Disclosure of Third-Party Funding in Commercial Arbitration

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ABSTRACT

Third-party funding used to be an unknown phenomenon to the majority of arbitration scholars and practitioners but, over the past decade, the phenomenon has entered the arbitration scene and become subject to significant attention. Today, arbitral proceedings may involve sophisticated funding arrangements. Such arrangements may promote access to arbitration and entail other advantages, but when they remain unknown to the arbitrators and the funded party's opponents, they may give rise to a series of practical issues concerning, inter alia, costs and conflicts of interest. When a party has raised funding from a third-party funder, the arbitrators and opponents need to know about it. A series of practitioners and academics have contributed to the general field of third-party funding in arbitration. They have examined the prevalence of the phenomenon and identified the issues associated with it. However, only a few have provided practical and operational solutions to these issues. The article explains how to solve the issues by way of disclosure. It examines the consequences of compelling a funded party to disclose its funding arrangements, and it examines how to adopt and construct a duty of disclosure in the most feasible manner. The article thereby contributes to the development of legal and institutional tools to tackle the issues associated with third-party funding in arbitration.

1. INTRODUCTION

Third-party funding has been subject to attention in the arbitration community over the past few years.[1] The phenomenon has become increasingly prevalent and has consequently given rise to unprecedented practical and procedural issues in arbitration.[2] Does the existence of an unknown funder disqualify an arbitrator? Should the funding arrangement influence the allocation of costs and decisions on security for costs? What is the accepted extent of the funder's influence on the funded party?

Questions as these arise on an increasingly frequent basis in practice, and they have resulted in numerous articles and blog posts as well as two handbooks and one published dissertation.[3] The aim of this article is not

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[1] See e.g. Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Wolters Kluwer 2016); Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2012). In 2013, the ICCA and Queen Mary, University of London established the ICCA-Queen Mary Task Force on Third-Party Funding whose work culminated in the ICCA-Queen Mary Task Force Report on Third-Party Funding published in April 2018.

[2] Goeler (n 1); Nieuwveld and Sahani (n 1).

[3] Goeler (n 1); Nieuwveld and Sahani (n 1); Nikolaus Pitkowitz (ed), *Handbook on Third-Party Funding in International Arbitration* (JurisNet 2018). See also Burcu Osmanoglu, 'Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' [2015] Journal of International Arbitration 325 ff.;

to answer the relevant questions altogether, but to answer a specific practical question related to all of them: is it time to make parties disclose their sources of funding? A thorough discussion of this question will help arbitration institutes and other arbitral regulators develop their rules and guidelines on third-party funding in the best possible way.

First, the article briefly examines the *concept* of third-party funding (section 2). Then, it identifies the *existing legal and institutional framework* of the disclosure of third-party funding (section 3). The article discusses the *feasibility* of duties to disclose third-party funding (section 4) and the possible ways to *adopt* (section 5) and *construct* (section 6) such duties. Finally, the article concludes that it *is,* in fact, time to make parties disclose their sources of funding, but only in particular ways (section 7).

2. THE HYPE AND HYSTERIA ABOUT THIRD-PARTY FUNDING

Despite its spot in the limelight, third-party funding is an ambiguous concept. To understand the underlying phenomenon and the increasing attention it gathers, the *concept* of third-party funding needs to be defined (section 2.1); its *recent developments* need to be addressed (section 2.2), and the compelling *risks and benefits* associated with third-party funding need to be identified (section 2.3).

2.1. DEFINING THE CONCEPT

Resolving a legal dispute involves many costs. In arbitral proceedings, the parties are required to remunerate the arbitrators and pay for their meeting facilities, catering services, and transportation. In addition, they might need to remunerate an administering institution and a number of experts. Typically, the parties will also need to spend significant sums on legal representatives. For the individual party, these costs may cause severe harm.

Generally, the costs associated with international arbitral proceedings are considered high. This particularly applies to the losing parties, because arbitral tribunals tend to allocate costs based on the

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Austrian Yearbook on International Arbitration 2017 (MANZ'sche Verlags- und Universitätsbuchhandlung 2017) 12; James Rogers and Matthew Townsend, 'CIETAC Hong Kong Consults on Draft Guidelines on Third Party Funding' (*Kluwer Arbitration Blog*, 13 August 2016) <http://arbitrationblog.kluwerarbitration.com/2016/08/13/cietac-hong-kong-consults-on-draft-guidelines-on-third-party-funding/?doing_wp_cron=1594549605.1177089214324951171875> accessed on 12 July 2020; Aren Goldsmith and Lorenzo Melchionda, 'The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction' (*Kluwer Arbitration Blog,* 14 March 2016) <http://arbitrationblog.kluwerarbitration.com/2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding-a-step-in-the-right-direction/?doing_wp_cron=1594549532.4014689922332763671875> accessed on 12 July 2020.

principle of "costs follow the event" more and more often.[4] Facilitating third-party funding enables a party to recover a major part of its costs. Put simply, a third-party funding arrangement means that someone who *is not* a party to a legal dispute provides funding to someone who *is* a party to the dispute.

