

When the Good Samaritan Pays: The Phenomenon of Strategic Third- Party Funding

K A J A Z A L E S K A - K O R Z I U K *

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I. INTRODUCTION

On March 18, 2015, Bloomberg Philanthropies and the Bill and Melinda Gates Foundation announced their creation of the Anti-Tobacco Trade Litigation Fund (the “Anti-Tobacco Fund”). The main purpose of this fund is to provide financial and technical assistance to governments of low and middle-income countries in defending against tobacco use legislation, particularly in arbitration proceedings arising under international trade

* Kaja Zaleska-Korziuk is a PhD candidate, as well as teaching and research assistant, at the University of Gdansk, Faculty of Law and Administration.

agreements. Explaining the decision to support the Anti-Tobacco Fund, Bill Gates stated the following:

Country leaders who are trying to protect their citizens from the harms of tobacco should not be deterred by threats of costly legal challenges from huge tobacco companies.¹

In the private sphere, on March 23, 2015, Harbour Litigation Funding (“Harbour”), one of the leading commercial third-party litigation funders, announced that it had a new fund of £230 million to offer, which is now available immediately to aid in the funding of international arbitration and litigation in common law jurisdictions.²

While the Anti-Tobacco Fund finances arbitration to reduce the harmful effects of tobacco use, Harbour is a multinational litigation funder of sophisticated businesspeople, which focuses instead on turning the claims of its clientele into new asset classes.³ Such litigation funders pay some or all of the costs associated with the dispute, and if the case is won, they take a previously agreed-upon share of the proceeds. If the case is lost, the loss is that only of the litigation funder – not the claimant.

Yet despite clear differences underlying the rationale of both Harbour and the Anti-Tobacco Fund, both entities clearly operate in the same sector of third-party funding (“TPF”).⁴ In recent years, third-party funding has increasingly drawn to it the attention of scholars, regulatory authorities, and institutions. To date, TPF has been described as everything between “the best thing since sliced bread” and the “antichrist.”⁵ Irrespective of the controversies surrounding TPF, however, it still must be remembered that it is an industry

¹ Campaign for Tobacco-Free Kids, “From Bloomberg Philanthropies and the Bill and Melinda Gates Foundation”, online: <tobaccofreekids.org/what-we-do/global/legal/trade-litigation-fund> [Tobacco-Free Kids].

² Harbour Litigation Funding, “New 230 million fund available immediately” (23 March 2015), online: <harbourlitigationfunding.com/new-230-million-fund-available-immediately/>.

³ B M Cremandes & A Dimolitsa, *Third-party funding in international arbitration*, 1st ed (Paris: International Chamber of Commerce, 2013) at 16, 25.

⁴ The use of term the “third-party funding” is controversial; see Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Alphen aan den Rijn: Kluwer Law International, 2016) at 2–3 .

⁵ *Ibid* at 3.

evaluated at approximately 10 billion US dollars.⁶ TPF is significantly impacting modern processes of civil litigation.⁷

In its standard form, TPF involves the provision of non-recourse litigation or arbitration financing by a third party – a funder – in return for a secured interest in the proceeds of the funded case.⁸ Nevertheless, the phenomenon of TPF exists in a variety of forms, not being limited to the funding of cases leading to direct returns on investment. One of these non-standard forms of TPF is referred to as “strategic TPF.”⁹

The characteristic feature of strategic TPF is that litigative investments are made with the aim of indirectly satisfying financial interests; in other cases, strictly non-financial goals are pursued by the funder, the funded party, or both.¹⁰ Strategic TPF can thus meet the needs of parties whose cases are not eligible for standard TPF. Yet even still, despite the clearly disparate rationales behind standard and strategic TPF, strategic TPF is, seemingly, always lumped in with standard TPF for analysis.¹¹ To date, there does not appear to be any research whatsoever, which would consider strategic TPF separately from, or contrasted with, standard TPF. The problem is that certain issues are clearly isolated to strategic TPF, yet the scholarship does not handle them as such, alone, or – in fact – at all.

This paper aims to analyse strategic third-party funding by establishing its main types and their features, and then by comparing and contrasting the

⁶ International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (April 2018) at 17 [ICCA TPF Report]; see also Cremades & Dimolitsa, *supra* note 3 at 153; see generally Burford Capital, “Summer 2017” 2017 Burford Quarterly, online: <burfordcapital.com/wp-content/uploads/2017/07/Burford-Quarterly-Summer-2017.pdf>.

⁷ Maya Steinitz, “Whose Claim is this Anyway? Third Party Litigation Funding” (2010) 95:4 *Minn L Rev* 1268 at 1271, online: <ssrn.com/paper=1586053>; ICCA TPF Report, *ibid* at 17.

⁸ See Aren Goldsmith & Lorenzo Melchionda, “Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask): Part 1” (2012) 5 *Int Bus LJ* 53.

⁹ *Ibid* at 62; von Goeler, *supra* note 4 at 58-59; Strategic TPF is also called “not-for-profit TPF”; see Victoria Shannon Sahani, “Revealing Not-for-Profit Third-Party Funders in Investment Arbitration” (2017), *Investment Claims* (blog), online: <oxia.ouplaw.com/page/third-party-funders> [Sahani, “Funders in Investment Arbitration”]; ICCA TPF Report, *supra* note 6 at 48; Catherine A Rogers, “Gamblers, Loan Sharks & Third-Party Funders” (2014) *Ethics in International Arbitration* (Oxford University Press, forthcoming), Penn State Law Working Paper No 51-2013.

