoing case.</td>
<td></td>
</tr>
<tr>
<td>7 August 2019</td>
<td>Muddy Waters, a US research firm, published a twenty-five-page report,(^{153}) which caused a significant loss in Burford's shares in The report Muddy Waters published is the</td>
<td></td>
</tr>
</tbody>
</table>

\(^{143}\)See id.

\(^{144}\)See infra note 152 and accompanying text.

\(^{145}\)See infra note 155 and accompanying text.


\(^{147}\)Id.

\(^{148}\)Id.


\(^{150}\)Id.

\(^{151}\)See id.


This table shows milestones in Burford's history since its establishment up until today. Burford constantly increased its profit as well as its capital. The rise of Burford is in parallel with the rise of third-party funding markets in the world. Third-party funding expands over jurisdictions, as has Burford. As a result, the company grew significantly. Now, the attitudes of courts in different jurisdictions towards third-party funding are discussed to show that, at least major jurisdictions, have already accepted third-party funding as a valid source of funding.\textsuperscript{159}

E. Lessons

The third-party funding market has grown fast and continues to grow.\textsuperscript{160} Burford has captured this growing area, and over its ten-year history has managed to become a leading global third-party funding

\begin{tabular}{|c|c|c|}
\hline
\textbf{Date} & \textbf{Event} & \textbf{Comment} \\
\hline
12 August 2019 & London Stock Exchange. Burford called this report a "short attack" in a document and published the response on its website the following day.\textsuperscript{154} & reason for Burford's dramatic loss in one single day in London Stock Exchange market.\textsuperscript{155} \\
\hline
\end{tabular}


\textsuperscript{155}Robert Smith & Lindsay Fortado, Burford Capital shares tumble as Muddy Waters takes aim, FIN. TIMES (Aug. 7, 2019), https://www.ft.com/content/29f4ac20-b8e9-11e9-96bd-8e884d3ea203.


\textsuperscript{157}Id.

\textsuperscript{158}See supra note 155 and accompanying text.

\textsuperscript{159}See infra Section II.

\textsuperscript{160}See supra note 145 and accompanying text.
company. As its Chief Executive Officer Christopher Bogart recounts, filling the demand for alternative economic financing from law firms was his goal when he created Burford Capital in 2009. The more jurisdictions that accept third-party funding, the more common third-party funding becomes. After Hong Kong and Singapore, the United Arab Emirates also permitted third-party funding in Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM).

After examining in this section the growing third-party funding market, along with Burford Capital—the leading third-party funding company—there are several lessons to learn. Lesson one is that third-party funding is in demand among law firms, clients and even different states. Lesson two is that states are supporting third-party funding development, even though they may not need funding, in order to attract funders in their respective jurisdictions to show they are ready to change the law and take advantage of the developments in the third-party funding market. Lesson three is that funders follow developments and adapt to changes quickly. As an example, the first known security for costs order granted in ICSID history in 2014, along with increasing security for costs order requests, led Burford to develop new products to address those concerns. Also, increasing portfolio funding investments of Burford show that Burford follows the market closely and addresses the market demand. Lesson four is that funders do not need to wait for the end of the case to profit from their investment. They can sell their entitlement in the case on a secondary market. This is a very strategic decision for them that can create instant cash for their further investments. Lastly, lesson five is that the number of new funders is increasing in the market, which is good for competition, but bad because of potential abuse. Therefore, growing in a controlled way is important and, as a result, more regulation is required.

We can conclude that the third-party funding industry is growing, and more jurisdictions are accepting third-party funding. As the table shows in this section, Burford grew systematically over the years since its

---


162Id.


164See supra Section I.

165See infra Section II.C.

166See supra note 119 and accompanying text.
establishment, which followed the global third-party funding market.  
However, recent tragic developments related to Burford showed that there 
are some pitfalls of which funders need to be careful. More transparent 
practices could prevent such aggressive attacks. A regulated market would 
ensure greater market security, and such reports would not cause a sharp 
decline in the stock prices.

III. EXPLORING THE EMERGING CASE LAW ON THIRD-PARTY 
FUNDING

After explaining the significant issues national courts have dealt 
with, it is important to look at what issues investment tribunals have dealt 
with and how they decide those issues. The following section shows that 
some issues investment tribunals have dealt with are similar to the issues 
that courts have addressed. However, other issues investment tribunals 
face are different than those tackled by courts because of the nature of the 
arbitration, such as whether funding arrangements make it more likely for 
parties to challenge the selection of an arbitrator. The possibility of 
challenging a judge because of the involvement of a specific third-party 
funder may not have any grounds in court; but in arbitration, the choice of 
arbitrator can be challenged because of a relationship between an arbitrator 
and funder, or as has happened in cases discussed in the following 
sections, because of an arbitrator's opinion on funding or the arbitrator's 
involvement in a third-party funding task force. Not all these issues are 
exclusive, and it is possible that there will be other aspects of funding 
arrangements which may be challenged by the opposing party. As far as 
discussed before tribunals, this section organises main challenges in the

167See supra Table 1.
168See supra note 155 and accompanying text.
169See Dimsey M., Pramod S. (2019) Selectio, Bias, and Ethics of Arbitrators in 
International Investment Law and Policy. Springer, Singapore [ 
170See infra Section II.A–F. See also Levine M.A.J. (2020) Emerging Practice on 
Investor Diligence: Jurisdiction, Admissibility, and Merits. In: Chaisse J., Choukroune L., Jusoh 
Jurisdictional Objections and Defenses (Ratione Personae, Ratione Materiae, and Ratione 
presence of third-party funding into six parts: tribunals' attitude towards (1) jurisdiction and admissibility of the claim, (2) allocation of costs, (3) security for costs, (4) challenge of arbitrators, (5) disclosure, and (6) discontinuation of arbitration proceedings.

