
INVISIBLE STAKEHOLDERS - THE CASE FOR TRANSPARENCY IN FUNDED ARBITRATION

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ABSTRACT

The emergence of third-party funding (TPF) in international arbitration has introduced the role of external investors who bear the costs of arbitration in return for a portion of the award. TPF bolsters the ability of previously disadvantaged parties to pursue justiciable and otherwise financially unconceivable claims. However, it also contrasts with the principles of justice and structural processes of integrity, independence, and fairness. There is an absence of transparency, depicted in the usage of the term “invisible stakeholders”, which contradicts with the fundamental principles of justice and procedural integrity, giving rise to a set of worrying conditions including the potential for a loss of independence and neutrality of arbitrators, the unforeseen management of arbitration, and undesired unpredictability of awards. This research analyses the emerging response from the law and institutions to the phenomenon of TPF, with a lens on the necessity of transparency in regulation. It argues the case for the necessity to make funding arrangements public to offer a balance to the arbitration system in the sense of enhancing efficiency and confidentiality, and systemic procedural legitimacy. This research strives to focus on a centralized and balanced approach to ensuring commercial confidentiality and requisite fairness in the process of arbitration.

Keywords: Third-Party Funding, Arbitration, Transparency, Conflict of Interest, Disclosure, Procedural Fairness, Arbitral Legitimacy

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INTRODUCTION

International arbitration is often praised for its flexibility, neutrality, and reliance on the autonomy of the parties. However, the rise of TPF complicates some of the traditional advantages of arbitration. TPF is financing that occurs when an entity that is not a party to the arbitration covers the expenses of one of the parties to the arbitration (the funder), & funder receives a financial return in the event that the party, whose expenses the funder covered, is successful in the arbitration. TPF has increased in both commercial and investment arbitration due to the increased costs of arbitration & increased tendency to treat legal claims as commodities.³

TPF has been a source of positive change for the accessibility of the legal system to people outside of the system, which in many cases is found to be financially disadvantageous. Nevertheless, TPF has been the inlet for an increased number of entities who are largely financially and/or legally influential outside of the system but are not part of the arbitration proceedings. While flexibility is a general positive feature in many systems, it is less positive in cases where the entity is not legally responsible and where there is no means to legally hold such an entity responsible. The lack of common and unified regulations for TPF brings about the problems of the absence of legal responsibilities of such entities, and such problems are increasingly evident in the arbitration systems of different jurisdictions and different arbitral institutes.⁴

This paper attempts to determine to what extent the lack of transparency in TPF arrangements damages the core values of arbitration and argues that in order to preserve arbitral legitimacy, transparency is an imperative factor to be integrated.⁵ To achieve this, it deals with the philosophical and historical background of the TPF, the analysis of the legal problems caused by the absence of enacting legislations, an analysis of the available regulations, and response of the courts to the subject. After that, a reasonable and fair perspective is offered on transparency.⁶

³ Mark Feldman, *International Arbitration and Transparency*, SSRN Electronic Journal (2016), <https://doi.org/10.2139/ssrn.2843140>.

⁴ *Id.*

⁵ Victoria Udoh, *Transparency in Arbitration, Desired or Necessary?*, SSRN Electronic Journal (2020), <https://doi.org/10.2139/ssrn.3689698>.

⁶ William Kenny, *Transparency in Investor State Arbitration*, 33 J. Int'l Arb. 471 (2016).

THE EVOLUTION AND FOUNDATIONAL CONCEPTS OF THIRD-PARTY FUNDING

When evaluating TPF, many people think of TPF as a modern invention. However, TPF is rooted in some historical concepts including maintenance and champerty which prohibit third parties who are not litigating to sponsor a litigant in payment. From the view of the law, these doctrines were aimed at preserving the integrity of the legal system and prohibiting sponsorship of litigation for the sake of profit. Many of these doctrines have been abolished (or relaxed) in many legal systems, and many legal systems have begun to view these doctrines as barriers to ensuring access to justice. The relaxation of these doctrines and practices facilitated funding of legal claims and, in particular, legal practices which have begun to treat disputes as marketable products and legal claims as commodifiable.⁷

In funded international arbitration disputes, TPF is most prevalent in cases of claims made by investors against state parties (i.e., state parties to a legal arbitration treaty firm). In these cases, claimants face a multitude of financial and procedural hurdles. These funding contracts enable investors to litigate (i.e., state parties to a legal firm arbitration treaty) claims in arbitration while relieving the claimant of the financial burden. The implications of these financing contracts have begun to alter the nature of arbitration due to the incorporation of purely profit driven motives.