¹⁰ von Goeler, *supra* note 4 at 58; Goldsmith & Melchionda, *supra* note 8 at 62; see generally Sahani, “Funders in Investment Arbitration”, *supra* note 9.

¹¹ See generally Rogers, *supra* note 9.

unique challenges of each type. This will involve the analysis of both standard and strategic TPF. The article will focus mainly on the issue of strategic TPF in the context of international arbitration (both commercial and investment), however, some references will also be made to the strategic funding of litigation. In sum, this paper argues that there is good justification for treating different types of TPF separately and that, for this reason, such ought to be done.

II. BROADENING DEFINITIONS OF THIRD-PARTY FUNDING

TPF is still challenging to define, because of its constant development.¹² In the last ten years, the TPF industry has grown significantly, evolving from the funding of large, one-off cases, to the regular business of supplying law firms with advanced financial products and a wide range of funding models.¹³ The diversity of products offered by funders makes it difficult to clearly define TPF.

Widespread definitions of TPF describe it as the non-recourse financing of legal costs, provided by an investor otherwise disconnected to the proceedings, in return for an interest in the proceeds of the funded case¹⁴ – this is, again, usually claimant-side funding.¹⁵ Such a definition applies to investment-oriented single-case TPF, leaving outside of its scope not only strategic TPF, but also advanced methods of standard TPF, such as law firm portfolio-financing.¹⁶ Thus, this definition was criticized for being too narrow.¹⁷

In its Draft Report for Public Discussion, September 1, 2017, the ICCA-Queen Mary Task Force of Third-Party Funding in International Arbitration

¹² ICCA TPF Report, *supra* note 6 at 45, 47, 49; von Goeler, *supra* note 4 at 3.

¹³ Nick Rowles-Davies, *Third Party Litigation Funding* (Oxford, UK: Oxford University Press, 2014) at vii; ICCA TPF Report, *supra* note 6 at 17.

¹⁴ See Max Volsky, *Investing in Justice. An Introduction to Legal Finance, Lawsuit Advances and Litigation Funding* (New Jersey: The Legal Finance Journal, 2013); Lisa Bench Nieuwveld & Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2012) at 3; von Goeler, *supra* note 4 at 71–72; Rowles-Davies, *supra* note 13 at 4; see Cento Veljanovski, “Third-Party Litigation Funding in Europe” (2012) 8:3 J L Econ Policy at 405; Rogers, *supra* note 9; Steinitz, *supra* note 7 at 1275–1278.

¹⁵ Goldsmith & Melchionda, *supra* note 8 at 59–60; Cremandes & Dimolitsa, *supra* note 3 at 11; von Goeler, *supra* note 4 at 49–50.

¹⁶ Portfolio financing exists in two forms; the corporate portfolio (also called “basket of cases”) and the law firm portfolio. In the portfolio financing scenario, a funder invests in a set of cases which allows for cross-collateralisation of claims. Financing may be structured either around a law firm, where claim-holders are various clients of the law firm or one claim-holder involved in multiple proceedings. Rowles-Davies, *supra* note 13 at 72–75; ICCA TPF Report, *supra* note 6 at 38–39.

¹⁷ ICCA TPF Report, *supra* note 6 at 51–52.

(the “ICCA-QMUL Task Force”) proposed a wide definition of TPF, covering all existing types of TPF, except for P&I and Defence Clubs, that arise in maritime litigation.¹⁸ The working definition provided that:

[t]he term ‘third-party funder’ refers to any natural or legal person who is not a party to the dispute and is not a party’s legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

- a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as a part of a specific range of cases, and
- b) such support or financing is provided either through a donation or grant or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute.¹⁹

The definition proposed by the ICCA-QMUL Task Force clearly covers not only advanced methods of TPF, but also strategic TPF.²⁰ If broadly adapted, such wording of the definition of TPF would have far-reaching consequences for strategic TPF, as it would impact on how the involvement of a strategic third-party funder ought to be envisaged (in terms of the possible challenges to a third-party’s involvement as a funder).

The majority of challenges arising from the use of TPF is related to a funder’s financial interest in the funded case.²¹ With strategic TPF, the financial interests are either non-existent or indirect.²² Accordingly, the lack of

¹⁸ The Task Force expressly excluded P&I and Defence Clubs that exist in maritime litigation from the TPF definition. The Task Force observed that: “The purpose of this exclusion is not to mark out any strictly defined blanked exclusion or imply that modern forms of third-party funding (and the recommendations in this Report) have no possible relevance in disputes relating to shipping. Instead, the Task Force recognizes that the vast majority of disputes in the maritime sector have special features that make the recommendations of this Report inapplicable. In particular, maritime arbitrations tend to involve a small but specialised pool of highly independent, full time arbitrators and practitioners together with well-regulated mutual funding by P&I and Defence Clubs. This regime has developed over many decades and is well known within the maritime industry, such that there is substantial transparency as to how this funding works and its impact on matters such as disclosure, conflicts and security for costs.” *Ibid* at 55; Trinidad Alonso, “Third-Party Funding’s Older Sibling: Legal Costs Insurance and the Issue of Regulation” (2017), *Kluwer Arbitration* (blog), online: <arbitrationblog.kluwerarbitration.com/2017/08/31/third-party-fundings-older-sibling-legal-costs-insurance-issue-regulation/>.