A. The Issue of Jurisdiction and Admissibility of the Claim

Jurisdiction and admissibility of the claim have been challenged in several cases, but the tribunals have rejected all arguments raised in the claims.171

In Abaclat v. Argentine Republic,172 Ambiente Ufficio v. Argentine Republic,173 and Giovanni Alemanni v. Argentine Republic,174 all respondents argued that the claims were inadmissible and objected to jurisdiction of the claims; however, none of the respondents based their arguments on the existence of a third-party agreement. Respondents only addressed the scope of the mandate given by the claimants in Abaclat and Ambiente.175 The Tribunal rejected these two claims and held that there was a lack of objection on the mechanism of third-party funding.176 In Giovanni, the scope of the NASAM mandate was challenged, but again, the existence of third-party funding itself was not challenged.177 The Tribunal rejected the claims, and held that:

---

171See infra text accompanying notes 170–72.
172See Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011). In that case, 60,000 Italian bondholders brought arbitration claims against Argentina for violating Italy-Argentina BIT. An entity called Task Force Argentina (TFA) was formed by Italian Banks, which had sold Argentina Bonds to Italian citizens. Several bondholders gave a mandate to TFA to institute and manage the ICSID Arbitration on their behalf. Argentina claimed that there was a conflict of interest because TFA had funded the claimant in this case and itself was funded by Italian Banks. Argentina therefore objected to the jurisdiction based on the mandate and consent given by the claimants to TFA, arguing that the arbitration was vitiated by the conflicts of interest of TFA. The tribunal rejected Argentina's allegation, and held that the claims were admissible.
173See Ambiente Ufficio v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, (Feb. 8, 2013). That case involved facts and circumstances similar to those in the Abaclat case. Italian bondholders brought arbitration claims against Argentina for violating Italy-Argentina BIT. The claimants were however funded by NASAM instead of TFA, like in Abaclat. The tribunal rejected the claim, echoing the decision in Abaclat.
174See Giovanni Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, (Nov. 17, 2014). In that case, Argentina challenged the other aspects of the mandate given to NASAM by the claimants with respect to the consent and objected to its admissibility. Argentina did not challenge the existence of the third-party funding.
175See cases cited supra notes 170-71.
176See cases cited supra notes 170-71.
Individual views may differ as to whether third-party funding is or is not desirable or beneficial, either at the national or at the international level, but the practice is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection to the admissibility of a request to arbitrate.\footnote{\textit{Id.} at ¶ 278.}

In \textit{Quasar de Valores v. The Russian Federation},\footnote{See \textit{Quasar de Valores SICAV S.A. v. The Russian Federation}, Award, ¶ 31 (Arb. Inst. Stockholm Chamber of Com. July 20, 2012). In that case, holders of American Depositary Receipts in the Yukos Company raised an arbitration claim, alleging that Russia had expropriated of their investment and violated the Spain-Russia BIT. Claimants received third-party funding from Group Menatep. It was worth noting that Group Menatep also raised an arbitration claim against Russia separately for its shareholding in Yukos Company. Russia claimed that the arbitration was abusive, and the tribunal thus did not have jurisdiction over this case. Claimants had no real stake in the claim. Similarly, the claim was rejected.} unlike the above cases, objection to its jurisdiction was based on the existence of third-party funding. However, the SCC tribunal still rejected the objection, reasoning that:

[T]here is no reason of principle why [the Claimants] were not entitled to pursue rights available to them under the BIT, and to accept the assistance of a third party, whose motives are irrelevant as between the disputants in this case. Ultimately, the Respondent's complaint, in the event its liability is established, can hardly be raised against the Good Samaritan, but rather against its own officials who acted in such a way as to give rise to that liability.\footnote{\textit{Id.} at ¶ 33.}

In a more recent case, \textit{Teinver v. Argentine Republic},\footnote{See \textit{Teinver S.A. v. Argentine Republic}, ICSID Case No. ARB/09/1,Application for Annulment, ¶¶ 66-67 (May 29, 2019), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C520/DS12192_En.pdf.} the Respondent State, Argentina, argued that claimants had assigned their right to a third-party funder after initiating the arbitration. ICSID did not comment on the correctness of the argument, but held that the argument had no impact on jurisdiction since jurisdiction was normally to be assessed as of the date of filing of the arbitration.\footnote{See \textit{id.} at ¶¶ 89-90.} In this case, Argentina...
even asserted that "Burford Funding Agreement was the vehicle of fraud to the ICSID system by allowing a third party, who was not an investor, to act against Argentina." The tribunal found no merit to the argument based upon two reasons: first, the funding agreement was concluded after the case had been initiated and the tribunal's jurisdiction is considered at the time when arbitration has been initiated—thus, the agreement after the case began did not affect the tribunal's jurisdiction. Second, the funding agreement did not provide any assignment of the claim, and the party to the dispute is the investor, not the funder, Burford Capital. Thus, the argument alleging that third-party funding is an abuse to the system has not been entertained in this case, nor in any case so far.

B. The Issue of Allocation of Costs

Tribunals have consistently held that third-party funding arrangements should not affect the allocation of costs.

In Kardassopoulos v. Georgia, RSM Production Corporation v. Grenada, and ATA Construction v. Jordan, the respondents argued that the allocation of legal costs should be affected by the third-party financing arrangement. Tribunals disagreed in all the above cases. In Kardassopoulos, the tribunal commented that it "knows of no principle why any such third party financing arrangement should be taken into

---

183 Id. at ¶ 91.
184 See id. at ¶¶ 91-92.
186 See Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶ 686 (Mar. 3, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C63/DC3353_En.pdf. In that case, the Respondent State argued that it did not have to indemnify the claimants for their legal costs because the claimants were funded under third-party financing arrangement.
187 See RSM Prod. Corp. v. Grenada, ICSID Case No. ARB/05/14, Annulment Proceeding, ¶ 13 (Dec. 7, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C58/DC1350_En.pdf. In that case, unlike most other ordinary cases, the third-party funder funded the Respondent State instead of the claimants. The claimants argued that they did not have to indemnify the State for its cost because the State did not incur any costs. It was funded under a third-party financing agreement and it was the third-party funder who incurred the cost. The Committee disagreed.
188 See ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Annulment Proceeding, ¶ 34–5 (July 11, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C264/DC2212_En.pdf. In that case, the claimants were funded by their law firm under a contingency fee agreement. It was arguable whether a law firm could constitute a "third party." However, the tribunal held that because the claimants had agreed to pay attorney's fees on a contingency basis, they should be entitled to the cost of attorney's fees.
consideration in determining the amount of recovery by the Claimants of their costs." In *ATA Construction*, the tribunal seems to recognise a principle of neutrality on the allocation of costs implicitly when the case involves third-party funding.  

