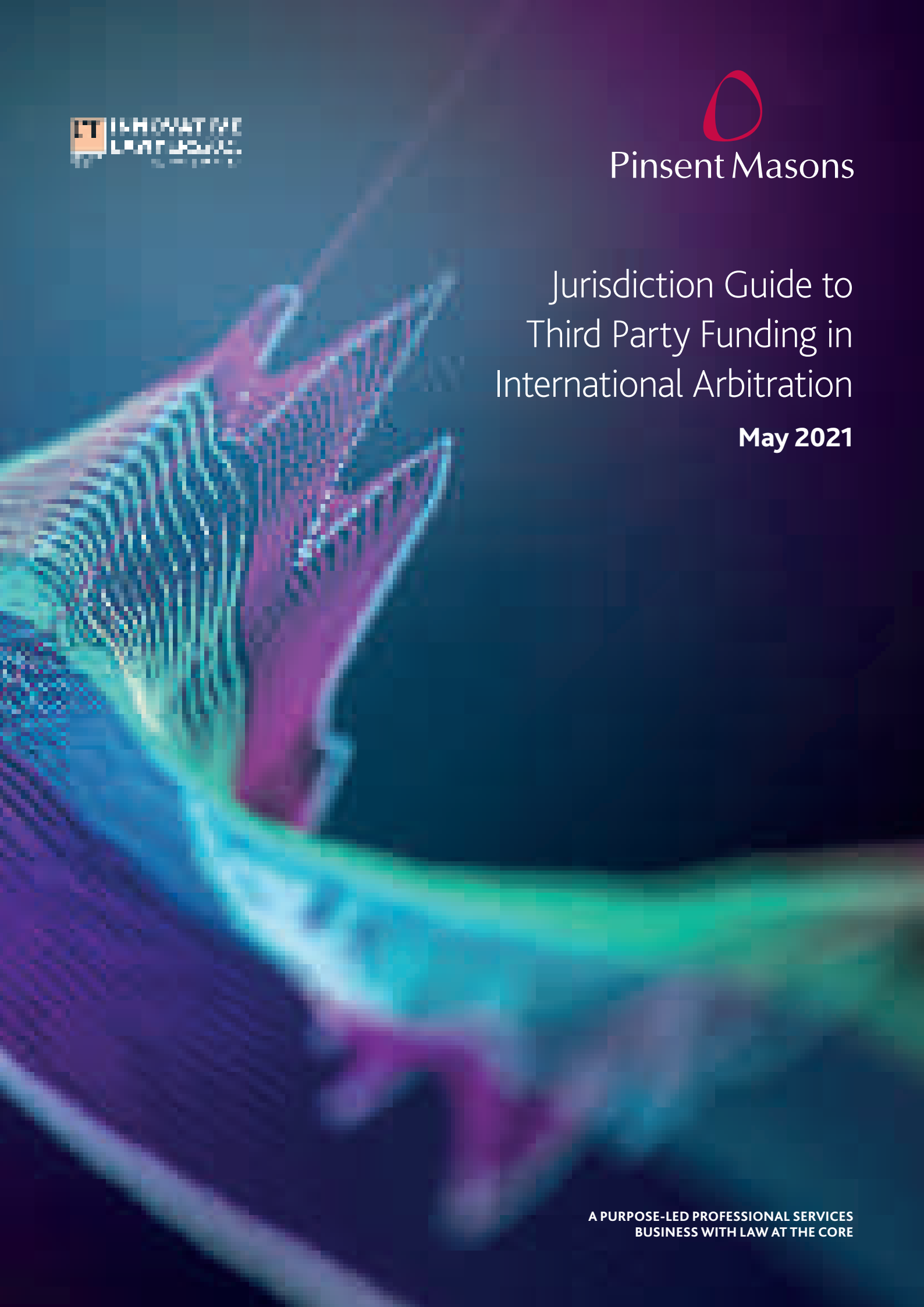

Pinsent Masons

Jurisdiction Guide to Third Party Funding in International Arbitration

May 2021

A PURPOSE-LED PROFESSIONAL SERVICES
BUSINESS WITH LAW AT THE CORE

CONTENTS

Pinsent Masons are **enthusiastic supporters of third party funding and are increasingly involved in international arbitrations** where third party funding is provided.

Introduction

We are pleased to present this second edition of the Pinsent Masons **Jurisdiction Guide to Third Party Funding in International Arbitration**, providing an update to the Guide's first edition (November 2020) and including the following additional chapters:

- **Australia**
- **Saudi Arabia**
- **Qatar**
- **Spain**
- **Germany**
- **South Africa**
- **Sweden**
- **India**

Third party funding ("**TPF**") arises when a (third party) litigation/arbitration funder provides financial support to enable individuals or commercial entities to pursue or defend legal proceedings. In most jurisdictions with a common law system, such arrangements were traditionally illegal or void, most notably on the grounds of being contrary to the legal doctrines of maintenance and champerty. In recent years, however, there has been a move away from this out-dated position and TPF is now permitted in a number of jurisdictions for international arbitrations and court proceedings related to international arbitrations.

There were of course reasons for TPF and similar arrangements being illegal, but the greater access to justice that TPF gives all litigants together with the effective way TPF is regulated (or self regulated) in those jurisdictions where it is permitted, means that it has become a significant part of the international arbitration landscape. In the Covid-19 era and beyond, TPF will be even more important with corporations facing unprecedented economic stresses and increasing pressure on cash-flow. In that context, we note that the new 2021 ICC Rules of Arbitration, which came into force on 1 January 2021, explicitly refer to TPF and include at Article 11(7) a new requirement for parties to disclose any TPF arrangements so that any potential conflicts of interest can be identified and managed. The ICC Note to Parties[1] provides further guidance, clarifying who would be captured within the definition of a 'non-party' to a funding arrangement where that non-party has an economic interest in the outcome of the arbitration. We will comment on this further in the next edition of this Guide.

TPF is 'non-recourse', meaning that if there is no recovery, then there is no obligation for the funded party to repay the funder its advances or any return on its investment. This provides parties faced with the prospect of commencing or defending an arbitration with an efficient "off balance sheet" solution for meritorious claims that removes the financial burden and uncertainty of pursuing this process.

Regulations associated with TPF generally include restrictions as to who can qualify to be a funder (usually relating to financing requirements), mandatory disclosure of TPF arrangements to ensure transparency, the limits of confidentiality of such arrangements, how conflicts of interest are dealt with and the impact on the allocation of legal costs.

Pinsent Masons are enthusiastic supporters of TPF and are increasingly involved in international arbitrations where TPF is provided. In July 2019, Pinsent Masons entered into a preferred supplier arrangement with major funder, Augusta Ventures. The arrangement with Augusta is non-exclusive and in appropriate circumstances Pinsent Masons will work with other third party funders. However, the Augusta arrangement, which applies globally, gives Pinsent Masons' clients better terms than are generally available in the open market. In particular, Pinsent Masons' clients receive the benefit of a dedicated facility at preferred rates, including a fast tracked due diligence process and transparent commercial terms. **Mark Roe**[2], who leads the Pinsent Masons TPF initiative, describes the arrangement: *"We have used our buying power to obtain for our clients TPF terms that are substantially better than any individual corporation would obtain if they were to go direct to the TPF market. While Augusta is flexible they usually fund all the costs of pursuing the claim, including lawyers, experts and Tribunals on a non-recourse basis, which means claimants pay nothing if the claim fails and Augusta recovers its investment out of sums payable by the respondent. This means that we and Augusta focus first on whether a prospective Respondent has substantial assets in a jurisdiction where reasonably fast enforcement of the relevant arbitral award is possible."*

A TPF agreement will specify the funder's recovery and this varies depending on what is permitted in the relevant jurisdiction. It could be a percentage of the amount recovered or the fees advanced by the TPF plus an uplift.

A funder will of course assess the prospects of success of a claim before entering into a TPF agreement and will as part of such assessment carry out a due diligence exercise to ensure the claim has reasonably strong prospects of success and recovery. This requires a detailed non-disclosure agreement unless the statutory framework provides for communications with funders to be privileged. As funders receive their return on their investment by reference to recoveries made, they are primarily interested in claims with a monetary outcome. Funding is therefore in most part available to claimants, and occasionally to respondents with a strong sizable counterclaim.

[1] ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration – 01-01-2021 https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf

[2] E: mark.roe@pinsentmasons.com.

In addition, a funder will generally be looking for a "recovery ratio" of at least between 6 and 10[3]. The recovery ratio is the ratio of legal and other costs to anticipated recovery. For example, if legal and other costs are anticipated to be US$1 million, a funder would require the anticipated recovery by the party to be at least between US$6 to $10 million. TPF in international arbitration is therefore more suited to larger claims, although smaller claims can be brought within the required recovery ratio by the creative use of conditional fee arrangements by the legal representatives, where such arrangements are permitted in the relevant jurisdiction. Where such arrangements are permitted, Pinsent Masons are happy to consider them. This has the effect of reducing the fees advanced by the funder and improving the ratio for smaller claims in particular.

As enforcement of the arbitral award is a key concern for funders, investigations into the respondent's asset position will be carried out to ensure that the respondent has the financial capability to meet the damages claim against it.

This Guide is intended to provide our clients with a succinct picture of TPF in the major jurisdictions where Pinsent Masons conduct international arbitrations. The Guide will highlight the key features in each of the jurisdictions covered, but local legal advice should be sought on whether TPF on the terms intended with the funder is permissible.

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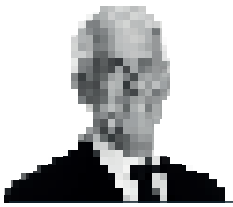

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[3] Augusta will expect to fund on the basis that the sums recovered will exceed the amounts advanced by a factor of about 700% (i.e. a ratio of 1 : 7).

Special thanks to Andrea Morgan, Senior Legal Project Manager in the London office of Pinsent Masons, for co-ordinating the production of this Guide.

Australia

Third party funding is permitted

Historically, third parties were prohibited from funding an unconnected party's litigation or arbitration under the doctrines of maintenance and champerty. However, maintenance and champerty are now obsolete as crimes at common law.[4] Further, maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory[5] but not in Queensland, Western Australia, Tasmania and the Northern Territory. Nonetheless, the landmark decision of the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* made clear that TPF is not contrary to public policy or an abuse of process.[6]

Following a boom in class actions backed by litigation funders, the Australian Federal Government introduced new regulations designed to improve transparency around litigation funding and to increase the accountability of funders operating in Australia. On 24 July 2020, the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) ("**Regulations**") came into effect. The Regulations give effect to the Australian Government's announcement on 22 May 2020 that litigation funders would be required to hold an Australian Financial Services Licence and comply with the regulatory regime applicable to managed investment schemes.[7] The changes do not affect litigation funding schemes entered into before 22 August 2020. The Regulations also preserve various exemptions that apply to certain funding schemes in the insolvency context and funding arrangements which are used in actions involving a single plaintiff.

Third party fee arrangements are flexible

There is no legislation or regulation in Australia that limits the fees that funders can charge. The courts' approach is to consider whether arrangements are contrary to public policy and unenforceable as a result.

Contract law considerations such as illegality, unconscionability and public policy may therefore still arise in relation to TPF fee arrangements but there is no objective standard against which the fairness of the agreement may be measured.[8] Accordingly, the courts will look to the circumstances of each particular case in deciding whether a particular clause in a TPF fee arrangement may contravene public policy.

As providers of financial services and credit facilities, third party funders are also subject to the consumer provisions of the Australian Securities and Investments Commission Act 2001 (Cth), which contains protections against unfair contract terms, unconscionable conduct, and misleading and deceptive conduct.

TPF features

Is it mandatory for a party to disclose that it is funded?
In Australia, parties have successfully resisted production of funding agreements and documents associated with the funding relationship, such as investigative reports and correspondence between the funder and a funded party, on the ground of legal professional privilege under Section 119 of the Evidence Act 1995 (NSW).[9]

Can lawyers fund claims in the same way?
The ability of lawyers to fund claims in the same way as third party funders continues to be debated in Australia. Currently, legal practitioners in all states and territories except Victoria are prohibited from entering into any arrangement for the payment of damages-based contingency fees.[10]

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[4] *Clyne v NSW Bar Association* (1960) 104 CLR 186, 203.

[5] *Civil Law (Wrongs) Act 2002* (ACT), section 221; *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) sections 3-4, 6; *Criminal Law Consolidation Act 1935* (SA) Schedule 11 cll 1(3), 3; *Wrongs Act 1958* (Vic) section 32; *Crimes Act 1958* (Vic) section 322A.

[6] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386.

