PROPOSED GUIDELINE – FOR COMMENT

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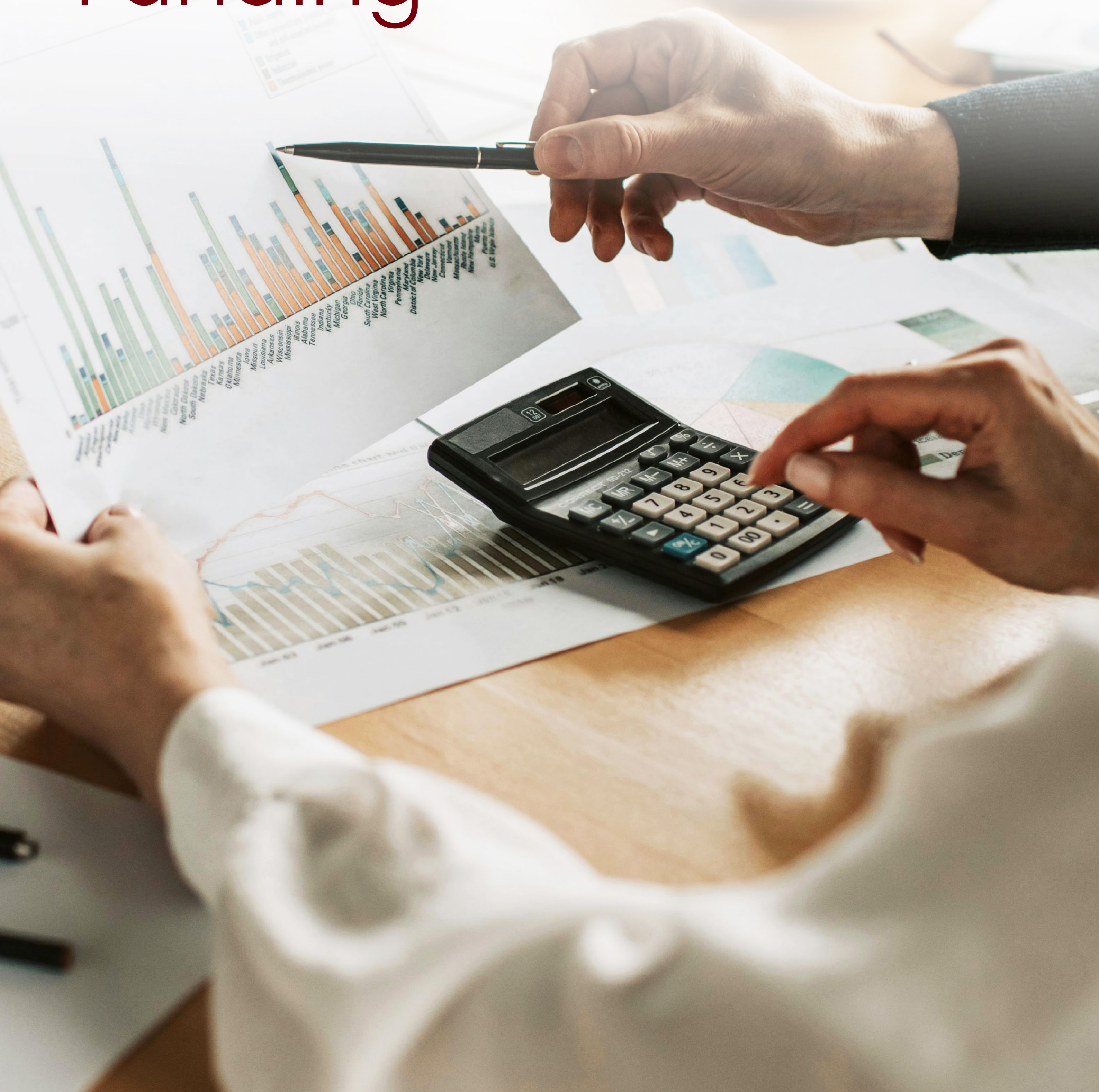
Guideline on Third-Party Funding



Guideline on Third-Party Funding (2025)

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Preamble

The rapid development of third-party funding in both litigation and arbitration over the past three decades represents both an expansion of access to justice (particularly as the costs of pursuing litigation and arbitration claims continue to rise) and a challenge for those dealing with funders and funded parties within the dispute resolution process.

While some national courts have responded to the use of third-party funding, by issuing court rules mandating disclosure of aspects of third-party funding arrangements, the position in arbitration is different. This is, for many reasons, not least of which is the involvement of a third-party (the funder) in a process which is contractually limited (and often confidential) to the parties to the agreement to arbitrate.

A major distinction between arbitration and litigation – in some jurisdictions, at least – is the ability of arbitral tribunals to award the costs of third-party funding to the funded party if it is the successful party in the arbitration: an option usually not available in the court system. This area of arbitration practice remains dynamic; legislative, regulatory, and institutional rule and guidance developments may alter the picture in specific cases. Therefore, this Guideline is expressly a general overview. Individual cases will be governed by the laws applicable to the parties, the funder, the seat of the arbitration, and the location of any related national court proceedings.

