CHAPTER 9

Beyond the Myth of the Bermuda Triangle: A Swedish Perspective on Conflicts of Interest in the Context of Third-Party Funding in International Arbitration

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§9.01 INTRODUCTION

The issue of potential conflicts of interest in cases involving third-party funding (TPF) has been widely debated since TPF emerged in the 2000s. The most discussed issue relating to conflicts of interest has been the situation where an arbitrator may have a previous or existing relationship with a funder. However, it has also been argued that TPF can give rise to potential conflicts of interest emanating from the relationship between the funder and a funded party, counsel, or the funded party's opposite party.

In §9.02 of this chapter, we examine what actually constitutes a conflict of interest, how the contractual TPF relationship is usually structured in Sweden, and whether it can generally be said that conflicts of interest are inevitable, or highly likely, to arise for funders and counsel involved in a funded dispute. In §9.03 of this chapter, we provide an overview of rules and best practices regarding conflicts of interest and disclosure in relation to arbitrators in funded international arbitrations seated in Sweden.

§9.02 CONFLICT OF INTEREST ISSUES RELATING TO FUNDERS, COUNSEL AND FUNDED PARTIES

[A] Introduction

This first section of the chapter focuses on potential and alleged conflicts of interest other than those involving arbitrators, mainly related to the funder and counsel. The

perceived danger of conflicts of interest arising in TPF has been frequently raised by international authors and commentators, sometimes even by pioneering funders themselves. For example, Selvyn Seidel, co-founder of Burford (later with Fulbrook), states that:

> real problems exist and are troublesome. One such problem is conflicts. The relationship among the claimant, its lawyer, and the investor, is fraught with potential conflicts and dangers, like the Bermuda Triangle. They can be managed, but first they have to be identified, and then governed.[1]

This remark, even if made in a short introductory booklet (which admittedly does not allow for a deep dive into the subject), can be regarded as somewhat characteristic of discussions on TPF.

Common themes in such discussions are that (i) the broad and vague term 'conflicts' is used in an unspecified and undefined manner; (ii) reference is made to a triangular relationship (unclear whether contractual or not); (iii) it is stated that TPF involves dangers; and, after those remarks have been made, (iv) no effort is shown to provide for a clear and systematic analysis of circumstances which would actually constitute such alleged conflicts. Below, we discuss and present our view on these topics.

[B] Brief Comments on the Term *Conflict of Interest*

In order to properly discuss issues regarding conflicts of interest, as with any other analysis relating to a legal concept, it is of course important to clearly set out what is meant by such a term.

Naturally, any discussion regarding conflicts of interest in international arbitration would at some point rely on and refer to the IBA Guidelines on Conflicts of Interest in International Arbitration (the 'IBA Guidelines'). However, the purpose and focus of the IBA Guidelines is to identify and avoid potential conflicts of interest with respect to the *arbitrator*, rather than any other participant in arbitral proceedings. Thus, for the purposes of a *general* understanding of what constitutes a conflict of interest, the IBA

1. Selvyn Seidel, *Snapshot. Contemporary Litigation Finance*, p. 30 (Lambert Academic Publishing, 2019). The reference to the Bermuda Triangle when discussing the relationship between funder, funded party and counsel has been taken up and used by others, *see*, *e.g.*, Jonas von Goeler, who refers to Luke Eric Peterson who, in turn, cites Selvyn Seidel. Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, p. 97 and footnote 187 (Kluwer Law International, 2016). *See also*, *e.g.*, Charles Kaplan, who states that 'the three-cornered relationship must inevitably give rise to potential conflicts …'. Charles Kaplan, *Issues for Counsel*, p. 75 (Bernardo M. Cremades and Antonias Dimolitsa (eds), *Third-Party Funding in International Arbitration*, ICC Dossier, Kluwer Law International, 2013). On potential conflicts of interest, *see*, *e.g.*, also Lucy Pert, Anthony Sebok, *Third-Party Litigation Financing and Lawyers' Ethical Obligations*, p. 76 (Steven Friel (ed.), *The Law and Business of Litigation Finance*, Bloomsbury Professional, 2020); Adriana Cordina, *Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe*, p. 277 (Erasmus Law Review, Vol. 14, No. 4, 2021) DOI: 10.5553/elr.000211 (stating that: 'Given the assumption of self-interest, TPF arrangements inevitably give rise to the possibility of conflicting interests between the funder, the claimant and the lawyer.' (p. 275).

Guidelines are not sufficient, as their primary purpose in this regard is to ensure that the individual sitting as arbitrator is impartial and independent (which is further discussed in the second section of this chapter). In this section, we are instead dealing with potential conflicts of interest arising mainly for funders and counsel – who are not and cannot be disinterested as to the outcome of the dispute.

According to Black's Law Dictionary, a conflict of interest means the following: '1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. 2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.' This definition is well reflected in both the Code of Conduct for European Lawyers[2] and the Swedish Bar Association Rules,[3] and it is clear that professional obligations and fiduciary duties[4] are key to understanding the concept of *conflict of interest*. This is well-explained in an EU report on conflict of interest:

> CoI [i.e., Conflict of Interest] as a legal concept has a long agreed-upon meaning in law used to regulate fiduciaries – individuals entrusted to serve the interest of another party or to serve a designated mission – who are held to the highest legal standards of conduct. Generally, these laws and codes do not permit fiduciaries to promote their own interests or the interests of third parties. Instead, they require fiduciaries to be loyal to the party they serve, to act prudently and diligently, and to account for their conduct.[5]

It is important to note that words such as *conflicting* or *competing interests*, as generally used in ordinary language, do not have the same meaning as the more narrow legal concept of *conflict of interest*.[6] All business arrangements almost inevitably give rise to competing interests between the contracting parties. There is nothing inherently harmful about that. At the core of the term *conflict of interest* is instead the compromise of professional or fiduciary duties, or the risk of such duties being compromised. The natural step for anyone who is in a conflict of interest is generally to resign or withdraw from further participation entirely or to discontinue at least one of the relations which give rise to the conflict of interest situation.[7]

2. The Code of Conduct for European Lawyers, items 3.2.1-3.2.3.
3. The Swedish Bar Association Rules, item 3.2.1.
4. *Fiduciary duty* is, according to Black's Law Dictionary, generally understood to mean the following: 'A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).'
5. The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, *The Effectiveness of Conflict of Interest Policies in the EU Member States*, p. 38 (2020).
6. This has been pointed out in a previous article by one of us, *see* Johan Skog, *Illusory Truths and Frivolous Claims: Critical Reflections on a Report on Litigation Funding by the European Parliamentary Research Service* (Eva Storskrubb (ed.), *YSEC Yearbook of Socio-Economic Constitutions 2022*, Springer, 2023).
7. If the person in a conflict of interest situation is a legal counsel, he or she should cease to act for the client (the Code of Conduct for European Lawyers, item 3.2.2 and the Swedish Bar Association Rules, item 3.4) and if being a judge, he or she should recuse himself or herself from adjudicating the matter, which is generally provided for under national procedural law.

In light of the above, we understand the term *conflict of interest* to mean the compromise of professional or fiduciary duties, or the risk thereof, arising *for* a certain party (not *between* parties). We will use the term accordingly in this chapter.

[C] The Contractual Relationships in a Swedish TPF Deal

As noted above, TPF arrangements have been referred to as a Bermuda Triangle of dangers. Such language is no doubt eye-catching, but for the purposes of any conflict of interest analysis, it is important that it is made perfectly clear how the relationships are actually structured and under which specific circumstances a conflict of interest would arise.

In some TPF markets, particularly common law jurisdictions, funders may enter into a contractual relationship with the funded party's counsel, either directly as a party to the litigation funding agreement ('LFA') or under a separate contract (as an ancillary agreement to the LFA),[8] with negative effects of intricate fiduciary and/or contractual duties for counsel.

However, these types of structures are in our experience not reflected in Swedish TPF practices.[9] On the contrary, in Sweden, where the authors of this chapter are primarily active, funders would not require – and counsel would generally not accept – that any contractual relationship be established between the two.[10] In our view, such a contractual relationship would under Swedish conditions expose counsel to situations involving challenging ethical issues, for example, if counsel would itself be contractually obligated to disclose to the funder any negative developments in a case, and at the same time be instructed by its client not to do so. Thus, Swedish funders typically enter into an LFA with the funded party only, with no ancillary agreements involving the funded party's counsel.