[7] The Hon Josh Frydenberg MP, 'Litigation funders to be regulated under the Corporations Act' (22 May 2020) available at https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/litigation-funders-be-regulated-under-corporations accessed 4 March 2021

[8] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386.

[9] *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305.

[10] See section 33ZDA of the *Supreme Court Act 1986* (Vic) applying from 1 July 2020 for the exception in Victoria, and section 183 of the *Legal Profession Uniform Law 2015* (NSW) for a New South Wales example of the common prohibition.

England and Wales

Third party funding is permitted and on the rise in England and Wales

The relaxation of the common law rules of maintenance and champerty spawned a rapidly growing funding market with England and Wales emerging as a key jurisdiction for funded claims. Provided the funding agreement does not give the funder an unreasonable return or the right to control the dispute, TPF in an arbitration (and related court proceedings) seated in London[11] is permitted as of 1967.[12]

The current landscape of TPF in England and Wales began to be carved out due to a more pragmatic approach taken by the judiciary in various court decisions from 2002 to 2005[13] as part of the desire to improve access to justice. Since then TPF has and continues to become more prevalent across the legal market in England and Wales, both in terms of the number of cases being funded and in the number of specialist firms offering funding. Although no formal regulation of TPF has been found to be necessary,[14] self-regulation in the form of a code of practice was advisable to provide a layer of protection to funded clients. This led to the Code of Conduct for Litigation Funders[15] published in November 2011 ("**the Code**") together with the formation of the Association of Litigation Funders of England and Wales ("**ALF**"). The Code requires funders to behave reasonably and sets the standards for the capital adequacy of funders, including the specific, limited circumstances in which funders may be permitted to withdraw from a case. Although ALF membership is voluntary, most established third party funders in London have joined. At Pinsent Masons we strongly advise parties to only consider third party funders that are approved members of ALF because they are guaranteed to have access to capital immediately within their control and to comply with all the other provisions of the Code. In addition to ALF, a number of funders in England have joined the recently formed International Legal Finance Association ("**ILFA**") whose stated goals are to be the voice of the global commercial funding industry on regulation, legislation, public awareness and best practices. The ILFA expects to have a significant presence in London, from where its chairman will lead the organisation.[16]

Third party funding fee arrangements are entirely flexible

When a funder agrees to invest in a claim, it does so after carefully assessing the commercial return on the investment. The factors that generally influence the offered pricing terms of the funding arrangement are largely based on the size of the claim or expected damages, the estimated length of the matter, and the level of risk involved. In order to be able to offer the most competitive terms, English law permits funders and legal practitioners to enter into a number of bespoke and flexible contingent and conditional fee arrangements with clients. A robust endorsement of this principle can be found in a 2020 English court judgment which urged caution against "undesirable satellite litigation to investigate funding arrangements in circumstances where the claim is bona fide and the inquiry into funding arrangements would afford no defence to the claim".[17]

TPF features

Is it mandatory for a party to disclose that it is funded?
There is no general requirement under English law for a party to disclose a TPF arrangement to any opposing party or to the court or tribunal.[18] However, from an ethical standpoint, disclosing the existence of funding in arbitrations is desirable given the potential for conflicts of interest between third party funders and tribunals. This is particularly relevant if a tribunal has sat in a number of cases where the claimant has been funded by the same funder, or if the funder is evaluating a case in which the funded claimant is represented by that tribunal's law firm or chamber.

Are communications with a third party funder privileged?
Preparing a claim for a third party funder to assess invariably involves the sharing of confidential documents and legal advice as early as the 'initial chat' stage. The terms of a funding agreement also typically require a client's legal team to send to the third party funder regular reports detailing the case progress. Under English law, a party is able to share privileged and confidential material with a limited number of third

[11] Including mediation proceedings and enforcement proceedings related to an international arbitration.

[12] Maintenance and champerty finally ceased to be criminal offences and torts by virtue of sections 13 and 14 of the Criminal Law Act 1967, following recommendations made by the Law Commission.

[13] R (*on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2)* [2002] EWCA Civ 932; *Arkin v. Borchard Lines Ltd & Others* [2005] EWCA Civ 655) (Arkin)).

[14] *Paccar Inc. and others v Road Haulage Association and others* [2021] EWCA Civ 299.

[15] See https://associationoflitigationfunders.com/code-of-conduct/. The Code pertains primarily to domestic litigation, and refers to "litigation funding", but equally covers the funding of international arbitrations.

[16] See https://www.ilfa.com/news

[17] *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), dated 12 June 2020.

[18] In the *Matter of Edwardian Group Limited* [2017] EWHC 2805 (Ch), the High Court rejected an application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.

parties under an express agreement to keep that material confidential, thereby preserving its privileged status.[19] To protect against an inadvertent waiver of a client's privilege, parties should enter into a non-disclosure agreement with the funder from the outset.

What are the additional cost benefits of TPF?

There is limited legal authority that currently governs the question of costs in funded arbitrations seated in London. However, the general rule in English litigation is that the loser pays the winner's costs. It is often debated as how that rule applies to a situation where one of the parties is involved in a TPF arrangement.

Can a successful party recover its funded costs?

In a 2016 decision of the English Commercial Court,[20] a successful claimant in arbitration was allowed to recover its TPF costs, on the terms agreed with the funder and in addition to the principal award.[21] A tribunal's jurisdiction to make such an order stems from the English Arbitration Act 1996[22] which gives the tribunal a general power to award costs as it sees fit. This costs bracket can include the legal and 'other costs' of the parties, which in this case was interpreted to mean the funder's commission.

Will a third party funder be liable for another party's costs?

Arbitral tribunals do not generally have the jurisdiction to issue an adverse costs order against third party funders because the funder is not typically a party to the arbitration agreement, and under section 61 of the English Arbitration Act 1996 a tribunal does not have jurisdiction to make a costs order against a non-party to the arbitration. Third party funders are therefore protected from adverse costs orders when funding arbitration proceedings seated in London. Recent court decisions[23] that have had a profound impact on the English litigation funding market eroded the previous certainty that a funder's liability for payment of the successful parties' legal costs is capped at the funding amount it had provided to the unsuccessful claimant.[24] This development, although significant for funded litigations, has little impact on the funding of arbitrations. Any risk for adverse costs awards is a matter for the funding agreement to deal with and appropriate insurance may be arranged to cover the funded party's liability for an adverse costs order.

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[19] Documents shared without a general intention to waive privilege as against the world at large, but instead subject to a limited waiver with respect to an identified third party, are described as subject to a 'limited waiver'.

[20] *Essar Oilfields Services Limited v Norscot Rig Management PVT Ltd* [EWHC 2361 (Comm)].

[21] Those terms included that the funder would receive the greater of 300% of the funding amount or 35% of the amount recovered in the case of "success" (as defined in the funding agreement).

[22] See section 59(1)(c) of Arbitration Act 1996.

[23] See *Davey v Money* [2019] EWHC 997 (Ch) and ChapelGate *Credit Opportunity Master Fund Ltd v Money & others* [2020] EWCA Civ 246).

[24] *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655; *Bailey v GlaxoSmithKline* UK Ltd [2017] EWHC 3195 (QB).

France

Third Party Funding is permitted in France

TPF is permitted in France and is considered a positive development towards access to justice. However, it remains fairly unregulated. The lack of legislative or regulatory framework at the national level stems, in part, from the relatively low cost of litigation in France as compared to common law countries. Moreover, punitive damages do not exist under French law and courts generally grant modest fees to the winning party compared to the actual costs that might have been incurred. As a result, the potential sums to be recovered by the funders are relatively low.

Although there has not yet been a significant need for TPF in French litigation, arbitration practitioners have recently reflected on TPF in French law. On 21 February 2017, the Conseil de l'Ordre of the Paris Bar adopted a resolution (the "**Resolution**")[25] and released a report (the "**Report**")[26] in support of TPF particularly in relation to international arbitration. To date, the Resolution and the Report are the only documents to address TPF in arbitration under French law.

Both the Resolution and Report confirm that no provision of French law "prevents a party from using the services of a third party to finance an international arbitration procedure"[27] and that TPF is in the interests of clients and counsels alike.

The Resolution also establishes ethical rules to protect attorneys and their clients. Any attorney representing a party funded by a third party funder is bound by his or her ethical obligations only to his or her client, the funded party. Moreover, an attorney representing a funded party cannot advise the third party funder in any way, even if asked by the client. In particular, an attorney must receive his or her instructions only from the funded party, and must refrain from communicating any type of information concerning the case to the third party funder.

TPF contract fee arrangements

As of today, there is no legislation in effect in France that would question the validity of TPF arrangements. French courts have addressed funding agreements in one case and held that such an agreement was a sui generis contract.[28]

However, TPF contract fee arrangements must comply with some general provisions under French law. Indeed, such fee arrangements must meet the conditions set out by article 1128 of the French Civil Code which are: (i) the consent of the parties, (ii) their capacity to contract and (iii) a lawful and certain content.[29]

Moreover, French Courts might intervene and regulate the TPF contract fee arrangements. The French Cour de cassation might sanction any success fee which is excessive for the services rendered.[30] As a result, such jurisprudence might apply to TPF and may lead to a reduction of the funder's fees if considered excessive.

[25] Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Resolution presented 21 February 2017: available at: http://www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf

[26] Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Report presented 21 February 2017: available at: http://www.avocatparis.org/system/files/publications/rapport_et_projet_resolution_tpf_0.pdf

[27] Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Resolution presented 21 February 2017; Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Report presented 21 February 2017, p. 2.

[28] *Société Foris* A.G. v. S.A. Veolia Propreté, Court of Appeals of Versailles (12th chamber s. 2), 1st June 2006, no. 05/0103.

[29] Article 1128 of the French Civil Code: "*The following are necessary for the validity of a contract: 1. the consent of the parties; 2. their capacity to contract; 3. content which is lawful and certain.*"

[30] Cour de cassation, Civ. 1re, 23 November 2011, no. 10-16.770.

In France, **the common law concept of privilege is covered by professional secrecy,** which imposes criminal liability on lawyers for breach of confidentiality obligations.

TPF features

The Resolution and Report highlight the main features and challenges posed by TPF under French Law: the impact of the involvement of a third party on the ethical obligations incumbent on counsel – particularly with regards to conflicts of interest and professional secrecy – and the issue of disclosure of the funding arrangement.

Preventing conflicts of interest
Article 4.1 of the *Règlement Intérieur National de la profession d'avocat* (RIN) imposes ethical obligations on French lawyers and prohibits the representation or the defence of more than one client in the same case.[31]

The counsel of the funded party must have an exclusive relationship with its client without any interference and communication with the funder. The relationship between the funder and the funded party must be considered as a factual relationship, independent from the one between the attorney and his client.[32]

However, this principle does not preclude the attorney from receiving direct payment or indirect payment from the funder as French law authorizes the payment from a third person.[33]

Professional secrecy
In France, the common law concept of privilege is covered by professional secrecy,[34] which imposes criminal liability on lawyers for breach of confidentiality obligations.[35]

As the Paris Bar Council Resolution clarified, the third party funder is not the client. Lawyers are not to advise the third party funder, receive instructions from the third party funder, communicate any information concerning the case, or meet with the third party funder in the absence of the client. Accordingly, French lawyers may not communicate any information concerning the case to the third party funder as this information is privileged. Practically speaking this means that it falls on the client to keep the third party funder in the loop during the arbitration.

As any information communicated to the third party funder by the client will not be covered by privilege or professional secrecy, it is highly recommended that the client and the third party funder enter into a confidentiality agreement at the outset of the relationship.

Disclosure of the funding arrangement
According to the Paris Bar Council, any French attorney representing a funded party should encourage his or her client to disclose to the tribunal the existence of TPF. Although there is no mandatory requirement to such disclosure, French law provides that both parties and arbitrators shall act diligently and in good faith in the conduct of the proceeding.[36] Disclosure of the existence of TPF to the tribunal might thus be considered as part of the good faith imposed upon the parties.

The Paris Bar Council also advises attorneys to warn the client of the possible consequences that such non-disclosure may entail, in particular with regard to the potential nullity of the award and the obstacles to its enforcement.[37]

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Senior Associate, Paris

[31] Article 4.1 of the RIN: "The lawyer can neither be the counsel nor the representative or the defender of more than one client in the same case [...]."

[32] Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Report presented 21 February 2017, p. 8.

[33] Article 1342-1 of the French Civil Code: "Satisfaction [e.g. payment] may even be rendered by a person who is not bound to do so, except where the creditor legitimately refuses it." 4° Article 2.1 of the RIN: "The professional secrecy of the lawyer is of public order. It is general, absolute and unlimited in time."