¹⁹ ICCA TPF Report, *supra* note 6 at 50 [emphasis added].

²⁰ *Ibid* at 52.

²¹ Eric De Brabandere & Julia Lepeltak, “Third-Party Funding in International Investment Arbitration” (2012) 27:2 ICSID Rev 379 at 385, online: <academic.oup.com/icsidreview/article-lookup/doi/10.1093/icsidreview/sis017> at 8.

²² Goldsmith & Melchionda, *supra* note 8 at 62.

direct financial interests in funded cases does raise the question of whether ethical and procedural considerations, from the context of standard TPF concerns, ought to be applied to strategic TPF.

III. STRATEGIC THIRD-PARTY FUNDING

As noted earlier, the fundamental difference between standard and strategic TPF is the rationale behind a funder's provision of funding. To reiterate this in another way, it could be said that standard TPF is investment-oriented,²³ while strategic TPF is driven by other motives.²⁴ Thus, contrary to the standard model of TPF, which generally focuses on funding claims of high financial value alone, strategic TPF may be used to finance both monetary and non-monetary claims. To date, there has been a number of reported cases funded on the basis of strategic TPF, and many of these cases vary considerably. For instance, claims have ranged from farm-expropriation claims against Zimbabwe (funded by humanitarian organisations),²⁵ to Uruguay's funded defence of Philip Morris International,²⁶ to philanthropic offerings of an ex-majority shareholder in the famous *Yukos* case.²⁷ In all of these cases, funders were not entitled to commission, nor other forms of remuneration or reward.

In this paper, the term "strategic TPF" will be used to describe the non-recourse provision of funds in regard to:

- 1) a party to particular arbitration or litigation (either a claimant or respondent) by
- 2) a third-party (a funder) with no other connection with the funded case to
- 3) promote, enhance or achieve non-financial or indirect financial interests of a funder, funded party or general public.

Strategic TPF may, of course, be used to finance both claimants and respondents. Whom will be financed in a given dispute depends solely on who, in the dispute, represents the values sought to be advanced by the funder. For

²³ *Ibid*; Veljanovski, *supra* note 14 at 417; von Goeler, *supra* note 4 at 63–64.

²⁴ ICCA TPF Report, *supra* note 6 at 48.

²⁵ Goldsmith & Melchionda, *supra* note 8 at 62.

²⁶ *Philip Morris Brands Sàrl et al v Oriental Republic of Uruguay*, online: <italaw.com/cases/460> [*Philip Morris*]. See the following press release by Uruguay's Counsel, Foley Hoag LLP, online: <foleyhoag.com/news-and-events/news/2010/October/Uruguay-taps-foley-hoag-for-representation/>.

²⁷ *Quasar de Valores SICAV SA et al v The Russian Federation [Quasar]*; Lisa Bench Nieuwveld, "Yukos Oil Wins with Good Samaritan Third Party Funder's Help?" (2012) *Kluwer Arbitration* (blog), online: <arbitrationblog.kluwerarbitration.com/2012/08/08/yukos-oil-wins-with-good-samaritan-third-party-funders-help/>.

example, in the case of the Anti-Tobacco Fund, the only litigants eligible for financing are countries responding to, or threatened with, lawsuits challenging their anti-tobacco legislation. Unsurprisingly, these lawsuits and threats are chiefly advanced by large tobacco companies. However, the scope of funding eligibility through the Anti-Tobacco Fund is very narrow.

It should also be mentioned that in single-case instances of standard TPF, funds are usually made available to claimants or counterclaimants. This makes sense, as it is only these individuals (and not respondents) who are, definitionally, claiming damages – an interest of which could be the subject of TPF “investment.” Respondent-side TPF, while theoretically possible, has rarely been seen in practice.²⁸

Funds collected by way of strategic TPF are often directly recycled to cover the expenses of litigation or arbitration. Such incurred costs may include legal fees, consulting fees, witness fees, filing costs, and other litigation-related expenditures.

In contrast to the standard third-party funders – sophisticated business entities – the strategic third-party funder may be any person or group. Usually, the strategic third-party funder will be a foundation, humanitarian organisation, or other non-profit entity. It is also imaginable for strategic third-party funders to present as large groups of people from one or more countries, raising funds for a common aim, e.g. the crowdfunding of a particular case or litigant. In 2014, the first specialized litigation-focused crowdfunding platform, *LexShares*, was established in the US. This platform provided for investment-based mechanisms that essentially mirror the standard TPF model. However, there are now other platforms, such as *Funded Justice* and *Crowd Justice*, which are non-investment focused. *Invest4Justice* was another non-standard TPF platform, as it provides mechanisms for both investment-based and donation-based TPF, but *Invest4Justice* was dissolved for unknown reasons.²⁹

Recently, funds were raised in Poland to finance civil litigation against a publicly funded Catholic university, which had chosen not to admit a student for not having provided a certificate from a parish priest. The claim itself was based on the grounds of religious discrimination by a public entity. This crowdfunding campaign was organised by the *Polish Society of Anti-Discrimination Law* (the “PSAL”), an apolitical non-profit organization of lawyers specializing

²⁸ von Goeler, *supra* note 4 at 49; Goldsmith & Melchionda, *supra* note 8 at 60.