C. The Issue of Security for Costs

There is no clear test for security for costs. Even though respondents cannot apply for security for costs based on the existence of a third-party funding agreement, a third-party funding agreement may still be relevant in evaluating the financial ability of the claimant to pay for costs.

In commercial arbitration, it is clear that the mere existence of a third-party funding agreement alone is not sufficient to secure an order of security for costs. The burden of proof is not shifted to the funded party.

In a treaty-based arbitration, investment tribunals are more reluctant to require claimants to post security for costs, since access to justice is a significant consideration. Normally, the Respondent State has not signed an arbitration agreement with the claimant, and wrongful expropriation of the claimant's assets by the State would put the claimant in a dire financial situation. To successfully apply for an order of security for costs, an applicant must show that there are extreme circumstances, such as elements of abuse, bad faith, or serious misconduct. According to *Guaracachi America, Inc. v. The Plurinational State of Bolivia*, mere existence of a third-party financing agreement alone cannot warrant an order for security for costs.

---

191 *EuroGas Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14; Also see Hayden, *supra* note 1.
192 *Id.*
193 *Id.*
194 *Id.* For example, abuse, bad faith and misconduct is present where a claimant company was deliberately created as a shell company to collect money if the case is won, or if the case is loss, to frustrate the respondent's cost claim.
195 *Guaracachi Am., Inc. v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17; Also, see Hayden, *supra* note 1.
In an exceptional case, *RSM Production Corporation v. Saint Lucia*, the ICSID tribunal did order security for costs because of the proven history of not complying with cost orders.\(^{196}\) The tribunal had decided to order security before taking into account the existence of third-party funding cumulatively.\(^{197}\) Thus, in *EuroGas Inc. v. Slovak Republic*,\(^ {198}\) the tribunal distinguished the situation from that of *RSM Production*. It held that no such exceptional circumstances existed, and mere presence of third-party financing alone did not justify a security for costs order.

It is worth noting that in *RSM Production*, a dissenting arbitrator, Edward Nottingham, suggested that "concerns about third party-funding and security for costs can and should be addressed by the Administrative Council."\(^ {199}\) Another arbitrator, Gavan Griffith, commented that the mere existence of third-party funding was sufficient for ordering security for costs and the burden of proof for not granting the security for costs should be on the funded party.\(^ {200}\) However, this view has been rejected by the tribunal in *South American Silver v. Bolivia*,\(^ {201}\) which further commented that if an order for security for cost was granted based on the existence of third-party funding arrangement only, it would increase the risk of blocking legitimate claims by investors.\(^ {202}\)

### D. The Issue of Arbitrator’s Challenge

In *RSM Production Corporation v. Saint Lucia*,\(^ {203}\) claimant challenged Dr. Gavan Griffith on the ground that he used the words "gambling" and "adventurers" to describe third-party funding. Two other

---

197 See id.
198 Eurogas, supra note 112.
arbitrators rejected the claim and held that there was no underlying bias against third-party funders.204

E. The Issue of Disclosure of Third-Party Funding

When integrity of the arbitration is at stake, a tribunal should be cautious not to give one party an undue advantage over the opposing party, especially when the tribunal is going to order the funded party to disclose its financial interest.205 This is because another party may exhaust the budget of the funded party before the case is ended if the financial interest of the funded party is disclosed.206

In Muhammet Cap v. Turkmenistan, in the Procedural Order No. 2 of 23 June 2014,207 the tribunal refused the request for disclosure made by Turkmenistan but held that the State has the right to request disclosure if there is "additional information to justify the application."208 It affirms that it has an "inherent power to make order of the nature requested when necessary to preserve the rights of the parties and integrity of the process" and order security for cost according to Article 26 of the UNCITRAL Rules.209 Tribunal considered that the following factors may be relevant to justify an order for disclosure:

(a) To avoid a conflict of interest for the arbitrator as a result of the third party funder; (b) For transparency and to identify the true party to the case; (c) For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration; (d) If there is an application for security for costs if requested; and (e) to ensure that confidential information which may

---


205 See Honlet, supra note 19, at 711.

206 Id.

207 Muhammet Cap & Sehil Insaat Endustri ve Tricaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction Under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, ¶ 50 (Feb. 13, 2015).

208 Id. at ¶ 14.

209 Id. at ¶ 9. See also S. Am. Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016) (confirming that the Tribunal had the power to order security for cost under Article 26 of the UNCITRAL Rules).
come out during the arbitral proceedings is not disclosed to parties with ulterior motives.210

In October 2014, the International Bar Association revised and approved its IBA Guidelines on Conflicts of Interest in International Arbitration.211 On 17 March 2015, in EuroGas Inc. and v. Slovak Republic, the tribunal also decided the funded "claimants should disclose the identity of the third-party funder and that third-party funder will have the normal obligations of confidentiality."212

In April 2015, Turkmenistan applied for a disclosure order based on various reasons, inter alia, 2014 IBA Rules on Conflicts of Interest in International Arbitration.213 On 12 June 2015, the Tribunal approved Turkmenistan's request and ordered the funded claimant to disclose the identity of the third-party funder, and for the first time, the terms of funding.214 In the reasoning, the Tribunal commented that it granted the order because:

(i) it was important to ensure transparency as to existence of the third-party funder and the integrity of the proceedings so as to determine whether any of the arbitrators [were] affected by the existence of the third-party funder, (ii) Claimants' ability to pay the State's cost and/ or the existence of a third-party funder were relevant factors for Turkmenistan to consider whether or not it should apply for security for cost, (iii) additionally, Claimants had not denied that they were funded by a third-party and they had not paid the costs order made by the tribunal even though Claimant had funded the annulment proceedings, and finally (iv) the Tribunal was 'sympathetic' to the concern of the Respondent that a third-party would escape from its liability to pay and Claimant

212EuroGas Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures 145 (Mar. 17, 2015).
213See Muhammet Cap & Sehil Insaat Endustri ve Tricaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3, ¶ 2 (June 12, 2015).
214See Honlet, supra note 19, at 708.
would not be able to pay the cost of arbitration.215

In the future, it is foreseeable that more requests for disclosure of third-party funding arrangements will be filed. Tribunals will have to specify the extent of such disclosure in their orders and analyse what is proper to disclose and what is not with regard to the objective of pursuing such a disclosure order.216 The tribunal must also address the following questions:

(i) how should one assess the relationship between an arbitrator who is a partner in a law firm, and a funder who is a partner of the same firm but in different offices than the arbitrator? (ii) should States bear the additional cost involved when claimants have to seek extra funding from the third-party funder so as to pay the security for cost? (iii) Will tribunals take into account States' past conduct in complying with decisions on costs or awards? (iv) If a State is funded by a third party who has a conflict of interest with the Claimant, such as a competitor of the Claimant, should the State potentially post security for costs, and if so, under what conditions?217

Apart from the above, there are a lot more questions that tribunals will have to deal with in the future.