[34] Article 2.1 of the RIN: "The professional secrecy of the lawyer is of public order. It is general, absolute and unlimited in time."

[35] Article 226-13 of the French Criminal Code: "The disclosure of information of a secret nature by a person who is a depository of such information by state or profession, or by reason of a function or a temporary mission, is punishable by one year's imprisonment and 15,000 euros of fine."

[36] Article 1464 paragraph 3 of the French Code of Civil Procedure.

[37] Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Resolution presented 21 February 2017; Ordre des Avocats de Paris, Le financement de l'arbitrage par les tiers ("Third party funding"), Report presented 21 February 2017, p. 10.

Germany

Third party funding is permitted and on the rise in Germany

Germany has a stable and rather liberal legal framework that permits TPF in its traditional sense and there are no signs of any legislative regulations in this field for the foreseeable future. The German market for TPF is relatively mature and well developed with foreign TPF providers becoming increasingly more active in Germany. There are no statutory regulations or prohibitions applicable specifically to TPF. The concept of champerty and maintenance does not exist in Germany. However, TPF is subject to the general rules applicable to the provision of legal services in Germany as well as general procedural rules and mala fide considerations which create certain limits, in particular for atypical models of TPF in connection with mass litigation.

Attorneys who are admitted to practice in Germany have an obligation to inform their clients that TPF might potentially be available for the claim. In case of a preferred funder, they have to inform the client about any equally or more favourable options of other funders which are known to the counsel.[38] However, without a specific instruction from the client, they are not obligated to conduct comprehensive market research and to help select the most favourable option.[39] At the same time, German law prohibits attorneys who are admitted to practice in Germany from paying a portion of their fees to a third party for the procurement or brokerage of a matter or client. Hence, framework agreements between funders and lawyers may not provide for such a brokerage fee.

[38] Higher Regional Court of Munich, decision of 31 March 2015 (case number 15 U 2227/14).

[39] Higher Regional Court of Cologne, decision of 5 November 2018 (case number 5 U 33/18).

[40] German courts accept a success fee of up to 50% of the proceeds.

[41] Higher Regional Court of Munich, decision of 10 May 2012 (case number 23 U 4635/11).

[42] ibid.

[43] Higher Regional Court of Munich, decision of 31 March 2015 (case number 15 U 2227/14).

[44] ibid.

Third party funding fee arrangements are entirely flexible

The factors that generally influence the offered pricing terms of the funding arrangement are largely based on the size of the claim or expected damages, the estimated length of the matter, and the level of risk involved. Major German funders prefer to structure their remuneration either as a percentage of the amount actually recovered or as a multiple of the amount invested. They usually ask for a share of 30% of the proceeds up to and including EUR 500,000.00 and an additional 20% of the proceeds that exceed EUR 500,000.00.[40] In arbitration, a hybrid model equipped with a cap or a floor is also quite common. For domestic matters, German TPF providers also readily finance relatively small claims. The usual threshold is in the region of EUR 100,000.00.

Contingent or conditional fee arrangements are generally prohibited in Germany and may not be circumvented by means of the funding or a supplementary agreement.[41] This includes express or concealed agreements that the funder's success fee is passed on to the legal counsel in full or in part[42] or that the attorney fees are going to be paid by the funder in whole or in part only in case of success.[43] However, the invalidity of such a scheme does not, generally, lead to the invalidity of the funding agreement as a whole.[44]

In Germany, TPF services are not subject to VAT. In the event that the fees of the funded party's legal counsel are subject to German VAT, the VAT will usually have to be paid directly by the funded party and not by the funder. The VAT can be claimed back from German tax authorities in case the funded party is itself subject to German VAT. Particularly in cross-border cases, VAT implication and payment obligations have to be checked before the funding agreement is signed.

Under German TPF agreements, the funded party usually assigns its claim to the funder for security purposes. In addition, the funding agreement typically contains a guarantee of the funded party that it has full rights to and the power to transfer the claim. Under German law, this assignment does not have to be disclosed to the debtor and the funded party formally remains the party to the arbitration.

TPF features

Is it mandatory for a party to disclose that it is funded?
German law does not provide for a general obligation to disclose the existence of TPF or the details of the funding agreement, neither in German state court proceedings nor in arbitration proceedings that are seated in Germany. In arbitration, a disclosure is necessary if required by the applicable institutional rules. The rules of the leading German arbitral institution DIS do not contain a general requirement that TPF arrangements must be disclosed. However, a de facto obligation to disclose the fact that the party is funded and the name of the funder may arise out of the obligation of the arbitrators to disclose any facts and circumstances that might give rise to justifiable doubts as to their independence and impartiality. In light of the General Standard 6(b) of the IBA Guidelines on Conflict of Interest in International Arbitration, if a party is aware of or has reasons to believe that an arbitrator or his law firm has a relevant connection with its funder, it is obligated to disclose these facts to all concerned and as early as possible. If there are no such ties between the arbitrators and the funder, a disclosure might become necessary in case the funder wishes to be present at a hearing or to take part in settlement negotiations which are, by the very nature of arbitration, private. Finally, a disclosure of some details of the particular TPF arrangement might become necessary in case of respondent's application for security for costs.

Are communications with a Third Party Funder privileged?
Attorney client privilege between the funded party and its counsel does not extend to the relationship between the funder and the funded party. However, the funding agreement will typically contain a strict confidentiality clause. Common exceptions include providing information to external lawyers and other experts whom the funder might need to instruct in order to review the claim prior to or during the arbitration in case of new events. In addition, the funded party would usually have to waive the attorney client privilege so that its counsel can share information with the funder.

Is TPF relevant in relation to an application for security for costs?
The approach to security for costs seems to shift more towards the international approach to this remedy, even in purely domestic cases. Hence, a funding agreement might become relevant and the funded party might have to disclose it in whole or in part. Notably, the rules of the leading German arbitral institution DIS do not contain an express provision on security for costs, but consider it included in the arbitral tribunal's general power to order interim or conservatory measures. In any event, funding agreements with a funded party that potentially might be subject to security for costs should contain the funder's obligation to procure such security.

What are the additional cost benefits of TPF?
There is limited legal authority that currently governs the question of costs in funded arbitrations seated in Germany. However, the general rule in German litigation is that the loser pays the winner's costs.

Can a successful party recover its funded costs?
Arbitral tribunals in German seated arbitrations readily accept hourly based attorney fees as recoverable costs, as long as these costs are not totally disproportional. In this respect, the rules of the leading German arbitral institution DIS follow the international standard of reasonableness. In general, that rule also applies to a situation where one of the parties is involved in a TPF arrangement.

Can a successful party recover its TPF costs?
The recoverability of TPF costs is still an unsettled issue in Germany. In litigation, these costs are not reimbursable as part of a party's procedural costs. The question of whether and, if so, under which circumstances TPF costs might be recoverable as one of the substantive heads of claim (e.g. claim for damages), if German substantive law applies, is still not fully settled. In the only publicly available decision of 2009, a court of first instance held that TPF costs are not recoverable as damages.[45] In academic writing, the prevailing view seems to be that TPF costs are rather not recoverable as damages, or are at least limited to the amount of interest that the claimant would have to pay for a loan in the amount of the funded costs.[46]

Will a Third Party Funder be liable for another party's costs?
As long as the arbitration proceedings are formally conducted by the funded party, the funder is not liable to pay any costs of the opposing party that were set to be recoverable by the arbitral tribunal. However, the prevailing TPF model in Germany is a "no risk" scenario, in which the funder is contractually liable vis-à-vis the funded party to reimburse the opposing party's recoverable costs in case the funded party is ultimately unsuccessful and the funded party will not have to reimburse the funder for these costs. In arbitration, since the recoverable costs are not limited to statutory fees, some TPF providers stipulate a cap on reimbursable costs of the opposing party. In this case, the difference has to be borne by the funded party.

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[45] Regional Court of Aachen, decision of 22 December 2009 (case number 10 O 277/09).

[46] *Sharma* in Perrin (ed), Third Party Litigation Funding Law Review, 2nd edition 2018, p. 59 (70 et seq.); *Rensen*, MDR 2010, 182 (184).

Hong Kong

TPF is permitted in Hong Kong

TPF in international arbitration and mediation is permitted in Hong Kong. On 1 February 2019, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 entered into force. This Ordinance amended the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620)[47] to ensure that TPF of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty.[48]

Pursuant to section 98P of the Ordinance, the Secretary for Justice issued the Code of Practice for Third Party Funding for Arbitration to set out the practices, standards and obligations of third party funders to carry on TPF in Hong Kong. A funding agreement must include a Hong Kong address for service for the third party funder, set out the name and contact details of the specified advisory body responsible for monitoring and reviewing the operation of TPF, and the third party funder must maintain access to a minimum of HK$20 million of capital. It must also ensure that it maintains the capacity to pay all its debts and cover its aggregate funding liabilities for a minimum period of 36 months.

The third party funder also has to take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it. If the funded party confirms in writing that it has taken independent legal advice before entering into the funding agreement, this requirement is deemed to be satisfied.

TPF in international arbitration and mediation is permitted in Hong Kong. On 1 February 2019, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 entered into force.

[47] Available at: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf

[48] Available at: https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm

TPF features

The funding agreement must state whether (and if so to what extent) the third party funder is liable to the funded party to meet any liability for adverse costs, pay any premium for costs insurance, provide security for costs, and meet any other financial liability.

For the duration of the funding agreement, the third party funder must maintain effective procedures for managing any conflict of interest that may arise. It must not take any steps that cause or may cause the funded party's legal representative to act in breach of its professional duties. Moreover, the third party funder must observe the confidentiality and privilege of all information and documentation relating to the arbitration and the subject of the funding agreement.

Third party funders also have obligations in terms of control. For example, the funding agreement must set out clearly that the third party funder will not seek to influence the funded party or its legal representative to give control or conduct of the arbitration except to the extent permitted by law. As for disclosure requirements, the funder must remind the funded party of its obligation to disclose information about the funding agreement under sections 98U and 98V of the Hong Kong Arbitration Ordinance (Cap. 609).

The HKIAC 2018 Administered Arbitration Rules ("**HKIAC Rules**") explicitly refer to TPF. The HKIAC Rules provide that if a funding agreement is made, the funded party shall communicate a written notice to all other parties, the arbitral tribunal, any emergency arbitrator and HKIAC of the fact that a funding agreement has been made, as well as the identity of the third party funder.[49] Finally, under the HKIAC Rules, the tribunal can take into account any funding agreement in determining all or part of the costs of the arbitration.[50]

Conditional Fee Arrangement

The use of conditional fee arrangement is currently not permitted in Hong Kong under s.98O of the Arbitration Ordinance. However on 17 December 2020, the Law Reform Commission ("**Commission**") published a consultation paper proposing, inter alia, amendment to be made to permit the use of outcome related fee structures ("**ORFS**") for arbitration taking place in and outside Hong Kong.[51]

Given most of the leading seats in the world permit some or all forms of ORFS in arbitration, the proposed reform aims to promote the competitiveness of Hong Kong as a major arbitration centre. In particular, the Commission recommends all three forms of ORFS, namely, conditional fee arrangements,[52] damages-based agreements ("**DBAs**"),[53] and hybrid DBAs[54] be permitted in arbitration in Hong Kong.

The consultation period ended on 16 March 2021 and the Commission will publish a final report on the subject for the government's consideration thereafter.

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Harriet Chu
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[49] Article 44.1.

[50] Article 34.4.

[51] Available at: https://www.hkreform.gov.hk/en/docs/orfsa_e.pdf

[52] i.e. a lawyer charges no or low fee during the course of the proceedings and be paid a success fee if the client's claim succeeds.

[53] i.e. a lawyer charges no fee during the course of the proceedings and receives payment as a percentage of the sum awarded or recovered if the client's claim succeeds.

[54] i.e. a lawyer receives fees (usually at a discounted hourly rate) during the course of the proceedings and receives payment as a percentage of the sum awarded or recovered if the client's claim succeeds.

India

Third Party Funding is permitted and on the rise in India

In recent years, TPF has experienced a groundswell of support within the Indian legal fraternity. Practitioners, industry leaders and stakeholders have united their efforts to clarify some of the ambiguities surrounding the legality of its practice.[55]

There is no legislation in India regulating TPF in arbitration. Within the litigation landscape, TPF is statutorily recognised in certain Indian states.[56] In these states, an amendment[57] to the (Indian) Civil Procedure Code 1908 ("**CPC**") expressly authorises the court to secure costs for litigation by directing the financier of a civil suit to join as a party to the proceedings and deposit security for costs in court. Although the remaining states of India have not expressly recognised TPF in this manner there is no legislative bar that prohibits its practice (other than the Advocates Act, 1961).[58] TPF also received favourable reference in the 2017 report of the High Level Committee to review the Institutionalisation of Arbitration Mechanism in India.[59]

Case law in support of TPF in India exists as far back as 1876,[60] where the Privy Council held that an agreement to supply funds for a suit in return for a fair share of the proceeds would not be regarded as opposed to the public policy of India, unless it was extortionate, unconscionable, inequitable, or entered into for improper objects.[61]

Most recently, the Indian Supreme Court observed[62] that there was no restriction on third parties funding litigations and getting repaid from their outcome. In doing so, the Supreme Court carved out an exception stating that it would be unethical for advocates to finance claims on behalf of their client as this would fall foul of their mandatory professional code of conduct.