²⁹ At the time of publication, *Invest4Justice* has been discontinued for unknown reasons; Ronen Perry, “Crowdfunding Civil Justice” (2018) 59 BCL Rev 1357 at 1370.

in anti-discrimination law. The crowdfunding campaign was launched through a general crowdfunding platform, known as *zrzutka.pl*.³⁰

Crowdfunding campaigns are gradually becoming a popular method of financing respondent and claimant-side litigation. In 2017 alone, Maajid Nawaz (chairman of a London-based think-tank), Andy Wightman (a member of the Scottish Parliament) and Ignal Sarna (an Israeli journalist) raised money to finance defamation proceedings via crowdfunding platforms.³¹ The growing use of crowdfunding platforms to finance civil proceedings on the basis of donations is perfectly illustrative of the market forces behind strategic TPF. Said another way, the free market deems it worthwhile to finance public-interest litigation, or litigation that will bring attention to certain matters.

Unlike standard TPF, strategic TPF may be used to finance practically any type of litigation, irrespective of the specific nature of the lawsuit, even where the case has no clear precedent. A special focus on creating precedent cases is underlined by the PSAL, for example, which reserves the right to refuse legal assistance or financing on the basis that the case is not a leading one.³² For standard TPF, on the other hand, the risk associated with taking on those cases without precedent are usually too high, and are thus not seen as worthy investments.³³ In cases of standard TPF, the expected time of recovering damages is *at least* just as important as the quantum of said damages.³⁴ For instance, even those cases with exorbitant potential pay-outs may be seen as unattractive to investors, if the turnaround time of the investment is too great. Even less attractive to investors are the similar, lengthy cases, but with the added disadvantage of uncertain outcomes.³⁵

A look at the leading cases shows that strategic TPF is an important player in the development of case law. Indeed, developing the case law may be *the* strategy, serving as the primary incentive for third-party involvement.

³⁰ See the following campaign on Facebook: Polskie Towarzystwo Prawa Antydyskryminacyjnego, "Dyskryminacja w Toruniu! Zbiorka na koszty sądowe!", online: <facebook.com/donate/2036868919885829/2056702374569335/>.

³¹ Perry, *supra* note 29 at 1358, 1369, 1370, 1390.

³² See generally the Polish Society of Anti-Discrimination Law (Polish: "Polskie Towarzystwo Prawa Antydyskryminacyjnego"), online: <ptpa.org.pl/pomoc-prawna/>.

³³ Commercial third-party funders are interested in success rates around 60-70%; see von Goeler, *supra* note 4 at 25.

³⁴ von Goeler, *supra* note 4 at 20.

³⁵ Rowles-Davies, *supra* note 23 at 11.

A. TYPES OF STRATEGIC THIRD-PARTY FUNDING

From the viewpoint of a strategic third-party funder, strategic TPF itself may be divided into two main sub-categories: *public interest funding* and that of advancing *indirect financial interests*.³⁶

A useful example of public interest funding is the Anti-Tobacco Fund or the PSAL. Public interest funding will advance claims seeking to impact the social or political landscape. In the case of the Anti-Tobacco Fund, the beneficial purpose is to reduce the harms associated with tobacco use in low and middle-income countries, which are worst exposed to the risks of tobacco. Another example of public interest funding comes from the case of the Zimbabwean farmers, whose land-expropriation claims were financially backed by both humanitarian organizations and non-investment-based crowdfunding campaigns. Accordingly, public interest funding appears to be almost the exact opposite of standard TPF, insofar as the motives for funding are concerned. Standard TPF can be seen as no different from any other type of investment, the value of which is assessed on scales of financial risk and reward.³⁷

Neither public interest funding nor strategic TPF, generally, should be confused with public interest litigation (“PIL”). However, public interest funding and PIL may appear to be very similar, as public interest funding is a method of *financing*. It means that the strategic third-party funder is not a party or, as a rule, an intervenor in financed litigation or arbitration. Even in the case of organisations such as PSAL, a funder is, at the most, only acting as counsel for a funded party. Financing of a claim by non-parties is the defining feature of third-party funding. Thus, immediately when a funder becomes a party to the funded legal proceedings, they clearly lose their status as a third-party funder.

Regarding *indirect financial interest funding*, there should be no clear link between a funder’s own financial interests and which proceedings are funded. In determining whether to finance a case, funders are motivated by larger commercial interests, which transcend the case. Usually, the larger commercial interests of a funder are advanced by creating favourable legal precedents.³⁸

A good illustration of indirect financial interest funding – provided by “Group Menatep Limited” – can be seen in the case of *Quasar de Valores*

³⁶ Goldsmith & Melchionda, *supra* note 8 at 62. The authors refer to “public interest” and “commercial strategic funding,” however for the sake of clarity, in this paper I will refer to “commercial strategic funding” as “indirect financial interests” funding.

³⁷ von Goeler, *supra* note 4 at 3; Veljanovski, *supra* note 14 at 417.

³⁸ von Goeler, *supra* note 4 at 58–59; Goldsmith & Melchionda, *supra* note 8 at 62.

SICAV SA *et al v The Russian Federation*.³⁹ Menatep, a former majority shareholder of Russian oil company “Yukos”, financed proceedings in order to create a favourable precedent for its own case of higher value, also against Russia, under the Energy Charter Treaty. By financing this case, Menatep was able to, from afar, test the likelihood of its own case succeeding. Nevertheless, Menatep was not entitled to any share in the proceeds of the funded case. Thus, Menatep’s contribution of funds was not an investment, but technically, a donation or “good Samaritan offering,” as generously described by the arbitral tribunal resolving the case.