A third-party may provide several different types of litigation funding and arbitration funding to a party. A large amount of recent literature concerns funding agreements, under which a funder is obliged to fund a party's arbitration costs, and the funded party is not obliged to repay the funded amount but is obliged to pay a fixed or variable amount in case of a favourable result.[5] Such funding agreements constitute a narrow definition of third-party funding.

Other types of funding include *contingency fees*, under which the party's counsel shall only receive its fees if the party wins the case, and *conditional fees*, under which the counsel's fees are reduced if the party loses the case. They also include *traditional loans*, under which a lender funds the party's costs against the payment of an interest rate and *insurance agreements*, under which insurers are obliged to cover possible costs related to pursuing or defending a claim against the payment of premium. Finally, the funding may consist of the *transfer* of the disputed claim to a third party. All of these types of funding arrangements fall under a broader definition of third-party funding.

When it comes to the need for disclosure, one might not need to distinguish between the narrow and broad definitions of third-party funding. However, the narrow definition concerns a specific, increasingly prevalent type of funding. This type of funding is usually comprehensive and hidden in a specific case. Due to these characteristics, arbitrators and parties need to be able to identify the specific type of third-party funding covered by the narrow definition above.

2.2. RECENT DEVELOPMENT

Different types of third-party funding have long been accepted and widely used in the United Kingdom, the United States, and Australia.[6] In international arbitration, the use of third-party funding as covered by the narrow definition is fairly new.[7]

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[4] Decisions on Costs in International Arbitration – ICC Arbitration and ADR Commission Report, ICC Dispute Resolution Bulletin 2015 4 ff.

[5] Bernardo M. Cremades, 'Third Party Litigation Funding: Investing in Arbitration' [2011] TDM 1, 2; Edouard Bertrand, 'The Brave New World of Arbitration: Third-Party Funding' [2011] ASA Bulletin 607, 609; Cento Veljanovski, 'Third-Party Litigation Funding in Europe' [2012] JLEP 405; Osmanoglu (n 3).

[6] Michele DeStefano, 'Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?' [2012] Fordham Law Review 2791, 2819 ff.; Nieuwveld and Sahani (n 1) 75 and 101.

[7] Maya Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' [2011] Minnesota Law Review 1268, 1278; Osmanoglu (n 3) 328; Christopher Bogart, 'Overview

Despite its novelty, the use of third-party funding in international arbitration appears to be growing rapidly. The increased focus on the phenomenon indicates its growing use, but even more so do testimonies from practitioners within the field. James Delaney, who currently manages the global funding broker TheJudge, has stated that the market for funding of arbitration cases "*has probably grown by well over 500 per cent since 2012, in terms of both the number of completed deals and the volume of active funders looking for viable opportunities*".[8] Other practitioners have stated that they have experienced a similar development.[9]

The cause of this development may be the latest financial crisis, which encouraged investors to seek new and more predictable markets.[10] The cause may also be the increasing costs associated with arbitration proceedings.[11] Furthermore, there may be limited opportunities to raise other types of funding in international arbitration, while third-party funding in the narrow sense is not yet subject to heavy regulation in national law and institutional rules.[12]

2.3. RISKS AND BENEFITS

A series of different risks have caused concern about the use of third-party funding in international arbitration. First, the funding arrangement may lead to a commercialization of the arbitration process, ultimately

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of Arbitration Finance' in Cremades and Dimolitsa (eds), *Dossier X: Third-Party Funding in International Arbitration* (Dossiers ICC Institute of World Business Law 2013) 55.

[8] James Delaney, 'Mistakes to Avoid When Approaching Third-party Funders' (*Global Arbitation Review,* 15 April 2014) <https://globalarbitrationreview.com/article/1033321/mistakes-to-avoid-when-approaching-third-party-funders> accessed on 12 July 2020.