F. The Issue of Discontinuation of Arbitration

In the RSM Production Corporation v. Saint Lucia dispute,218 the Claimants' funding arrangement was terminated after the Tribunal ordered Claimants to post security for costs. Claimants were thus not able to post the security and the Respondent requested discontinuation of the proceedings.219

215Muhammet Cap & Sehil Insaat Endustri ve Tricaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3, ¶¶ 8–12 (June 12, 2015).
216See Honlet, supra note 19, at 710.
217Id. at 712.
218RSM Prod. Corp. v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security Costs, ¶ 90 (Jan. 15, 2016). RSM failed to comply with a security for cost order ($750,000).
219Id. at ¶ 30.
The Tribunal has the power to order discontinuation because of its inherent power to protect the integrity of the proceedings, according to ICSID Arbitration Rule 45, and case law of the International Court of Justice, and to maintain proper administration of justice, even though conditions for discontinuation were not met in this instance. In RSM v. Saint Lucia, respondents alleged that claimants acted against good faith and destroyed the integrity of the proceedings by failing to abide by the Tribunal's decisions. Furthermore, continuing proceedings against the failure on the part of the claimant to comply with security for costs order the intended purpose of posting security for costs would be lost. There is no imbalance between Claimants' right to access justice and Respondent's interests if the arbitration is discontinued because of the modest amount of security.

The Claimant asserts that the proceedings must continue because none of the conditions for discontinuation pursuant to the Rules and the ICSID Administrative and Financial Regulations apply here. The Respondent's references to the case law are irrelevant, as the present cases are heard by ICSID instead of the International Court of Justice. Rule 34(3) provides that the sanction for non-compliance with an order about the production of evidence is not the discontinuance of the proceedings, but the formal taking note of the party's failure and of any reasons given for such failure. There is no precedent of sanction by discontinuance. It also did not pursue its claim abusively, as the non-compliance is not a question of bad faith or unwillingness.

The Tribunal affirmed its power to sanction non-compliance of a security-for-cost order but did not endorse the grounds offered by the Respondent for immediate discontinuation. It "enjoys significant scope to fill procedural gaps so long as it respects the ICSID Convention's
obligations." It also enjoys power to impose sanctions for non-compliance. The lack of any enforcement powers for provisional measures under the ICSID Convention does not rule out the possibility that sanctions could be applied in the case of non-compliance. The most suitable sanction here should be to vacate its schedule, because other alternatives, including damages or a negative inference, might not preserve St. Lucia's "asserted right to claim reimbursement of costs." The Tribunal made clear that it will look favourably on a future request by St. Lucia to discontinue the case if the Claimant has not within six months posted the security. "An indefinite stay would be contrary to procedural fairness" and "would simply hinder Claimants' ability to seek annulment of the Tribunal's earlier security-for-cost order." Similarly, any indefinite suspension "would not be fair to the Respondent and its desire for resolving the underlying dispute over offshore energy assets." St. Lucia's government would also be "burdened by uncertainty if it were merely granted a future costs award, but left to try to enforce this against RSM's third-party funder."  

IV. FURTHER CONCERNS: MAPPING THE ISSUES INDIRECTLY RELATED TO THIRD-PARTY FUNDING

Apart from legal issues raised before tribunals directly related to third-party funding agreements, some other specific legal problems can also be brought before tribunals. Such specific issues are not directly challenging third-party funding agreements; however, the presence of a third-party funding agreement raises concerns. Here, those issues will be addressed and how tribunals decide on such specific legal issues in the presence of third-party funding agreement will be analysed. This section consists of six subsections. Tribunal's attitude towards (1) stay of enforcement of an ICSID award, (2) breach of freezing orders, (3) allocation of costs, (4) security for costs, (5) tribunal's power to order

---

230 Id. at 2. 
231 Peterson, supra note 225, at 2. 
232 Id. at 2-3. 
233 Id. at 3. 
234 Id. 
235 Peterson, supra note 225, at 3. 
236 Id. 
237 Id.
defaulting state to post its share of procedural costs and (6) other specific issues.

A. Tribunals' Attitude Towards Stay of Enforcement of an ICSID Award

In Adem Dogan v. Turkmenistan, the Tribunal held that investors' duty to pass a portion of the recovery sum to a third-party funder is a reason not to lift a stay of enforcement of that award.

The Tribunal ruled against Turkmenistan and ordered Turkmenistan to pay Dogan in mid-2014. Turkmenistan thus requested annulment of the award and has requested a temporary stay of enforcement since the request for annulment has been filed.

An ad-hoc committee refused to lift the stay of enforcement because of the Claimant's arrangements with its lawyers and a third-party funder (Omni Bridgeway) that any recovery sum should be transferred to those parties. If the award were to be enforced before the decision on annulment and the award were to be ultimately annulled, efforts by Turkmenistan to recoup its funds would be complicated. The ad-hoc committee was also concerned about the fact that private individuals and corporate shell companies can be stripped of assets when a claimant is an individual who can relocate physically and remove his assets with relative ease from one jurisdiction to another.