The nature of TPF has begun to change the nature of international legal arbitration toward acceptance and incorporation of TPF. In the case of *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*,⁸ the court held that, under the arbitration rules, the TPF cost is recoverable as part of the arbitration costs. This case represents a rejection of the older regimes aimed at eliminating TPF from legal arbitration and, in particular, international arbitration. In the case of *Arkin v. Borchard Lines Ltd*,⁹ court recognized the intermediation of professional funding while limiting the liability of professional funding.

Despite the growth in TPF, countries face inconsistent laws and regulations regarding funding. Some countries have passed laws for TPFs, while others have developed no laws or practices

⁷ N. S. Tursunbaeva & A. A. Babaliev, *International Commercial Arbitration: Confidentiality or Transparency*, 23 *Vestnik Kyrgyz-Russian Slavic Univ.* 108 (2023).

⁸ [2016] EWHC 2361 (Comm).

⁹ [2005] EWCA Civ 655.

and still others have restructured laws to limit TPFs. Irregularity in the system stresses the need for uniformity.¹⁰

The difficulties posed by TPF concern a funding party's ability to conceal themselves from ethical standards no matter the impact their funding has on the court's proceedings. Other parties in the process, including the counsel and arbitrators, are required to uphold certain morals, yet money provides TPFs influence without consequence. This concern is in regard to ethics and accountability.¹¹

Conflicts of interest are highly concerning because it calls an arbitrator's neutrality into question. Despite the expectation of impartiality and transparency from arbitrators when it comes to any potential or apparent control regarding neutrality, dissent posed to unreported funders of awarded arbitrators relates to funder-linked control, which is a key problem. This ICSID case of *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd Şti v. Turkmenistan*¹² is instructive of the chief issue by way of the tribunal's demand for further assessment regarding potential unreported funder control ascribed to the funding arrangement to warrant a disclosure of the funding arrangement.

Another worry comes from a potential loss of control of the process. Even though the funding agreement stipulates that the claimant funds the labour, the funder still impacts on a number of key decisions, such as settlement and choice of litigation counsel. The extent to which a funded party still has control is a concern, as is the level of control the parties retain in a party-driven arbitration.

The invisibility of funders also has an effect on the cost allocation and cost security. The Respondents also do not have much information about the financing claimants' funders. This is particularly true for financially weak claimants. The tribunal in *RSM Production Corporation v. Saint Lucia*¹³ dealt with a situation in which there was no disclosure order and decided on cost security because the tribunal was aware of the funder's presence. The absence of

¹⁰ Albert Tan, *The Transparency Debate in Investment Arbitration*, SSRN Electronic Journal (2023), <https://doi.org/10.2139/ssrn.4366702>.

¹¹ Meagan Wong & Rebecca Hadgett, *Contents*, in *Transparency in International Investment Arbitration* vii (Dimitrij Euler, Markus Gehring & Maxi Scherer eds., Cambridge Univ. Press).

¹² Case No ARB/12/6, Procedural Order No 3 (12 June 2015).

¹³ ICSID Case No ARB/12/10, Decision on Security for Costs (13 August 2014).

transparency contributes to a lack of procedural balance.¹⁴

TRANSPARENCY AS A NORMATIVE IMPERATIVE

In the arbitral process, transparency is seen as opposed to confidentiality. However, the introduction of TPF creates a new paradigm, & delicate balance needs to be shifted. To maintain fairness and confidence in arbitration, funding arrangements must be disclosed, and transparency needs to be a standard. Disclosure serves several important purposes. First, it aids arbitrators in identifying any possible conflicts of interest. Second, it allows tribunals greater ability in evaluating the adequacy of security for costs or costs in general. Third, it ensures all of the parties provide full disclosure of the interests in the case.¹⁵

Several of these functions have been addressed in recent institutional reforms. Art. 11(7) of the ICC Arbitration Rules requires greater transparency concerning parties' recognition of a third person, or, in ICC's case, a legal person, who has an interest in the outcome of the arbitration. The ICSID Rules goes even further in that fuller transparency of case costs and security requires disclosing third-party financial bidders and case expenses and further proposes fuller transparency through third-party funded arbitration. In these areas, the rules are in agreement that third-party funders create an imbalance of equity.¹⁶

The argument for greater transparency through full disclosure of TPF has been cast in opposition, arguing that it would put an end to funding third-party financial statements and would slow the arbitration process. Achieving this equilibrium would address both parties' interests, the funding agreements & transparency.