Definitions

Adverse Costs: Costs a losing party may be required to pay to the successful party in a dispute, including legal fees, tribunal/arbitrator fees and expenses, and, in some jurisdictions, other costs such as witness or expert fees and other disbursements.

After the Event (ATE) Insurance: A specialised insurance policy that insures the risk of an adverse costs order. Usually obtained after a dispute has arisen, it can be structured to cover the entire costs liability or a portion thereof; premiums may be staged, deferred, or contingent on success.

Anti-Avoidance Endorsement (AAE): An additional endorsement sometimes added to an ATE insurance policy providing further assurances to the opposing party (and tribunal) that the policy cannot easily be avoided or invalidated by the insurer for minor breaches.

Conditional Fee Agreement (CFA): An arrangement between a solicitor and client where a part or all of the solicitor's fees will be payable only upon a successful outcome.

Contingent Premium: A premium arrangement typical in ATE insurance whereby payment of some or all of the premium is triggered only upon a successful outcome, reducing the funded party's initial cost burden.

Cross-Collateralisation: In the context of portfolio funding, the principle that gains from one funded claim can offset or subsidise losses in another, thereby reducing the overall portfolio risk for the funder.

Damages-Based Agreement (DBA): Sometimes called a "contingency fee" arrangement, a DBA is a form of fee agreement where the solicitor's payment depends on the case's outcome, typically expressed as a percentage of the recovered amount.

Exclusivity: A term in a preliminary funding arrangement (often in the Term Sheet) giving a single funder priority negotiation rights for a specified period. During the exclusivity window, the party seeking funding cannot solicit or accept competing offers from other funders.

Funding Commitment: The maximum amount of capital a funder pledges to provide; this may be allocated in one or more tranches, subject to conditions set out in the LFA.

Indicative Terms: An informal, preliminary outline of the main commercial terms (including Pricing and budget parameters) offered by the funder prior to detailed case assessment. If mutually acceptable, these terms typically evolve into a Term Sheet.

Investment Committee: A funder's committee which determines whether or not to proceed with a funding opportunity. Typically, an Investment Committee will comprise representatives of the funder and independent third-party representatives.

Law Firm Finance: An arrangement in which funders provide liquidity directly to a law firm to cover its operating expenses or portfolio cases, rather than investing in an individual claim or claimant.

Litigation Funding Agreement (LFA): The contract that sets forth the rights and obligations of both the funder and the funded party, addressing budget, scope of funding, confidentiality, termination events, and the allocation of recovered sums.

Monetisation: When a third-party provides a claimant with some portion of the expected value of an arbitral award in exchange for a share of the final proceeds.

Multiple-Based Model: A funding structure in which the funder's return is defined by a multiple of the amount invested (e.g., two or three times the the original capital outlay).

Non-Recourse Funding: A type of funding arrangement in which the funder's recovery is contingent solely on a successful outcome in the case. If the funded party does not prevail, there is no obligation to repay the funder's outlay.

Percentage-Based Model: A funding structure where the funder's return is calculated as a negotiated percentage (e.g., 20–30%) of any final award or settlement.

Portfolio Funding: A financing arrangement in which one funding facility covers multiple claims. By pooling disputes brought by the same company or law firm, the funder diversifies its risk; the funded party may benefit from lower-cost terms of funding.

Pricing: The commercial terms applicable to the provision of funding, including, in particular, the basis on which the funder is paid in the event of a successful outcome. Normally, this will either be a multiple of the sums invested or a percentage of the sums awarded or paid on settlement of the proceedings.

Priorities Agreement (PA): A separate agreement often entered into by stakeholders in a funded case, including the solicitor, counsel, insurers, and the funder, that clearly outlines the order in which the proceeds of a successful outcome are distributed.

Security for Costs: A procedural mechanism whereby the claimant (or counterclaimant) may be required to furnish financial security, sometimes via ATE insurance, to assure the respondent that costs will be paid if the claim fails.

Single-Case Funding: The traditional approach of financing one discrete matter, where the funder's underwriting, returns, and risks are limited to the outcome of that single case.

Term Sheet: A preliminary document, issued by the funder, summarising proposed key terms of the financing (e.g., terms of funding, budget, scope) pending more detailed due diligence and negotiation of the full LFA.

Third-Party Funding (TPF): A contractual arrangement in which an external entity (the funder) finances some or all of a party's legal fees and expenses to pursue or defend a claim. In exchange, the funder is entitled to either a share of any financial recovery or a multiple of its invested amount if the claim is successful. If the claim fails, the funder typically bears the loss.

Waterfall Provisions: Clauses that detail how any monies recovered (whether from a settlement or award) are shared among stakeholders.