As will be demonstrated below, it turns out that many of the allegedly difficult 'conflict' situations discussed in much of the literature on TPF actually evaporate when counsel do not expose themselves by entering into a contractual relationship with the funder, and when the funder refrains from requiring counsel to do so. A key factor for our conflict of interest analysis with respect to TPF in Sweden is the presumption that the funder is not a client of the funded party's counsel and that it has not entered into any contract with counsel. It is equally important to remind oneself that, similarly, the funded party is not a client of the funder, as the funder is generally not a service

8. Alex Lempiner, Jonathan Barnes, *The Litigation Funding Agreement*, p. 145, para. 6.4 (Steven Friel (ed.), *The Law and Business of Litigation Finance*, Bloomsbury Professional, 2020); Jonathan Barnes, *Regulation and Legislation: England*, p. 34, para. 4.45 (Steven Friel (ed.), *The Law and Business of Litigation Finance*, Bloomsbury Professional, 2020); Max Volsky, *Investing in Justice: An Introduction to Legal Finance, Lawsuit Advances and Litigation Funding*, pp. 128 and 141-142 (The Legal Finance Journal, 2013); Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration*, Second Edition, p. 26 (Wolters Kluwer, 2017).
9. Johan Skog and Carl Persson, *Tvistfinansiering*, p. 108 (Norstedts Juridik, 2022).
10. *See also* Stefan Kirsten and Alexander Foerster, *Sweden*, p. 230 (Steven Friel and Jonathan Barnes (eds), *Litigation Funding*, Lexology GTDT, 2023).

provider but an investor,[11] and thus under no fiduciary obligations vis-à-vis the funded party.[12]

It has now been explained that (i) a *conflict of interest* means the compromise of professional or fiduciary duties, or the risk of thereof; (ii) the funder is not a client of the funded party's counsel or in a contractual relationship with counsel; and (iii) the funded party is not a client of the funder. The next section will apply these findings when examining some of the situations which have been raised as being particularly 'dangerous' from a conflict of interest perspective.

[D] Situations Often Discussed with Respect to Conflicts of Interest

[1] Initial Comments

In the sections below, we discuss some of the situations that are often mentioned in the context of TPF and conflicts of interest and analyse them on the assumption that a conflict of interest means the compromise of professional or fiduciary duties, or the risk thereof, for a certain party.[13]

[2] The Funder

[a] General

As mentioned above, it is an important fact that litigation funders are *investors* – not service providers – and thus, the funded parties are not their clients. Yet, this is often overlooked or forgotten in writings on TPF, where the funded party is frequently referred to as a 'client' of the funder.[14] Regrettably, such ignorance has a bearing on the

11. Lempiner and Barnes, p. 143, para. 6.1; Cordina, p. 277; the EPRS study, p. 5, footnote 13; Mohamed F. Sweify, *Third Party Funding in International Arbitration. A Critical Appraisal and Pragmatic Proposal*, p. 4, stating that 'Rather than providing a service in exchange for a fee, funders invest in the lawsuit.' (Edward Elgar Publishing, 2023); Susanne Augenhofer and Adriani Dori, *The Proposed Regulation of Third Party Litigation Funding – Much Ado About Nothing?*, p. 32 (Zeitschrift für das Privatrecht der Europäischen Union, Vol 20, Issue 5).
12. It should however be noted that in September 2022, the European Parliament adopted a resolution which includes a proposal for a directive regulating TPF in the EU, in which it is set out that member states shall ensure that TPF agreements 'are based on a fiduciary relationship', requiring funders 'to act in the best interests of a claimant', and that 'the litigation funder shall commit to placing the interests of the claimants […] above its own interests.' *European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))*, Draft Art. 7. Such language is at odds with the fact that the funder is an investor, not a service provider to the funded party. Augenhofer and Dori state the following regarding the proposed directive's language on conflict of interest: 'These provisions focus on the relationship between the funder and the claimant. They neglect the fact that in Europe, as mentioned, the wronged party is hardly ever the client of the funder.' (p. 32) The European Commission has stated that it will carry out a study on TPF within the EU before taking any action in relation to the proposed directive.
13. Except for arbitrator conflicts of interest, which are discussed in §9.02 below.
14. *See, e.g.*, Nick Rowles-Davies, *Third Party Litigation Funding*, p. 66 f., para. 3.37 f. (Oxford University Press, 2014); Bench Nieuwveld and Shannon Sahani, p. 12; Solas, p. 261.

analysis carried out with respect to the relationship between the funder and funded party (as a client is owed fiduciary duties not owed to other business partners) and to what extent – if at all – there are any risks of conflicts of interest arising. Our view is that a funder owes no fiduciary duties to the funded party (but it is, of course, under a general obligation of contractual loyalty under the LFA).

[b] Funder Control

As regards potential conflicts of interest due to funder control in relation to the funded party, such concerns often relate to the understanding that the funder may wish to see or withhold certain procedural actions, including seeking an earlier settlement.

In common law jurisdictions, funders are generally careful not to take control over the proceedings, as such arrangements may not be allowed. However, in civil law jurisdictions, where doctrines of maintenance and champerty have generally not been applied and where claims may be freely assigned, the issue of control is of less significance. This is explained by Willem van Boom as follows:

> Whether 'steering the case' is considered unlawful or unethical depends heavily on the foundations of assignment of claims and debts. If, under a particular legal system, the law of assignment is unproblematic and fully permits such legal transfer, it is unlikely that any ethical problems will be experienced when a TPF funder is permitted to take control with the claimant's consent. It is, however, important to note that, depending on the rules of professional conduct applicable to client-counsel relationships, issues of conflict of interest may quickly arise if the lawyer is retained simultaneously by the claimant and the TPF funder.[15]

Sweden is such a jurisdiction where claims may be freely assigned and where the parties can agree as they wish with respect to the level of control by the funder. However, it should be stressed that unless the LFA confers the right on the funder to exercise control in a certain situation, such as a settlement, the funder will not have any right or possibility to take control or require certain action by the funded party. The funded party – and not the funder – is and should be the only client of the law firm; the funder can have no possibility or right to steer the dispute other than as explicitly set out in the LFA – and the funded party's counsel should never under Swedish conditions be 'retained simultaneously' by the funder, as put by van Boom in the above quote.[16]

15. Willem van Boom, *Litigation Costs and Third-Party Funding*, p. 25 (van Boom (ed.) *Litigation, Costs, Funding and Behaviour. Implications for the Law*, Routledge, 2017).
16. In a Swedish context, the funded party might delegate the management of the case to the funder, but counsel should of course only accept and follow instructions from the funder as long as such delegation has not been withdrawn. With respect to the issue of funder control, von Goeler makes the following remark: 'To the extent the funded party agrees with the litigation funder on a free and informed basis to cede control to the latter, it is difficult to see how this could be an issue. Why should a commercially experienced and legally advised party in international arbitration *not* be able to exercise its private autonomy by delegating case management to a third person?' (von Goeler, pp. 97 et seq., emphasis in original.) This is a truly continental or north European approach, which – due to the historical doctrines of champerty and maintenance – is almost unthinkable to find in US and UK works on TPF, most commonly utterly concerned with the issue of control.

Counsel should and must take instructions from the funded party, irrespective of whether such instructions would be in breach of the funded party's obligations to the funder under the LFA. The funder can never be allowed to direct counsel against the will of the funded party. The funder can thus only require that the funded party complies with its obligations under the LFA with respect to instructions to counsel.[17] Should that not be the case, the funded party would be in breach of the LFA, and the funder could take action accordingly.[18]

If the LFA contains no right for the funder to require that the funded party shall take or refrain from certain actions, including settling the case at a certain level, the funded party will be able to proceed as it sees fit. Thus, the parties have either identified the relevant situation in advance and dealt with it in the LFA, which may allow the funder to require certain actions by the funded party, or the situation is not dealt with in the LFA, which allows the funded party to act as it wishes. The fact that the parties may have competing interests regarding such matter, as at what time or at what level to settle, does not mean that either of them has a conflict of interest in either situation, as there is no risk of professional or fiduciary duties being compromised.[19] That would be the case also if the funded party acted in breach of the LFA by not taking the required action.

[c] Excessive Pricing

It is sometimes argued that funders may provide funding in return for an excessive share of any recovery to the benefit of the funder itself and at the expense of the funded party and that this may constitute a conflict of interest.[20] However, we do not consider that to constitute a conflict of interest issue within the legal meaning of the term and as we use such term in this chapter. Of course, the parties have competing interests as to the amount of the recovery which should be paid out to the funder. But this is a pricing issue that is fully reflected in the terms of the LFA. The concerns one may have relating to alleged excessive remuneration would rather be an issue of potentially unlawfully charged rates or payment terms, something which is not the subject of this chapter.