[9] Kantor, Mark, 'Third-Party Funding in International Arbitration: An Essay About New Developments' [2009] ICSID Rev. 65; Alexander Brabant and others, 'Third Party Funding in International Arbitration: Practical Consequences and Tactical Considerations' [2016] Int ALR 113.

[10] Steinitz (n 9) 1283 ff.; Valentina Frignati, 'Ethical Implications of Third-Party Funding in International Arbitration' [2016] Arbitration International 505; Khushboo Hashu Shahdadpuri, 'Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory' [2016] Asian International Arbitration Journal 77.

[11] The ICCA-Queen Mary Task Force Report on Third-Party Funding (2018) 18; Susanna Khouri, Kate Hurford and Clive Bowman, 'Third Party Funding In International Commercial And Treaty Arbitration - A Panacea Or A Plague? A Discussion Of The Risks And Benefits Of Third Party Funding' [2011] TDM 1.

[12] Goeler (n 1) 81; Steinitz (n 9) 1278; Victoria Shannon, 'Harmonizing Third-Party Litigation Funding Regulation' [2015] Cardozo L. Rev. 861, 870; Aren Goldsmith and Lorenzo Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (but Were Afraid to Ask)' [2012] Int'l Bus. L.J. 53, 54.

making the process subject to financial speculation rather than a pursuit of justice.[13]

Second, the funding arrangement may encourage arbitral "litigiousness", thereby increasing the number of frivolous claims and unnecessary costly arbitral proceedings that the parties could have avoided by virtue of settlements.[14]

Third, the funding arrangement may increase the costs associated with each case, because the funder and the funded party may be motivated to maximize claims and increase the extent of procedural measures in order to put pressure on the funded party's opponent.[15]

Fourth, the existence of a third-party funder may give rise to conflicts of interest. Due to the funder's inevitable interest in the outcome of the case, certain relations between a funder and an arbitrator may give rise to justifiable doubts about the arbitrator's impartiality and independence.

The funding arrangement may also reduce the funded party's control of the process for the benefit of the funder's control of the process. Having invested substantial amounts of money in the case, the funder's desire to control the process may be significant and obvious.

Finally, due to the funder's desire to control the process, as explained above, the arrangement may give rise to conflicts and disagreement within the triangular relationship between the party, its counsel, and the funder, whose individual demands and expectations may be mutually incompatible.

Despite these risks, third-party funding is a beneficial tool in many respects. It improves opportunities for parties to pursue their claims and thereby promotes access to justice. This advantage does not only apply to impecunious parties. Even though a party could afford to pursue its claims itself, the funding arrangements can allow the party to transfer some or all of its financial risks associated with the proceedings to the funder.[16]

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[13] Stephen Jagusch, Third Party Funding of International Arbitrations, in Newman og Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (2014) 217; Edouard Bertrand, 'The Brave New World of Arbitration: Third-Party Funding' [2011] ASA Bulletin 607, 609; Goeler (n 1) 88.

[14] Khouri, Hurford and Bowman (n 13) 2; Cassandra Burke Robertson, 'The Impact of Third-Party Financing on Transnational Litigation' [2011] Case W. Res. J. Int'l L.159, 171; John Beisner, Jessica Miller og Gary Rubin, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding In The United States (2009) 5 f.

[15] Aren Goldsmith and Lorenzo Melchionda, 'Everything You Ever Wanted to Know (but Were Afraid to Ask) – Part Two' [2012] Int'l Bus. L.J. 221, 223; Stoyanov, Marie and Owczarek, Olga, 'Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?' [2015] BCDR International Arbitration Review 171, 191; Goeler (n 1) 87.

[16] Victoria Shannon, 'Judging Third-Party Funding' [2016] UCLA Law Rev 388, 392; Khouri, Hurford and Bowman (n 13) 4; Shahdadpuri (n 12) 82; Derric Yeoh, 'Third Party Funding in International Arbitration: A Slippery Slope or Leveling the Playing Field?' [2016] Journal of International Arbitration 115, 116.

The funding arrangements can also equalize the balance of forces between strong and weak parties. By providing financial strength to a weak party who holds a meritorious claim, the third-party funder can facilitate access to justice for a party who would not otherwise be able to pursue its claim, at least not with the same force.

Finally, the funding arrangements may lead to an early assessment and determination of the case and its possible outcomes. Typically, the third-party funder conducts thorough due diligence before deciding to invest in the case. The result of such due diligence may indicate what submissions and arguments to focus on and what settlement amount to accept.