Introduction

The purpose of the first part of this Guideline is to assist various participants in arbitration matters who may engage with funding of a claim:

– We describe how the process of funding a claim works, the steps which are taken to evaluate and to finance the bringing or defence of an arbitration claim, the types of funding products which are used, and the terms and commercial balance of those arrangements. This overview is intended to assist a party seeking funding to understand the potential options and implications of seeking funding; or to provide a general overview of the funding process for anyone wishing to understand more about how it works in practice.

– We consider common provisions in LFAs to explain the relationship between the funder, the funded party, and its lawyers, and to explain what level of involvement the funder may have in the arbitration process.

– We discuss ATE insurance and the role which it can play alongside third-party funding arrangements in arbitration.

The second part deals with the case management impacts of a funding arrangement on an arbitration process. The aim of this part is to assist both parties and tribunals to achieve effective case management of a funded matter, including:

– Disclosure obligations on both the parties and the tribunal members
– Conflicts of interest
– The implications for institutions of the involvement of a non-party funder
– Security for costs applications, and
– Cost recovery

Our hope is that this Guideline provides a useful overview for all participants in arbitration as to how funding can affect the positions of the parties, the tribunal and the institution.

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Part 1:
The funding process

1. Process and timing of getting a funding arrangement in place

Summary guidance: The funding process has a number of key stages which are common to most funders. A party seeking funding should be aware of the likely requirements of the funder, and of the stages which will be completed prior to the execution of a funding arrangement.

1.1. Whilst the exact process will differ between funders, the following can be considered a common approach applied by funders to all cases or portfolios they are considering for funding. The better prepared that claimants and their counsel are in anticipation of the funder's needs, the quicker they are likely to obtain a funding decision.

1.2. There are essentially four standard steps, which are:

i. Preliminary discussions on a no-name basis

a) This may involve a short phone call or email.

b) If the case is considered potentially promising for funding, the parties move to a non-disclosure agreement (NDA), which is typically on the funder's standard terms, to protect future communications.

c) The funder will conduct a conflict check.

d) The funder will then do an initial assessment of available documents (opinion on the merits, any work on quantum, information about the counter-party, etc.).

ii. Indicative terms

a) Funders aim to move to this stage quickly, within a matter of weeks.

b) The funder will send a draft Term Sheet setting out the financial terms on which they would be prepared to fund the claimant's case (subject to more detailed due diligence). This will include Pricing and some of the major terms that would form part of the LFA.

iii. Due diligence on the claim

a) Only if the funder and claimant can agree commercial terms would the funder move to perform further, and more thorough, due diligence in respect of the claim. This will most likely involve the party seeking funding providing additional information and answering questions to fill in any gaps in the funder's understanding of the case.

b) The precise scope of due diligence will differ between funders. Research in order to identify realistic routes to recovery of any resolution sum will be an important part of this process, as well as analysing the merits of the claim, evidence, and potential defences and counterclaims.

c) The funder may consider getting an independent opinion on specific issues that have arisen as part of their due diligence.

iv. Approval, offer, and LFA

a) If the outcome of the funder's due diligence is positive, a report is prepared and presented to the Investment Committee for approval. The funder internal approval process varies depending on how each funder is structured. Some funders are more compartmentalised, making the process more formal. Others have a more intertwined setup, allowing certain steps to run simultaneously and enabling members of the Investment Committee to be involved at an earlier stage.

b) The funder's internal approval process may take one to two months following the close of due diligence, or longer, depending on the quality and scope of information available about the claim.

c) Occasionally, an Investment Committee may condition its approval on obtaining some further due diligence (e.g., certainty around a minimum quantum amount or obtaining a positive additional legal opinion).

d) Upon the Investment Committee's approval, an LFA is agreed and executed.

2. Pricing and the economics of funding

Summary guidance: *The commercial terms, or Pricing, of the third-party funding arrangement derive from various factors as described in this section, including risk factors, duration, and the prospects of settlement. Funders will balance these factors to make a proposal of commercial terms to the funded party.*

2.1. The economics of funding

2.1.1. Several factors can affect the commercial terms offered by a third-party funder to allocate recoveries in the event of a positive outcome in the funded case. In establishing appropriate Pricing, the funder evaluates not only the legal merits of the case, but also the potential damages, enforcement and recoverability risk, duration of the dispute, and likelihood of settlement. Since funding is non-recourse, the Pricing tends to increase proportionally with the level of risk.

2.1.2. Proposed Pricing is typically expressed as a multiple of the funds committed or percentage of the amount recovered, based on the duration of the dispute. Consequently, the longer the committed funding amount is tied up, the higher the return the funder seeks to reflect the time value of their investment. If a dispute is funded at a later stage in the arbitration process, the funding Pricing may be lower.

2.1.3. Funders often provide a chart showing how their Pricing will change over time. Once the parties agree on the Pricing, they move to the next stage of the funding process. However, funders may pass on a funding opportunity if the financial projections are unfavourable.

