

Third Party Funding in International Arbitration- A Reflection

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Abstract

International Arbitration is field that is continuously evolving and now encompasses several emerging issues. Among the key emerging trends in international arbitration is the rise of third-party funding. This paper critically reflects upon the concept of third party funding in international arbitration. It defines third party funding and discusses its emergence in international arbitration. The paper further highlights the advantages of third party funding in international arbitration. It also discusses some of the key concerns about third party funding in international arbitration and proposes reforms in light of such concerns.

1.0 Introduction

Arbitration is one of the Alternative Dispute Resolution (ADR) processes¹. ADR refers to a set of processes that are applied to manage disputes without resort to adversarial litigation². It can also refer to a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes³. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁴.

The *Charter of the United Nations*⁵ sets out the legal foundation for ADR mechanisms at the global level. It provides that parties to a dispute shall first of all seek a solution by

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¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

² Ibid

³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

*negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*⁶(Emphasis added). At a national level, the *Constitution of Kenya*⁷ embraces ADR mechanisms. It mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs⁸. ADR mechanisms are viewed as ideal in enhancing access to justice due to some of their key attributes⁹. These features include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes¹⁰.

Arbitration refers to a private consensual process where parties in dispute agree to present their grievances to a third party for resolution¹¹. It has also been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute¹². Arbitration has emerged as the preferred mechanism for managing disputes especially those that are transnational in nature¹³. It has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems¹⁴. It also guarantees enforcement of decisions through the *New York Convention*¹⁵ which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

⁶ Ibid, Article 33 (1)

⁷ Constitution of Kenya, 2010., Government Printer, Nairobi

⁸ Ibid, Article 159 (2) (c)

⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁰ Ibid

¹¹ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

¹² World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 16/01/2024)

¹³ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONALCOMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 16/01/2024)

¹⁴ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

¹⁵ United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

International Arbitration is a field that is continuously evolving and now encompasses several emerging issues¹⁶. Among the key emerging trends in international arbitration is the rise of third-party funding¹⁷. This paper critically reflects upon the concept of third party funding in international arbitration. It defines third party funding and discusses its emergence in international arbitration. The paper further highlights the advantages of third party funding in international arbitration. It also discusses some of the key concerns about third party funding in international arbitration and proposes reforms in light of such concerns.

2.0 Defining Third Party Funding in International Arbitration

It has been pointed out that the idea of third party funding originally emerged in civil litigation where it was conceived as a method of financing litigation and therefore a tool to reduce or eliminate the risk associated with potentially unfavorable outcome of the litigation¹⁸. It occurs when a third party, external to the parties and not involved in the legal relation between them, agrees to pay for the one party's (in most cases the Claimant) legal fees, including costs of lawyers, experts, outside counsels, any other costs that may be relevant or needed in the civil litigation in accordance with a stipulated agreement and stipulated budget, in exchange for an agreed return¹⁹. It has also been observed that third party funding arises when a third party litigation or arbitration funder provides financial support to enable individuals or commercial entities to pursue or defend legal proceedings²⁰. In addition, the funder may additionally agree to pay the opposing party's costs if the funded party is so ordered and provide security for the opponent's cost²¹. It

¹⁶ International Chamber of Commerce., 'Third-party Funding in International Arbitration.' Available at <https://iccthailand.or.th/media/www/product/92846621543303446.pdf> (Accessed on 16/01/2024)

¹⁷ Ibid

¹⁸ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Available at <https://core.ac.uk/download/pdf/132335993.pdf> (Accessed on 16/01/2024)

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

has been asserted that third-party funding is a growing phenomenon that is becoming more mainstream in both the litigation and the international arbitration communities²².

In international arbitration, third party funding occurs when a person who is not involved in an arbitration provides funds to a party to that arbitration in exchange for an agreed return²³. It has also been defined as the involvement of an entity with no prior interest in the legal dispute, providing financial assistance to one of the parties, usually the Claimant, on a non-recourse basis in the case of an unsuccessful claim²⁴. Third-party funding can also refer to a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award, or judgment rendered against that party, or both²⁵. Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration²⁶. Further, the funder may also agree to pay the other side's costs and provide security for the opponent's costs if the funded party is so ordered²⁷.