The ad-hoc committee also held that the Respondent should be entitled to a conditional continuation of stay as long as the respondent has offered "reasonable assurance" with respect to the ultimate honouring of the award. If there is 'any doubt' in this context, then Turkmenistan should warrant a posting of financial security. The Committee also states

---

239 Id. at ¶ 282.
240 Id. at ¶ 1.
241 Id.
243 Id.
245 Id.
246 Id.
that Turkmenistan is entitled to pursue post-arbitration remedies.\textsuperscript{247} Yet, the Committee also commuted that Turkmenistan appeared to use such tactics to "delay enforcement" and oblige award-creditors to engage in settlement negotiation.\textsuperscript{248}

Though the Committee has the discretion to consider Turkmenistan's record of complying with non-ICSID awards, the Committee was of the view that Turkmenistan did comply with the order and had ultimately paid all the awards.\textsuperscript{249} However, normally in other cases, committees have expressed concerns about the commitment of a given respondent state to satisfy an ICSID award promptly in the event that it is not annulled.\textsuperscript{250}

In view of the request of a stay of enforcement and the record of Turkmenistan in complying with arbitral awards, the Committee ordered Turkmenistan to post an irrevocable and unconditional bank guarantee from an international bank.\textsuperscript{251}

B. Tribunals' Power to Order Defaulting State to Post its Share of Procedural Costs

In the \textit{Valle Verde v. Bolivia} dispute,\textsuperscript{252} in view of its increasingly precarious financial situation, the Claimant lodged a provisional measures request for an order that Venezuela pay its share of prior advance-costs requests (totalling $375,000), which the Claimant had previously posted so as to avert the discontinuation of the proceedings.\textsuperscript{253}

In the exchange of legal arguments, if the Request is rejected, "it would have no choice but to recur to a third-party funding," a recourse that would be "highly expensive, uncertain, and quite remote" since, due to the risk of default, "very few aid [...] funds are willing to fund disputes against

\textsuperscript{247}Id. at 3.
\textsuperscript{248}Peterson, supra note 242, at 3.
\textsuperscript{249}Luke Eric Peterson, \textit{Turkmenistan Must Post Bank Guarantee in Order for Stay of ICSID Award to be Kept in Place During Annulment Phase}, IAREPORTER 1, 1–2 (Nov. 26, 2014), \url{https://www-iareporter-com.easyaccess1.lib.cuhk.edu.hk/arbitration-cases/adem-dogan-v-turkmenistan/}.
\textsuperscript{250}Id. at 2.
\textsuperscript{251}Id. at 1-2.
\textsuperscript{252}Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/18, Decision on Provisional Measures, ¶ 56 (Jan. 25, 2016).
Venezuela," and they are only willing to do so in exchange for an "extremely high percentage on the indemnification granted." The dispute would also be aggravated in a significant way due to these extremely high funding costs. The tribunal opined that the Claimant's request should be rejected, as this request "does not meet any of the essential requirements for the adoption of this type of measure: (1) the Claimant has not identified the alleged protected right in connection with the main claim, and there is no obligation that a State make an advance payment of costs (2) there is no urgency, since the funds provided by the Claimant seem to be enough for the Tribunal to render a decision on its jurisdiction and the Claimant has just retained new counsel, and (3) there is no risk of irreparable harm, since the Claimant admits that, without this measure, it would have other ways of obtaining the necessary funds. The Respondent adds that, in bringing this arbitration, "the Claimant should have taken into account the costs that it would be required to pay." The Tribunal rejected the Claimant's argument. Though procedural rights such as the right of defense have been deemed worthy of protection through provisional measures, the Claimant has not proven the existence of circumstances that could impede the exercise of those rights in this case. "Particularly, the availability of other sources of funding . . . shows that its financial difficulties –even if they were proven– would not be an impediment for the continuation of the proceeding." Therefore, the Tribunal considers that the legal requirements for the recommendation of the provisional measures sought in the First Request would not have been met had it been considered admissible."

C. Tribunals' Attitude Towards Breach of Freezing Order

In the dispute KT Asia Investment Group B.V. v. Kazakhstan, the Respondent alleged that funding of the arbitration by the third party would breach the freezing order, but the tribunal left the question open. However, previously the Court of Appeal of England decided on that issue

---

255Id. at ¶ 61.
256Id. at ¶ 66.
257Id. at ¶ 95.
259Id.
260Id. at ¶ 89.
that the claimant's rights under the funding agreement are not assets for the purposes of the freezing order.262

The tribunal considered the issue and held that the funding of the arbitration should not be in breach of a court order.263 There was a correspondence in which the Claimant stated that it had been funded in the same way that Mr. Ablyazov had been funded in the English proceedings.264 "The Claimant, however, drew attention to the decision of Mr. Justice Christopher Clarke . . . that rights under loan agreements with third-party funders were not assets within the meaning of the freezing order and thus that it was not a breach of the order to fund the arbitration in this way."265 Additionally, "after complying with their own 'know your client' procedure, acting solicitors had no reason to believe that the funds advanced by Green Life were not independent of Mr. Ablyazov."266

In the English court proceedings, "questions arose whether Mr. Ablyazov was in breach of the freezing order by borrowing sums from third parties to fund the litigation and whether the persons from whom he borrowed were independent third-party lenders (initially Wintop Services Limited and Fitcherly Holdings Limited and subsequently Green Life International SA)" or were really Mr. Ablyazov "himself in another guise."267 The court was later asked to "decide whether the rights under the loan agreements between Mr. Ablyazov and Wintop, and Mr. Ablyazov and Fitcherly to borrow large sums of money and direct that they are paid by the lender to third parties (in particular, Mr. Ablyazov's lawyers) constituted assets of Mr. Ablyazov for the purposes of the freezing order. . . Mr. Justice Christopher Clarke held that such rights under loan agreements with third-party funders were not assets for these purposes, and that exercising them did not constitute disposing of or dealing with an asset."268

---

262JSC BTA Bank v. Ablyazov, [2013] EWCA Civ. 928, (Eng.).
264Id.
265Id.
266Id.
268Id. at ¶ 47.
D. Tribunals' Attitude Towards Allocation of Costs

In the award *Giovanni Alemanni v. Argentina*, the Tribunal discontinued the proceedings since the Claimant and Respondent failed to pay the advance on costs requested by the Arbitrators. Concerning the allocation of costs, a tribunal is obliged to promote the cost-efficiency of proceedings, including through the use of costs-apportionment orders that hold parties accountable for inappropriate claims or defence tactics.