2.1.4. Funders aim to stay within a 1:10 budget-to-damages ratio to ensure that the client receives a meaningful recovery amount from the proceedings. Thus, funders carefully analyse projected damages and proposed budgets as part of the due diligence process while building their Pricing structure. As a result, funders will carefully consider the quantum reports submitted with funding inquiries and applications, and are likely to engage with quantum experts during the funder's due diligence process. The economics of the case might become more complicated with additional costs such as ATE insurance, the claimant's operational expenses, or other costs specific to the claimant or case.

2.2. Pricing structure

2.2.1. The TPF arrangements can be structured according to each case, as well as the needs of the claimant and the law firm. The basic principle, as set out above, is that the funder will cover some or all of the legal costs in exchange for a percentage of the proceeds from the case, or a multiple of their invested or committed amount. Since the funding is non-recourse, the funder's return will depend on the success of the case and the monies being recovered (as in a non-recourse scenario the funder can never be paid more than is recovered by the funded party).

2.2.2. In general, third-party funders use two basic methodologies to structure their returns: a percentage-based model and multiple-based returns. Occasionally, funders might mix these two methodologies and create a hybrid structure reflecting the risks of the dispute. In some hybrid agreements, funders may prefer language stating that their return will be determined by taking the higher value of either of these two options calculated on the basis of the sums achieved, ensuring the most favourable outcome based on the case recovery.

2.2.3. In its simplest form, the percentage-based model involves the funder receiving the invested or committed amount plus a percentage of the proceeds. For example, in the percentage-based model applied to the funded amount, if the funder invests £1,000,000 and the case proceeds amount to £10,000,000, with an agreed percentage of 20%, the funder would receive their initial investment plus £2,000,000, totalling £3,000,000.

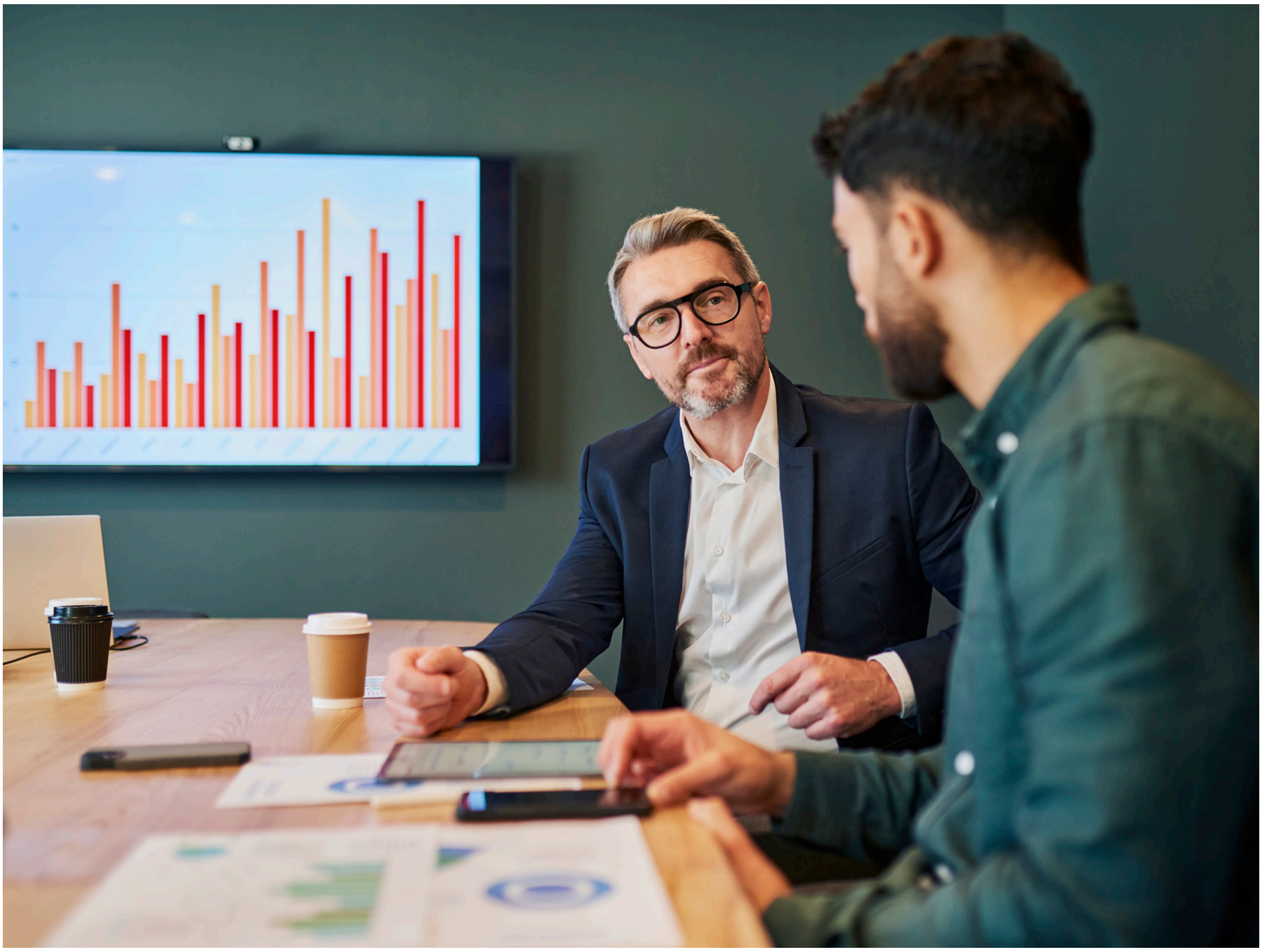
2.2.4. Alternatively, the multiple-based model means the funder receives a multiple of the invested or committed amount. For example, in the multiple-based model, if the funder invests £1,000,000 with an agreed multiple of 3x, the funder would receive three times the investment amount, totalling £3,000,000. It is also important to clarify whether the multiple includes the return of capital or not, as this can often cause confusion if not expressly stated. Therefore, in the example, the funder might either say 3x of the invested amount or return of capital plus 2x of the invested capital.