Accordingly, third-party funding is generally a useful and necessary tool. However, it entails a number of risks. Arbitrators and arbitral institutions need to be aware of these risks, and they need to address them through the necessary steps. A strong third-party funder may influence the process in a way that satisfies none of the parties' interests. If the funder is unknown to the funded party's opponent or the tribunal until a late stage of the proceedings, the existence of the funder may disqualify the arbitrator at this late stage.

Therefore, the question is: how should these risks be addressed? One obvious way to address them is to oblige parties to *disclose* the existence of third-party funders. By making the funded party's opponents and arbitrators aware of the funding arrangements, the funded party can eliminate a significant part of the problems described above.

3. EXISTING DUTIES OF DISCLOSURE

Only a few arbitration laws and institutional rules currently oblige the parties to disclose the existence of third-party funders, and this is due to recent amendments in these laws and rules. Under a revised version of the Hong Kong Arbitration Ordinance, a party shall disclose the existence and identity of a third-party funder.[17] The Hong Kong International Arbitration Centre recently laid down a similar duty in its rules.[18]

Under Article 24 (a) of the 2017 Investment Arbitration Rules of the Singapore International Arbitration Centre, the tribunal may order the parties to disclose the existence of a party's third-party funding arrangement and the identity of the third-party funder. If appropriate, the tribunal may also order the parties to disclose details of the third-party funder's interest in the outcome of the proceedings and possible commitment to undertake adverse costs liability. Under section 49 A (1)

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[17] This follows from section 98T. See also the sanction that follows from section 98 V. In 2018, the Secretary of Justice in Hong Kong published the Hong Kong Code of Practice for Third Party Funding in Arbitration, which contains similar disclosure rules. This Code came into effect on 1 February 2019.

[18] This follows from article 44 of the HKIAC Administered Arbitration Rules that were adopted to take effect from 1 November 2018.

of Singapore's Legal Profession Act, a legal practitioner must disclose the existence and identity of a third-party funder in international arbitration cases.[19]

Furthermore, a series of soft law instruments require the parties to disclose the existence and identity of third-party funders. According to the IBA Guidelines, a party shall disclose "*any relationship, direct or indirect, between the arbitrator and the party … or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration*".[20] Similar requirements are laid down in the CIETAC Guidelines for Third Party Funding in Arbitration, SIAC's Practice Note on Arbitrator Conduct in Cases Involving External Funding and SCC Policy on Disclosure of Third Parties with an Interest in the Outcome of the Dispute.[21]

The Danish Institute of Arbitration *requests* parties to disclose facts and circumstances that may give rise to justifiable doubts about an arbitrator's impartiality and independence, including their sources of funding. The institute does not *oblige* parties to disclose the relations, as it does with arbitrators. Accordingly, the institute does not impose any *sanctions* on a party's failure to accommodate the request. However, if the failure gives rise to additional costs, the tribunal may impose these costs on the party who failed to disclose.

The rules of the newly established institution, Nordic Offshore and Maritime Arbitration Association (NOMA), does not contain provisions regarding third-party funding. However, the door does not seem closed on this issue. It has been pointed out that there is room to adapt to users' wishes and also, that the tribunal may bear the topic in mind when conducting the arbitration *"in such manner as it considers appropriate"*, cf. article 15 of the NOMA rules.[22]

4. IS A DUTY OF DISCLOSURE FEASIBLE?

As explained in section 3 above, certain but few legal frameworks are obliging parties to disclose the existence and identity of third-party

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[19] This follows from Singapores Civil Law (Third-Party Funding) Regulations 2017 section 3.

[20] IBA Guidelines, p. 15.

[21] See the CIETAC Guidelines for Third Party Funding in Arbitration article 3, the SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding articles 5 and 7 and the SCC's Policy on Disclosure of Third Parties with an Interest in the Outcome of the Dispute.

[22] Jacob Skude Rasmsusen and Jens V. Mathiasen, 'Nordic Offshore and Maritime Arbitration Association (NOMA): Could the Nordic Maritime Model Attract a Wider Audience?' (*Kluwer Arbitration Blog*, 26 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/26/nordic-offshore-and-maritime-arbitration-association/?doing_wp_cron=1594548296.6015739440917968750000> accessed on 12 July 2020.

funders in international arbitration. Notably, the revised Hong Kong Arbitration Ordinance and Singapore's Legal Profession Act lay down such obligations. Is this approach a step ahead? Or is it a step too far? The present section will identify the *advantages* (section 4.1), *disadvantages* (section 4.2), and *necessity* (section 4.3) of the approach. Based on these elements, the section *concludes* that duties of disclosure are beneficial and necessary if designed in a proper way (section 4.4).