The Tribunal's subsequent reading of Article 61(2) of the ICSID Convention and the relevant provisions of the ICSID arbitration rules (Articles 28(1) and 47(1)) led it to find that it lacked authority to make such costs orders outside the confines of an arbitral award. Even if the Tribunal had the power to award costs, it seriously doubted that it should do so since (1) parties had failed to corporate with the Tribunal, (2) bringing two identical arbitrations (*Ambiente*) had incurred substantial additional costs to no apparent purpose and (3) it had "no way of knowing whether the proceeds of any costs award would have found their way into the pockets of the Claimants themselves or the litigation funders."272

E. Tribunals' Attitude Towards Security for Costs

Investment arbitration tribunals have always been reluctant to order security for costs. Since the first case, where the security for costs order was requested by Spain, tribunals have constantly rejected such requests and set high thresholds. Recently, in some cases, security for costs orders have been requested because the Claimant was funded by a third-party funder. However, the Tribunal rejected such requests in this case as well, by repeating the reasoning in previous cases and stressing that security for costs would be granted only "in the most extreme case" and the "mere

---

270Id. at ¶ 26.
271Id. at ¶ 25.
272Id. at ¶ 26.
273Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2 (Oct. 2, 1999).
275Libananco Hldgs. Co. Ltd. v. Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 35 (June 23, 2008).
276Id. at ¶ 57.
existence of [a] third-party funding” agreement cannot be a reason for security for costs orders.

Until 2014, tribunals constantly rejected security for costs orders, and it was in that year, for the first time in ICSID history, that security for costs order was granted.278 In that case, interestingly, a third-party funder was present, and third-party funding agreement was the most controversial aspect of the case because all Arbitrators had different opinions on the effect of third-party funding for granting such orders.279 In investment arbitration, however, the RSM case remains the sole case where security for costs order has been granted.280 However, since then, requests for such orders have increased, and it can be concluded that one of the most popular reasons to request such orders is the existence of third-party funding agreements. Yet, no other security order has been granted.

Since the RSM case, there has been no other example of granting security for costs orders. One year after the RSM case, the tribunal expressed the opinion that "[t]he Tribunal is of the view that financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs."281 The Tribunal also pointed out that in the RSM v. Saint Lucia case, the reason was not only that the party was funded but that it also had a proven record of non-compliance.282 In South American Silver Limited v. Bolivia, the Tribunal referred to the Eurogas case and unanimously rejected the security for costs application.283 In another example, Italy requested a security for costs order against Eskosol, where the Claimant was funded by a third-party funder.284 The Arbitral Tribunal concluded that because

278 See supra text to note 34.
279 See supra note 34 and accompanying text (explaining that apart from the award, assenting and dissenting opinions rendered stated different opinions about the effect of third-party funding for granting such orders).
281 Eurogas Inc. v. Slovak Republic, ICSID Case No. ARB 14/14, Procedural Order No. 3 Decision on the Parties’ Requests for Provisional Measures, ¶ 123 (June 23, 2015).
282 Id. at ¶ 122.
the Claimant had ATE insurance, which covers costs against Eskosol up to €1 million, a security for costs order was neither necessary nor urgent at that point.\textsuperscript{285}

In conclusion, tribunals remain cautious about granting security for costs orders, and the mere fact that parties are funded by a third-party funder is not enough for tribunals to grant security for costs orders.\textsuperscript{286}

\section*{F. Other Specific Issues}

Third-party funding may raise other issues apart from those stated previously. For example, the degree of control by third-party funders over proceedings or the relations between the client's lawyers and funders are the first issues that come to mind. However, those potential issues are not discussed by arbitral tribunals. It is, however, important to keep them in mind since they might be discussed in the future. Tribunals have been asked to enjoin ongoing criminal proceedings against the claimant, and an array of parties including the claimant's third-party funder, in the respondent state.\textsuperscript{287} While this significant development has been discussed extensively;\textsuperscript{288} here, it is briefly discussed specific to third-party funding agreement issues. The issue, in that case, had arisen regarding criminal procedures Argentina initiated against the Claimant, Claimant's subsidiary and legal representatives, and the Claimant's third-party funder.\textsuperscript{289} What is interesting here is that according to the Claimant, the respondent state started criminal proceedings to hinder the Claimant's ability to pursue its claim "by exerting undue pressure on Claimants to desist from the claim, on their counsel to desist from representing their clients in this arbitration, and on their funder, Burford, to cease to provide funds to Claimants."\textsuperscript{290} The claimant requested provisional measures from the Tribunal to stop those criminal proceedings.\textsuperscript{291} The respondent, on the other hand,
submitted that "Claimants failed to link such facts with the requirements to be met for granting such measures." 292

The Tribunal ordered that the respondent refrain from publicising complaints, criminal prosecution and any other matters related to this arbitration, but deferred its decision regarding provisional measures to suspend criminal proceedings. 293 The reasoning behind this decision regarding the third-party funder, Burford, is that the Tribunal thought that there is no indication that those criminal proceedings would affect Burford's willingness or ability to fund the claimants. 294 In the final award, the Tribunal also concluded that "none of these proceedings proves any illegality of Claimants' investments." 295 Also, the Tribunal further elaborated that "[e]ach [p]arty must prove the facts it alleges before this Tribunal and the findings of other courts or tribunals will only be of limited, if any, assistance in that regard." 296

It is interesting to see how different scenarios of third-party funding relations might arise in investment arbitration tribunals. Parties can use third-party funding arrangements against each other in different platforms. Further consideration must be given, however, to what the limit of the state's power to initiate criminal proceedings or other types of investigations is if the sole purpose is to discourage claimants from pursuing their cases.

V. RESHAPING THIRD-PARTY FUNDING: WILL THE REFORM OF ISDS AFFECT THIRD-PARTY FUNDING?

UNCITRAL has six different working groups today, and those groups are working on different subjects according to their agenda. 297 Among them, Working Group III has worked on four subjects and is

293Id. at ¶ 239.
294Id. at ¶ 219.
295Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award, ¶ 367 (July 21, 2017).
296Id. at ¶ 368.
currently working on investor-state dispute settlement reform.298 The group is working with the purpose of possible reforms on the current investment dispute settlement mechanism.299 According to the mandate, the working group has three objectives: "(a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission."300 Working group III meets twice per year in New York and Vienna.301 Government representatives, as well as observers from many different institutions, can join.302 After this brief introduction of Working Group III, the relevance of this group in this article is the effect of third-party funding on ISDS reform talks.303

Working Group III had six sessions on Investor-State Dispute Settlement Reform, where third-party funding was also discussed, and the next meeting is scheduled between March 30 to April 3 in New York.304 The working group consists of member states, non-member states, intergovernmental organizations, and invited non-governmental organizations, who may also attend as observers and represent the views of their organizations.305 Thus, the working group has a broad multilateral structure. Third-party funding has been raised as a concern since the first session of the working group as posing a "structural imbalance" between investors and states since such funding is generally not available to states.306 Third-party-funding-related issues are not limited to costs, but also include conflicts of interest, and collection and enforcement of costs awards.307 Lastly, third-party funding raises concerns over the transparency

299 Id.
300 Id.
302 Id.
303 Id.
304 Id.
306 See UNCITRAL Session 51 Report, supra note 80, at ¶¶ 57, 64.
307 Id. at ¶ 69.
of the system, and transparency will be considered when addressing, in ter alia, third-party funding. These concerns raised in the working group meetings and submissions from states and intergovernmental organisations regarding third-party funding are assessed in this note.