B. CHALLENGES ARISING OUT OF USING STRATEGIC THIRD-PARTY FUNDING

This part of the article will examine the challenges typically considered in the context of standard TPF and analyse them within the context of strategic TPF. The following issues will be considered: doctrines of maintenance and champerty, the risk of fuelling frivolous litigation or arbitration, disclosure and conflicts of interest, control over the funded case and the possibility of rendering cost orders for or against third-party funders.

1. *Doctrines of Maintenance and Champerty*

In common law countries, one of the main obstacles to relying on TPF are the doctrines of maintenance and champerty, which prohibit the financing of litigation by non-parties. Such doctrines are generally not known in civil law countries, where TPF seems to flourish on the legal basis of “party autonomy.”⁴⁰

Maintenance is a tort, which is considered to have been committed by a person who, “supports litigation in which he has no legitimate concern, without just cause or excuse.”⁴¹ “Champerty,” however, is an aggravated form of maintenance, in which a maintainer is entitled to a share in the proceeds of a funded case.⁴² In the Canadian case of *McIntyre Estate v Ontario (Attorney General)*,⁴³ the Ontario Court of Appeal described maintenance and champerty as follows:

Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of

³⁹ *Quasar*, *supra* note 27.

⁴⁰ Nieuwveld & Sahani, *supra* note 14 at 39; Rogers, *supra* note 9; von Goeler, *supra* note 4 at 60–61.

⁴¹ Nieuwveld & Sahani, *supra* note 14 at 23.

⁴² *Ibid.*

⁴³ *McIntyre Estate v Ontario (Attorney General)*, 61 OR (3d) 257, [2002] OJ No 3417 (QL).

others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the others. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation.⁴⁴

The main aim of maintenance and champerty is to discourage “unnecessary” litigation.⁴⁵ Thus, these doctrines are not absolute and do not prohibit funding which is in the interest of justice. Canadian courts held that the motive of an alleged maintainer is the key factor in determining whether a funder involvement constitutes maintenance.⁴⁶ In a similar vein, the court in *Schenk v Valeant*⁴⁷ established a three-step legal test for the legality of TPF agreements. First, the funder should not “stir up” the litigation. Second, the funder cannot control the litigation. Thirdly, the funder's return has to be reasonable. In the English case of *Hamilton v Al Fayed (No 2)*,⁴⁸ the English Court of Appeal made a distinction between “pure” (i.e. strategic) funders and “professional” (i.e. commercial) funders of litigation. In this ruling, the court held that:

The pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that this essential motivation is to enable the party funded to litigate what the funders perceived to be a genuine case.⁴⁹

In the *Schenk* case, the court confirmed that the main issue which would render funding agreements illegal turns around the funder's return. In the *Schenk* case, the court held that:

Such an agreement, in my view, does not provide access to justice to Schenk in a true sense, but rather provides an attractive business opportunity to Redress [i.e. the third-party funder] who suffered no alleged wrong.⁵⁰

As it follows from the above-mentioned cases, maintenance and champerty considerations are closely linked to the direct financial interest of third-party funders. In the case of strategic TPF, a funder is not entitled to share in the proceeds of the case whatsoever. Thus, a strategic TPF agreement would never be champertous. As regarding maintenance, it should be emphasised that the

⁴⁴ *Ibid* at para 26.

⁴⁵ Hugh A Meighen, “Canada” (2017) 1 Third Party Litigation Funding L Rev 30 at 31.

⁴⁶ *Ibid*.

⁴⁷ [2015] ONSC 3215 [*Schenk*].

⁴⁸ [2003] 2 WLR 128 [*Hamilton*].

⁴⁹ *Ibid* at para 47.

⁵⁰ *Schenk*, *supra* note 47 at para 17.

real motive underlying strategic TPF is to provide a party with access to justice (i.e. *public interest funding*) or to further create advantageous precedents (i.e. *indirect financial interest funding*). Both of these motives seem to be in the public interest and, as such, unlikely to be classified by any decision-makers as ‘improper’. By way of another example, in the Canadian case of *Marcotte v Bank of Montreal*,⁵¹ the Supreme Court allowed in part an appeal by representative plaintiffs from the Court of Appeal for Quebec, holding that funding agreements may sometimes be acceptable, because without third-party funding, some claims may not be otherwise pursued. Following the court’s logic, standard TPF seems to be allowed under the doctrine of maintenance, as it is used to facilitate access to justice that would otherwise be out of reach. Nevertheless, a lack of distinction between standard and strategic TPF puts users of the strategic TPF at risk of courts’ examination concerning the legality of strategic TPF agreements under maintenance and champerty doctrines.