17. von Goeler notes in plain language that '[t]he litigation funding agreement may expressly entitle the litigation funder to exercise control over certain decisions of the funded party. The appointment of counsel and arbitrator by the funded party as well as decisions relating to settlement are situations that immediately spring to mind.' (von Goeler, p. 35.) From a Swedish perspective, this is not controversial, particularly as no common law doctrines of champerty or maintenance exist, as claims may be freely assigned and as funders will not enter into any contractual relationship with the funded party's counsel.
18. For a more detailed account of alleged conflicts of interest in settlement situations, *see* Skog (2023), sections 5.2 and 5.3.
19. Here, a comparison may be made with respect to the intervention in the attorney-client relation that follows under many insurance liability arrangements. Bench Nieuwveld and Shannon Sahani: '… in situations … where a traditional liability insurance arrangement is involved, the client usually retains little or no control over the direction of the case.' Bench Nieuwveld and Shannon Sahani, p. 9.
20. For example, these issues are mentioned by the EPRS, p. 22. *See also*, *e.g.*, Cordina, p. 276 and Solas, p. 278.

[d] A Funder's Relation with the Funded Party's Opposite Party

It is a banal truism that a funder's interest is in fundamental conflict with the funded party's opposite party in the dispute. Even so, this issue has been addressed by commentators,[21] public bodies[22] and EU regulators,[23] and is understood by some to raise certain concerns within the context of conflicts of interest.

In the EPRS report, for example, it is stated that 'the third party intervention may lead to conflicts of interests between the funder and the defendant'.[24] Naturally, it is unavoidable in every funded case that there will be competing interests between a funder and the funded party's opposite party. From our perspective, this does not raise any issues of interest for further analysis, particularly as there are no duties (fiduciary or other) whatsoever arising between the funder and the funded party's opposite party, and no conflict of interest (as the term is understood in this chapter) would thus arise for a funder in relation to the funded party's opposite party. Some brief comments should nevertheless be made.

What appears to be the most common point of discussion with respect to the relationship between the funder and the funded party's opposite party is so-called revenge funding, where a funder provides capital to a party in order to pursue a claim not for commercial reasons but for the purpose of harming a competitor or other legal or natural person – irrespective of whether there is a sound legal claim. However, the risk that any professional funder managing its investors' capital should carry out a TPF deal for anything other than business purposes is presumably non-existent.[25] Any revenge funding arrangements that might potentially be carried out by other parties are outside the scope of this chapter.

Two other related situations that are sometimes discussed in this context are when a funder is backing a claim against (i) a competitor; or (ii) a respondent on whom the funder is dependant. For example, the EU Representative Actions Directive provides as follows:

> 1. Member States shall ensure that, where a representative action for redress measures is funded by a third party, […] conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers.

21. *See, e.g.*, Solas, who in a specific section of his book under the heading 'Conflicts between Funders and Counterparties', states that '[i]t may also be possible that conflictual situations concern the funder in relation to the counterparty of the funded party.' Solas, p. 263.
22. EPRS-report, Annex, p. 78.
23. The Representative Actions Directive, Art. 10. See also the European Parliament's proposal for a directive regulating TPF, Art. 5.1 (c) and Art. 13.2 (b).
24. EPRS report, Annex, p. 78. See also the European Parliament's proposal for a directive regulating TPF (suggested to apply also in arbitration), Art. 5.1 (c), where it is set out that member states shall ensure that funders 'have established internal procedures to prevent a conflict of interest between themselves and the defendants in proceedings involving the litigation funder'.
25. Solas also correctly notes that there are mechanisms in place in most jurisdictions with respect to summary dismissal of vexatious claims. Solas, p. 263.

> 2. For the purposes of paragraph 1, Member States shall in particular ensure that:
> (a) [---];
> (b) the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.[26]

With respect to the situation involving a 'competitor', it should be noted that, by definition, this means that the funder and the respondent must be in the same line of business, as they have to be competitors. Thus, in the case of professional TPF, such a situation can only arise if a funder funds a claim against a competing funder. We are aware of no such case to date, and it may strongly be questioned whether any such case would ever materialize.

As regards the situation of a dispute against a respondent on which the funder is dependent (Representative Actions Directive, Article 10.1(b)) or by whom the funder is controlled,[27] that would mean that a funder would be providing capital for a claim against its own parent company or major individual shareholder. We cannot foresee that such a situation would ever arise in practice, as no management or investment committee of a funder would propose or accept that such an investment be made.

Now, the EU Representative Actions Directive discussed above may not be directly relevant to international arbitrations. However, it should be stressed that there are regulatory proposals at the EU level which suggest that language similar to that contained in the referenced Directive be adopted in a Directive specifically regulating TPF – which should apply to arbitration as well.[28] Thus, the draft Directive provided in a report by the Committee on Legal Affairs, the so-called Voss Report, and adopted as a proposed Directive by the European Parliament sets out as follows:

> Member States shall require litigation funders to disclose to a claimant and intended beneficiaries in the third-party funding agreement all information that may reasonably be perceived as having the potential to give rise to a conflict of interest. Litigation funders' disclosures shall include at least the following: (a) […]; (b) details of any relevant connection between the litigation funder and a defendant in the proceedings, in particular in relation to any situation of competition.[29]

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26. Directive (EU) 2020/1828, Art. 10. *See also*, *e.g.*, the EPRS report, where the following is set out: 'For example, a conflict of interests may arise: […] b. when the funder provides financing for an action against a defendant who is a competitor of the funder or against a defendant by whom the funder is controlled ("revenge funder").' EPRS, p. 75.
27. EPRS, p. 75, *ibid*.
28. *European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))*, draft Art. 3 (c) and (e), which set out that the term 'court' includes 'arbitral body' and that 'proceedings' include 'arbitration procedure'.
29. *European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))*, draft Art. 13. See also *Committee on Legal Affairs, Proposal for a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding*, Art. 13 (*Annex to Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))*, July 2022. As mentioned above, the European Commission has stated that it will carry out a study on TPF within the EU before taking any action in relation to the proposed directive.

As stated above, it is difficult to even imagine a situation where a funder should provide funding for a claimant to take legal action against a respondent in which the funder has a financial or other interest (in lack of which there could be no conflict of interest). Therefore, such suggested conflicts of interest situations would presumably be non-existent or close to non-existent, particularly with respect to the professional practice of commercial funding. However, should such a situation nevertheless arise, it would of course be important for the funded party that such information be disclosed.

[3] The Counsel

[a] Control

Much of the focus with respect to conflicts of interest for counsel relates to the level of control of the proceedings that is exercised by the funder.[30] These concerns partly stem from the common law doctrines of maintenance and champerty.[31] In Sweden, as in continental European civil law jurisdictions, there are no such doctrines to take into consideration. Even so, situations may also arise in a Swedish context which warrant careful and due consideration by counsel in order not to run into conflicts.

Any risk for counsel to compromise professional or fiduciary duties with respect to issues of control would mainly arise if and when counsel has entered into some form of contractual relationship with the funder, under which it is obliged to follow instructions directly from the funder. As has been argued above, counsel should be careful not to put itself in such a position.[32] Thus, the funding agreement should be entered into between the funder and the funded party only, and counsel should not agree to enter into any ancillary agreements with the funder. Even though the funder may have influence over the funded party with respect to the instructions the funded party is to provide to its counsel, the funder must not have any right to control or directly instruct counsel, nor to receive any information, against the will of the funded party. This would generally be the case in a standard TPF deal involving a Swedish funder and counsel. If this basic premise is upheld, there should be limited – if any – need for concern, as this arrangement provides for a simple and straightforward conflict of interest analysis.

Considering the influence exerted by legal insurance companies on counsel representing the insured, a well-established and accepted arrangement in most jurisdictions, it is intriguing that the issue of control in the TPF context is deemed by some to be so difficult and controversial. As a Swedish-style TPF arrangement does not provide for the funder to have any direct influence over counsel, a traditional insurance situation may indeed be considered to give rise to more concerns with respect to issues of control.

30. Rowles-Davies, p. 12; Pert and Sebok, p. 77, para. 4.46.
31. Lempiner and Barnes, p. 147, para. 6.13; Bench Nieuwveld and Shannon Sahani, p. 43.
32. *See, e.g.*, von Goeler, who notes that 'counsel will need to make sure that it is not representing conflicting interests, similarly to the situation where an insurer becomes involved.' von Goeler, p. 99.

[b] Counsel Acts for the Funder in Another Matter

[i] Counsel Acts for the Funder in a Matter Related to the Funded Case

A situation that may raise certain concerns is where a counsel is engaged by a funder to perform an initial case assessment in relation to a dispute and, either during or after the engagement, is asked to represent one of the parties to the dispute.[33]

As a result of the engagement relating to the initial case assessment, a client relationship arises between counsel and the funder in relation to that case. Due to this client relationship, it is of course not possible for counsel to simultaneously represent the opposing party of the party seeking funding in the dispute, given that counsel has a client relationship with the funder in relation to the same case.[34]

As regards the possibility for counsel to represent the potentially funded party in the same case, a distinction should be made between the situation (i) where counsel would represent the funder and the potentially funded party at the same time; and (ii) where counsel's engagement for the funder has ended when it is asked to represent the potentially funded party.