2.2.5. Which methodology is most appropriate for a proposed funding opportunity purely depends on the economics of each case. The applicable law governing the LFA will also be a consideration. The main issue with the multiple-based model is that it does not align incentives well, especially in a low-win scenario, because it is a fixed fee structure. In such cases, funders may receive a large proportion of the damages. These misaligned incentives are also apparent in high-win scenarios, where the funder receives a much smaller proportion of the proceeds due to the fixed multiple agreed upon. Consequently, percentage-based returns may better align the interests of the funder and the claimant, ensuring a fair distribution of proceeds in both low and high-win scenarios. Funders cannot arbitrarily set exorbitant prices because they must compete with other firms and risk losing good opportunities if their Pricing is too high.

2.3. Committed or funded amount

2.3.1. The disbursement of committed amounts depends entirely on the terms agreed upon in the LFA which typically involve monthly or quarterly payments over the duration of the dispute. This is crucial for the case's economics, as if the dispute is settled early, only a small portion of the committed amount will have been disbursed. Therefore, it is essential for the parties to understand whether the multiple-based model is based on the committed funds or the deployed amount (usually the latter).

2.3.2. The funder's return can be calculated on the funder's invested amount (what they have actually paid) or on the committed amount (the total they agreed to provide). This distinction matters because calculating the multiple on a higher committed amount could significantly increase the funder's entitlement, even if not all funds were ultimately used. As a result, it is vital to clarify which figure applies at the outset to avoid confusion or disputes over the final payout.



3. Pros and cons of TPF

***Summary guidance:** TPF offers access to funding to meet the ongoing costs of an arbitration. Its suitability in each case needs to be considered in the round as it offers both advantages and disadvantages to the funded party.*

3.1. Advantages of funding: Pursuing a legal claim carries the inevitable prospect of incurring legal costs and disbursements, which are often significant over the life of the proceedings. TPF is a non-recourse source of funding which can be used by any individual, business, or entity with a potential claim it is seeking to bring before a court or tribunal.

i. **Risk transfer:** When a dispute is funded, the funder takes on all or a portion of the costs and risks of pursuing a claim before a court or tribunal. The finance is non-recourse, meaning the claimant pays nothing if the claim is unsuccessful. The funder only recovers the expenses and a return on what it has invested in the claim if the claim succeeds.

ii. **Adverse costs**: In addition to the direct financial outlay on the legal spend over the course of the case, the funder may bear the risk of an adverse costs order in the event that a matter is unsuccessful, depending on the terms of the LFA the existence of ATE insurance, the circumstances of the case, and whether the jurisdiction in question adopts cost-shifting rinciples.

iii. **Level the playing field:** Funding can help impecunious parties or parties who are disadvantaged by the size and availability of funds of their opponent. In such a scenario, despite a very strong case, a lack of funds might prevent the smaller party from accessing arbitration. Funding arrangements allow smaller companies or companies which lack sufficient capital to pursue the claim (potentially due to the wrongful actions of the opposing party) to put up an equal fight against their opponents, promoting access to justice and facilitating arbitration that would otherwise be unaffordable.

iv. **Corporate finance and risk management:** Funding is not only used by those that cannot afford to bring claims, but also by well-established corporates seeking to offset risk, monetise claims, and avoid the diversion of capital away from core business needs. In this way, it is essentially used as a corporate finance and risk management tool.

v. **Independent second opinion:** Professional funders (such as those who are members of the International Legal Finance Association (ILFA) or Association of Litigation Funders (ALF) in the UK), many of whom have staff who are experienced former disputes practitioners, subject the claim to a comprehensive due diligence process and therefore provide a second review and opinion on the merits of a case (at no cost during the funders' initial due diligence).