It has been posited that the emergence of third-party funding can be attributed to the upsurge in the practice of international arbitration, with the users demanding innovative ways to finance arbitral matters²⁸. In addition, it has been argued that international arbitration is a particularly attractive area of investment in form of third party funding due to certain factors²⁹. These include the high values of the claims, the speed of the proceedings, the potential for greatly reduced evidentiary costs, the greater predictability

²² Sahani. V. S., 'Third-Party Funding in International Arbitration.' Available at https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1217&context=shorter_works (Accessed on 16/01/2024)

²³ Ashurst., 'Third Party Funding in International Arbitration.' Available at <https://www.ashurst.com/en/insights/quickguide-third-party-funding-in-international-arbitration/#:~:text=Third%20party%20funding%20is%20where,expenses%20incurred%20in%20the%20arbitration> (Accessed on 16/01/2024)

²⁴ Nyamasi. I., 'Third Party Funding in International Arbitration.' Available at <https://ncia.or.ke/wp-content/uploads/2021/03/Third-Party-Funding-In-International-Arbitration.pdf> (Accessed on 16/01/2024)

²⁵ Sahani. V. S., 'Third-Party Funding in International Arbitration.' Op Cit

²⁶ Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

²⁷ Ibid

²⁸ Nyamasi. I., 'Third Party Funding in International Arbitration.' Op Cit

²⁹ Sahani. V. S., 'Third-Party Funding in International Arbitration.' Op Cit

of the outcome than in litigation, the industry expertise of the decision-makers, and the high enforceability of arbitration awards³⁰.

It has been observed that two key factors are driving the increased demand for dispute financing in form of third party funding in international arbitration³¹. On one hand, third party funding has been necessitated by the global financial market crisis, which has forced financial institutions to seek new forms of investments, which are available in international arbitration because of the large amount of money at stake³². For example, it has been argued that the provision of funds by non-parties to pursue or defend a dispute, namely third-party funding, has become a focal point in investment arbitration because of participation of States, and the high value of disputes and thus expenses³³. On the other hand, third party funding is also driven by the very high costs of international arbitration, which induces either needy claimants, or companies that want to maintain sufficient cash flow to continue their regular business while the arbitral proceedings are ongoing, or that simply want to share the risk of the arbitration with a third party, to seek financing to pursue a meritorious claim³⁴.

It has been observed that in most jurisdictions, third party funding arrangements were traditionally illegal or void, most notably on the grounds of being contrary to the legal doctrines of maintenance and champerty³⁵. However, in recent years, there has been a move away from this position and third party funding is a concept that is now permitted in a number of jurisdictions for international arbitrations and court proceedings related to international arbitrations³⁶. Third party funding has gained prominence in recent years

³⁰ Ibid

³¹ Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' *Arbitration International*, 2016, 32, 505-522

³² Ibid

³³ Kayali. D., 'Third-Party Funding in Investment Arbitration: How to Define and Disclose It.' *ICSID Review - Foreign Investment Law Journal*, Volume 38, Issue 1, 2023, Pp 113-139

³⁴ Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' Op Cit

³⁵ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

³⁶ Ibid

as a means of mitigating the financial risk and burden associated with international arbitration³⁷.

Several international arbitration institutions have now embraced the idea of third party funding. The *International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules*³⁸ require a party who is a beneficiary of third party funding to issue a notice to that effect³⁹. Under the Rules, a party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ('third-party funding')⁴⁰. Further, the Rules provide that if the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person⁴¹. The Rules require the party who is a recipient of third party funding to file the Notice of Third-Party Funding with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration⁴². The party is required to immediately notify the Secretary-General of any changes to the information in the notice⁴³. Further, the Secretary-General is required to transmit the Notice of Third-Party Funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding⁴⁴. In addition, the

³⁷ Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Available at https://www.linkedin.com/pulse/new-frontier-exploring-role-third-party-funding-tariq-sheikh/?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 16/01/2024)

³⁸ The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules., Available at https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (Accessed on 16/01/2024)

³⁹ Ibid, Rule 14

⁴⁰ Ibid, Rule 14 (1)

⁴¹ Ibid

⁴² Ibid, Rule 14 (2)

⁴³ Ibid

⁴⁴ Ibid, Rule 14 (3)

Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding⁴⁵.

In addition, the *International Chamber of Commerce (ICC) Arbitration Rules*⁴⁶ also embraces the concept of third party funding. According to the Rules, in order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the *funding of claims or defences* and under which it has an economic interest in the outcome of the arbitration⁴⁷ (Emphasis added). It has been argued that under the ICC Arbitration Rules, disclosure and transparency in respect of third party funding arrangements seek to avoid conflicts of interest between an arbitral tribunal and the parties (or any related parties, including funders), thereby ensuring the enforceability of an award⁴⁸. In addition, the obligation to disclose is consistent with a funder's interest to protect its investment since avoiding conflicts of interest further assures a funder of a return on its investment via an enforceable award⁴⁹.