In the first situation, there is a conflict of interest. Counsel would be acting for different clients in the same or a related matter at a stage where their interests could be considered to be conflicting in that the funder wants the case assessment to be as illuminating as possible, whilst the potential funded party has an interest in ensuring that the case assessment does not deter the funder from funding the dispute.[35] Therefore, counsel should refrain from representing both parties because the dual representation adversely affects both clients.

In the second situation, i.e., where counsel's engagement with the funder has ended, a conflict of interest could arise due to a residual duty of loyalty for counsel in relation to the funder.[36] For example, the funder may have intended to continue using counsel's services to assess the dispute at a later stage. This would no longer be

33. A more detailed account of the matters addressed in this section from a Swedish Bar rules perspective can be found in section 14.3.2 of our full-length book on TPF, *see* Skog and Persson.
34. In view of the risk of a breach of confidence, and the undue advantage that the new client could gain as a result of the previous engagement, counsel would be barred from taking on such assignment also if the engagement for the funder has come to an end. Section 3.2.3 of the Code of Conduct for European Lawyers provides that '[a] lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.' Even if counsel's engagement for the funder has been completed, there can still be a risk of a breach of a confidence entrusted to counsel by the funder. The knowledge obtained by counsel during the engagement for the funder (e.g., regarding strategy and evidentiary issues) could also give the new client an undue advantage.
35. Section 3.2.1 of the Code of Conduct for European Lawyers provides that '[a] lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.' If counsel represents both the funder and the funded party, there would be a significant risk of a conflict between the interests of the two clients.
36. *See* section 3.2.3 of the Code of Conduct for European Lawyers. *See also* Council of Bars and Law Societies of Europe, *Charter of Core Principles of the European Legal Profession & Code of Conduct for European Lawyers*, commentary to principles (c) and (e).

possible if counsel accepts instructions from the funded party, as the situation would then be the same as in the first situation described above. Depending on whether it is deemed to be the same or a related matter, counsel would either have to decline one assignment (if the matter is deemed to be the same) or inform both clients of the situation and the potential implications that may arise from this, and obtain the clients' approval (if the matters are only considered to be related).

Even if such approval is given, a conflict of interest may arise for counsel with respect to its advice as to how the funded party should conduct the dispute if such advice is at odds with the advice counsel may have given to the funder as to what case strategy and procedural actions that would best suit the funder's purposes. Consequently, where counsel has previously represented a funder, it should always carefully consider whether it is appropriate to accept an engagement for a party being funded by the same funder, as situations may arise in which the funder and the funded party could have different interests.[37] Thus, some prudence is required in this respect.

[ii] Counsel Acts for the Funder in a Matter Unrelated to the Funded Case

A related question is whether a counsel could represent a client in a dispute ('Dispute 1') in which the funder is considering investing (a matter in which counsel has not been engaged by the funder) at the same time as, or after, counsel performs a case assessment or other work on behalf of the funder in another dispute ('Dispute 2'). Thus, this would be a situation in which counsel would act for both the funder and the funded party, but in relation to two different cases.

It cannot be excluded that a conflict of interest could arise in such a situation. That could for example be the case if there is a risk that knowledge gained by counsel through its work for the funder in relation to Dispute 2 could be relevant to counsel's work for the client in Dispute 1, or that counsel in some other way could be prevented from acting in the client's best interests in Dispute 1 due to its relationship with the funder.[38]

An example of such a situation could be that counsel as part of its assignment in Dispute 2 has gained certain confidential information of the funder's business, and is thereafter asked to negotiate the funding agreement with the funder on behalf of the party seeking funding in Dispute 1. In such case, counsel should not accept to represent the party seeking funding in the negotiations of the funding agreement or any questions relating to the funding agreement unless the funder grants its approval to counsel to do so (and assuming that counsel is not prevented from acting in the client's best interests

37. Cf. David Riskin, *Third-Party Litigation Financing: Ethical Issues for Attorneys*, p. 9 (Practical Law, accessed on 29 March 2023).
38. *See* section 3.2.3 of the Code of Conduct for European Lawyers, pursuant to which a lawyer must refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

in some other way).[39] In any case, considering the risk of a conflict of interest, a simple and practical way to deal with the situation could be for the party seeking funding in Dispute 1 to engage other counsel for the task of representing such party in the negotiations of the funding agreement and subsequent issues that may come up in relation to the funding agreement.

However, it should be noted that the preparation of a case assessment or other type of work for the funder in Dispute 2 would not necessarily provide counsel with such knowledge pertaining to the funder that would be relevant to the negotiation of the funding agreement in Dispute 1.[40] It should also be noted that, in the context of a dispute, the funding agreement is only a secondary matter of minor importance in relation to the engagement as such, which is to represent the client in a dispute against another party.[41]

Having said this, it should be borne in mind that the negotiation of the funding agreement is just one area where a conflict of interest could arise. The situation and example described above may be varied, depending on, among other things, the timing of the assignments in relation to each other (for example, counsel might already be representing the party in Dispute 1 when asked to assist the funder in relation to Dispute 2). Whether or not counsel could accept the second assignment would then have to be assessed on a case-by-case basis, taking into account what knowledge counsel has gained and whether or not counsel could be prevented from acting in both clients' best interests due to its relationship with the other client.

[c] Disclosure of Case Information

One issue that is sometimes raised in relation to the question of whether counsel runs the risk of conflict of interest when representing a funded party is that of disclosure of

39. As the LFA arguably benefits counsel (as it relates to payments to be made to the counsel), it can sometimes be recommendable for the party seeking funding from the funder to engage separate counsel for the task of negotiating the LFA also in situations where the counsel who is to represent the client in the dispute has not previously been engaged by the funder. External counsel can in such situations negotiate (i) the legal budget between counsel and the party seeking funding and (ii) the LFA between the funder and the party seeking funding. If the party seeking funding does not engage other counsel, it is important to bear in mind that counsel, when negotiation the LFA, has a strict duty of loyalty against the client and that it is the client's interests that counsel must safeguard (and not its own interest to take on the matter). *See also* section 3.2.3 of the Code of Conduct for European Lawyers.
40. Counsel's case assessment should reasonably relate to the chance of winning the case and other legal assessments relating to the dispute, not to matters concerning the funding agreement.
41. Similarly, if the relationship between the funded party and the funder becomes strained during the course of the proceedings in the case between the funded party and its opposite party and a dispute arises between the funder and the funded party over the interpretation of the funding agreement, it is important that counsel ensures that it can fully represent the funded party in discussions with the funder, notwithstanding the fact that counsel is acting or has acted for the funder in another matter. Where counsel, or counsel's law firm, has an ongoing relationship with the funder, the lawyer should also inform the funded party of this relationship and obtain approval from the funded party to be represented by the law firm, notwithstanding its relationship with the funder. (Riskin, p. 8 f.) Therefore, some prudence is required in this respect as well.

case information to the funder.[42] In a chapter on TPF in Sweden, Stefan Kirsten and Alexander Foerster provide the following explanation regarding this concern:

> Notably, it is advisable for an advocate to exercise caution when agreeing to an obligation to disclose information to the funder. If the obligation is too extensive, the advocate runs a risk of ending up in a conflict of interest in relation to his or her client. It is conceivable, in certain situations, that the disclosure of information to the funder is not necessary in the client's best interest. Therefore, an advocate should insist that he or she is given a right to continuously test, in each individual situation, whether a disclosure is compatible with his or her fiduciary duty towards the client.[43]

Kirsten and Foerster thus suggest that there is a potential risk of conflict of interest for counsel with respect to disclosure of case information. However, the argument presumes that it should be an issue for counsel (rather than for the funded party) to decide on or agree to a disclosure obligation to the funder. This, in turn, implies a specific arrangement between counsel and funder under which counsel has certain contractual obligations towards the funder. We are not aware of such practices by local funders operating on the Swedish TPF market, even though some international funders from other jurisdictions that are also occasionally active in Sweden may require that counsel enter into an adherence agreement or other direct arrangement with a funder.