2. *The Risk of Pursuing Meritless Claims*

The lack of a strategic funder’s financial interest in a case does raise concerns regarding the risk of fuelling excessive and frivolous litigation.⁵² The same concerns were initially raised with respect to standard TPF, but these were likely exaggerated, as investment-style funders are also thoroughly concerned with the winnability or hopelessness of cases. Thus, case assessment is a central aspect of standard TPF,⁵³ which serves to determine whether a particular claim is worthy of a funder’s investment, i.e. the probability of seeing a financial return within a preferred time horizon.⁵⁴ It may appear that, in the case of strategic TPF, case assessment might lose its importance if a funder is not interested in financial returns. Nevertheless, the assumption that case assessment is the direct result of a funder’s financial interest in a case is oversimplified. In fact, there is a number of other factors that motivate a funder to assess a case on its merits prior to investment. First of all, the financial capacities of the strategic third-party funder is never unlimited. Secondly, not every applicant may be granted financing. Thirdly, the spending of strategic third-party funders is usually subject to controls, checks, and balances – especially if the funder is non-governmental organisation. If the funds are raised

⁵¹ 2014 SCC 55, [2014] 2 SCR 725 at 43-44.

⁵² Perry, *supra* note 29 at 1376.

⁵³ von Goeler, *supra* note 4 at 13.

⁵⁴ Rowles-Davies, *supra* note 23 at 10–11.

from the general public, as in case of crowdfunding campaigns, there is also an issue of case creditability and legitimacy in the eyes of the public.⁵⁵

The Anti-Tobacco Fund, on its webpage, provides clear guidance regarding which aspects of a case are considered in the determination of whether it is eligible for funding:

- 1) the importance of the issue's resolution to both the specific low- or middle-income country, and to other countries that are considering similar action;
- 2) the legal defensibility of the tobacco control measure being challenged;
- 3) the probability of success on the merits of an international trade challenge;
- 4) the size of the population that will benefit from the law; and
- 5) the commitment of the government to tobacco control and to participating fully in the defense of the measure being challenged.⁵⁶

However, as shown above, the assessment is not primarily focused on the likelihood of a case succeeding on its merits; this was the third issue considered by the Anti-Tobacco Fund for case eligibility of funding, which considerably limits the risk of financing meritless defences.

Also, in regard to cases supported by PSAL, the risk of supporting meritless claims is mitigated by case examination. This is conducted by PSAL lawyers. Additionally, PSAL screens not just cases, but also the financial situation of a prospective plaintiff, who in some circumstances may be asked to participate in the payment of legal costs, even if PSAL does decide to support the case.

The risk of financing meritless litigation appears to be the highest in cases of legal crowdfunding,⁵⁷ particularly where the action is organized by the party and not by the organisation who assessed and supported the case (e.g. PSAL). However, it also appears to be doubtful that court dockets will become overcrowded by cases funded by crowdfunding. It is worth mentioning that the risk of frivolous litigation is equally high in countries where exemption of court fees is granted solely on the basis of a party's (usually claimant's) financial situation; this does not prejudice the merits of a claim.⁵⁸

3. *Disclosure and Conflicts of Interest*

The obligation to disclose the involvement of third-party funding to an adjudicator and other party is highly controversial. While scholars advocate for

⁵⁵ Rob Gleasure & Joseph Feller, "Does Heart or Head Rule Donor Behaviors in Charitable Crowdfunding Markets?" (2016) 20:4 Intl J Comm Electron 499.

⁵⁶ Tobacco-Free Kids, *supra* note 2.

⁵⁷ Perry, *supra* note 29 at 1385.

⁵⁸ Such regulations for exemptions of judicial fees are provided in most European countries, such as Poland.

mandatory disclosure both in arbitration and litigation, the TPF industry perceives disclosure, instead, as an element of case strategy.⁵⁹

The 2014 International Bar Association (“IBA”) Guidelines on conflicts of interest in international arbitration, in Standard 6(b), explicitly refers to third-party funding in the following quotation:

[I]f 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 duty to indemnify a party for, the award to be rendered in the arbitration may be considered to bear the identity of such party.⁶⁰

The wording of Standard 6(b), as well as the Explanation to General Standard 6(b), clearly indicates that the main source of any possible conflicts of interest are a result of “direct economic interest” of a funder in an outcome of the case, and not the mere provision of funds.

Despite the wording of the 2014 IBA Guidelines, the ICCA-QMUL Task Force took an opposite approach, proposing instead to broaden the IBA definition in such a way that would also cover financing provided through “a donation or grant.”⁶¹ It was not explained by the Task Force why strategic TPF should also, then, be subject to such a definitional broadening. However, it appears that the Task Force definition of TPF fits into a wider trend. EU-Canada Comprehensive Economic and Trade Agreement (CETA) is not only the first treaty to impose the obligation of disclosure, but also first to expressly refer to strategic third-party funding. Art. 8.1 of CETA expressly provides that the term third-party funding covers also financing through donation or grant. Further, Art. 8.26 imposes on a funded party a duty to disclose the name and address of the third-party funder at the earliest possible moment.

Beyond any doubt, transparency of investment arbitration is vital.⁶² But bearing in mind that the aim of strategic TPF is to further the “big-picture” cause associated with the funded claim, a disclosure of existing third-party funding agreements would seem necessary to promote notions of transparency, but also, to draw the public’s attention to issues that transcend the funded case. The fact that strategic third-party funders generally disclose their involvement in cases is proved by the many cases mentioned above in this paper, including

⁵⁹ Maxi Scherer, Camille Flechet & Aren Goldsmith, “Third party funding in international arbitration in Europe: Part 1: funder’s perspectives” (2012) *J Intl Bus L* at 217-219.

⁶⁰ International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014) Standard 6(b) [emphasis added].

⁶¹ ICCA TPF Report, *supra* note 12 at 50.