4.1. ADVANTAGES

If the funded party openly shared its information about its funding arrangements with the other parties, the arbitrators and any arbitral institution involved in the specific case, it would tackle a number of the risks identified in section 2.3 above.

First, the information would reduce the risk of long and costly challenge procedures. In most modern jurisdictions, arbitrators are subject to strict requirements about impartiality and independence.[23] Circumstances that give rise to justifiable doubts about the arbitrator's impartiality and independence can make a party challenge the arbitrator. The tribunal, institution, or national court may then disqualify the arbitrator. If the circumstances arise after the rendering of the award, the party may challenge the award before the national courts.

Ideally, the parties identify any possible conflict of interest, including conflicts caused by funding arrangements, *before* the appointment of the arbitrator and the initiation of the arbitral proceedings. As long as the circumstances are unknown, the potentially challenging party cannot identify the conflict. If the party identifies the conflict and raises the challenge at a late stage of the proceedings, the resources spent on the proceedings so far may be wasted.

Second, disclosing the existence of a funding arrangement will make it easier for the tribunal to determine the need for security for costs.[24] Such security may be necessary to ensure the proper remuneration of the arbitral tribunal. The existence of a third-party funder may indicate that the funded party is impecunious or may soon become so. In that case, security for costs may be necessary for the arbitrators to receive their fees.

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[23] See e.g. LCIA Arbitration Rules article 5(3); UNCITRAL Model Law article 12(2); ICC Arbitration Rules article 11(1); SCC Arbitration Rules article 18(1); SIAC Arbitration Rules article 13(1); HKIAC Administered Arbitration Rules article 11(1).

[24] See regarding this argument the following: Frignati (n 12) 518 ff.; Kelsie Massini, Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs (2015) 7 Y.B. Arb. & Mediation 323, 331 ff.; William Kirtley and Koralie Wietrzykowski, 'Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying Upon Third-Party Funding?' (2013) 30 Journal of International Arbitration 17 ff.; The ICCA-Queen Mary Task Force Report on Third-Party Funding (2018) chapter 6. The ICCA-Queen Marty Task Force concluded that the existence of funding is not generally relevant to determinations on security for costs, but examines exceptions that may exist.

Third, the disclosure may help the tribunal to allocate the costs between the parties.[25] This may be the case regardless of the outcome.

The funding arrangement will reduce the funded party's own procedural costs to the extent that the third-party funder covers these costs. If the third-party funder covers the funded party's entire procedural costs, the procedure does not incur that party any costs. Under the rules of several different arbitral institutions, the tribunal shall only order a party to pay another party's costs if the procedure has *incurred* that other party costs.[26] The funding arrangement may be an important factor for the tribunal to take into account in this respect.

On the other hand, if the funded party loses the case, it might be necessary to make the *funder* cover the winning party's costs, to the extent that this is possible. As explained above, the funded party may be impecunious. The funded party's payment of security would cover the arbitrators' fees but not necessarily the winning opponent's costs. The funded party may not be able to cover the winning party's costs. If the third-party funder has agreed to cover the funded party's procedural costs, it may be argued that the agreement obliges the third-party funder to cover the winning opponent's costs in such a case.

Fourth, the disclosure may help the funded party to accommodate any agreed obligation to keep the proceedings confidential. Such an obligation may conflict with the funder's need for information about the case. A strict non-disclosure agreement would prohibit the party from disclosing confidential information about the case to the funder. However, such information may be necessary for a funder to determine whether the case is a good investment and to follow the progress of the arbitral proceedings. If all of the parties and the tribunal know about the funder's involvement in the case, they can mutually permit the transmission of information from the funded party to the funder.

The disclosure may entail a fifth advantage concerning the funder's control over the proceedings. As explained in section 2.3, such control may be a consequence of the funding arrangement. One may argue that the tribunal should be able to limit the funder's control by issuing appropriate measures.[27] Without information about the funding arrangement, the tribunal cannot issue such measures.

However, the tribunal may not be able to deal with the funder's control in any event. The control may be implicit and take place behind

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[25] See The ICCA-Queen Mary Task Force Report on Third-Party Funding (2018) chapter 6, where the ICCA-Queen Mary Task Force provides guidance regarding the impact of third-party funding on allocation of costs.

[26] ICC Arbitration Rules article 38(1); LCIA Arbitration Rules article 28(3); SCC Arbitration Rules article 50; UNCITRAL Arbitration Rules article 40(2)(e); CIETAC Arbitration Rules article 52(2). See e.g. this argument discussed by Goeler (n 1) 378 ff.