Under a typical Swedish TPF arrangement, it may well be that the funded party is required to release counsel from its confidentiality obligation and instruct counsel to disclose any and all relevant information about the dispute directly to the funder. Such agreement does not allow counsel to decide whether to agree or refuse to follow its client's (i.e., the funded party's) instruction that the information be disclosed to the funder. If the LFA contains an obligation that the funded party must provide for full disclosure by counsel to the funder, and the funded party has also instructed counsel to make such disclosure, it would be contrary to the client's instruction if counsel were to second guess the effects of disclosure of specific information and not to provide such information to the funder (acting in breach of direct client instructions). Of course, there may be information which the funded party would have preferred that the funder was unaware of. However, when negotiating the terms of the LFA, the funded party has generally allowed the funder to have full access to the file in exchange for the provision of funding.

In light of the above, it is difficult to understand how counsel could 'insist' that it should have the right to assess in each case whether disclosure should be made.[44] If the funded party were to allow counsel to do so, it would directly be in breach of the LFA under which it has agreed to instruct counsel to fully disclose information in the file. In any event, it is difficult to conceive why counsel should be in a conflict of interest if it complies with the client's instructions on disclosure (which the client

42. Solas, p. 261.
43. Kirsten and Foerster, p. 229.
44. *Ibid.*

agreed to provide to its counsel in order to have its dispute funded). It is not even clear to us what the conflicting interests would be,[45] or which party that would act or risk acting contrary to any fiduciary or ethical duty (under Bar rules or otherwise).[46]

Thus, under a Swedish TPF arrangement, we can see no reason why the disclosure of information from counsel to funder – of course, only with the funded party's consent – should amount to a conflict of interest for counsel.

[d] Fee Arrangements

An issue which is sometimes raised with respect to fee arrangements and potential or alleged conflicts of interest is the fact that counsel's fees are often being paid directly to counsel by the funder.[47] However, that situation does not seem to be significantly different from the situation in which an insurer picks up the bill for counsel fees on behalf of the insured (who is the client of counsel) under a regular liability or legal fees expense insurance policy.[48] Most dispute resolution lawyers on the Swedish market have represented insured parties under such arrangements without any significant reports of noncompliance with Bar rules or any other rules relating to conflicts of interest. However, if counsel were to adjust their advice to their client in order to better serve the goals of a funder (or other type of third party, e.g. an insurer), that would indeed constitute a serious conflict of interest and breach of fiduciary duty. This follows directly from applicable Bar rules and does not require a particularly sophisticated analysis which would have to take account of the specifics of TPF; rather, it is a general and fundamental principle to which all lawyers should always adhere.

[4] The Funded Party

To our knowledge, it is rarely, if ever, suggested by arbitration academics or practitioners that the funded party should risk finding itself in a potential conflict of interest

45. A specific situation which would put counsel in a very difficult situation is if a funded party in breach of the LFA would instruct counsel not to disclose certain negative information to the funder, or even instruct counsel to inform the funder as part of the regular updates on the proceedings that no negative developments have occurred. Such actions by counsel, knowingly providing false and misleading information to the funder in order not to have the funder cease its payments for counsel's services under the LFA, would presumably be in breach of the bar rules in most countries.
46. The analysis in this regard may of course be different if counsel has entered into a US/UK style tripartite TPF arrangement. As explained above, we strongly recommend against such arrangements.
47. For example, the EPRS has stated the following: 'The existence of a conflict of interests between the claimant and the funder places the lawyer in a very sensitive position, as the latter is contractually obliged towards the claimant but his or her fees are paid by the funder.' Poncibò and D'Alessandro, p. 72.
48. Another situation which may come to mind is the relatively common M&A situation where a SPA provides for a specific indemnity by the seller in relation to the outcome of a dispute to which the target company is a party, and where such seller is entitled to disclosure and steering power in relation to the dispute and the target company's counsel representing the target company in the dispute.

situation due to the funding arrangement. The discussions are solely focused on the funder and the counsel. Following our understanding of the term conflict of interest, as set out above, we have also not identified any situation which could potentially imply a conflict of interest for the funded party that warrants any comment in this chapter.

[5] Summary and Concluding Comments

Even though TPF is now an established commercial practice which is widely used – often in international arbitration – it is still approached with suspicion by some commentators, particularly as regards discussions regarding potential conflicts of interest. Bench Nieuwveld and Shannon Sahani have stated the following in this respect: 'Despite the debates and obvious confusion, which creates a sort of mystery around third-party funding in ethical circles, it appears to be a market that is only growing. Therefore, eventually these ethical mysteries will require a resolution.'[49]

As we have explained above, to penetrate any such perceived mystery with respect to conflicts of interest, it is important to be careful with the terminology used. Our position is that, preferably, any legal commentary on conflicts of interest should set out what is meant by the term *conflict of interest*; whether the parties are in a fiduciary or another type of relationship with each other, which would imply that conflict of interest rules could be relevant; what the potentially conflicting interests consist of; and why they are in conflict.

As set out above, in our view: (i) a conflict of interest means the compromise of professional or fiduciary duties or the risk thereof; (ii) a conflict of interest may arise for a party, not between parties; (iii) the funder is not a client of the funded party's counsel and should not be in a contractual relationship with counsel; and (iv) the funded party is not a client of the funder.

Following such analysis and principles, many of the alleged or perceived dangers and conflicts of interest – stemming from the presumed Bermuda Triangle trope of a tripartite contractual arrangement – disappear, or, at least, they can be easily resolved or assessed using existing rules on conflicts of interest. Thus, we have found that, at least in a Swedish context, there are no 'ethical mysteries' in TPF which necessitate any specific solutions that are not already available. What remains after the fog has cleared are mainly situations to which traditional tools and methods can be applied.[50] We will now turn to the issue of potential conflicts of interest for arbitrators in funded international arbitrations.

49. Bench Nieuwveld and Shannon Sahani, p. 72.
50. Pert and Sebok, p. 65.

§9.03 ARBITRATOR CONFLICTS OF INTEREST AND DISCLOSURE[51]

[A] Introduction

As mentioned in the introduction to §9.01, this second section of the chapter will provide a Swedish perspective on rules and best practices regarding arbitrator conflicts of interest and disclosure in funded international arbitrations, focusing on the Swedish Arbitration Act (SAA) and the Arbitration Rules of the SCC Arbitration Institute (the 'SCC Rules').

Initially, it is worth noting that arbitrators tend to be practising lawyers who can be active in both arbitrator and counsel assignments. As a result, contacts between arbitrators and funders can be numerous. For reasons set out below, this could be problematic given that funders may be treated as a party to proceedings for conflict of interest purposes. Accordingly, the risk of conflicts of interest must be carefully assessed in arbitration proceedings when a funder is involved.

If an arbitrator has to be released from his or her appointment due to a conflict of interest, this will typically lead to significant delays in the arbitration proceedings.[52] Even more serious is the fact that if a conflict of interest only becomes apparent after arbitration proceedings have been concluded, this may constitute grounds for setting aside the arbitral award.[53] In addition to constituting grounds for challenge, a conflict of interest may also constitute grounds for refusing to enforce the arbitral award in accordance with the rules of the New York Convention.[54]

In light of the above, issues relating to conflicts of interest and the duty of disclosure in arbitration proceedings are of great importance to both the funded party, the funder and the arbitrator, as will be set out in the following.

51. This section of the chapter is based on Chapter 16 in our book on TPF in Sweden, *see* Skog and Persson, but further develops relevant aspects of our reasoning, in particular with regard to corresponding foreign rules and regulations, such as the IBA Guidelines, and the rules adopted by other arbitration institutes than the SCC Arbitration Institute.
52. *See* sections 10 and 16 of the SAA and Arts 19-21 of the SCC Rules. Art. 21(3) of the SCC Rules states that if an arbitrator has been replaced, the newly composed arbitral tribunal should decide whether and to what extent the proceedings are to be repeated.
53. It should be noted that the time limit for challenging arbitral awards seated in Sweden is no more than two months. If a challenge is not brought within that time limit, the ground of challenge is precluded. Whether the losing party did not become aware of the ground of challenge until after the expiry of the time limit is irrelevant to the issue whether the challenge was timely made. *See* section 34, para. 1, subsection 6 of the SAA; Lars Heuman, *Skiljemannarätt*, p. 656 (Jure, 1999); Stefan Lindskog, *Skiljeförfarande*, p. 990 (Norstedts Juridik, 2020).
54. Article V.(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[B] Arbitrator Conflicts of Interest

[1] General Comments on Arbitrator Conflicts of Interest under the Swedish Arbitration Act

According to the general rule under Article 8, paragraph 1 of the SAA, an arbitrator must be impartial and independent. This means that arbitrators must be independent of both the parties and the case. If any circumstances exist that may diminish the confidence in the arbitrator's impartiality or independence, the arbitrator must be released from his or her appointment at the request of a party.