The idea of third party funding is therefore being embraced in international arbitration.

3.0 Third Party Funding in International Arbitration: Advantages and Drawbacks

The rise of third party funding in international arbitration has been associated with some benefits. It has been argued that third party funding in international arbitration represents a positive phenomenon, in that it attracts investments, and it permits greater

⁴⁵ Ibid, Rule 14 (4)

⁴⁶ International Chamber of Commerce (ICC) Arbitration Rules, 2021., Available at <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> (Accessed on 16/01/2024)

⁴⁷ Ibid, Article 11 (7)

⁴⁸ Barnett. J., Macedo. L., & Henze. J., 'Third-Party Funding Finds its Place in the New ICC Rules.' Available at <https://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/> (Accessed on 16/01/2024)

⁴⁹ Ibid

access to justice⁵⁰. Further, it has been posited that the main advantage of third party funding is granting access to justice for those who could not, due to financial reasons, bear costs of expensive, often unpredictable and lengthy civil proceedings (or international or investment arbitration)⁵¹. In such circumstances, accepting external financial help in form of third party funding may be the only option for the claimant to pursue meritorious claim⁵². Third party funding can therefore enhance access to justice for under-resourced parties (as is often the case in investor-state disputes) enabling them to pursue proceedings which a lack of financing would otherwise have prevented⁵³. It has been argued that by reducing the financial barriers to entry, third-party funding has made international arbitration more accessible for parties who may have otherwise been unable to pursue their claims⁵⁴. This ensures that meritorious claims can be heard, regardless of the parties' financial means⁵⁵. Further, for parties that are adequately resourced, third party funding also offers a more convenient financing structure, allowing capital which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings⁵⁶.

In addition, third party funding in international arbitration has been associated with enhanced risk management⁵⁷. It has been argued that third party funding can also serve as a risk management tool for parties engaged in international arbitration⁵⁸. For example, by sharing the financial risk with an investor, parties can better manage their exposure to potential costs and secure the necessary resources for their legal strategy in international

⁵⁰ Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' Op Cit

⁵¹ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁵² Ibid

⁵³ Norton Rose Fulbright., 'International Arbitration Report Issue 7 – September 2016.' Available at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf?revision=&revision=4611686018427387904> (Accessed on 17/01/2024)

⁵⁴ Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

⁵⁵ Ibid

⁵⁶ Norton Rose Fulbright., 'International Arbitration Report Issue 7 – September 2016.' Op Cit

⁵⁷ Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

⁵⁸ Ibid

arbitration⁵⁹. In addition, it has been observed that third party funding in international arbitration serves as a risk-management tool by sharing of risk associated with the arbitration between a party and a funder⁶⁰. It has also been posited that funders are interested in strong and grounded claims that offer high predictability of refund and will therefore conduct a due diligence and legal analysis to properly assess the risk of pursuing the case⁶¹. Through this approach, third party funding can therefore assist the Claimant to shape its strategy and prepare a well-grounded claim, which can even be decided through settlement⁶².

Third party funding in international arbitration can therefore foster certain advantages including access to justice and enhanced risk management⁶³. However, despite these advantages, third party funding in international arbitration can also result in certain concerns. It has been argued that third party funding may end up being expensive since a successful claimant will generally have to pay a significant proportion of damages recovered to the funder⁶⁴. It has correctly been observed that in third party funding, a successful claimant has to pay a significant proportion of his or her recoveries to the funder as a remuneration for funding the arbitration a situation that could end up making the whole process more expensive compared to if the claimant had funded the arbitration on his or her own initiative⁶⁵.

In addition, third part funding may result in the loss of one of the key attributes of arbitration which is party autonomy⁶⁶. The feature of party autonomy gives parties significant control in arbitration including the choice of arbitrator and conduct of

⁵⁹ Ibid

⁶⁰ Horodyski, D., & Kierska, M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁶¹ Ibid

⁶² Ibid

⁶³ Sheikh, T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

⁶⁴ Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

⁶⁵ Horodyski, D., & Kierska, M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁶⁶ Ibid

proceedings and therefore the outcome may be mutually acceptable to the parties⁶⁷. However, in third party funding, a Claimant may to a certain extent lose autonomy in favour of the funding party (in particular when considering settlement) since it may reserve the right of approval of the settlement⁶⁸. It has been argued that although funders are generally prohibited from taking undue control or influence in an arbitration, there may be some loss of autonomy on the part of the funded party (in particular when considering settlement) since funders may reserve the right of approval of the settlement⁶⁹.