COMPARISON OF REGULATORY FRAMEWORKS FOR THIRD-PARTY FUNDERS

Legal traditions and policy preferences create a patchwork of regulation for TPF in arbitration. Some jurisdictions, such as UK and Singapore, have more progressive policies that accept TPF as a legitimate option for financing disputes and rely on soft regulation and market regulation.

¹⁴ *Id.*

¹⁵ James Crawford, Meagan Wong & Rebecca Hadgett, *Foreword*, in *Transparency in International Investment Arbitration* xxiii (Dimitrij Euler, Markus Gehring & Maxi Scherer eds., Cambridge Univ. Press).

¹⁶ Sam Wordsworth & Marie Veeder, *The Transparency of International Arbitration*, in *On Arbitration* 278 (1st ed., Oxford Univ. Press 2023).

Other jurisdictions seem more reluctant, and therefore more regulatory or silent.¹⁷

The UK has advanced the funding market with diminishing restrictions on champerty and maintenance. Moreover, the Association of Litigation Funders (ALF) established a voluntary framework to address some funding issues. This framework covers insufficient resources and interference; however, there are issues creating the foundation for this framework.

In contrast, Singapore and Hong Kong have a stricter, yet more structured policy. TPF in arbitration is addressed within the country's regulatory framework. Singapore's Civil Law (Amendment) Act, 2017 legalized TPF for international arbitration and related issues. Hong Kong has a similar framework in the Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, 2017, which requires funders to practice according to the Code and to funding disclosure. TPF in arbitration within these jurisdictions is of a legislative and to a limited extent, a regulatory pluralism nature.¹⁸

Indian law on TPF is not as rigid as seen in many Western countries. Although the law on TPF is vague in India because the doctrines of champerty still hold, India, unlike many other countries, has been more flexible in interpreting TPF, especially from a judicial perspective. For example, court in *Bar Council of India v. A.K. Balaji*,¹⁹ upheld the argument of TPF in a situation where third parties from legal practice funded the legal battle. There still remains a vacuum in regulations on indirect funding and challenges in arbitration within India.

More robust regulations on investment arbitration specifically address this concern. ICSID, in the Rules, 2022 has opted for a more rigid framework than in the past that centers on the disclosure of certain information to address the concern of a conflict of interest & issue of fairness and due process. Similarly, there is a significant focus on TPF in the context of the UNCITRAL Working Group III & proposed reforms of the new trade agreements within the context of a structured TPF model that combines funding, and ethics and other compliance of the regulations.²⁰

¹⁷ Maja Stanivuković, *Confidentiality and Transparency in International Arbitration*, 52 Zbornik Radova Pravnog Fakulteta, Novi Sad 449 (2018).

¹⁸ Maxi Scherer et al., *Introduction*, in *Transparency in International Investment Arbitration 1* (Dimitrij Euler, Markus Gehring & Maxi Scherer eds., Cambridge Univ. Press).

¹⁹ AIR 2018 SUPREME COURT 1382.

²⁰ Ramona Lampley, "Underdog" Arbitration: A Plan for Transparency, SSRN Electronic Journal (2015), <https://doi.org/10.2139/ssrn.2574064>.

The expansion of TPF is validated empirically. There is evidence of growing levels of TPF and its increasing economic impact. The global litigation funding market has witnessed significant expansion in recent years, fueled by increasing costs of arbitration and an emerging consensus on the acceptance of funding as a legitimate financial asset.²¹

Year	Estimated Market Size (USD Billion)	Number of Active Funders (Approx.)
2015	1.5	15
2018	5.0	30
2020	9.5	45
2022	13.5	60
2024	17.0	75

Both the market & active funders consistently attract more interest every year. Sustained growth suggests more confidence by investors and greater commoditization of legal claims. Due to high costs and a substantial arbitration claim value, Investor State Dispute Settlement (ISDS) arbitration is a leading claim in the funding market.

The purpose of TPF in a market economy is risk mitigation. For the investors, funding arbitration is more profitable than funding other commodities. Unlike other markets, the return of investment remains critically dependent on the outcome of the arbitration. For the investors, the return on investment, which is between 20% and 40% of the awarded amount, proves lucrative.²²

²¹ Raghvendra Pratap Singh & Srishti Kumar, *Transparency and Confidentiality in International Commercial Arbitration*, 86 *Arb. Int'l J. Arb. Mediation & Disp. Mgmt.* 463 (2020).