Section 8, paragraph 2 of the SAA sets out an illustrative list of circumstances that are considered to always diminish confidence in the arbitrator's impartiality or independence in such a way that an arbitrator must be released from his or her appointment.[55] If any of the circumstances listed in the provision are present, there is a presumption of a conflict of interest that cannot be remedied.[56]

Although impartiality is ultimately a mental attitude of an arbitrator, the assessment of an arbitrator's impartiality is objective in nature. This means that it is to be made based on external observable circumstances that typically pose a risk to an arbitrator's impartiality. Accordingly, it is not necessary for an arbitrator to be aware of or actually influenced by the circumstances giving rise to diminished confidence.[57]

A conflict of interest often arises where there is a relationship between an arbitrator and a party. A conflict of interest will exist if an arbitrator is in some kind of state of dependence in relation to a party, e.g., if the arbitrator is indebted to or paid by the party or if an arbitrator is employed by a company that has an ongoing business relationship with a party.[58]

Additional circumstances become relevant to the assessment if the arbitrator is also a practising counsel, as alluded to in the introduction. If a party is, or recently has been, a client of the arbitrator or of a counsel practising at the same law firm as the arbitrator, there is a conflict of interest. It is irrelevant that the client matter has no

55. Section 8, para. 2 of the SAA lists the following circumstances:

> 1. if the arbitrator or a person closely associated with the arbitrator is a party to the dispute or otherwise stands to gain or be prejudiced by the outcome of the dispute;
> 2. if the arbitrator or a person closely associated with the arbitrator is a director of a company or other entity which is a party to the dispute or otherwise acts as a representative of a party or of another person who stands to gain or be prejudiced by the outcome of the dispute;
> 3. if the arbitrator has taken on a position in the dispute as an expert or otherwise, or has assisted a party in the preparation or conduct of its case in the dispute; or
> 4. if the arbitrator has received or reserved remuneration in breach of section 39, paragraph 2.

56. Lindskog, p. 451.
57. *Ibid.*, pp. 449 and 454.
58. *Ibid.*, pp. 459 et seq.; Government Bill 1998/99:35, p. 85; case reported on p. 347 in NJA 1900.

connection with the arbitration.[59] This is also the case if a party, or a party's counsel's law firm, has appointed the same arbitrator in several previous arbitrations.[60]

In addition to the provision of the SAA described above, the Swedish Supreme Court has stated that when considering issues relating to conflicts of interest, it can be appropriate to look not only to the provisions of the SAA but also to consider foreign rules and guidelines. In a case reported at NJA 2007 p. 841, which concerned an arbitration between two Swedish parties, the Swedish Supreme Court found that there were circumstances that could have given rise to diminished confidence in an arbitrator's impartiality or independence, adding that its assessment was supported by, *inter alia*, the IBA Guidelines.[61]

Accordingly, case law indicates that Swedish courts and arbitrators may, and possibly should, draw guidance from international frameworks such as the IBA Guidelines when deciding on conflict of interest issues.[62] Therefore, it is worth looking more closely at these leading guidelines for advice on how to deal with TPF when section 8 of the SAA is at issue. However, before proceeding with the discussion of the IBA guidelines, something should first be said about the SCC Rules.

[2] General Comments on Arbitrator Conflicts of Interest under the SCC Rules

Article 18 of the SCC Rules sets out a similar conflict of interest provision as the SAA, stating that '[e]very arbitrator must be impartial and independent.'[63] According to Article 19 of the SCC Rules, a party may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess the qualifications agreed by the parties. Any such challenge will be decided by the board of directors of the SCC Arbitration Institute.

In making its assessment, the SCC will consider a variety of sources, such as the SAA (assuming the seat of arbitration is Sweden), previous decisions of the SCC and the IBA Guidelines.[64] For an arbitration seated in Sweden, an assessment under the SAA and the SCC Rules can be expected to produce the same result.[65] As is also the case under the SAA, Article 19 of the SCC Rules does not require that the circumstances have actually influenced the arbitrator.[66] Thus, the examples of breaches of trust described

59. Lindskog, p. 461.
60. Case reported on p. 317 in NJA 2010.
61. The Supreme Court also referred to the IBA Guidelines in the case reported on p. 317 in NJA 2010.
62. According to Lindskog, the significance of the IBA Guidelines should lie primarily in the fundamental values expressed therein. However, Lindskog further states that, at a detailed level, the IBA Guidelines should hardly be attributed much importance; the court must always make its own assessment of whether a conflict of interest within the meaning of section 8 of the SAA exists. Lindskog, pp. 447 et seq.
63. Article 18(1) of the SCC Rules.
64. Ragnwaldh et al., *A Guide to the SCC Arbitration Rules*, p. 63 (Kluwer, 2019).
65. Lindskog, p. 446.
66. Ragnwaldh et al., p. 65.

above in relation to the SAA are also relevant in SCC arbitrations, and both sets of rules allow for guidance to be drawn from the IBA Guidelines.

[3] General Comments on Arbitrator Conflicts of Interest under the IBA Guidelines

From a general perspective, the IBA Guidelines contain similar provisions as the SAA and the SCC Rules in that arbitrators are required to be impartial and independent. If an arbitrator has any doubt as to his or her ability to be impartial or independent, the arbitrator must decline the appointment or (if the proceedings have already commenced) refuse to continue to act as an arbitrator.[67]

The IBA Guidelines become of particular relevance when considering the issue of conflicts of interest in the context of TPF. This is because neither the SAA nor the SCC Rules specifically address TPF. In contrast, the IBA Guidelines contain specific provisions on TPF, which may be relevant for determining conflicts of interest under both the SAA and the SCC Rules.

Of particular importance is General Standard 6(b) of the IBA Guidelines, which states:

> 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, may be considered to bear the identity of such party.[68]

The meaning of the provision is that a party with a direct economic interest in the outcome of the dispute – e.g., a funder – can be equated with the relevant party in the proceedings for the purposes of a conflicts of interest analysis. This is also explicitly stated in the commentary on said provision:

> Third-party funders [...] may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party.[69]

67. General Standard 2(a) of the IBA Guidelines.
68. General Standard 6(b) of the IBA Guidelines.
69. The commentary to General Standard 6(b) reads in full as follows: 'When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. Funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms "funder" and "insurer" refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.' It is worth noting that an entity which has funded an action for other than commercial reasons, e.g., for social, political or indirect economic purposes (without any right to part of the recovery), falls outside the scope of the provision (cf. 'a direct economic interest in the award').

Therefore, the question of whether a funder may be considered to bear the identity of the funded party must be assessed on a case-by-case basis. Given how the commentary has been drafted, the provision should apply to a commercial funder since its remuneration is generally directly dependent on the outcome of the case. Accordingly, the funder can be considered to have a direct economic interest in the award, and there are compelling reasons for equating the funder with a party to the proceedings, as provided for under the IBA Guidelines.

[4] Arbitrator Conflicts of Interest That May Arise in the Context of Funded Arbitrations

[a] Introduction

The general position in relation to arbitrator conflicts of interest under the SAA and the SCC Rules has been described above. The question that arises is if, and to what extent, these considerations also apply to the relationship between an arbitrator and a funder.

As mentioned above, it is the Swedish Supreme Court's position that foreign rules and guidelines should be considered when assessing conflict of interest issues. As also explained above, a funder can be equated with a party in the proceedings for such purposes under the IBA Guidelines. As this is the case, there is reason to believe that a funder can be considered a party from a conflict of interest perspective under the SAA (even though it is not settled law). The same applies to the SCC Rules, given that the Board of the SCC will take the IBA Guidelines into consideration when assessing a challenge of an arbitrator. As a result, a variety of situations may arise in which parties, funders, counsel and arbitrators will have to carefully assess whether TPF may give rise to circumstances that could constitute a conflict of interest. Some of the situations that may arise are discussed in the following.

[b] The Arbitrator Is or Has Been Acting on Behalf of the Funder

As stated above, it is considered a conflict of interest under the SAA if an arbitrator has a remunerated engagement from a party if the engagement is ongoing during the arbitration or if such engagement has been concluded shortly before the arbitration begins. A typical example in the context of TPF would be when a counsel has provided a second opinion on a dispute on behalf of a funder, and the same counsel is then asked to be an arbitrator in another dispute in which one of the parties' claim is funded by the same funder. If the second opinion engagement is ongoing or has recently ended, the prospective arbitrator (and counsel) should decline the arbitrator appointment or, at the very least, inform the parties of the situation if and when accepting the appointment.[70]

70. In the case of a minor engagement, the existence of a conflict of interest may be questioned, according to the reasoning of the Swedish Supreme Court in case Ö 5308-17, paras 26 and 27.