Further, third party funding may result in further costs for the party seeking funding⁷⁰. A party seeking funding may incur substantial costs when packaging the case for presentation to a funder⁷¹. These costs will be wasted if the application for funding is unsuccessful⁷². It has also been observed that even if successful, funders are not usually liable for any costs incurred before the funding arrangement is put into place, including the costs of packaging and the negotiation of the funding arrangements⁷³. The issue of costs is therefore a key concern in third party funding.

In addition, third party funding in international arbitration could potentially result in conflict of interest⁷⁴. In third party funding, conflict of interest may arise where an arbitrator, or his/her colleagues or firm, have a relationship with a funder involved in the case⁷⁵. It has also been pointed out that conflict of interest arises in third party funding when there is a direct and dependent relationship between the funder and the arbitrator where the outcome of the case significantly affects: the financial performance,

⁶⁷ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

⁶⁸ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁶⁹ Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

⁷⁰ Ibid

⁷¹ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁷² Ibid

⁷³ Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

⁷⁴ Ibid

⁷⁵ Ibid

profitability, or share price of the funder, or the arbitrator's personal financial interests⁷⁶. It has been argued that third party funding increases the likelihood of conflict of interest in international arbitration due to cases where an arbitrator has close links with a funder by virtue of being a member of its corporate bodies, or if the arbitrator holds a substantial stake in the funder, given that some of the third party funders are now publicly traded companies⁷⁷. Third party funding could therefore result in cases of conflict of interest. It has been pointed out that adding a third party interested in the outcome of the dispute increases the number of potential situations in which an arbitrator could be in conflict with a party⁷⁸.

It is therefore necessary to address the foregoing concerns in order to enhance the suitability of third party funding in international arbitration.

4.0 Way Forward

It has been observed that the growth of third party funding in international arbitration is set to continue, as a result of the ever-increasing costs and complexities of dispute management⁷⁹. Therefore, it is necessary for participants in international arbitration including parties to disputes, arbitrators, lawyers and other party representatives to adapt and develop the necessary skills to navigate the evolving landscape of third party funding in international arbitration⁸⁰. It is also vital to address some of the underlying concerns in third party funding in order to enhance the effectiveness of the process⁸¹. Several measures are necessary in order to achieve this objective.

⁷⁶ Gilcrest. S., 'When Peer Pressure is not Enough: Mandatory Disclosure and Third-Party Funding.' Available at <https://core.ac.uk/download/pdf/270219865.pdf> (Accessed on 17/01/2024)

⁷⁷ Hubbuck. N., 'Reform of the Arbitration Act: Should Disclosure of Third-Party Funding be On the Agenda?' Available at <http://arbitrationblog.practicallaw.com/reform-of-the-arbitration-act-should-disclosure-of-third-party-funding-be-on-the-agenda/> (Accessed on 17/01/2024)

⁷⁸ Arnaud. B., 'Third-Party Funding.' Available at <https://jusmundi.com/en/document/publication/en-third-party-funding> (Accessed on 17/01/2024)

⁷⁹ Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.'

Op Cit

⁸⁰ Ibid

⁸¹ Ibid

To begin with, there is need for enhanced disclosure and transparency in relation to third party funding⁸². It has been pointed out that in most cases parties in international arbitration are not obliged to reveal the involvement of a funder in a dispute⁸³. Therefore, the presence of the funder and the nature of its relationships with the lawyers and the parties in an international arbitration case is often unknown⁸⁴. In addition, it has been observed that the funders generally require that their involvement is not revealed and use confidentiality agreements to prevent the disclosure⁸⁵. However, there is an increasing move from this position with disclosure and transparency being required in third party funding⁸⁶. It has been argued that disclosure of third party funding is necessary due to the arbitrators' impartiality requirement, the potential conflicts of interest, and the transparency, the latter especially in the investment treaty arbitration⁸⁷. In addition, it has been posited that despite there being no general obligation on a funded party to disclose the fact of its funding arrangement, the demand for greater transparency is growing in light concerns regarding conflict of interest⁸⁸.