In this section, third-party funding (1) in the reports of Working Group III, and (2) in submissions from the states are analysed in two subsections.

A. Third-party funding in the Reports of Working Group III

In the first session of the Working Group on ISDS reform, third-party funding was raised as a concern. It was stated that:

Development of third-party funding giving rise to ethical issues (such as possible conflicts of interest between the arbitrators and the funders and confidentiality duties of the funder), as well as procedural concerns (such as the possible control or influence of the funder on the arbitration process, and the allocation of costs).

The first session continued with the suggestion of giving states more options in ISDS such as counterclaims. This can have "positive impacts on, inter alia, third-party funding." TPF is not available to States. TPF has been a significant concern, and TPF is related to not only costs but other issues such as conflict of interest and cost orders. Transparency is the main issue in terms of third-party funding, the appointment of arbitrators and the compensation of arbitrators.

In the next session, again, third-party funding was expressed as a concern. Conflict of interest was suggested to be addressed in terms of third-party funding since double-hatting might occur. Third-party funding was featured in a separate section in the report, which stated that the "practice raised [serious] ethical issues" such as funders having excessive control over the case, "which could lead to frivolous claims and

---

308 Id. at ¶ 88.
309 Id. at ¶ 44.
310 See UNCITRAL Session 51 Report, supra note 80, at ¶ 44.
311 Id. at ¶ 57.
312 Id. at ¶ 69.
313 Id. at ¶ 88.
315 Id. at ¶ 79.
discouragement of settlements."

It was said that third-party funding is a useful tool to ensure access to justice, while the opposite view was also expressed. The general agreement at the end of this meeting was to add third-party funding to the list of concerns for consideration.

The Secretariat also prepared a note on third-party funding. This note gives a complete background on the subject regarding what has been discussed so far. In another note by the Secretariat, the need for harmonized rules or regulation of third-party funding was expressed and the impact of third-party funding on ISDS procedure including security for costs, allocation of costs and transparency was discussed. The working group considered third-party funding to address the financial burden of parties by harmonizing rules.

In another note by the Secretariat on costs and duration, exploring the use of third-party funding for states was discussed as another way to address concerns over third-party funding.

The fact that states might not benefit from third-party funding is addressed as a "structural imbalance between states and investors." In the last session of Working Group III, after repeating all concerns regarding third-party funding in previous sessions, it was decided "that reforms be developed by UNCITRAL in order to address concerns related to the definition and the use or regulation of third-party funding in ISDS."

B. Third-Party Funding in Submissions from the States

It is important to look at what states, unions and international organizations have submitted regarding third-party funding. Brazil does

---

316 Id. at ¶ 89.
317 Id. at ¶ 91.
321 Id. at ¶ 63.
323 Id. at ¶ 16.
not mention third-party funding in its submission and suggests a more interactive dispute settlement mechanism.\textsuperscript{325} Colombia suggests an outline for potential reforms in ISDS and suggests an article relating to third-party funding.\textsuperscript{326} The government of Turkey submitted that "third-party funding should be transparent and subject to clear regulations," while funding contracts should be accessible for counsels and arbitrators, and the premium fees that funders can get should be limited.\textsuperscript{327}

Indonesia and the European Union said nothing on third-party funding, neither positive nor negative. The European Union simply stated that the Union and its member States are "open to including . . . solutions to issues related to third-party funding should the Working Group decide that reform is desirable."\textsuperscript{328} Intergovernmental organizations (ICSID, PCA) said nothing in their second submission. In its first submission, however, ICSID submitted that exploring potential provisions for third-party funding is among the topics for potential ICSID rules amendment.\textsuperscript{329}

In the summary of the inter-sessional meeting submitted by the Dominican Republic, the practice of third-party funding was noted as a great concern, and it was on the agenda of the Working Group in its 37th meeting.\textsuperscript{330} It was further submitted that disclosure is important to prevent

---


potential conflict of interests and the excessive control by a funder that might interfere with settlements.\textsuperscript{331}

In another summary, of the inter-sessional meeting submitted by the Government of the Republic of Korea, it is suggested that the regulation of third-party funding should be considered with regard to existing doctrines such as "the doctrines of maintenance and champert, confidentiality and preservation of privilege."\textsuperscript{332} Regarding the definition of third-party funding, IBA Guidelines on Conflicts of Interest, the ICCA–Queen Mary Task Force Report on Third-Party Funding and the proposed amendments to the ICSID Arbitration Rules were mentioned as a reference. While the meeting accepted there was a need for such a funding market, participants discussed conflict of interest, security for costs and the possibility of cost awards against third-party funding.\textsuperscript{333} Requirement of disclosure of third-party funders, and remedies for any non-compliance with disclosure, and other details that need to be disclosed remain open for discussion.\textsuperscript{334} Also, the possibility of third-party funding of mediation, and the imbalance between states and investors in terms of accessing third-party funders, since states have limited options to raise counterclaims, are stated.\textsuperscript{335}