If the prospective arbitrator, or his or her law firm, is acting for the funder, it means that counsel most likely cannot accept an appointment as arbitrator in a dispute in which a party is funded by the same funder. This is because, as stated above, it is considered a conflict of interest if an arbitrator is employed by a company that has an ongoing business relationship with a party.

In light of the above, if a counsel is acting as an arbitrator and becomes aware that a party's claim is funded by a funder, it is important that the funder is also registered as a party in the law firm's conflict of interest management system. By doing so, it is possible to avoid the situation that a colleague of the arbitrator agrees to act on behalf of the funder or a party funded by the funder during the proceedings without any knowledge of the relationship. If this happens, a conflict of interest may exist since the arbitrator would then be working for a law firm which has an ongoing business relationship with someone who can be equated with a party. This, of course, presupposes that the legal position actually is such that a funder is to be equated with a party. However, in view of the foregoing and the potentially draconian effects in the form of the risk of an arbitral award being set aside if a conflict of interest is subsequently discovered, the relationship should, in any event, be disclosed and the arbitrator should carefully consider whether he or she can continue as arbitrator.

[c] The Arbitrator, or His or Her Colleague, Is Acting as Counsel for a Party in Another Dispute Whose Claim Is Funded by the Same Funder That Is Funding a Party to the Arbitration

Another problematic situation can arise if a lawyer, or his or her colleague, is acting as counsel for a funded party in a dispute ('Dispute 1'), while the lawyer, or his or her colleague, is at the same time asked to be arbitrator in another unrelated dispute ('Dispute 2'), where one of the parties is being funded by the same funder.[71]
The above example may be varied, depending on, among other things, the timing of the different situations in relation to each other. However, the fact that the fees for the representation in Dispute 1 are paid by the funder (even if it is not a client or principal per se) raises significant concerns about the lawyer's suitability as arbitrator in Dispute 2. As mentioned above, a party with a direct economic interest in the outcome of the dispute – e.g., a funder – may be equated with the relevant party in the proceedings for the purposes of a conflicts of interest analysis.

If this situation arises, the lawyer should in our view decline the arbitrator appointment in Dispute 2 or, at the very least, inform the parties of the situation if and when accepting the appointment.[72] If the lawyer has already been appointed as arbitrator in Dispute 2 and subsequently becomes aware that a party is receiving funding from the funder, the arbitrator should inform the parties of the situation and carefully consider whether he or she can continue as arbitrator.

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71. The example, which has been slightly modified, has been taken from International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, pp. 112 et seq. (The ICCA Reports No. 4, 2018).
72. See also footnote 72 above.

[d] The Arbitrator Has Been Appointed on Several Occasions by Parties Who Have Received Funding from the Same Funder

As set out above, it is considered a conflict of interest if a party or a law firm frequently appoints the same arbitrator in several different disputes, as this can give the impression that the arbitrator has ties to the party or the firm. It may also constitute a conflict of interest if parties funded by the same funder repeatedly appoint the same arbitrator.[73] The IBA Guidelines state that a repeat appointment exists if an arbitrator during the last three years has either been appointed on at least two occasions by the same party, or an affiliate of the party,[74] or more than three times by the same counsel or law firm.[75] Both of these situations are included in the so-called 'Orange List' of the IBA Guidelines, meaning that the arbitrator would be under a duty to disclose such situations. If no timely objection is made after disclosure, the parties will be deemed to have accepted the arbitrator.[76]

The legal position as to whether these rules should be applied by analogy to an underlying funder in Sweden is unclear. It should be borne in mind that the funder rarely has a formal right under the funding agreement to control the appointment of the arbitrator but that it is common for discussions on this issue to take place between the funded party, its legal counsel and the funder.

In order to avoid conflict of interest issues in this respect, a funder should keep records of the number of times each arbitrator in its funded cases has been appointed by a party funded by the funder over the past three years. Since it is in the interest of the funder to avoid conflict of interest issues that could delay the proceedings or give rise to a challenge, a funder should seek to avoid, as far as possible, recurrent appointments of the same arbitrator by the parties it funds in a manner that could be inconsistent with the IBA Guidelines.[77]

[C] Disclosure Obligations in Funded Arbitrations

[1] Initial Comments

As we have just seen, there are various situations where conflicts of interest can arise for arbitrators under the SAA and the SCC Rules in the context of funded arbitrations. This, in turn, raises the question of what duty of disclosure arbitrators and parties have under the SAA and SCC Rules. This question will be addressed in the following.

73. The ICCA Reports No. 4, pp. 48 et seq.
74. Situation 3.1.3 of the IBA Guidelines (Part II: Practical Application of the General Standards).
75. Situation 3.3.8 of the IBA Guidelines (Part II: Practical Application of the General Standards).
76. Paragraph 3 of the IBA Guidelines (Part II: Practical Application of the General Standards).
77. According to the case reported on p. 317 in NJA 2010, an overall assessment must be made with respect of conflicts of interest, which in this context should mean that a conflict of interest cannot automatically be deemed to exist on the grounds that a funder has funded parties who have appointed the same arbitrator, especially if the arbitrator in question receives a large number of requests every year and the funder funds a large number of parties who in turn appoint just as many arbitrators.

However, before going into detail on these issues from a Swedish perspective, it is worth mentioning a few words regarding disclosure obligations in relation to TPF from an international perspective, focusing on some of the more well-known arbitral institutions and frameworks.

[2] TPF Disclosure Obligations from an International Perspective

Starting with the IBA Guidelines, General Standard 7(a) requires a party to, on its own initiative and at the earliest opportunity, disclose '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.'[78] As explained in the commentary to the provision, the '[d]isclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment.'[79]

Several arbitral institutions have adopted similar mandatory disclosure requirements. Both the ICC Arbitration Rules[80] and the HKIAC Administered Arbitration Rules[81] require funded parties to disclose the existence of a funding agreement and the identity of the funder. SIAC has adopted a slightly different approach, whereby tribunals are empowered to order parties to disclose the existence of a funding arrangement and/or the identity of the funder and, where appropriate, details of the funder's interest in the outcome and if the funder has committed to undertake adverse costs liability.[82] Under the CIETAC International Investment Arbitration Rules, a party must disclose the existence and nature of the funding arrangement and the name and address of the funder, and the tribunal can also order the disclosure of any relevant information about the funding arrangement.[83]

Most recently, the latest version of the ICSID Arbitration Rules that came into effect on 1 July 2022 also introduced a mandatory duty for parties to file a written notice stating the name and address of any non-party who has provided funding through a donation or grant, or in return for remuneration dependent on the outcome of the proceedings.[84] If the funder is a juridical person, the notice shall also include the names of the persons and entities that own and control that juridical person. Furthermore, a

78. General Standard 7(a) of the IBA Guidelines.
79. Explanation to General Standard 7 of the IBA Guidelines.
80. Article 11(7) of the 2021 ICC Arbitration Rules provides the following: '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 arbitration.'
81. Article 44 of the 2018 HKIAC Administered Arbitration Rules.
82. Rule 24(l) of the 2017 SIAC Investment Arbitration Rules. *See also* Singapore International Arbitration Centre, *Practice Note PN – 01/17 on Arbitrator Conduct in Cases Involving External Funding for Administered Cases under the SIAC Arbitration Rules*, para. 5 (2017).
83. Article 27 of the 2017 CIETAC International Investment Arbitration Rules.
84. Article 14(1) of the 2022 ICSID Arbitration Rules.

tribunal may order the disclosure of further information regarding both the funding agreement and the funder.[85]

Based on the above, the general trend considered from an international perspective seems to point towards the adoption of mandatory rules requiring parties to disclose whether their claims are funded by a funder. Bearing this in mind, we will now proceed to examine the disclosure obligations of both arbitrators and parties from a Swedish perspective.

[3] Arbitrator Disclosure Obligations under the Swedish Arbitration Act

Under section 9 of the SAA, a prospective arbitrator must immediately disclose any circumstances that might be considered to prevent him or her from acting as an arbitrator (e.g., the circumstances discussed above in relation to arbitrator conflicts of interest).[86] Further, the arbitrator must also inform the parties and the other arbitrators as soon as the arbitrator becomes aware of any new relevant circumstance after the commencement of the arbitration proceedings.[87]

In addition, an appointed arbitrator most likely has a certain duty of disclosure with regard to conflicts of interest. An arbitrator must consider the areas in which such a conflict may exist, including whether any previous position could constitute an impediment. If there is any indication that there is a conflict of interest, an arbitrator must take further investigative steps.[88] More specifically, an arbitrator's duty of investigation may include asking the parties whether any of them are receiving TPF. Such a duty most likely exists if there is any indication that a party is receiving funding, in which case the arbitrator should inquire about this no later than at the first case management conference.