Judicial precedents therefore support the TPF landscape in the context of civil suits. However, the development of TPF in arbitrations seated in India is still very much in its embryonic stages. The (Indian) Arbitration and Conciliation Act, 1996 (the "**1996 Act**") and its subsequent amendments make no mention of TPF. In the absence of clear authority, its permissibility would depend on funding agreements being held as valid contracts under the (Indian) Contract Act, 1872. Except where an advocate is a party to the agreement, a champertous contract where returns are contingent on the success of a case is not per se illegal.[63] For this reason, in India-based arbitrations, TPF agreements must be entered into between the client and funder directly.

[55] According to data gathered by FTI Consulting (India), in the infrastructure sector alone, companies are facing large scale disruptions and disputes, negatively impacting the financial position of many construction firms in the absence of timely payments from their clients. Industry data reveals that major public sector undertakings and government agencies in India have over USD 10 billion of contingent liabilities in large part relating to ongoing construction projects. Moreover, construction projects under development across the country valued at almost USD 800 billion have been impacted by COVID-19, leading to further disruptions and disputes. With many large players being classified as non-performing assets, banks and traditional financial institutions find it rather difficult to provide further financial support for pursuing legitimate claims.

[56] Including Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh.

[57] Civil Procedure Code 1908, Order XXV Rule 2.

[58] Rule 20, Bar Council of India's Standards of Professional Conduct and Etiquette, Chapter II, Part VI, Bar Council of India Rules 1975 (read with Section 49(1)(c) of the Advocate's Act 1961, and its proviso).

[59] https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf sub-item (c) at page 43.

[60] *Ram Coomar Coondoo vs. Chunder Canto Mukherjee* [1876 PC 19], para 43 and 44.

[61] This was upheld in *Kunwar Ram Lal vs. Nil Kanth* (1893) L.R. 20 I.A. 112.

[62] *Bar Council of India vs. A.K. Balaji and Ors* 2018 (5) SCC 379.

[63] See G, A Senior Advocate AIR 1954 SC 557.

Most recently, the Indian Supreme Court observed that there was **no restriction on third parties funding litigations and getting repaid from their outcome.**

Until recently there was no code of conduct administering TPF best practices in India. However, in February 2021 the Indian Association for Litigation Finance[64] was founded as a means to educate and promote the development of TPF in India through self-regulation.

Montek Mayal, Senior Managing Director and Practice Leader (India) at FTI Consulting[65] states:

"An additional advantage that TPF appears to be bringing to the Indian market is the professionalisation of the damages quantification process. A preliminary quantification of damages is a critical component of the funding process. The reason is straightforward: the funder needs to understand from the outset the returns it might earn if the case is successful. Therefore, in such circumstances, parties and counsel often seek an independent expert report for quantification of damages early on in the case. This is in contrast to a number of India-related arbitrations where parties often do not engage with quantum and damages issues until much later in the dispute resolution process. This results in a general lack of understanding of the commercial and economic issues relevant to the dispute. The growth of TPF is changing this scenario and helping introduce global best practices to the Indian market."

Third party funding fee arrangements

It is well established that lawyers in India are expressly barred from funding claims when representing a party or accepting a success based fee. The Indian Supreme Court has unequivocally held that a profit-sharing arrangement between an advocate and his/her client would amount to professional misconduct.[66] Further, the Bar Council of India Rules, which set out standards of professional conduct for legal practitioners in India make clear that lawyers are prohibited from entering into conditional or contingency fee agreements.[67]

There is no legislation that limits or regulates the fees or interest a funder can charge. However, the contractual terms of a funding agreement may be subject to the court's scrutiny and review.[68] Funding agreements may risk breaching Indian public policy requirements if the funder's stake in the award is considered extortionate. The courts may limit the fee or interest being charged if the agreement is contrary to the principles set out by the Privy Council in Ram Coomar. Another potential limitation is the permissibility of foreign investment. The funding of Indian litigations from foreign sources will have to comply with the Foreign Exchange Management Act, 1999.[69] There is no specific regulation governing third party funding from foreign sources for arbitrations. As a result, a number of potential issues remain to be conclusively addressed, which include identifying permissible investment routes, the repatriation of returns,[70] and the approval of the Indian Government as such funding agreements are qualified as 'other financial services'.[71] In light of these uncertainties, greater diligence is to be exercised while structuring and finalising a TPF agreement with an Indian party.

[64] https://ialf.co.in/

[65] https://www.fticonsulting.com/our-people/montek-mayal

[66] *Re: Mr. 'G', A Senior Advocate of the Supreme Court* [AIR 1954 SC 557].

[67] BCI Rules, 1975: Rule 18 (fomenting litigation); Rule 20 (contingency fees); Rule 21 (share or interest in an actionable claim); and Rule 22 (participating in bids in execution).

[68] See *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876-77) 4 IA 23, where the Privy Council noted that "*[Agreements] of this nature must carefully be watched, and as and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them*".

[69] And its related rules and regulations.

[70] Coverage as 'capital account transaction' or 'current account transaction' for 'other financial services'.

[71] Under Schedule I, S No F.10 of the FEMA (Non-Debt Instruments) Rules, 2019.

TPF features

Is it mandatory for a party to disclose that it is funded?
For arbitrations seated in India, it is advisable to promptly disclose to the other party and the tribunal the existence of the executed funding agreement to eliminate any concerns around conflict of interest between the tribunal and the funder. Disclosure also protects the validity of the arbitration agreement and consequent award against claims from the respondent that the funder is to be considered as a 'third party' to the original arbitration agreement.

Are communications with a third party funder privileged?
Private and confidential communications are subject to privilege when made between the client and its legal advisors in the course of and for the purpose of his/her professional employment. Since a funder is a third party to the arbitration agreement it can be contested that disclosure of the client's confidential information, strategy and documents to the funder results in 'attorney-client privilege' being lost/waived.[72] Moreover, the disclosure of such privileged information to a third party may be construed as 'express consent' under the Indian Evidence Act.[73]

What are the additional cost benefits of third party funding?

Can a successful party recover its funded costs?
The tribunal has discretion[74] to award reasonable costs to a successful party in relation to its legal fees, the tribunal's fees and expenses, administrative fees of the arbitral institution, and any other expense incurred in connection with arbitral proceedings.[75] Recent amendments to the 1996 Act[76] further establish the principle that costs follow the event and direct the tribunal to consider all aspects in determining reasonable costs. TPF may impact cost orders and awards, where for example, in a security for costs application the tribunal will have to consider whether existence of TPF should be taken into account.[77] However, since TPF of arbitrations in India is still in its nascent stages the issue of whether funded costs can be recovered as the 'costs of arbitration' presently remains untested.

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Recent amendments to the 1996 Act further establish the **principle that costs follow the event and direct the tribunal to consider all aspects in determining reasonable costs.**

[72] *Mohd. Afzal Mir Vs Haji Mahda Bhat and Anr* (1983 SLJ 218 (J&K) ("the privilege is the privilege of the client and not of the legal adviser" has been followed in this case).

[73] Section 126 of the (Indian) Evidence Act, 1872.

[74] Section 31A of the (Indian) Arbitration and Conciliation Act 1996.

[75] The tribunal's discretionary power to award costs is independent of the provisions of the CPC as amended by the 2015 Act.

[76] See Section 31 A (2) and (3) of the (Indian) Arbitration and Conciliation Act, 1996.

[77] Due to principles incorporated in CPC, Order XXV.

Kingdom of Saudi Arabia

Third Party Funding is permitted in the Kingdom

The court system in the Kingdom of Saudi Arabia ("**KSA**") consists of a hierarchical structure, as listed in this descending order: (i) the Supreme Court; (ii) Courts of Appeal; (iii) First Instances Courts, which include General Courts; Penal Courts; Family Courts; Commercial Courts and Labour Courts; and (iv) The Administrative Court (or the Board of Grievances), which is the administrative judiciary court responsible for disputes involving a government entity as a party. Arbitration, on the other hand, is governed by the Arbitration Law,[78] and this Law is based, in the most part, on the standards and procedures of the UNCITRAL Model Law. Provided that parties agree on its jurisdiction over their agreement, the Arbitration Law applies to all arbitral procedures, whether local or foreign, save for non-reconcilable disputes such as criminal matters.

The Saudi Council of Commercial Arbitration ("**SCCA**") was founded in 2014,[79] and it is located in a modern facility at the Council of Saudi Chambers building in Riyadh. SCCA published the Arbitration Rules in May 2016, and these Rules enable it to facilitate and administer arbitrations in KSA. The Arbitration Rules set out: (a) the procedure by which arbitral proceedings are commenced; (b) the rules by which the tribunal is appointed and how arbitrators can be challenged and replaced; (c) the detailed procedures by which the arbitration will be managed, including the conduct of proceedings, exchange of information, the use of experts and the possibility of interim measures; (d) the rules regarding the making of the arbitral award; and (e) the fees and costs of the SCCA. The Arbitration Rules are relatively new and have not yet been widely tested.

There are no rules or laws that expressly prohibit TPF in KSA but the question of whether it is permitted under KSA law is yet to be definitively tested in KSA courts. Some commentators view that TPF can be considered a new emerging innominate contract which was not known before and it is therefore subject to the Sharia Principles that are applicable to contracts.

In general, Islamic Sharia has the ability to adapt to all developments, as it accommodates all types of contracts and transactions that do not lead to usury or other prohibited transactions, whether the contract is similar to one of the nominate contracts or a combination of multiple contracts. Under the well-established rules of the principle of permissibility in Islamic jurisprudence, nothing in terms of new transactions, contracts and conditions is prevented or prohibited without a clear and express provision. Further, contracts are subject to the principle of pacta-contractors (i.e. the contract is the law of the parties), provided that the contract does not violate the Sharia.

It should also be noted that only funding institutions regulated and licensed by the central bank are allowed to provide funding services in KSA. Individuals or companies are prohibited from practicing funding activities if they are not licensed.

[78] Royal Decree No. M/34 of 24/5/1433H, corresponding to 8/6/2012G.

[79] Under Council of Ministers Resolution number 2057 of 14/6/1435H, corresponding to 15/03/2014G.

TPF fee arrangements

Given there is no KSA law on TPF arrangements, the general KSA principles of law referred above will also apply to TPF fee arrangements. The Saudi Advocacy Law[80] does not prohibit contingency fees. Article 26 stipulates that the lawyer's fees and method of payment shall be determined by agreement with the relevant client. Where there is no such agreement, the fees shall be assessed by the court pursuant to a request made by the lawyer or client. The Saudi Administrative Court has previously ordered a client to pay the client's lawyer the agreed sum of contingency fee, being 15% of the collected disputed amounts as agreed upon between the parties.[81]

TPF features

As for disclosure requirements, there is only a general obligation imposed on arbitrators under the Arbitration Law, stating that that the arbitrator shall not have any interest in the dispute and shall declare in writing to all parties to the arbitration all the circumstances that raise justifiable doubts about their impartiality and independence, unless they have previously informed the parties of such.[82]

If the arbitrator or the other party to the arbitration has no knowledge about the existence of a TPF transaction, it would not be possible for the arbitrator to fully assert their integrity. Disclosing the existence of a TPF arrangement in arbitration is therefore desirable given the potential conflict of interest between third party funders and the arbitrator. However, this may be debated on the basis that a TPF is a form of funding/financing, and similar to the basic form of financing services provided by e.g. banks, a TPF is not subject to potential conflict of interest.

Privileged legal communications is not in itself a recognised concept in KSA. In case the TPF entity was a member of a credit information entity that is licensed in KSA, they must abide by Article 6 of the Credit Information Law,[83] stating that a credit information entity must maintain the confidentiality of the credit information of its clients. Beyond that, and considering that agreements and/or communications with third-party funders are likely to include sensitive information, it is only reasonable and safer to enter into confidentiality and non-disclosure agreements. It is also reasonable and practical that these confidentiality agreements include the legal services provider in the agreement structure and/or in the loop as it is likely that the funder will ask for reports and updates on the matter they are funding. However, this could be linked to the general Sharia rule of not causing damage to others, considering that disclosing a piece of information that harms the concerned person is a damage that needs to be lifted and compensated for, or as may be otherwise decided by the competent court.