²² *Research on Transparency Reform of International Commercial Arbitration*, in *Proceedings of the 2017 Int'l Conf. on Frontiers in Educational Technologies & Management Sciences* (Francis Academic Press 2017).

Survey/ Institution	Year	% of Respondents Using TPF	Key Observations
Queen Mary University of London & White & Case Survey	2015	28%	Limited awareness; early adoption stage
Queen Mary University of London & White & Case Survey	2018	36%	Increasing acceptance in commercial arbitration
Queen Mary University of London & White & Case Survey	2021	47%	Significant rise in ISDS cases
ICC Dispute Resolution Survey	2020	41%	Growing institutional recognition
Burford Capital Industry Report	2023	~50%+	Mainstream adoption among large claims

The data shows that TPF started out as a niche practice and has now become embedded as a standard component of arbitration. The growing proportion of users demonstrates the importance of tackling funding related regulation issues, particularly those of a legal nature related to funding transparency.²³ The empirical data also shows a contrast between various geographical areas. Europe and North America still lead the funding market, but a large portion of growth is also taking place in Asia, particularly due to recent changes in funding regulations in Singapore and Hong Kong. India's potential for a large growth market is still limited primarily due to the existence of funding related regulations & lack of formal funding transparency.²⁴

²³ Evelyn, *Prospects for Transparency in International Commercial Arbitration: Will Indonesia Rise to the Challenge of Introducing Transparency into Its Arbitration System?*, 2 Mahadi: Indon. J. L. 1 (2023).

²⁴ Laurence Boisson de Chazournes & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2 BCDR Int'l Arb. Rev. 59 (2015).

Funding related regulations have been largely influenced by the responsiveness of the courts and arbitral tribunals in relation to the funding of third parties. Courts and tribunals have started to indicate consideration of the positive effects of funding & funding related regulations on the protection of the integrity of the arbitral process.²⁵

The influence of the Courts on funding has primarily related to the regulation of funding related Transparency. Courts have slowly started to accept the fairness of TPF of arbitration by allowing funding costs to be recovered. In *Essar Oilfields Services Ltd v. Norscot Rig Management*,²⁶ court did not require funding related transparency in this instance, and it started a practice of accepting TPF as an inevitable component of arbitration.

NOVEL ASSESSMENT - FINDING THE BALANCE BETWEEN TRANSPARENCY, CONFIDENTIALITY, AND OPERATIONAL EFFICIENCY

As with most other processes, the discussion around TPF whereby the funder covers part of the costs incurred highlights the equilibrium between transparency and confidentiality. Arbitration has largely been appreciated for the ability to allow parties to resolve the dispute without the watchful eye of the public.²⁷ Entry of funders with direct economic interests, however, distorts the current paradigm of discretion, whereby secrecy is no longer justifiable when there are undisclosed parties in proceedings, at least. The fairness and legitimacy of the processes may largely be affected as well.²⁸

A novel assessment argues that the interests of transparency largely outweigh the costs of breaching anonymity. The concern by funders that revealing their identity or the terms of the funding agreement would be disclosing commercially sensitive information and thus have an adverse impact on their industry, is with merit. However, there is an equally adverse impact on the industry of revealing the identity of the funder, as is the breach of the unduly exorbitant terms of the funding agreement. The latter may be justifiable, but the former largely is not. It is therefore possible to reconcile apparently divergent interests with a moderate disclosure

²⁵ Azhaham Perumal Perumal Saravanan & Subramanian Ramamurthy Subramanian, *Transparency and Confidentiality Requirements in Investment Treaty Arbitration*, 5 BRICS L.J. 114 (2018).

²⁶ [2016] EWHC 2361 (Comm).

²⁷ Michael Douglas & João Ribeiro, *Transparency in Investor-State Arbitration: The Way Forward*, 11 Asian Int'l Arb. J. 49 (2015).