⁶² Willem H van Boom, “Third-party Financing in International Investment Arbitration” (2011) *SSRN Electronic Journal* at 13.

cases funded via crowdfunding campaigns. With respect to strategic TPF, the Task Force itself referred to the well-known case *Philip Morris v Uruguay*,⁶³ which was backed by the Anti-Tobacco Fund. In this case Uruguay not only voluntarily disclosed the involvement of the Anti-Tobacco Fund, but also publicly disclosed information of Anti-Tobacco Fund involvement in an October 8, 2010 press release,⁶⁴ which was approximately one year before “Uruguay’s Memorial on Jurisdiction” was filed in the case.⁶⁵

Thus, imposing a duty of disclosure on strategic third-party funders does appear to be a simple, albeit accidental, consequence of classifying strategic TPF as a type of standard TPF.

4. *Control over the Funded Case*

The issue of funder’s control over funded proceedings is, in fact, a question of every individual funding agreement.⁶⁶ The funding agreements vary significantly, and there is no generally accepted standard how much funder’s control over proceedings is excessive. Additionally, the terms of the funding agreement are very likely to be confidential.⁶⁷ Noteworthy, neither CETA nor the Task Force Report expressly requires disclosure of the terms of the funding agreement itself. Thus, it appears that disclosure of the terms of the funding agreement should be ordered only in exceptional circumstances.

The provisions on funder’s control over the case and especially settlement offers are, again, closely linked to funder’s interest in the outcome of proceedings.⁶⁸ While entering into the TPF agreement, the funder assumes the full risk of case failure. This risk is to be repaid by the funded party should the case succeed. Thus, it is clear that the funder will try to provide itself with some degree of control over the funded case.

Remarkably, the provision of funds itself is not a control.⁶⁹ Thus, in the case of strategic TPF, it seems to be very unlikely that the funder would in any way control the proceedings. In some instances - e.g. litigation crowdfunding - the control might turn out hard to exercise, if possible at all.⁷⁰ Of course, the

⁶³ See generally *supra* note 26.

⁶⁴ Foley Hoag, *Uruguay Taps Foley Hoag for Representation* (2010).

⁶⁵ *Philip Morris*, *supra* note 26.

⁶⁶ von Goeler, *supra* note 4 at 12.

⁶⁷ Rowles-Davies, *supra* note 23 at 123; von Goeler, *supra* note 4 at 38.

⁶⁸ Perry, *supra* note 29 at 1379.

⁶⁹ Association of Litigation Funders, “Litigation Finance”, online: <associationoflitigationfunders.com/litigation-finance/>.

⁷⁰ Perry, *supra* note 29 at 1380.

funded party might assume reporting obligation to the funder, but, again, reporting does not equal control. Furthermore, there is no implied duty on the funded party to report the conduct of litigation to crowdfunders. There is also no ground on which an amount donated might be claimed back by the crowdfunders.

Still, one may consider a strategic funder's role in case settlement. In the case of standard TPF, the main point is the amount. Thus, financial consequences of settlement are interlinked with funder's contractual rights to control strategic decisions.⁷¹ In strategic TPF scenario, the amount seems not to be relevant as long as it is fair for the funded party. More probably, the involvement of strategic TPF would encourage settlement. To this author's knowledge, in the so-called *David v Goliath* scenario, the stronger party is usually abusing its power and tries to sabotage the weaker party by the threat of costly litigation. Consequently, strategic TPF is rather levelling the playfield than being an obstacle to amicable dispute resolution.

Should the dispute over settlement offer arise between the funder and the funded party, it is, again, an issue depending on the wording of the TPF agreement. It is common practice for standard funders that in such a case the funder might terminate the TPF agreement or claim reimbursement from the funded party.⁷² Especially, the funder is not having any veto right against terms of the settlement.⁷³ It would be reasonable to expect mirroring provisions on dispute settlement in strategic TPF agreements.

5. *Decisions on Costs*

While ruling on costs in the case of *Quasar de Valores*,⁷⁴ the arbitral tribunal held that the claimant was not entitled to recover procedural arbitration costs, which were financed wholly by Menatep, i.e. the "good Samaritan", and there was no obligation for the claimants to reimburse Menatep for the incurred costs. Thus, the arbitral tribunal simply found that the claimant did not incur *any costs* connected to the proceedings and, as a consequence, not entitled to any kind of reimbursement.

There are two main comments to be made about the approach taken by the arbitral tribunal of *Quasar de Valores*. First, following the logic of the

⁷¹ von Goeler, *supra* note 4 at 44.

⁷² *Ibid* at 35, 36, 44.

⁷³ *Ibid* at 44.

⁷⁴ There are also other investment arbitration cases in which a funded party was granted costs orders. However, the *Quasar* case is the only one known to the author in which a claimant was financed by a strategic third-party funder and was not obliged to reimburse the funder upon the case succeeding.

tribunal, it would seem that an agreement between a strategic third-party funder and their funded party (to reimburse costs incurred by the funder) would be procedurally sufficient for the tribunal to render cost order in favour of the funded party. Such an agreement (provided it does not result in a windfall for the strategic funder) would not contradict the essential character of strategic TPF and may be easily introduced into a third-party funding agreement. Furthermore, in proceedings funded by crowdfunding campaigns, each individual funder does not generally expect any reimbursements if the funded case prevails.