In principle, Article 24 of the Arbitration Law states that the arbitration fees are to be stipulated for in the arbitration agreement, and if parties fail to agree on the fees, the competent court will decide on the matter. There is no regulatory obligation to compensate the winning party for the fees per se, but in practice, the position will likely be that the losing party will pay the fees – unless otherwise agreed between the parties. Recovering funding costs in arbitration is likely to turn on the arbitration agreement, any separate ad hoc agreement between the parties and the agreed institutional rules.

While there exists no clear regulatory position, local experts consider that a funder in arbitration proceedings is unlikely to be held liable for another party's costs considering that they are not party to the arbitration agreement, and an arbitral tribunal has no jurisdiction to make costs orders against a party that is outside their arbitral scope. That said, consideration needs to be had to the arbitration agreement, any separate ad hoc agreements between the parties and the agreed institutional rules.

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[80] Royal Decree No. M/38 of 1/1/1422H, corresponding to 26/3/2001G.

[81] Appeal Judgment No. 266 of 1429H, Hearing of 4/7/1429H.

[82] Article 16(1) of the Arbitration Law.

[83] Royal Decree No. M/37 of 5/7/1429H, corresponding to 9/7/2008G.

Qatar

Third party funding is permitted in the state of Qatar

Qatar has a system of courts that are often referred to as 'local' courts. In addition, there is a court located in the Qatar Financial Centre ("**QFC**") known as the Qatar International Court ("**QIC**"). As the 'local' courts' legal system is based on civil law it does not recognize many of the historical impediments to TPF (notably champerty and maintenance) faced by common law jurisdictions. In addition, the laws and regulations that are applied in the QIC[84] make no reference to TPF.

Parties doing business in Qatar have the option to agree that disputes will be resolved by arbitration. Parties can choose between having the arbitration seated in onshore Qatar or in the QFC. In the case of an onshore seat the arbitration will be governed by Law 2/2017 Promulgating the Civil and Commercial Arbitration Law (the Arbitration Law). Arbitration seated in the QFC will be subject to the QFC Arbitration Law.[85]

Further sources of regulation in arbitration are the institutional rules (if any) that the parties have agreed to apply. ICC rules are commonly featured in contracts in Qatar and in addition there is a set of rules in the Qatar International Centre for Conciliation and Arbitration ("**QICCA**"). The QFC does not have any further rules beyond the QFC Arbitration Law as it is not an administrative centre for arbitration in the way that QICCA is.

There are no rules or laws that expressly prohibit third party funding in Qatar but the question of whether it is permitted under Qatar law is yet to be definitively tested in the Qatar courts, whether "local" or the QIC.

It is often argued that third party funding promotes access to justice and is therefore aligned and consistent with principles of Sharia law.

The Arbitration Law is based on the UNCITRAL Model Law and does not include any prohibition on the use of TPF in arbitrations. Similarly the QFC Arbitration Regulations do not contain any prohibition such that, as with litigation, there is no express prohibition on TPF. With that said, its use in arbitrations in Qatar appears to have been fairly limited to date.

Third party funding fee arrangements

The lack of specific TPF regulation means there is a lack of clarity surrounding the permissibility of TPF in Qatar. Lawyers recommending TPF or advising clients in relation to TPF should consider whether such arrangements are in accordance with their professional obligations (e.g. whether funding is in the best interest of the client, potential conflicts of interest etc). There may also be other relevant considerations, for example, whether a potential funder is appropriately licensed to provide funding.

Subject to those matters being investigated and cleared, generally Qatar law recognises the freedom of parties to contract and so long as the nature of the contract is not prohibited by Qatar law (which TPF does not appear to be) then it would be an enforceable bargain and recognised as such by a court / tribunal.

TPF features

In terms of recovery of TPF funding costs in Qatar seated arbitrations, the Arbitration Law provides that *"The arbitral award shall state the costs and fees of the Arbitration and the Party who shall pay such fees and the procedures of payment, unless the Parties agree otherwise".*[86]

The QFC Arbitration Law provides that "Unless the parties to an Arbitration Agreement have (whether in the agreement or in any other document in writing) otherwise agreed, an Arbitral Panel may in making an Award:(1) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid;(2) fix the amount of costs to be paid or any part of those costs; and (3) award interest on any sums it directs to be paid".

If the parties have agreed to the QICCA rules applying then the relevant provisions are Article 43.1 which provides that the Tribunal shall fix the costs of the arbitration in the final award and Article 43.2(g) which includes the following in the definition of "costs":

"The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable…"

[84] Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules and Schedule 6 to QFC Law No (7) of year 2005.

[85] QFC Arbitration Regulation 2005.

[86] Article 31(4) of Law 2/2017 Promulgating the Civil and Commercial Arbitration Law.

These provisions are broadly worded and so can be construed as including a Party's legal and other expenses that it has incurred in the arbitration. However, typically the Parties will, though their submissions and agreement to Terms of Reference, make the position clear as to the Tribunal's powers as regards costs.

It will be a matter of strategy whether a TPF funded party reveals the existence of TPF at the outset and seeks an express reference to a claim for funding costs in the submissions (but more importantly in the Terms of Reference). Absent express reference, while there may be some scope to argue that funding costs fall within the tribunal's jurisdiction in regards to costs, we are not aware of any definitive decision on this issue.

Absent anything specific in the arbitration agreement, any separate ad hoc agreement between the parties and/or the agreed institutional rules, it is unlikely that a funder in arbitration proceedings would be held liable for adverse costs as an arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement.

There is no concept of legal professional privilege or litigation privilege in Qatar, legal professionals are subject to obligations of confidentiality.[87] Law No. 23 of 2006 obliges a lawyer to "keep confidential all the information disclosed to him by his client and papers and documents received" (see Article 51) and as such a lawyer is not "permitted to give declarations, disclose information" (see Article 56) nor "permitted to disclose any facts or information which comes to his knowledge through his profession" (see Article 57).

For international law firms and foreign attorneys registered with the QFC, the duty of confidentiality derives from Law No. 7 of 2005 (as amended by Law No. 2 of 2009) and its regulations including QFCA Rules (2018). Paragraph 8, Part 6 [Legal Services Code] of the QFCA Rules imposes the duty of confidentiality on them to "maintain the confidentiality of client information."

Communications and agreements with third parties (including funders), which are likely to include sensitive information and which may be a target for disclosure requests, should be protected through confidentiality agreements.

Article 233 of Law No. 13 of 1990 (known as the Civil and Commercial Procedure Code) confers the court/tribunal with a discretionary right to reject a party's request for an order to disclose documentation during the court proceeding if the other party shows that it has a "legitimate interest" to abstain from disclosing the same. Although the term "legitimate interest" is not defined, it is generally thought that this will include any duties of confidentiality the party owes at law, and can restrict the disclosure of documents in a similar manner to legal privilege.

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[87] See Law No. 23 of 2006, Articles 51, 56 and 57.

Singapore

Third Party Funding is permitted in Singapore

TPF in international arbitration seated in Singapore and related court (including enforcement) and mediation proceedings has been permitted in Singapore since 2017.[88] This was an important step towards reinforcing Singapore's position as the leading Asia Pacific international dispute resolution hub. Singapore's Minister of Law announced on 10 October 2019 that TPF will be extended to domestic arbitrations in 2019 as well as to certain proceedings in the Singapore International Commercial Court (SICC) and mediations connected with those proceedings.[89] However these changes are currently still awaiting implementation.

Only professional funders are permitted to enter into TPF arrangements in Singapore. A qualifying third party funder must carry on the "principal business" of funding dispute resolution proceedings (in Singapore or elsewhere) and have a paid up share capital or managed assets (as defined in the Regulations) of not less than S$5 million (or the foreign currency equivalent).[90]

Singapore lawyers and foreign lawyers based in Singapore are permitted to introduce or refer third party funders to clients provided they receive no direct financial benefit from the introduction or referral. Lawyers are also allowed to advise or act for their clients in relation to TPF contracts (as long as they do not receive any financial benefits, other than fees for legal services).[91] Foreign lawyers not based in Singapore are free to represent parties in arbitrations in Singapore and[92] are not regulated by the Singapore legislation. They therefore have even more flexibility in relation to TPF arrangements.

TPF contract fee arrangements are entirely flexible

Complete flexibility is provided to TPF contracts, in particular arrangements based on a percentage of the sums recovered and / or conditional fees are permissible for providers of TPF.[93] However Singapore lawyers are not permitted to enter into such agreements[94] which may make it difficult to obtain TPF for smaller claims.

TPF features

Singapore has not yet introduced any statutory code of practice, however, many of the usual features of TPF have statutory support. First, amendments were made to the Legal Profession Rules to address problems of conflicts of interests between legal practitioners and third party funders.[95] Secondly, those rules also address the obligations of disclosure of the TPF arrangement by the Singapore legal representative.[96] There is no similar duty imposed by Singapore legislation on foreign lawyers in relation to proceedings in Singapore. There may thus be inequality in the disclosure obligations between the parties in Singapore-seated arbitrations where one party is represented by Singapore lawyers and one by foreign lawyers.

[88] Civil Law Amendment Act and the Civil Law (Third Party Funding) Regulations 2017.

[89] https://www.mlaw.gov.sg/news/speeches/speech-by-minister-k-shanmugam-at-opening-ceremony-of-lawsoc-at-maxwell-chambers-suites at [31].

[90] Civil Law (Third Party Funding) Regulations 2017.

[91] Legal Profession Act (LPA) and the Legal Profession (Professional Conduct) Rules 2015 (Legal Profession Rules). The 2017 amendments to the CLA were accompanied by related amendments to both the LPA and the Legal Profession Rules.

[92] Section 35 LPA.

[93] Section 5 Civil Law Act.

[94] It is not clear whether these fee arrangements are available for foreign lawyers taking advantage of S35 of the LPA, where such fee arrangements are allowed in their home jurisdiction.

[95] Rule 49B of Legal Profession (Professional Conduct) Rules 2015.

[96] Rule 49A.

Singapore has not yet introduced any statutory code of practice, **however, many of the usual features of TPF have statutory support.**

There are no regulations or authorities dealing with the recoverable costs in a TPF arbitration so a tribunal may not have jurisdiction to award costs based on any uplift on those costs payable to the funder, following a successful claim (although such an award may be possible under the ICC Rules in some jurisdictions).[97] For this reason, Augusta does not usually require claimants to take out After the Event Insurance ("ATE")[98] to cover the risk of an adverse costs award. There are also no regulations requiring a funder to meet any adverse costs order in the event that a claim fails or dealing with whether a TPF arrangement can generally be a ground for security for costs,[99] particularly in circumstances where there is no obligation on the funder to respond to any adverse costs order. However, this is likely to be something that a tribunal will take into account if an application for security for costs was made, albeit not in itself being conclusive as to a party's financial status.

The law as outlined above is complemented by a trio of soft law instruments developed by industry stakeholders in Singapore to promote best practices in connection with TPF in the city-state. The Law Society of Singapore, Singapore Institute of Arbitrators and SIAC all have guidelines and practice recommendations much of which seek to complete the picture where the statutory framework may be incomplete.

SIAC's Investment Arbitration Rules 2017 ("IAR") and its Practice Note on Arbitrator Conduct In Cases Involving External Funding include explicit provisions on TPF and SIAC is likely to extend similar provisions to the 2021 edition of its international commercial arbitration rules that are currently open for public consultation. They empower the tribunal to order full disclosure of the TPF arrangement including whether the funder has committed to undertake an adverse costs order.[100] The tribunal can also take into account the TPF arrangement in apportioning the costs of the arbitration.[101]

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[97] *Essar Oilfields Services Limited v Norscot Rig Management PVT Ltd* [EWHC 2361 (Comm)].

[98] ATE premiums are usually in the range 25 to 40% of the costs risk insured against.

[99] The SIAC's Practice Note on Arbitrator Conduct in Cases involving External Funding does however provide that the involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal or other costs.

[100] IAR Rules 24 (l). and 35 and SIAC's Practice Note on Arbitrator Conduct in Cases involving External Funding, paragraphs 5, 7 and 8.

[101] IAR Rule 33.1 and SIAC's Practice Note on Arbitrator Conduct in Cases involving External Funding, paragraphs 10-11.