vi. **Strategic support and additional commercial rationale:** Using professional funders can come with additional non-financial benefits, including strategic support and leveraging expertise and experience by, for example, providing recommendations for counsel, experts, and arbitrators. Some funders may also have in-house capabilities and expert resources for intelligence gathering and asset tracing, which can improve prospects of recovery.

vii. **Messaging to the opponent:** Where funding is disclosed, sometimes this can be viewed as a message to other stakeholders in the dispute, in particular the opponents, about a third-party funder's investment-backed belief in the strength of the claim.

viii. **Bespoke funding solutions:** Subject to sufficient value being expected to be recovered, funding can be provided not only for costs, but also for a party's general business needs. A claimant might want to include legal or other costs incurred in relation to the dispute prior to approaching a funder and/or ask for a substantial advance on the claim value (termed monetisation). Where relevant laws allow, some funders may also purchase claims or awards outright. In this way, claimants can seek a bespoke funding package that best suits their commercial needs.

ix. **Rigour in budgeting:** The amount of funding the funder is willing to provide will be set out in the LFA. Therefore, a funder will review and assess the reasonableness and sufficiency of a budget for the costs of pursuing the proceedings through to conclusion. Further, as the funder may be paying the invoices as the proceedings progress, they will inevitably conduct a review of reasonable costs as each invoice is submitted and, in any event, periodically keep a check on what is spent.

x. **Available at any stage of a dispute:** TPF can be used at any stage of a matter – including during the course of a matter where a claimant may start to struggle with meeting ongoing costs or want to free up capital for use elsewhere, or at the appeal, set aside, or enforcement stage.

xi. **Available for a variety of claims:** Funding can be used for a broad variety of claims – including contract disputes, competition and consumer disputes, breach of duty claims, insolvency claims, and intellectual property matters. It is used in both arbitration (commercial and investor-State) and litigation, including litigation proceedings related to an arbitration such as challenges to awards and enforcement proceedings.

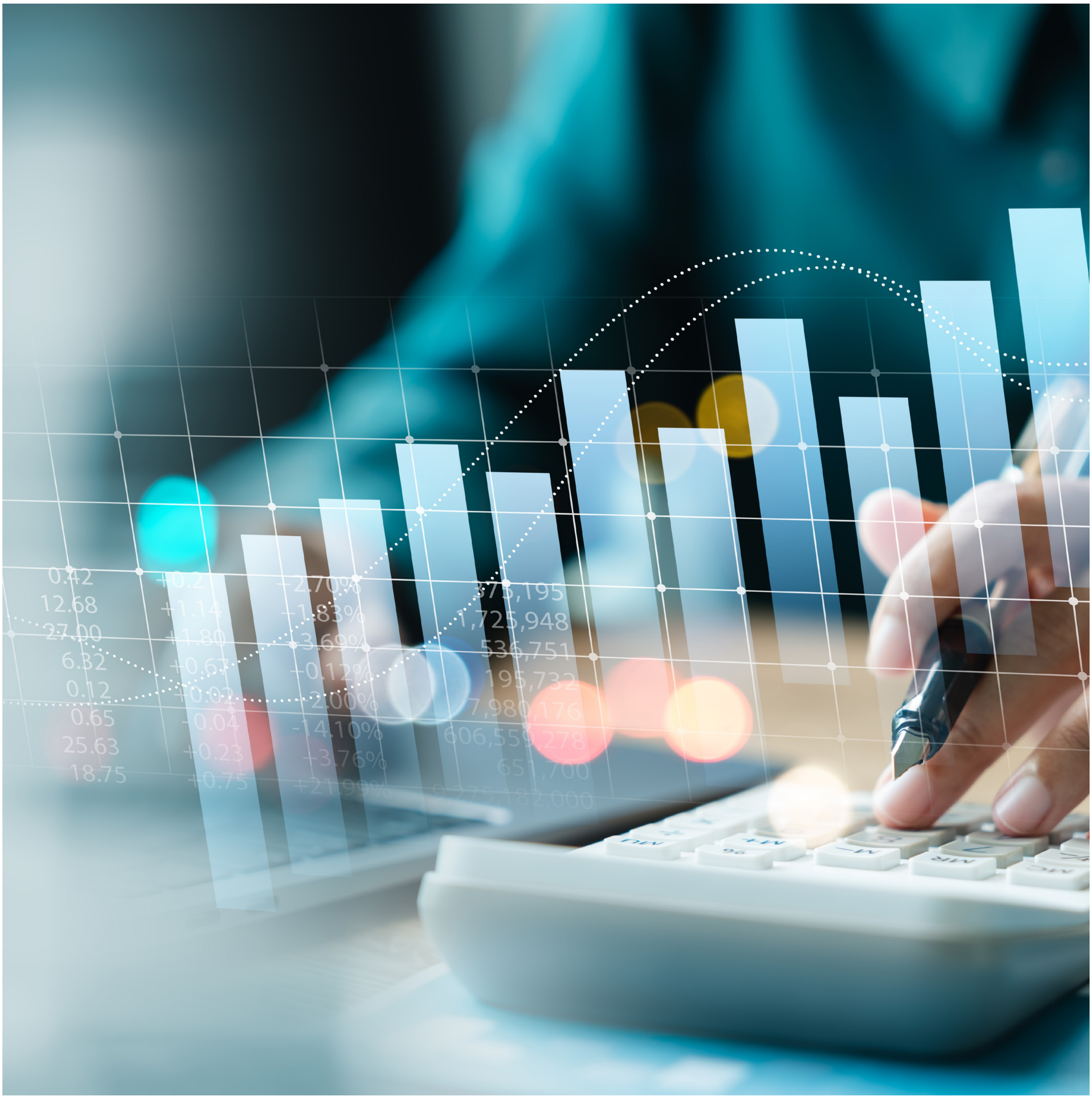
3.2. Disadvantages of funding: Whilst TPF can significantly aid parties by alleviating their financial burden, the process of securing such funding and dealing with its aftermath can occasionally be challenging. Drawbacks of TPF can include lengthy processing times, high costs, extensive intervention, and potential conflicts of interest, particularly when settlements or awards are on the lower end of the expected value range.