Accordingly, it would appear that the main procedural problem that may face strategic third-party funders would be the risk of adverse cost awards, if a funded case were to fail.⁷⁵ In cases of standard TPF, a lack of funder liability for adverse costs was already criticized.⁷⁶ Commentators pointed out that such regulations allows funders to avoid any responsibility for lack of merits of the funded case.⁷⁷ However, in many countries, state courts will not have legal grounds to issue adverse cost orders against third-party funders.⁷⁸ English and US courts have found that they may broaden their jurisdiction to order that third-party funders must reimburse the costs of their prevailing parties.⁷⁹ Nevertheless, in *Hamilton*, the court held that strategic third-party funders (i.e. “pure” funders) should not be liable for adverse costs. With respect to strategic TPF, in *Hamilton*, Morland J. emphasised that it would “be rare or very rare that it will be just and reasonable” to issue an order of costs against a strategic

⁷⁵ This paper does not analyse the issue of security for costs, as it was established that the involvement of third-party funders (either commercial or strategic) may not be solely for the reason of granting an applicant security of costs. See Christopher P Bogard, “Third-party financing of international arbitration” (2017) *Eur Arb Rev*, online: <globalarbitrationreview.com/insight/the-european-arbitration-review-2017/1069316/third-party-financing-of-international-arbitration>.

⁷⁶ William Kirtley & Koralie Wietrzykowski, “Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?” (2013) 30:1 *J Int Arbitr* 17, online: <kluwerlawonline.com/abstract.php?area=Journals&id=JOIA2013002> at 26; von Goeler, *supra* note 4 at 367–375.

⁷⁷ Kirtley & Wietrzykowski, *ibid* at 26; von Goeler, *supra* note 4 at 367–375; Dmytro Galagan & Patricia Živković, “If They Finance Your Claim, Will They Pay Me If I Win: Implications of Third Party Funding on Adverse Costs Awards in International Arbitration” (2015, Special Edition) *Euro Sci J* 173, online: <eujournal.org/index.php/esj/article/viewFile/5517/5307>.

⁷⁸ Steven Friel & Jonathan Barnes, *Litigation Funding* (London: Gideon Robertson, 2017) at 18, 23, 31, 40, 43, 52, 59.

⁷⁹ Stavros Brekoulakis & Jonas von Goeler, “It’s all about the Money: The Impact of Third-Party Funding on Costs Awards and Security for Costs in International Arbitration” (2017) *Austrian YB Intl Arb* at 8–9.

funder, whereas in the case of commercial funders, it would be “very exceptional” for such to be “not just and reasonable to make an order under s 51.”⁸⁰

The risk of adverse costs awards may be avoided by ATE insurance,⁸¹ which is now widely used by commercial third-party funders. Even so, the costs of ATE insurance are high and impose additional financial burdens on the parties utilizing strategic TPF.

IV. CONCLUSION

The standard TPF industry is constantly growing and changing. Recently, single-case funding (one-off financing) has lost its importance in light of advanced methodologies for financing litigation, e.g. portfolio financing, which allows third-party funders to optimise the risks associated with investing in any given claim. The existing variety of products offered by commercial third-party funders does indeed render standard TPF difficult to describe and regulate.

As opposed to standard TPF, strategic TPF is not rapidly developing. It is still a single-case oriented method of financing, which is focused not on the claim itself, but rather on other causes and effects associated with a claim.

The different rationales backing standard and strategic TPF puts the potential involvement of third-party funders into different contexts. Strategic TPF – especially in “public interest” scenarios, is much more comparable to legal aid or pro-support for legal causes rather than standard TPF. Similar to legal aid,⁸² strategic TPF seems to have only minor impacts on the TPF market generally. Again, the unique nature of strategic TPF was noticed by the courts and arbitral tribunals dealing with cases financed by strategic third-party funders. In the *Quasar* case, the arbitral tribunal distinguished between commercial and strategic third-party funding and considered the latter to be that of a “good Samaritan.” In *Hamilton*, the court perceived strategic third-party funding as ‘pure’ funding, undertaken out of public interest to increase access to the justice.

Different functions of standard and strategic TPF are mirrored by the challenges likely to arise on the basis of these two types of financing. While standard TPF raises concerns as to the ethical and procedural implications of

⁸⁰ *Supra* note 48, para 31.

⁸¹ The issue of adverse costs might be dealt with by the after-the-event legal expenses insurance policy, so-called ATE insurance. ATE policies normally cover the legal costs which a party (usually claimant) must pay to an opponent if the adverse cost order is rendered against the party. See e.g. Rowles-Davies, *supra* note 13 at 128-129; von Goeler, *supra* note 4 at 53.

⁸² Veljanovski, *supra* note 14 at 410.

commercial third-party funding in funded cases, strategic TPF appears to be an exception to most of these challenges, because of a strategic funder's lack of direct economic interest in a funded case.

Consequently, strategic TPF only theoretically falls within the definition of standard third-party funding. It is, therefore, more worrying that academics and lawmakers tend to apply the all-catching, broad definition of TPF, regardless of the functional differences between standard and strategic third-party funding. Accordingly, the definition of standard TPF should expressly exclude strategic TPF, just as BTE insurance does with P&I and Defence Clubs in maritime cases. Thus, it is reasonable and justified to consider how strategic TPF is unique as an independent instrument for both financing and advancing civil justice, and accordingly, to afford it the appropriate treatment when the circumstances of a case so warrant.