South Africa

Third party funding is permitted and on the rise in South Africa

Although South Africa is the most advanced litigation funding market in Africa, it is still in its infancy compared to global markets.[102]

TPF is permitted under South African law due to case law precedent; however it is currently not regulated by legislation. Contingency fees, which differ from 'pure funders' or non-legal practitioner funders, are regulated by the Contingency Fee Act.[103]

Prior to 2004, the courts in South Africa allowed TPF arrangements in certain circumstances. However, these arrangements were not encouraged by the courts.

Notwithstanding this, since the Supreme Court of Appeal judgment in *Price Waterhouse Coopers Inc. v National Potato Co-operative Ltd*,[104] the South African courts have recognised that access to justice is often limited for financial reasons and TPF arrangements provide an avenue to assist in this regard.

Further, the courts considered it a greater injustice if the right to access to justice (a right held under the South African Constitution), was denied to litigants due to financial constraints.

In the *Price Waterhouse* case the court held that financial assistance for litigation in return for a share in the proceedings in that litigation is not contrary to public policy. However, the court did qualify this by saying that TPF arrangements must not amount to an abuse of process. Therefore, TPF must not enable frivolous or vexatious litigation and must not be used for ulterior purposes that prejudice the other party.

The process is considered abused if a party has no bona fide claim but intends to use litigation to cause the other party financial (or other) prejudice.

Third party funding fee arrangements are to some extent flexible

South Africa recognises the principle of *pacta sunt servanda* which dictates that where a contract is clear and unambiguous, effect is given to its meaning and the parties are bound by the contract. The only exceptions to this principle are where the terms of the funding arrangement are unclear or ambiguous, or where the arrangement would be contrary to public policy.

The High Court in *De Bruyn v Steinhoff International Holdings NV*[105] considered certain key factors when determining whether a TPF arrangement was fair and reasonable. Some of the most notable of these factors include the following: (1) the TPF arrangement should be necessary to provide meaningful access to justice; (2) the TPF agreement should be fair in protecting the interests of the defendants; (3) the TPF arrangement must not overcompensate the third party funders for assuming the risks of the litigation; and (4) the funding arrangements must not interfere with the duty of the lawyers to act in the best interests of their clients or the client's rights to exercise control over the litigation.

In obiter, the court in *De Bruyn v Steinhoff* further considered the termination rights of the third party funders under the TPF arrangement in detail. It held that the third party funders should be entitled to lawfully terminate their TPF arrangement, where the dispute lacks reasonable prospects of success. However, the court further held that this decision to terminate should not be made without the advice of the independent view of the lawyers on record. The purpose of doing so would be to create sufficient safeguards that the funding commitments could not be *"capriciously withdrawn and that funding will remain available to maintain access to the courts"*.[106]

[102] *"Litigation Funding in Africa: Where are the opportunities in this investment vehicle in 2020 and beyond"*, GRM Intelligence (pg. 42). Available at https://grmintelligence.com/wp-content/uploads/Litigation_Funding_Report-F1.pdf

[103] Act 66 of 1997.

[104] *Price Waterhouse Coopers Inc. and Others v National Potato Co-operative Ltd* (448/2003) [2004] ZASCA 64.

[105] *De Bruyn v Steinhoff International Holdings NV and Others* [2020] JOL 47482 (GJ).

[106] ibid, para 103.

Although South Africa is the most advanced litigation funding market in Africa, **it is still in its infancy compared to global markets.**

TPF features

Is it mandatory for a party to disclose that it is funded?
It is not mandatory for a party to disclose that it is funded under a TPF arrangement. However, as was the case in *De Bruyn v Steinhof*,[107] a court may compel the disclosure of the TPF agreement itself where questions arise as to whether the arrangement is fair and reasonable.

A court may also join a third party funder as a co-litigant in the proceedings and such funder could be held liable for the costs of the litigation.

Are communications with a third party funder privileged?
Litigation privilege covers communication between a litigant or their attorney and third parties provided such communication was made for the purpose of pending or contemplated litigation.

Accordingly, the communications between the litigant and the third party funder would be privileged provided it concerned pending or contemplated litigation.

Will a third party funder be liable for another party's costs?
In the High Court judgment of *Price Waterhouse Cooper Inc. v IMF Ltd*,[108] the court held that a third party funder may be joined as a co-litigant in the proceedings and such funder could be held liable for the costs. The purpose of doing so was to counter any possible abuses that could arise from the Supreme Court of Appeal's earlier recognition of the validity of TPF agreements.

This issue was further dealt with by the Supreme Court of Appeal in *Naidoo v EP Property Projects (Pty) Ltd*[109] where the court upheld the decision of the lower court granting a *de bonis propriis* costs order against a third party funder who was neither joined nor a party to the proceedings. In reaching its decision the court considered that:-

- the level of involvement of the third party funder in the proceedings was substantial amounting to a complete take over of the handling of the proceedings;
- the third party funder stood to benefit from a favourable award; and
- the conduct of the third party funder was found to be fraudulent and in bad faith.

The third party funder was not a pure/commercial funder and therefore became a party even though not cited as such.

No set criteria was indicated from which it could be determined when the level of involvement by the funder in proceedings, and the level of aiding in a claim in bad faith, will result in the courts granting an exceptional remedy provided for in *Naidoo*.[110]

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[107] ibid.

[108] *Price Waterhouse Cooper Inc. v IMF Ltd* 2013 (6) SA (GNP).

[109] *Naidoo v EP Property Projects (Pty) Ltd* (444/2012) [2014] ZASCA 97.

[110] ibid.

Spain

TPF is permitted in Spain

There is an increased interest in Spain for TPF solutions for litigation and arbitration, with a number of international funds involved in claims either litigated in Spain or involving Spanish companies, in particular in relation to international arbitration proceedings.

Although TPF is not specifically regulated in any statute or extra-statutory regulation, as its use is relatively recent, TPF is permitted in Spain.

The General Council of Spanish Bars (Consejo General de la Abogacia Española) has published and echoed different articles and news in relation to TPF. However there is no reference to it in the current Spanish Lawyers General Statute ("**Statute**").[111] A new General Statute has been approved in March 2021 (to enter into force on 1st July 2021)[112], but it does not include either any express reference to TPF.

Given the lack of regulation, one should consider the principle of freedom of contract under Article 1255 of the Spanish Civil Code, which states that contracting parties can establish the agreements, clauses and conditions that they deem convenient, as long as they do not violate the law, morality or the public order. Therefore, in principle, a TPF agreement would be valid if it does not violate the law, morality or the public order.

TPF contract fee arrangements

Conditional or contingency fee arrangements are currently permitted in Spain. Fee arrangements based on percentages of amounts to be recovered (*pactum quota litis*) were historically prohibited in Spain but the Supreme Court issued a historic ruling in 2008 lifting that prohibition and making the freedom of contracts prevail.[113] The new rule coming out of this important judgment was reflected (by means of an amendment) in the Spanish Lawyers General Statute shortly after the judgment and has also been incorporated into the latest update of the Statute approved in March 2021. The only limits that the Statute imposes are the respect of ethic rules and fair competition rules.

Thus, lawyers and clients are free to agree fees and the way to pay them and it is not uncommon to agree contingency or success fees, provided that ethical and fair competition rules are respected. The same freedom to contract would apply in relation to TPF fee arrangements that are based on the result of the litigation or arbitration that is being funded.

[111] Estatuto General de la Abogacía Española approved by Royal Decree 658/2001 of 22 June is the norm that regulates the practice of the legal profession in Spain.

[112] Approved by the Council of Ministers on 2 March 2021 by means of Royal Decree.

[113] Spanish Supreme Court dated 4 November 2008 (number 5837/2005).

TPF features

Disclosure of the funding arrangement

When considering the need to disclose TPF arrangements in Spain, there is an important distinction between litigation and arbitration.

With regards to litigation, there are no provisions under Spanish law that compel the parties to disclose the existence of a funding agreement. Thus, only a court can order disclosure of the existence of a funding agreement if one of the parties requests it (although the judge could decide not to order the disclosure despite the request).

The position is different in arbitration, where soft law instruments and arbitration rules of some arbitral institutions in Spain have taken steps in relation to the need to disclose the existence of funding arrangements.

In this regard, a Code of Good Arbitration Practice was released in 2019 by the Spanish Arbitration Club (Club Español del Arbitraje) giving guidelines to arbitrators, parties, experts and any other participants in an arbitration process.

Section VI of the Code of Good Arbitration Practice incorporates recommendations concerning third party funders. In particular, recommendation 154 states:

"Any party that has received funds or obtained any kind of funding from a third party, linked to the result of the arbitration, shall inform the arbitrators and the counter party, at the latest at the time of the statement of claim and disclose the identity of the third party."

Likewise, Spanish arbitral institutions have included references to TPF in their rules. The Arbitration Rules of the Spanish Court of Arbitration (*Corte Española de Arbitraje*) provide that parties must disclose in the request for arbitration and in the answer to the request if a third party has provided funding linked to the outcome of the arbitration as well as the identity of the funder.[114]

Pursuant to these Arbitration Rules, the obligation to disclose that circumstance is an on-going obligation and arises as soon as a funding arrangement is put in place even if this happens after the request for arbitration and the response. In this regard, the Arbitration Rules of the Spanish Court of Arbitration provide that the party receiving financing must inform the tribunal, the counterparty and the Court as soon as the financing takes place. They also provide that subject to any rules of professional secrecy that may apply, the tribunal may request that party to disclose further information that it considers appropriate in relation to such funding arrangement and the funding entity.[115]

This has been reinforced with article 27.2, subparagraph (n) of the rules related to arbitrators' powers, which specifically gives the arbitrators the power of *"requesting additional relevant information from any of the parties concerning funding or funds linked to the outcome of the arbitration."*

The Madrid International Arbitration Center (*Centro Internacional de Arbitraje de Madrid, also known as CIAM*) has also acknowledged the importance and relevance of TPF and has included relevant provisions in its Arbitration Rules. In this regard, article 23 of the CIAM's Arbitration Rules includes the duty of the parties to inform the tribunal of the existence of third party funding:

"1. If any party obtains third-party funding, it must notify it, along with the third party's identity, to the arbitral tribunal, the counterparty and the Centre as soon as the funding is provided.

2. Subject to any applicable rules on non-disclosure, professional secrecy or attorney-client privilege, the tribunal may request the party funded by a third party to disclose any information it considers appropriate about the said funding and about the funding entity."

When considering the need to disclose TPF arrangements in Spain, **there is an important distinction between litigation and arbitration.**

[114] Articles 6.2.i) and 7.2.i).

[115] Article 26.

Preventing conflicts of interest

The Spanish Lawyers Code of Conduct[116] regulates conflicts of interest and provides that a lawyer must not represent a client if the matter is in conflict with another matter from another client, or with the lawyer's own interests.[117]

The Code of Conduct also provides that lawyers must not be involved in cases when there is any circumstance that may affect their freedom and independence in defending or advising their client, or any other situation that may put in risk the preservation of professional secrecy or objectively entails a conflict of interest.[118]

The Spanish Lawyers' General Statute of 2001 provides that the practice of the law is incompatible with other activities that may disregard the independence that is inherent to the profession and that lawyers should refrain from performing those activities that could imply a conflict of interest.[119]

The new Spanish Lawyer's General Statute (approved in March 2021 and to enter into force in July 2021, replacing the 2001 version) is expected to regulate in more detail the different cases of conflict of interest and their consequences.

The existence of third party funding does not entail in itself a conflict of interest but it has to be handled taking into account the relevant provisions of the Code of Conduct and the General Statute. Whilst each case will be different and should be considered specifically, having the express agreement of the client in relation to any liaison between the lawyer and the fund and clearly stating that the lawyer shall act in the client's interest at all times would be in accordance with applicable requirements.

Professional secrecy

Article 5 of the Spanish Lawyers Code of Conduct states that the professional secrecy rule *"[…] imposes on those who practice law the obligation to keep secrecy and, at the same time, confers this right on them with respect to the facts or news that they may learn by reason of any of the modalities of their professional practice, limiting the use of the information received from the client to the needs of his defence and legal advice or counsel"*.

In addition, the new Spanish Lawyers General Statute to enter into force in July 2021, regulates in more detail professional secrecy, including the protection of the conversations held by the lawyers with their clients, the opposing parties or their lawyers, in person or by any telematics means, which may only be recorded with the previous warning and consent of all intervening parties (being in any case covered by professional secrecy). Another important novelty of this new statute is that communications with in-house company lawyers will also be protected by professional secrecy.

In addition to the Code of Conduct and the General Statute, the Organic Law on the Judiciary (*Ley Orgánica del Poder Judicial)* also provides that lawyers *"must not disclose any information or particulars they may be aware of in the course of their legal practice and may not be asked to depose on any of these matters"*.[120]

In Spain, the consequences for breaching professional secrecy are covered under the Spanish Criminal Code[121] and breaching that obligation may attract criminal liability.