i. **Long processing time:** Each funder operates with different processing times depending on their organisational structure. The period from initial contact to securing funding can range from one month to a year. Although this range is broad, depending on the complexity of the matter and the efficiency/speed with which claimants and lawyers provide the necessary materials to funders, it can potentially take up to a couple of months to complete the funder's due diligence, financing, structuring, and Investment Committee processes. In some rare cases, by the time the case receives funding, lawyers often have had dozens of calls and spent significant amounts of their own time or their client's money preparing for these calls, gathering the necessary documents, and repeatedly communicating with various teams from the same funding organisation. While some funders may expedite the process by outsourcing certain stages, others may prefer to handle everything in-house, which can take longer to reach an investment decision. Ultimately, funders have responsibilities to their investors and need to follow their internal processes as they see fit. Nonetheless, this can be quite exhausting for the client and the law firms, especially if they are under time pressure such as an approaching limitation deadline, or in a case where the need for funding has arisen during the course of the proceedings.

ii. **High risk and cost:** TPF is inherently risky, and the Pricing, as expressed in the terms of funding, may vary considerably due to several factors, including legal risks, duration, enforcement and recoverability, and the cost of capital at the time of investment. Some funders have large teams of lawyers, which increases their operating costs, leading to higher prices compared to smaller funds. These funding terms may sometimes appear verpriced. Ultimately, the Pricing should reflect both the financial and legal risks involved.

iii. **Level of intervention (legal and budgetary):** The level of intervention can be seen to be a challenge for law firms. Some funders may take a hands-on approach, requiring regular updates, reviewing every submission, and providing feedback on every draft. This level of reporting and hands-on monitoring can burden the legal team, prolong the process, and increase case administration costs. However, under current market practice, such a high level of intervention is less common and less desirable than the alternative hands-off approach, whereby funders operate more like financial service providers. They still require reporting, but it consists of brief updates rather than extensive documents. Otherwise, where a funded party feels that it benefits from the funder's oversight and experience (as set out above), the reporting process can result in valuable exchanges of view. Ultimately, the funder's style relating to intervention will be a matter for the funded party and its counsel to explore and take into account in its decision whether or not to proceed (see [section 4] below). Overall, it is important that the law firm, client, and funder are operating under the same assumptions about the level of funder involvement and reporting requirements from the outset and provide for the costs of that involvement and reporting in the budget.

iv. **Conflict of interest on settlement:** As mentioned in [Section 2], funders may have fixed returns based on the capital invested, such as a multiple-based structure, or a percentage-based model, where they receive a percentage of the settlement amount or final award. It is important to apply a structure that aligns the interests of both the funder and the client. The potential range of financial outcomes is therefore an important consideration in structuring the funding terms.



4. Choosing a funder: Party due diligence

Summary guidance: *A party seeking third-party funding will want to assure itself that the funder has the capacity to provide the required funding. While not all funders will be able to provide detailed information of the kinds specified here (for reasons of investor confidentiality), party due diligence can ensure that both the funder and the funded party have confidence and certainty as to the availability of the required funding and its management.*

4.1. There should be transparency over how and by whom claims are funded, in other words, whose money lies behind the funding entity. It should also be made clear at the time of funding a new claim that the funder has adequate capital to fund that claim through to conclusion, alongside any other existing claims that are reliant on the same fund(s).