²⁸ Shunsuke Sato & João Ribeiro, *Transparency in Investment Arbitration: Its Importance for Japan*, 13 Asian Int'l Arb. J. 27 (2017).

threshold.²⁹

Another issue is efficiency. Although arbitration is generally understood as rapid and flexible, the addition of disclosure may be interpreted as interfering with the efficiency of arbitration. However, the risks associated with nondisclosure, manifested in challenges to arbitrators, arbitrator annulment, and disputes over the enforcement of arbitration awards, are far more costly. In the end, a more costly, longer arbitration may be the result of a lack of transparency, negating the flexible, rapid approach of arbitration. In this regard, transparency should be seen as a positive factor and an important contributor to predictability and efficiency in the arbitration process.³⁰

Additionally, the presence of funders raises more complex questions about the substantive goals of arbitration. If arbitration remains a self-determined and autonomous process, it should be aimed at the very least, to safeguard the autonomy of the disputants at the decision-making level. Undisclosed funders may change the tribunal's decision-making balance, with the focus shifting from the achievement of justice to the pursuit of profit. This challenges the conception of arbitration as an objective and neutral system of dispute resolution and necessitates more sophisticated regulation.³¹

A true and consistent proportional transparency approach to the regulation of TPF in arbitration should be viewed as a positive addition to justice. Operating to safeguard the integrity of arbitration should be the rigid end goal of this transparency. Funding should not be entirely prohibited, as funding promotes the objective of greater access to arbitration.³² Ironically, the first major reform addresses the challenge of changing the structure of arbitration. It is suggested that compulsory disclosure of TPF be introduced at the pre-trial stage or at the earliest possible point of the proceedings. Subsequently, such duties should be periodic, and disclosure should be updated in the event of funding changes. Early disclosure of funding arrangements allows arbitrators to identify and assess potential conflicts of interest and prevents the emergence of challenges at later stages in proceedings. Institutional rules of

²⁹ Nayanika Jain & Bindu Jindal, *Technology-Driven Arbitration: Efficiency, Transparency and Due Process*, 23 *Lex Localis – J. Loc. Self-Gov't* 509 (2025).

³⁰ *Id.*

³¹ Gloria Stone Plottel, Rachel Adler, Chelsea Jenter & Jason P. Block, *Managing Conflicts and Maximizing Transparency in Industry-Funded Research*, 11 *AJOB Empirical Bioethics* 223 (2020).

³² Mark Feldman, *International Arbitration and Transparency*, in *Cambridge Compendium of International Commercial and Investment Arbitration* 1697 (1st ed., Cambridge Univ. Press 2023).

arbitration, such as ICC Arbitration Rules, 2021 and ICSID Arbitration Rules, 2022, can be seen as examples in this regard, as can a number of other rules as well, with an overall harmonization of provisions within different institutions.³³

Further, tribunals should obtain a formal mandate to grant specific permissions for further disclosure. Almost certainly, in most cases, tribunals should retain the prerogative of requiring further disclosure of funding agreements in cases with funds for costs, alleged abuse of proceedings, and questions of control. By adopting such an approach, tribunals are able to ensure that the disclosure process is tailored to the individual case.³⁴

CONCLUSION & A WAY FORWARD

TPF has significantly changed the dynamics of arbitration. It has made justice more accessible for those who could not afford to pursue legitimate claims. It has also caused the emergence of “invisible stakeholders” who destroy the integrity of the arbitration process because of the lack of strict guidelines. This has shown that challenges that arise from funding require more than a simple sense of convenience. It is evident that there could be more conflicts of interest, and imbalances occur during the arbitration process which leads to suspicion and uncertainty which would in turn make funding the process less legitimate. Alignment of these guidelines & value of one-sided reliance of stakeholders is unfavorable. Funding should be controlled and managed to ensure complete information is available to the stakeholders.

Transparency has been embraced & evidence of positive change is visible. A rational response toward funding in arbitration should be harmonized and regulated to achieve order. To maintain the integrity of the funding process, all funding partners should be managed and ethically controlled. National standards and institutional guidelines should be harmonized to strengthen the framework of accountability. The legitimacy of arbitration fundamentally relies upon users’ confidence. Such confidence maintains the integrity of arbitration, despite the changes in the system that accommodate new players and economic challenges. The integrity of arbitration relies on transparency in TPF. As funding support systems shift, arbitration continues to add fairness and effectiveness to the resolution of arguments, even with increasingly complex global dynamics.

³³ Ji-Hyeon Hwang & Yong-Il Kim, *A Study on Transparency Improvement in International Commercial Arbitration*, 96 Int’l Com. & L. Rev. 163 (2022).

³⁴ Russ Bleemer, *Seeking Transparency, International Arbitration Users Propose to Gather Feedback*, 25 Alternatives to the High Cost of Litigation 183 (2007).