The new Spanish Lawyer's General Statute (approved in March 2021 and to enter into force in July 2021, replacing the 2001 version) **is expected to regulate in more detail the different cases of conflict of interest and their consequences.**

[116] Código Deontológico de la Abogacía Española, approved by the General Council of Spanish Bars on 6 March 2019.

[117] Article 12.C.

[118] Article 12. A. 5.

[119] Article 22.1.

[120] Article 542.3 of the Spanish Organic Law 6/1985. of 1 July, on the Judiciary.

[121] Article 199.2 of the Spanish Criminal Code.

How can the obligation or duty of professional secrecy be kept if there is a TPF arrangement in place?
The most orthodox approach would be for clients to liaise directly with the third party funder and provide them with any information required by the fund. Having said that, clients often prefer that lawyers deal with those requests. Depending on the specific circumstances, the sharing of information by lawyers with a third party funder can be considered as needed for the client's defence (as required by Article 5 of the Spanish Lawyers Code of Conduct), because otherwise the third party would not put forward funds and the client would not be able to exercise his defence. Likewise, the duty of professional secrecy extends to those that have a professional collaboration with lawyers. That said, the client's express consent would be required for lawyers to provide information about the case to third party funders.

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Depending on the specific circumstances, the sharing of information by lawyers with a third party funder can be considered as needed for the client's defence (as required by Article 5 of the Spanish Lawyers Code of Conduct), because otherwise the third party would not put forward funds and the client would not be able to exercise his defence.

Sweden

Third Party Funding is permitted in Sweden

There are no particular restrictions as regards funding of a claim.[122] There are, however, several rules (soft law and actual legislation) on conflict of interests and the possibility for members of the Swedish Bar Association to agree to a risk agreement that will have an impact.

While there is no prohibition on TPF under Swedish law it is not allowed for a member of the Swedish Bar Association to enter into a risk agreement, unless under very special circumstances, according to the Code of Professional Conduct by the Swedish Bar Association (the "CPC").

TPF fee arrangement

While there is no prohibition on TPF under Swedish law it is not allowed for a member of the Swedish Bar Association to enter into a risk agreement, unless under very special circumstances, according to the Code of Professional Conduct by the Swedish Bar Association (the "**CPC**").[123]

A risk agreement is defined as an agreement where the fee is based on the success, or result, of the claim. The Disciplinary Committee of the Swedish Bar Association, which has taken a very restrictive view as regards risk agreements, has so far never accepted one.[124] The main principle of fees under the CPC is that they should be "reasonable".[125] The prohibition on risk agreements is due to concerns that a risk agreement could violate this principle. When determining what a reasonable fee is, several factors will be of relevance, such as: the agreement with the client, the scope, nature, complexity and importance of the work and the skills and expertise of the lawyer.

It is considered to be of utmost importance that the financial situation of the lawyer is never "co-mingled" with the client's and this is another factor that ultimately restricts the use of risk agreements.

Another issue that has been discussed in relation to the fee arrangement for TPF in Sweden is conflicts of interest. A member of the Swedish Bar Association is obliged to always put the interest of the client first. This entails inter alia an obligation to share all relevant information with the client and an obligation of non-disclosure in relation to others. It is not difficult to envisage a situation where the interests of the client and the funder might become contrary, at least in the future. In such a case, counsel cannot have agreed to an obligation to inform the funder of every development in the case, as is customary in TPF agreements, without permission from the client. It is furthermore important not to create a situation where the funder also can be regarded as a client. This could potentially create a conflict of interests for counsel further down the line and ultimately a potential need to step down from representing the client.

These rules in the CPC apply generally, i.e. both in arbitration and in litigation, as long as counsel is a member of the Swedish Bar Association.

[122] The opposite situation has however come under the assessment of the Swedish Supreme Court which has led to a lifting of the corporate veil in a situation where an SPV had been set up for a particular dispute (the disputed claim being the only asset) and subsequently lost the claim. The shareholders of the SPV were ordered to reimburse the respondent for costs, see NJA 2014 s. 877. In RH 2011:24 from the Skåne and Blekinge Court of Appeal the ownership of the company could not be determined and instead the directors were held accountable for the litigation costs. See also for reference NJA 1975 s. 45.

[123] See section 4.2.1 and 4.2.2 of the CPC. It is also prohibited to engage in financial transactions with the client, outside of normal invoicing etc., see section 2.7.1 of the CPC and its commentary.

[124] Until 1 January 2020. See section 4.2.1 and 4.2.2 of the CPC and the Disciplinary Committee's decision D-2014/1967 as well as the referenced and published decision from 2009 on the website of the Swedish Bar Association. In D-2014/1967 the structure of the risk agreement and the idea came from the client, it was nevertheless not permitted. See also (D-17/1735) where counsel had acquired a claim against the counterparty that led to the outcome of the case being of financial importance also for the counsel.

[125] Section 4.1.1 of the CPC.

Disclosure obligation?

There is no formal disclosure obligation for TPF in Sweden.

The SCC has, however, adopted a policy encouraging parties to disclose TPF in arbitral proceedings under the SCC Rules.[126] There is no equivalent for arbitration in general or for litigation in Sweden.

The SCC's disclosure policy is a way to address potential conflicts of interests for arbitrators that might have other engagements where TPF is active. If the existence and identity of TPF is not disclosed this might risk the future award being set aside based on the argument that one or more of the arbitrators were not independent and impartial due to other commitments wherein TPF was involved in one way or another.

There is also some resemblance to the regulation in the Swedish Arbitration Act ("**SAA**") where it is stated that an arbitrator has to be impartial and independent.[127] According to the SAA an arbitrator shall disclose any and all circumstances according to which the arbitrator could be deemed to be subject to a conflict of interest.[128] In addition, a judge in a Swedish court has an obligation under the Swedish Procedural Code to disclose potential conflicts of interest.[129] The same rule also follows from the IBA Guidelines.[130] Although there is no formal rule on disclosure under Swedish law the conflict rules should be taken into consideration prior to making a decision on disclosure.

In this context one might also take note of the fact that the Swedish Supreme Court has regularly taken soft law instruments into account when assessing arbitral matters. It is therefore likely that the SCC policy and the IBA Guidelines will have an impact in a future case wherein conflict of interests for arbitrators is up for scrutiny.[131]

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The SCC's disclosure policy is a way to **address potential conflicts of interests for arbitrators that might have other engagements where TPF is active.**

[126] See the SCC Policy on Disclosure of Third Parties with an interest in the outcome of the dispute adopted by the SCC Board on 11 September 2019.

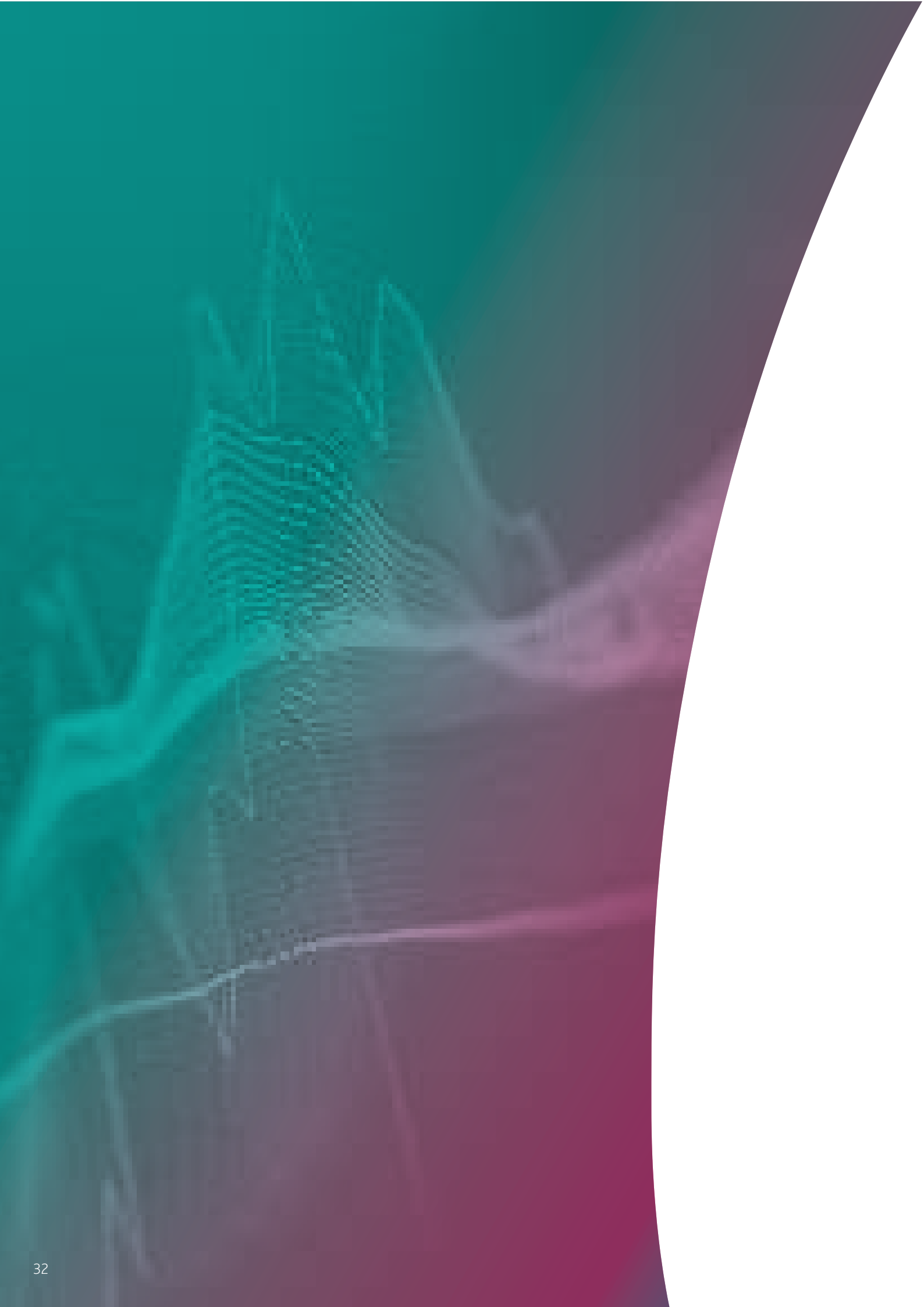
[127] Article 8 of the SAA.

[128] See for instance Supreme Court case NJA 2010 s. 314 (not a conflict) and NJA 2007 s. 841 (conflict). See also for reference NJA 1981 s. 1205 (conflict) which was adjudicated under the old SAA.

[129] Chapter 4 Article 13 of the Swedish Procedural Code, and according to Chapter 4, Article 14 of said Code a judge must disclose any circumstance which could constitute a conflict.

[130] IBA Guidelines on Conflicts of Interest in International Arbitration as adopted by resolution of the IBA Council on 23 October 2014. See in particular 6 (b) of the IBA Guidelines.

[131] See inter alia Supreme Court case regarding conflict of interest NJA 2007 s. 841.



Switzerland

Third Party Funding is permitted in Switzerland

In Switzerland, it is recognized that TPF plays an important role in increasing access to arbitration for some parties. In a landmark decision of 2004, the Swiss Federal Supreme Court held that TPF is permissible under Swiss law and protected by the principle of freedom of commerce guaranteed by the Swiss Constitution.[132]

Attorneys practicing in Switzerland are obliged, depending on the specific circumstances, to make their clients aware of the possibility of TPF and to advise them regarding the conclusion of the TPF agreement.[133]

There is no specific legislation in Switzerland regarding TPF in arbitration. However, existing provisions in various parts of Swiss legislation protect attorneys and their clients when it comes to TPF. For example, in view of their professional duty to avoid conflict of interests, attorneys are not allowed to advise and represent their client and at the same time be in a relationship with the funder so that they have an interest in the funding.[134]

A TPF agreement between the funder and the client usually provides for certain control and participation rights of the funder regarding the case strategy and management, thereby influencing the attorney-client relationship. In principle, such control and participation rights of the funders are permissible.[135] However, in the event of a conflict of interest between the funder and the client, the attorneys owe their professional and fiduciary duties to the client.

No disclosure obligation in Switzerland

There is no obligation or best practice in Switzerland that parties must disclose being funded in a Swiss-based arbitration. However, some authors argue that such an obligation exists under certain specific circumstances.

The IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, provide that any legal or physical person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party. Consequently, a conflict of interests may arise, for example, in a scenario in which an arbitrator in Case A is serving as counsel to claimant in Case B that is financed by the same funder as claimant in Case A. Such a scenario might require the disclosure of the TPF in order to exclude possible negative consequences on the arbitration or the enforcement of the arbitral award.