The Government of Morocco submitted longer comments on third-party funding. Morocco submitted that while "third-party funding is an important tool used by many investors,"\textsuperscript{336} it "cannot play a constructive role in ISDS unless it is regulated."\textsuperscript{337} Morocco even furthered its argument by saying that until such regulation is provided, third-party funding should be prohibited as part of the current reforms.\textsuperscript{338} If such prohibition does not happen through ISDS reform, claimants using third-party funding must provide security for costs since they do not have enough financing to cover adverse costs.\textsuperscript{339} Morocco is making several points. First, it accepts that

\[\text{\textsuperscript{331}}\text{Id. at ¶ 40.}\]
\[\text{\textsuperscript{333}}\text{Id. at ¶ 36.}\]
\[\text{\textsuperscript{334}}\text{Id. at ¶ 37.}\]
\[\text{\textsuperscript{335}}\text{Id. at ¶ 38.}\]
\[\text{\textsuperscript{337}}\text{Id. at ¶ 28.}\]
\[\text{\textsuperscript{338}}\text{Id. at ¶ 30.}\]
\[\text{\textsuperscript{339}}\text{Id. at ¶ 33.}\]
third-party funding is important for many investors. Second, there is need for regulation to prevent potential abuses. Third, as an extreme suggestion, until such regulation is provided, third-party funding should either be prohibited or security for costs orders should be granted whenever a third-party funder exists. The third suggestion seems problematic, since not all funded parties have financial difficulties. Some funded parties use third-party funding as part of their financial strategy even though they have enough money in their accounts to pay adverse costs. Moreover, banning third-party funding would mean cutting an important tool for investors, as accepted by Morocco, or even sometimes the only tool to access ISDS.

The Government of Thailand also suggested regulation for third-party funding. It is noted in their submission that, while third-party funding may facilitate access to justice and improve security for costs, concerns regarding conflict of interest between funders and arbitrators can danger the impartiality of arbitrators and the legitimacy of international arbitration proceedings. Thailand concludes that regulation can minimize such concerns and maximize the advantages of third-party funding. The Government of Thailand in its second submission, again, suggests regulation for third-party funding for the reasons of transparency, conflict of interest or other reasons as deemed appropriate. Three states, Chile, Israel and Japan, also suggested disclosure to address concerns over

---

341 See id. at ¶ 29.
342 See id. at ¶ 30.
344 Id.
third-party funding. Costa Rica also submitted that there is a need for rules on third-party funding.

VI. CONCLUSION

Many countries have already accepted third-party funding, and ancient doctrines such as maintenance and champerty have lost their dominance in common law jurisdictions. Even some jurisdictions where TPF was not possible a few years ago have passed legislation to make TPF available. More countries now accept this financial tool, and companies are in need of such a financial option to support their cases. Of course, this development does not come problem-free. National courts already have a relatively high number of cases dealing with funding arrangements in various aspects in different jurisdictions, especially well-developed funding jurisdictions such as the U.S., the U.K., and Australia. However, investment tribunals have also started discussing funding arrangements on different bases. How TPF changes the investment regime is a controversial issue, and different working groups and publications already have been made.

As a result, TPF is a positive development, but more options for the parties and regulations and guidelines are needed. It is true that both the use of third-party funding and, with its help, the number of disputes brought before investment arbitration tribunals, have increased. When the parties have the opportunity to bring their cases without any cost, this gives them confidence to bring their claims. Is this an abuse of the system? The answer should be no, because the investment arbitration system is a mechanism available to parties to pursue compensation if there is any action by the state that is against the law. If the state has taken such action, it should be responsible. Unfortunately, some states have managed to escape their illegal actions because investors had no money to bring their claims against them. Now, thanks to this new financial development, states can no longer act with impunity when claimants do not have enough money or do not want to initiate proceedings because of the financial risk. Now, with the help of third-party funding, they can initiate a case more


bravely when they have a meritorious one. If states, on the other hand, have breached the law and mistreated investors or have taken their assets illegally, then they must face the responsibility. Thus, third-party funding actually brings justice to the investment regime by backing up parties who otherwise would not have the confidence to bring a case because of financial difficulties.

This development in the current investment regime is important at least for several reasons. First, it facilitates investment regimes, and more parties have access to investment arbitration. Second, it does not encourage frivolous cases, because through the funder's due diligence, if a case is not strong enough, it is eliminated before accessing the investment regime. Third, it gives a signal to all governments that there will be consequences for any illegal activity and, now, no matter the financial situation of the investor, it has a chance to seek compensation for its loss. This will strengthen the rule of law in general. Fourth, it creates new opportunities for lawyers, companies, and even states. Lawyers now have a new career path, companies have more financial options, and states can even benefit from third-party funding because of the different financial options third-party funding companies provide. Fifth, it encourages settlement. The whole idea of the investment regime is to boost investment across countries. Therefore, disputes are not useful for any party in the long term. If funders involved and states know that investors' money will not run out because of the funder, they can offer a good settlement deal, so disputes might be efficiently settled before arbitration is started. The list goes on. Overall, funding is now a part of the investment regime. This option is available for all parties and it facilitates the system in many different aspects. The future should be a more regulated market, with more access to the dispute settlement system, greater involvement, and more responsible behaviour by states toward foreign investors.

The reality of third-party funding is that it is a well-established market in many jurisdictions. Third-party funding is also used in commercial arbitration, but it has not raised the same ethical issues that it has in investment arbitration. Because transparency is an important aspect of investment arbitration, there is a demand for a disclosure requirement for third-party funding arrangements, while in commercial arbitration, no public interest exists, and it is between two commercial companies.

TPF does not constitute a threat to ISA. Perhaps more regulated practice is on the way. Third-party funding facilitates the investment regime and enables parties' access to justice. If parties have enough financial resources, in a way, financial freedom over their cases, they can
use the system more efficiently. Thus, TPF plays a big role in that, and facilitates the system in this way.

Third-party funding has been raised as a concern in Working Group III meetings. However, even though there was an extreme suggestion of completely banning third-party funding from ISDS, the general tendency is leaning towards regulating it. Banning third-party funding seems extreme and inconsistent with the legal situation of third-party funding in many jurisdictions in litigation and arbitration. Another criticism against third-party funding is an imbalance between investors and states due to the fact that funding is generally an option for investors, not states. This might not be true due to the developing nature of the funding market and more options, not only for funders but also for states. Funders create more solutions in terms of financing their cases. Certain issues related to third-party funding, such as conflicts of interest and transparency concerns, can be addressed by disclosure. Other issues, such as the liability of third-party funders from adverse cost orders, can be resolved with a Code of Practice and ensuring that all third-party funders follow this Code, otherwise, they will face sanctions such as being barred from funding any case in the ISDS system. To increase the use of third-party funding and its utilization, regulation seems a good solution.

***