[27] See Elizabeth Chan, 'Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration' [2015] Am. Rev. Int'l Arb. 181, 299; Marc Goldstein, 'Should the Real Parties in Interest Have to Stand Up?' [2011] TDM 1, 15.

the scenes. Furthermore, there is hardly any compelling reason why the tribunal should in fact limit the funder's control at all. As stated by Goeler, the funder's control is "*none of the arbitral tribunal's business*".[28] The funder's control is a private matter between the funder and the funded party, and the funder is not a party to the arbitration. The funded party is responsible for the funder's control, and the control primarily affects the funded party. Therefore, the funded party, and not the tribunal, is the one to deal with this possible issue.

4.2. DISADVANTAGES

To make the funded party disclose its funding arrangement would not only entail advantages. Any duty entails disadvantages, and a duty for the party to disclose its funding arrangement is no exception.

First, it may be difficult to delimit the duty. There is no clear and simple way to categorize the specific funding arrangements that need to be disclosed. However, such categorization may not be necessary to make at all. If a party is required to disclose *any* kind of funding, from insurance to loans, the scope of the duty will be straightforward. As explained in section 5 below, there is no compelling need to limit a duty of disclosure to certain types of funding, although certain types of funding agreements may be more important to identify than others.

Second, one may argue that funding arrangements are private affairs that the parties should be allowed to keep secret. Parties need a certain degree of freedom in terms of procedural strategy, and the funders need discretion regarding their investments. Imposing a duty of disclosure would indirectly compromise the parties' need for freedom and directly compromise the funders' need for discretion. However, these needs are not compelling when compared to the need for information about the funding arrangements.

Third, disclosure about possible funders may negatively interfere with the conduct of the parties and arbitrators. The funded party may act excessively risky, and the non-funded party may seek to delay the process in order to increase the funder's expenses.[29] The tribunal may base its decision on a conscious or unconscious impression that the funded party has a stronger case because of the funder's decision to fund the party.[30] The tribunal may also make decisions on fees, costs, or other procedural issues based on its knowledge about the funding arrangement.

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[28] Goeler (n 1) 143.

[29] Maxi Scherer, Aren Goldsmith and Camille Fléchet, 'Third Party Funding in International Arbitration in Europe: Part 1' (2012) Int'l Bus. L.J. 207, 218; Osmanoglu (n 3) 341.

[30] Scherer, Goldsmith and Fléchet I (n 32) 218; Goeler (n 1) 271; Laurent Lévy and Regis Bonnan, 'Third-Party Funding Disclosure, Joinder and Impact on Arbitral Proceedings' in Cremades and Dimolitsa (eds), *Dossier X: Third Party Funding in International Arbitration* (Dossiers ICC Institute of World Business Law 2013) 79.

Duties of disclosure are not the only possible way to address these scenarios. Other measures, such as guidelines on the conduct of the parties and arbitrators, could address the scenarios too. However, a duty of disclosure would probably be more effective.

Fourthly, a duty of disclosure may delay the arbitration procedure. Complying with such a duty may take time, especially if the disclosure results in separate submissions or challenges. The duty would probably be worth the delay in most instances. When the information gives rise to submissions or challenges and thereby delays the procedure more significantly, the duty would arguably be *particularly* useful and necessary. In these instances, the arrangements give rise to concern for one reason or the other. Without the duty of disclosure, the arrangements could remain unknown through most or all of the proceedings.

Furthermore, it would hardly take much time to comply with the duty. As explained in section 6 below, all it should take for a party to comply with the duty is to disclose the existence and identity of its funder in an email or a letter to its opponents, the arbitrators, and possibly an administering institution. Accordingly, this fourth alleged disadvantage is not a compelling reason to refrain from implementing a duty of disclosure.

Finally, the duty might compromise the funded party's duty of confidentiality towards the funder. A funding arrangement typically entails a non-disclosure agreement between the funded party and the funder. A requirement that the funded party discloses the funding arrangement puts the funded party in a dilemma. Either the party complies with its non-disclosure agreement and fails to provide the information, or the party provides the information and breaches its non-disclosure agreement with the funder.

Arbitrators face a similar dilemma. If an arbitrator cannot comply with its duty of disclosure under the applicable conflicts-of-interest rules without breaching a non-disclosure agreement, the arbitrator must either deny the appointment or breach the non-disclosure agreement. Similarly, a duty of disclosure for the funded party would force that party to (i) provide the information, (ii) sacrifice the funding arrangement, or (iii) breach the duty of disclosure and accept the legal consequences.