Disclosure and transparency in third party funding offers several advantages. It has been asserted that disclosure of the funding arrangement will often benefit a funded party since the fact that a claim is funded demonstrates that an independent third party has faith in the merits of the claim and so its existence may encourage parties to settle the dispute⁸⁹. In addition, disclosure of third party funding arrangements at an early stage prevents the other party from raising conflict of interest arguments at the enforcement stage should the funded party prove successful⁹⁰. It is therefore necessary for parties in

⁸² Horodyski, D., & Kierska, M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Thrasher, R. D., 'Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform.' Available at <https://lira.bc.edu/files/pdf?fileid=efcf2063-409d-41e7-ae00-0939116fa502> (Accessed on 17/01/2024)

⁸⁷ Ibid

⁸⁸ Ashurst, 'Third Party Funding in International Arbitration.' Op Cit

⁸⁹ Ibid

⁹⁰ Ibid

international arbitration to embrace disclosure and transparency in order to enhance suitability of the process.

The need for disclosure and transparency in third party funding is being embraced in international commercial arbitration. *The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration*⁹¹ address the conflict of interest concerns arising from third party funding in international arbitration. Under the Guidelines, if one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, it may be considered to bear the identity of such party⁹². It has been correctly pointed out that given the fact that the funder may have a direct economic interest in the award, as such it may be considered to be an equivalent of the party⁹³. In addition, the IBA Guidelines provide as follows in relation to the duty of disclosure:

*'A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration (Emphasis added)*⁹⁴.'

The IBA Guidelines therefore embrace the duty of disclosure and transparency in third party funding. It has been pointed out that the IBA Guidelines were an important milestone towards transparency since they were the first rules that directly address third

⁹¹ International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (Accessed on 17/01/2024)

⁹² Ibid, General standard 6 (b)

⁹³ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁹⁴ International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.', General Standard 7 (a)

party funding⁹⁵. Subsequently, international arbitration institutions are following this example and are now embracing the duty of disclosure and transparency in third party funding. For example the ICSID Arbitration Rules⁹⁶ and the ICC Arbitration Rules⁹⁷ both require a party who is a beneficiary of third party funding to disclose the arrangement. It is therefore imperative to embrace disclosure and transparency in order to enhance the effectiveness of third party funding in international arbitration.

In addition, it is necessary for party representatives including lawyers to embrace third party funding and be equipped in certain aspects of the process in order to enhance the appropriateness of third party funding in international arbitration⁹⁸. It has been argued that it is important for lawyers to familiarize themselves with the various third-party funding providers and their investment criteria including their track records, expertise, and reputation within the industry in order to effectively advise parties about the suitability of third party funding arrangements⁹⁹. In addition, it has been pointed out that it is necessary for lawyers and other party representatives to examine the benefits and risks of third-party funding before encouraging parties to take up the option¹⁰⁰. Therefore, it is important for lawyers and party representatives to advise their clients about the implications of funding arrangements, such as the potential for conflicts of interest, confidentiality concerns, and the funder's level of involvement in the arbitration process¹⁰¹. It is also pertinent for lawyers and party representatives to develop capacity in the legal and commercial aspects of third-party funding such as negotiation of funding agreements, due diligence procedures, and understanding the funder's return on

⁹⁵ Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

⁹⁶ The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules., Op Cit

⁹⁷ International Chamber of Commerce (ICC) Arbitration Rules, 2021.,

⁹⁸ Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

⁹⁹ Sahani. V. S., 'Reshaping Third-Party Funding.' *Tulane Law Review.*, No. 2 of 2017

¹⁰⁰ Ibid

¹⁰¹ Ibid

investment expectations¹⁰². Finally, building and maintaining relationships with third-party funders is also vital in order to better understand their investment criteria and to facilitate potential collaborations¹⁰³.

The above measures are integral in enhancing the efficacy of third party funding in international arbitration.

5.0 Conclusion

Third party funding is fundamental concept in international arbitration. It is a positive phenomenon that can permit greater access to justice¹⁰⁴. Third party funding in international arbitration is also associated with enhanced risk management¹⁰⁵. However, third party funding in international arbitration is also associated with certain challenges key among them being the potential of conflict of interest¹⁰⁶. It can also result in increased costs and loss of some of the key features of arbitration especially party autonomy¹⁰⁷. Despite its challenges, the growth of third party funding in international arbitration is set to continue, as a result of the ever-increasing costs and complexities of dispute management¹⁰⁸. It is therefore necessary to address the underlying concerns in order to enhance the suitability of third party funding in international arbitration. This calls for embracing disclosure and transparency in third party funding and the need for party representatives including lawyers developing their capacity on salient issues in third party funding including investment criteria by third party funders, risks and benefits of third party funding, and negotiation of funding agreements¹⁰⁹. Third party funding is a

¹⁰² Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

¹⁰³ Ibid

¹⁰⁴ Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' Op Cit

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welcome idea in international arbitration. There is need to embrace it in order to foster the growth of international arbitration and enhance access to justice.

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