Furthermore, claimants, of course, are free to disclose the TPF to strengthen their negotiating power.

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In Switzerland, it is recognized that TPF plays an important role in increasing access to arbitration for some parties. In a landmark decision of 2004, the Swiss Federal Supreme Court held that TPF is permissible under Swiss law and protected by the principle of freedom of commerce guaranteed by the Swiss Constitution.

[132] Decision of the Swiss Federal Supreme Court 12P.4/2004 of 10 December 2004 = ATF 131 I 223.

[133] Decision of the Swiss Federal Supreme Court 2C_814/2014 of 22 January 2015, para. 4.3.1.

[134] Decision of the Swiss Federal Supreme Court 2C_814/2014 of 22 January 2015, para. 4.3.1.

[135] Decision of the Swiss Federal Supreme Court 12P.4/2004 of 10 December 2004 = ATF 131 I 223, para. 4.6.2.

United Arab Emirates

Third Party Funding is permitted in the United Arab Emirates

The UAE is made up of seven Emirates with local courts that are often referred to as 'onshore' courts. As the onshore UAE legal system is based on civil law, it has not inherited many of the historical impediments to TPF (notably champerty and maintenance) faced by common law jurisdictions. In addition, the UAE has a number of commercial 'free zones' where companies can set up and do business under the rules of the particular free zone ('offshore' UAE). Two of these free zones, the Dubai International Financial Centre (the "**DIFC**") and the Abu Dhabi Global Market (the "**ADGM**"), have their own independent legal systems and courts.[136] The amount of regulation for TPF across these jurisdictions differs.

Parties doing business in the UAE have the option to agree that disputes will be resolved by arbitration. Parties can choose between having the arbitration seated in onshore UAE, in the DIFC or in the ADGM. In the case of an onshore seat the arbitration will be governed by the UAE Federal Arbitration Law (Law No. (6) of 2018). Arbitration seated in the DIFC will be subject to the DIFC Arbitration Law (DIFC Law No. 1 of 2008) while arbitration in the ADGM is governed by the ADGM Arbitration Regulations 2015.

There are no rules or laws that expressly prohibit TPF in onshore UAE but the question of whether it is permitted under UAE law is yet to be definitively tested in the UAE courts. Some commentators have argued that TPF promotes access to justice and is therefore aligned and consistent with principles of Sharia law. The position that TPF is permitted in the UAE is also supported (at least by implication) by DIAC releasing draft arbitral rules in 2018 which make reference to funding in the context of apportioning costs (although these rules are yet to be implemented) as well as the DIFC and ADGM taking steps to regulate the use of TPF.

TPF in proceedings before the DIFC courts is permitted. In March 2017, the DIFC courts issued a Practice Direction[137] on TPF which clarifies the requirements that funded parties must observe in the DIFC courts, and how they should interact with funders in legal proceedings. The Practice Direction requires funded parties to disclose the existence of a funding arrangement and identity of the funder without necessarily divulging confidential terms (unless ordered to by the court). While the DIFC Arbitration Law is silent regarding TPF in DIFC seated arbitrations, the fact that it is permitted before the DIFC courts suggests by implication that it would be permitted in arbitration.

TPF in the ADGM, whether in relation to court or other proceedings (eg. arbitration) appears to be permitted by operation of Article 225 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (ADGM Courts Regulations), unless the matter relates to proceedings that cannot be the subject of an enforceable conditional fee agreement, or to any proceedings specifically prescribed by the Chief Justice and provided other criteria are met.

The UAE Arbitration Law is based on the UNCITRAL Model Law and does not include any prohibition on the use of TPF in arbitrations such that, as with litigation, there is no express prohibition on TPF and its use in arbitrations in the UAE has increased over the last few years and continues to do so.

TPF fee arrangements

The lack of specific TPF regulation means there is uncertainty surrounding the permissibility of TPF onshore in the UAE. Lawyers recommending TPF or advising clients in relation to TPF should consider whether such arrangements are in accordance with their professional obligations (e.g. whether funding is in the best interest of the client, potential conflicts of interest etc). There may also be other relevant considerations, for example, whether a potential funder is appropriately licensed to provide funding.

The DIFC courts have issued a mandatory code of conduct for legal practitioners registered with the DIFC Courts that regulates TPF in DIFC court proceedings.[138] However, there is no equivalent for arbitrations seated in the DIFC.[139] In broad terms, DIFC lawyers must advise their clients on the effect of the funding agreement and only recommend the use of TPF when it is in the client's best interests.[140] TPF arrangements in the ADGM free zone are highly regulated.[141] They are also prescriptive as to who can provide funding[142] and impose various obligations on funders.[143] Notably, the ADGM Regulations apply to any proceedings including arbitration.[144]

[136] The DIFC and the ADGM also have their own common-law based laws. The DIFC's laws are modeled closely on the principles of English common law. English common law is directly applicable in the ADGM, as are certain United Kingdom statutes.

[137] Practice Direction No. 2 of 2017: Available at: https://www.difccourts.ae/2017/03/14/practice-direction-no-2-2017-third-party-funding-difc-courts/

[138] Order No. 4 of 2019.

[139] DIFC law does permit the laws of England and Wales to supplement its laws in some circumstances and it may be the case that in the absence of DIFC law regulating TPF, that the laws of England and Wales relating to TPF have some force.

[140] Any breach of the Order can be referred to the DIFC Courts Registrar for investigation and further action, including penalties on individual Practitioners and/or their respective firms.

[141] See, e.g., the ADGM Courts Regulations and the ADGM 'Litigation Funding Rules' 2019 which supplement the Regulations.

[142] A funder's principal business must be funding proceedings to which they are not a party. They must have also qualifying assets of not less than USD 5 million (or equivalent). A funder must also be independent of the client and its legal counsel.

[143] For example, funders are to ensure the funded party has received independent legal advice in relation to the funding agreement and its terms prior to execution and must ensure the funding agreement is in writing.

[144] ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, Art. 225(8).

In addition to the regulations in the DIFC and ADGM in regards to TPF fee arrangements, it is worth noting that the UAE takes a strong position on contingency / conditional fee arrangements. Both the UAE and DIFC prohibit contingency or damage-based arrangements between lawyers and clients namely, where the lawyer takes a share in the proceeds of the outcome of litigation or arbitration proceedings. However, this prohibition does not extend to agreements between a funded party and the funder. Conditional fee arrangements ("CFAs"), where a lawyer receives an uplift in fees in the event of success but not a share in the proceeds, are permitted provided the success fee is clearly quantified. CFAs and damages-based agreements between clients and lawyers, whether relating to court or arbitral proceedings, are permitted in the ADGM provided they comply with the requirements in sections 222 to 224 of the ADGM Court Regulations.

TPF features

In terms of recovery of TPF funding costs in UAE seated arbitrations, the UAE Arbitration Law only provides for recovery of the fees and expenses of the tribunal and any tribunal appointed experts.[145] The ability for a party to recover funding costs in arbitrations seated in onshore UAE is therefore likely to turn on the arbitration agreement, any separate ad hoc agreement between the parties and the agreed institutional rules.[146] The DIFC Arbitration Law allows tribunals greater discretion in the award of costs but is otherwise silent on whether funding costs are recoverable.[147] While there may be some scope to argue that funding costs fall within the tribunal's jurisdiction in regards to costs, there is no definitive decision on this issue. For ADGM seated arbitrations, the ADGM Regulations (Art. 225(8) & (10)) appear to permit tribunals to take account of funding costs when making cost awards.

It is unlikely that a funder in arbitration proceedings would be held liable for adverse costs as an arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement, although consideration would need to be had to the arbitration agreement, any separate ad hoc agreement between the parties and the agreed institutional rules.

While there is no concept of legal professional privilege or litigation privilege in the UAE, legal professionals are subject to obligations of confidentiality.[148] Communications and agreements with third parties (including funders), which are likely to include sensitive information and which may be a target for disclosure requests, should be protected through confidentiality agreements.

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[145] Law No. 6 of 2018, the Arbitration Law, Article 46(1).

[146] The approach in other jurisdictions of taking out insurance to cover legal costs including adverse cost orders (e.g. "After the Event" or "Before the Event" Insurance) is not common in the UAE and is not widely available in the insurance market.

[147] DIFC Law No. 1 of 2008, DIFC Arbitration Law, Article 38(5).

[148] See, e.g. Federal Law No. 23 of 1991, Regulation of the Legal Profession, Art. 42 and Draft Conduct Charter, Art. 12(b).

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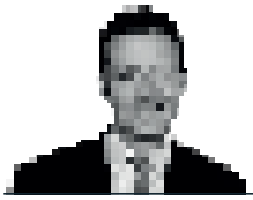

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Jason specialises in international arbitration, litigation and strategic project advice in the energy, infrastructure and manufacturing sectors. Over the last 25 years, he has represented clients on major projects around the world including LNG facilities, FPSOs, offshore process platforms, drilling rigs, refineries, gas turbine and coal fire power stations, waste-to-energy plants, pipelines and tunnels.

Jason has acted as counsel and advocate on international arbitrations under the ICC, LCIA, UNCITRAL and SCC Rules and on ad-hoc arbitrations and has advised on a wide array of disputes, ranging in value from $50m to over $1bn, in both common law and civil law jurisdictions.

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Dean is a leading arbitration and mediation specialist representing parties in disputes arising out of major infrastructure and energy projects across Asia Pacific and the Middle East. For more than 35 years, he has appeared as lead advocate or party representative in ad-hoc arbitrations and under the rules of the ICC, UNCITRAL, HKIAC, SIAC, AIAC and LCIA with many clients amongst the largest contractors globally. Dean also accepts arbitral appointments and is currently Presiding Arbitrator in a Middle East energy project arbitration under the HKIAC Rules.

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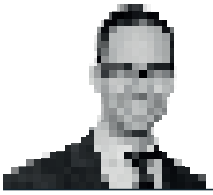

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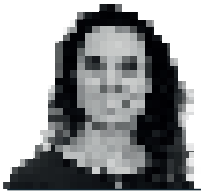

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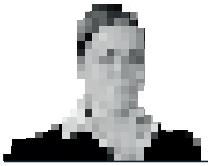

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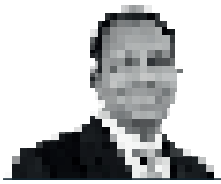

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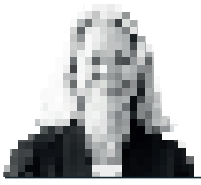

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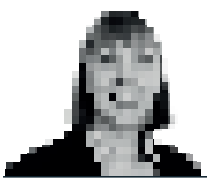

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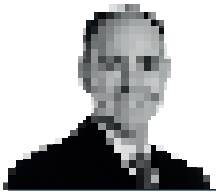

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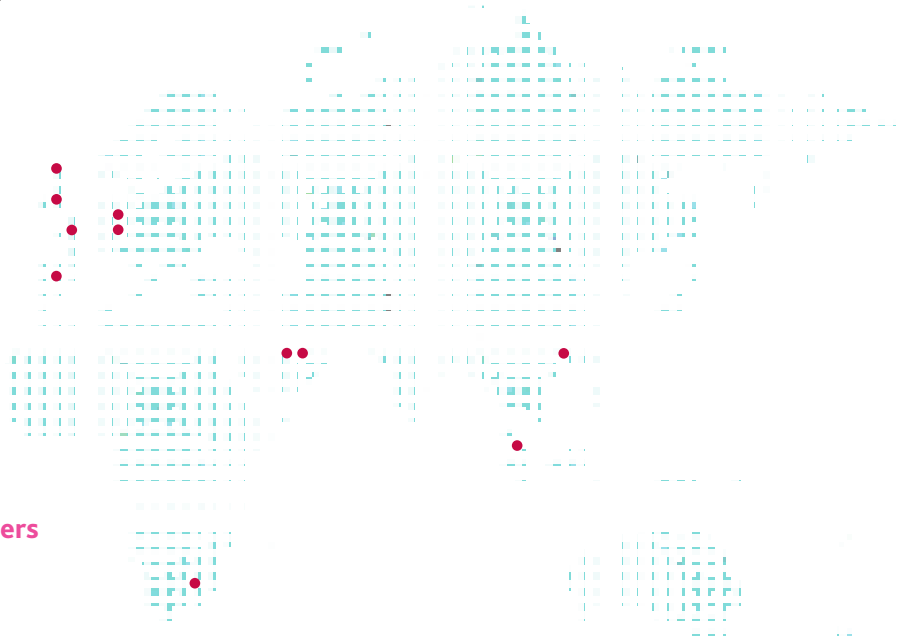

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