Arguably, the funder should not need the party to keep the funding arrangement secret from other parties or arbitrators involved in the case, as long as they are all subject to non-disclosure agreements in relation to the arbitration. Accordingly, a duty of disclosure would probably be compatible with most funding arrangements as long as the arbitration is confidential.

However, the arbitration is not necessarily confidential. Under Danish law, the arbitration is *not* confidential unless the parties agree to make it confidential. The Model Law, upon which the Danish Arbitration Act is drafted, contains no duty of confidentiality. To make the duty of disclosure as feasible and harmless as possible, the parties need to ensure that the arbitration is confidential. They can do so by reference to a set of

institutional rules or to national arbitration law under which the arbitration is confidential.

4.3. NECESSITY

It has been argued that the tribunal's power to order document production renders a duty of disclosure needless.[31] The tribunal can demand the submission of information on the funding arrangement through discovery or other types of document production.

However, for the tribunal to demand the submission of certain information, the tribunal needs to know about the existence of the information. If the tribunal has no knowledge of the funding arrangement, it cannot demand the submission of information about the arrangement. Therefore, the duty could be a prerequisite for the tribunal's decision to demand document production. Accordingly, the duty is necessary, despite the tribunal's opportunity to order document production.

Goeler argues that arbitrators and non-funded parties are likely to know about the funding arrangement even if the funded party has not explicitly made them aware.[32] The argument does not seem convincing. Third-party funders may invest in any type of case and any type of party. The funding arrangement does not necessarily appear significant from any available facts or circumstances in the specific case, so the arbitrators and non-funded parties do not necessarily know about it.

4.4. A DUTY OF DISCLOSURE IS FEASIBLE

Balancing the arguments in the subsections above leads to the conclusion that a duty of disclosure is feasible and necessary. The duty would prevent many practical problems to which the parties' possible funding arrangements may give rise, and it would not necessarily create any major problems. The duty would, therefore, be valuable to arbitration practitioners.

However, the duty would only avoid creating other problems if it would take the obstacles mentioned in subsection 4.2 into account. Particularly, the concerns about confidentiality, efficiency, and party autonomy should be observed in this respect. The party's duty to disclose information about a funder should entail a duty for the recipients of the information to keep the information confidential, and as clarified in section 6 below, the duty should be swift and easy to accommodate.

5. HOW TO ADOPT IT

The results of the analyses in the previous sections leave us with two major questions. How could a duty of disclosure be adopted, and how should it be constructed? The present section deals with the first question, and section 6 below deals with the second question.

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[31] Goeler (n 1) 133 ff.

[32] Goeler (n 1) 155.

When it comes to the adoption of the duty, three different opportunities could be considered. First, national legislators may implement the duty by law. Second, national or international organizations may implement the duty into soft law instruments. Third, arbitral institutions may implement the duty as part of their institutional rules. One opportunity does not exclude the other, but they will be dealt with individually in the following.

The first opportunity is ideal, but it would be overly optimistic to believe that national legislators would change their arbitration laws and adopt the duty. Singapore's and Hong Kong's legislators have done so, but, in other countries, governments are hardly as progressive and dynamic when it comes to arbitration as in Singapore and Hong Kong.

The second opportunity is realistic, but laying down the duty in soft law instruments would hardly have any direct effect on the parties' willingness to disclose their funding arrangements. The IBA Guidelines already provide a duty for the parties to disclose relationships between their funders and the arbitrators, but the guidelines do not impose any sanctions on the party's failure to meet the duty. The guidelines may have influenced the few legislators and institutions that are now implementing the duty into law or institutional rules, but soft law instruments as the IBA Guidelines do not seem to be influencing the conduct of the *parties* in any direct way when it comes to the disclosure of funding arrangements.

The third opportunity seems realistic and effective. As private entities, the institutions are able to draft their rules as they wish. Compared with national legislators, the institutions have significant leeway and flexibility when it comes to rule-making and amendments. As mentioned in section 3 above, two institutions have already implemented amendments that require the parties to disclose the existence and identity of their funders, and the Danish Institute of Arbitration is now encouraging parties to disclose their sources of funding.