If it turns out that one of the parties is receiving TPF, the arbitrator will have to proceed to investigate whether this may give rise to a conflict of interest and then inform the parties of this. The information should be as exhaustive as possible to enable the parties themselves to make an adequate assessment of whether or not there are grounds for requesting that the arbitrator be released from his or her appointment.

[4] Arbitrator Disclosure Obligations under the SCC Rules

Article 18 of the SCC Rules addresses the arbitrator's duty of disclosure and states that an arbitrator must submit a signed statement confirming his or her impartiality and

85. Article 14(4) of the 2022 ICSID Arbitration Rules.
86. The disclosure obligations under section 9 of the SAA in effect correspond to those set out in General Standard 3 of the IBA Guidelines.
87. Lindskog, p. 477.
88. Government Bill 1998/99:35 p. 86, and Lindskog, p. 476. *See also* General Standard 7(d) of the IBA Guidelines which states as follows: 'An arbitrator is under a duty to make reasonable inquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable inquiries.'

independence. The statement must contain disclosures of any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Further, an arbitrator must immediately inform the parties and the other arbitrators if any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence arise during the course of the arbitration.[89] Similar duties of disclosure exist in all established institutional rules.[90]

In order to avoid a circumstance giving rise to a conflict of interest coming to light at a late stage or after the conclusion of the arbitration proceedings, it is advisable for a requested arbitrator to check with the party seeking the appointment of the arbitrator whether any of the parties' claims are funded by a third party, at least if there is any circumstance that leads the arbitrator to believe that this may be the case. If any party is in fact receiving TPF, the funder should also be taken into account when the arbitrator conducts his or her conflict of interest assessment and subsequently submits the statement confirming his or her impartiality and independence to the SCC. As stated above, the arbitral tribunal should also follow up on this issue at a later stage once it has been constituted and ask the parties to disclose any TPF.

[5] Party Disclosure Obligations under the Swedish Arbitration Act

There is no obligation for a party to disclose TPF on its own initiative under the SAA. Although General Standard 7(a) of the IBA Guidelines states that '[t]he parties are required to disclose any relationship with the arbitrator' and a funder can be equated with a party according to General Standard 6(b) of the IBA Guidelines, the IBA Guidelines cannot be considered binding on the parties in this respect (unless agreed otherwise between the parties).

The above means that unless the arbitral tribunal orders the parties to disclose any TPF, there is a risk that, in an ad hoc arbitration under the SAA, there may be a third party with a direct economic interest in the outcome of the dispute without the arbitral tribunal being informed of that fact. As TPF is becoming increasingly more common, arbitral tribunals should, therefore, in our view, be proactive in this respect and require the parties to disclose any TPF. Such an order should only relate to the identity of the funder and not to the funding agreement as such.[91] The arbitral tribunal should preferably do this when the tribunal is constituted or at the time of the first case management conference.

From an international perspective, it is sometimes argued that an arbitrator cannot be considered to have a conflict of interest if the arbitrator is not actually aware of the underlying circumstance and that, consequently, there is no need to disclose the existence of TPF.[92] This conclusion presupposes that the assessment of whether there

89. Article 18 of the SCC Rules.
90. *See, e.g.*, Art. 11(1)-(3) of the 2021 ICC Arbitration Rules and Art. 5.3-5 of the 2020 LCIA Arbitration Rules.
91. The ICCA Reports No. 4, p. 81.
92. *Ibid.*, p. 86. It should be noted that the authors of the ICCA Report do not support such an analysis.

is a conflict of interest is based on a subjective perception. However, as mentioned above, the assessment under Swedish law is objective in nature – meaning that it is irrelevant whether the arbitrator is unaware of the circumstance giving rise to a conflict of interest. Instead, the only relevant factor is whether there are external observable circumstances that constitute a conflict of interest.[93]

As mentioned initially, if the TPF relationship is discovered later in the proceedings, and if there is a conflict of interest due to any relationship between the funder and one of the arbitrators, it may constitute a conflict of interest under the SAA. In such a situation, the arbitrator, whose impartiality has been compromised, may have to be released from his or her appointment – which typically leads to significant delays in the arbitration. A conflict of interest that only becomes apparent after the arbitration has been concluded may constitute grounds for challenge and setting aside of the arbitral award or refusal to enforce the arbitral award in accordance with the rules of the New York Convention.

Given this fact, although there is no such obligation under the SAA, a funded party and a funder take a significant risk if the funded party fails to inform the arbitral tribunal that its claim is being funded by a third party. Consequently, the question of whether the arbitral tribunal should be informed of the TPF in order to prevent the existence of an *ex post facto* conflict of interest from becoming apparent must be carefully considered by the funded party.

If the funded party for some reason chooses not to disclose the TPF to the tribunal, it is important that the party and its legal counsel at the very least discuss the composition of the tribunal with the funder to ensure that no conflict of interest exists. For example, the funded party's counsel should inquire whether the funder has invested in any other dispute in which any of the arbitrators has also been appointed. It should also inquire whether there is any type of employment or consultancy relationship between the funder and any of the arbitrators or (where applicable) their law firms or whether the arbitrators have any corporate links with the funder. As mentioned above, failure to do this carefully and correctly could, in the worst case, result in the setting aside or unenforceability of a subsequent arbitral award.

[6] Party Disclosure Obligations under the SCC Rules

As set out above, the general international trend seems to point towards arbitral institutions adopting mandatory rules requiring parties to disclose if their claims are funded by a third party. In contrast, following their latest revision in 2023, the SCC Rules do not contain any duty for a party to disclose that its claim is being funded by a third party. At the same time, the SCC has adopted a non-binding policy on the duty of disclosure applicable to third parties with an interest in the outcome of the dispute.[94]

93. Lindskog, pp. 449 and 454.
94. SCC Policy – Disclosure of Third Parties with an Interest in the Outcome of the Dispute, adopted by the Board of the SCC on 11 September 2019.

The SCC's policy states that each party in an SCC arbitration is encouraged to disclose the identity of any third party with a significant interest in the outcome of the dispute in its first submission, including but not limited to funders and parent companies. The parties are also encouraged to promptly disclose during the arbitration the identity of any third party who acquires a significant interest in the outcome of the dispute.[95] The information should be provided to the arbitral tribunal, the institution and the other party.

The SCC's policy does not impose any explicit obligation on the parties to disclose such information, and as the policy is not binding, no sanction is imposed on a party that does not comply with the policy. However, a funded party that derogates from the policy should carefully consider the risk that a circumstance giving rise to a conflict of interest might come to light at a later stage.

[7] Summary and Concluding Comments Regarding Arbitrator Conflicts of Interest and Disclosure in Funded Arbitrations

As we have seen in §9.02 of the chapter, TPF arrangements can give rise to conflicts of interest under certain circumstances. However, even though TPF arrangements may give rise to new situations where such issues become of relevance, these situations could generally be managed using the general framework for conflicts of interest set out in the SAA and the SCC Rules. This is so even if neither the SAA nor the SCC Rules contain any rules specifically dealing with TPF. While the scope of existing general conflict of interest rules may be extended to funders as a result of the fact that funders may be equated to parties under the IBA Guidelines, this also means that there already are mechanisms to handle such situations, even if increased attention will need to be given to such matters from all parties involved, in particular with regard to the disclosure of relevant circumstances.

As is the case in other jurisdictions and under established institutional rules, arbitrators acting in Swedish and/or SCC arbitration proceedings are under an obligation to disclose circumstances that could give rise to justifiable doubt as to their impartiality and independence. Even without the explicit mention of TPF in this regard, funding arrangements should certainly be considered to be a circumstance that is of relevance to that assessment.

The assessment under Swedish law is objective in nature, meaning that it is irrelevant for the assessment whether an arbitrator actually had knowledge of or was influenced by a certain circumstance. However, arbitrators can of course only disclose circumstances of which they are aware. This means that in the context of TPF, the onus of disclosure with regard to funding arrangements is effectively moved to the parties themselves, as the parties are the only ones who are in a position to disclose whether a case is funded.

95. SCC Policy – Disclosure of Third Parties with an Interest in the Outcome of the Dispute, paragraph A.

As set out above, there is no general obligation for a party under the SAA or the SCC Rules to disclose whether its case is being funded. However, due to the objective nature of the assessment and the risks inherent in a conflict of interest only becoming apparent later on, parties in funded arbitrations should nevertheless have strong incentives to disclose any funding arrangements (at least to the extent necessary for the determination of potential conflicts of interest) even in the absence of mandatory disclosure obligations. By doing so, the parties avoid the risk of delays to the proceedings or even setting aside or refusal of enforcement of an award due to a conflict of interest.