Accordingly, the ball is in the institutions' court. The institutions are realistically able to make parties disclose their funding arrangements, and they may do so in an effective, quick, and uncomplicated way. Institutions should not be concerned about implementing such duties. As mentioned in section 4 above, the duties would not do any harm if constructed properly. Parties can accommodate the duty without much effort, and third-party funders have no reasonable and legitimate interest in remaining unknown to arbitrators, non-funded parties, and administering arbitral institutions.

6. HOW TO CONSTRUCT IT

The only remaining question concerns the construction of the duty. What should it look like? A number of issues are relevant to consider in this respect. These issues include delimitations, the extent of information, recipients, the duty's beginning and end, and the sanctions of breaching the duty.

As mentioned in subsection 4.2 above, there is no compelling reason to delimit the duty to certain types of funding. No matter whether the funding arrangement is an insurance agreement, a loan, an agreement to pay contingency fees, or any other type of arrangement, the need for disclosure is the same.

Only funding arrangements related to the specific case should be disclosed. The parties need not disclose their insurance agreements and loans altogether, but only the ones that cover or depend on the specific case. Accordingly, the duty should encompass any funder who provides coverage for any kind of costs associated with the case or who might otherwise have a financial interest in the outcome of the case or an influence on that outcome.

Information about the funder's mere existence and identity may sufficiently enable the non-funded party, the arbitrators and any administering institution to accommodate the needs described in section 4.1 above. In that case, it would be unnecessarily onerous for the party to disclose all available information about the funder and the funding agreement. Accordingly, the duty should require the party to disclose the existence and identity of the funder and, in principle, nothing else.

If the information about the funder's existence and identity does *not* provide the necessary basis for decisions on challenges, security for costs or the allocation of costs, the duty might authorize the tribunal to demand further information as long as this is necessary and relevant. It may for instance be necessary for the tribunal to know the identities of the funder's affiliates or the duration of the funding agreement.

The information about the funder's existence and identity is primarily relevant to the other parties and the arbitrators, but it may also be relevant to an administering arbitral institution. The institution may be involved in challenge decisions or decisions about the security for costs. Accordingly, the recipients of the disclosure should be all parties involved in the case as well as the arbitrators and any administering institution.

As soon as a party has initiated arbitration and the funding agreement is concluded, the need for information about the funding arrangement has arisen. There is no need for disclosure of the funding arrangement *before* the initiation of arbitration. Accordingly, the duty of disclosure should run from the time when (i) a party has initiated arbitration, and (ii) the funded party has entered into a funding agreement. If the information about the funding arrangement remains unknown for too long, the problems identified in subsections 2.3 and 4.1 may appear at the time when the other parties and the arbitrators become aware of the arrangements.

The consequences of breaching the duty may give rise to discussion. What sanctions would be effective, and should there be any sanctions at all? The right answers are straightforward. Arbitrators are subject to duties of disclosure too and, for arbitrators, the sanctions are provided by private law. An arbitrator may lose its fees or become liable for damages if the

arbitrator breaches the duty of disclosure. Similar sanctions should apply to the parties. If a party fails to disclose the existence and identity of its funder, the failure should affect the tribunal's allocation of costs, and if the general requirements under national tort law are met, the failure should make the party liable for damages.

7. CONCLUSION

The increasing use of third-party funding is beneficial, but non-funded parties and arbitrators need to be made aware of any funding agreement in the case. Without information about the funding arrangement, the arrangement may give rise to long and costly challenge procedures. Furthermore, the information about the arrangement would make it easier for the tribunal to allocate the costs and determine the need for security for costs. The information might also make it easier to keep the proceedings confidential.

A duty for the parties to disclose the existence and identity of its funders would motivate parties to provide information about their funders. The duty would entail a number of disadvantages, but certain measures could mitigate these disadvantages. First, the party's duty to disclose information about its funder should entail a duty for the recipients of the information to keep the information confidential. Second, the duty should be swift and easy to accommodate.

It would be optimistic to believe that national lawmakers are ready to implement the duty into national arbitration laws. Soft law instruments would hardly be effective. The most effective and realistic solution is that arbitral institutions implement the duty into their institutional rules. They can do so in an effective, quick, and uncomplicated way.

The institutes may construct the duty in numerous different ways. The best way would arguably be without limiting the duty to certain types of funding and without requiring disclosure of anything but the mere existence and identity of the funder. The funded party should provide the information to the other parties involved in the case as well as the arbitrators and any administering institution. The party should do so when the arbitral proceedings are initiated and when the funded party has entered into the funding agreement with the funder. If the funded party fails to comply with the duty of disclosure, the failure should affect the allocation of costs and, if the conditions under national tort law are met, make the party liable for any damages caused.