4.2. Consequently, unless the following are adequately covered by applicable national rules and regulations, robust self-regulation (such as that adopted by members of ILFA or ALF), or corporate rules (if the funder is a listed company), funders should be asked to provide due diligence information of the following types to prospective funded parties and their legal representatives in pre-contract documentation and/or the LFA. This type of funding due diligence is best carried out by lawyers or other disputes finance specialists who have extensive experience of TPF issues. It should be appreciated that the fund structure and/or funders duties of confidentiality to investors may limit the extent of information that can be provided:

i. Confirmation of funds and their controllers

a) The names of, and relationship between, the companies or other corporate vehicles which it is proposed will fund claims, or make or receive payments, and any investors ultimately owning or controlling more than 25% of the relevant fund.

b) Whether any of the above have ever been the subject of an investigation by a regulatory body.

c) Outline what anti-money laundering, sanctions, and related measures are undertaken in relation to investors in the relevant fund(s).

d) Undergo annual audits and provide a copy of the most recent auditor's report of the relevant fund prior to entering into an LFA.

ii. Fund information and policies

a) The relevant fund holds and has complete control of funds to meet funding obligations for the next 36 months (a requirement under the UK's voluntary code of conduct drafted by the ALF and likely a suitable minimum requirement for any funded claim outside of the UK of a similar duration).

b) Confirm the total current funds held by the relevant fund (if applicable) and the amount which has already been committed to other matters.

c) Confirm their fund management policy for ring-fencing funds allocated for each claim and to provide for unbudgeted contingencies (e.g., adverse costs orders, cases exceeding their original budgets, appeals, or enforcement steps to collect claim proceeds).

iii. Confirmation of funder's indemnity for adverse costs

a) If the funder is reliant on any third-party insurance policy to meet adverse cost claims, whether the funded party has any direct rights (e.g., subrogation) under that policy, and any relevant exclusion or aggregation provisions.

b) If applicable to the claim, whether and how the funder would prove their ability to provide the opposing party with security for costs.

iv. Confidentiality and conflicts of interest

a) The funder's system for undertaking conflict checks on the parties and subject matter of the prospective claim, including with any major investors.

b) What measures the funder has in place to ensure the preservation of confidentiality and privilege over the funded party's information, including confirming what, whether, and how client/claim details and documents are shared with investors.

c) Acknowledgement that the funded party's lawyers' primary duties are to their client, and that in the event of any tension between those duties and any obligations to or expectations of the funder, the client's interests and instructions take precedence.

d) Whether the funder requires the client's lawyer(s) to be a party to the LFA or any related agreement without imposing obligations that breach the lawyers' primary duty to their client.

v. Court orders and client disputes

a) Confirm whether the funder has ever failed to make timely payment of any non-party costs order, or been the subject of criticism in court or arbitral proceedings.

b) Require disclosure of pending regulatory or other investigations or insolvency.

c) Confirm the circumstances in which the funder would have a right to terminate the LFA or decline to release a funding tranche/phase, as well as whether they are based on the assessments of the instructed legal team, other objective criteria(s), or the funder's unfettered discretion.

d) Confirm the details of any a dispute resolution mechanism(s) under the LFA.

4.3. Those advising the funded party should ensure that the LFA provides that if any of this due diligence information changes substantively during the claim, the funder will promptly notify the funded party and their legal representatives.

5. What the funder needs to know about the case in order to fund: Suitablility

Summary guidance: *Funders will consider several essential criteria during their due diligence process. The priorities of these criteria may vary from funder to funder, but each will examine the information addressed in this section to determine if a case is suitable for funding.*

5.1. Damages

5.1.1. The economic aspects of the case are crucial for a funder even to begin considering an opportunity. As a result, it is critical that legal counsel provides the minimum realistic value of the claim as opposed to an optimistic view. The opportunity must be substantial enough, and generally speaking, funders aim to stay within a 1:10 budget-to-damage ratio. This ensures not only sufficient headroom for funders to receive returns that accurately reflect the risks taken, but also prevents situations where the funder ends up receiving a disproportionate amount of the proceeds. For instance, if the estimated damages are approximately £10 million, the funding requirement should not exceed £1 million.

5.1.2. Each funder has a different appetite for various sizes of funding opportunities, and thus likely has a minimum damages quantum requirement to begin considering a case. Such minimum damages requirement can differ depending on the funder and the type of case. For example, some funders might have higher damages requirements for investment arbitration cases, while they may consider smaller commercial arbitration cases for funding. This is due to the nature of investment arbitration cases, which generally are likely to be more expensive and take longer to resolve than their commercial counterparts. Consequently, funders may seek higher sunk costs for investment arbitration cases, reflecting their risk appetite. On the other hand, as explained in [Section 6] on portfolio funding, the calculations behind this reasoning might change in portfolio deals due to cross-collateralisation. Hence, funders might adjust their minimum damage requirements depending on the deal structure as well.

5.2. Enforcement and recoverability

5.2.1. From a funder's perspective, obtaining a favourable judgment is futile if it does not culminate in a financial recovery at the end of the process. Therefore, it is essential for funders to establish whether they can enforce the award and how long it might take to get paid. Understanding the creditworthiness of the respondent(s), the jurisdiction(s) where their assets are located, and the types of assets they have are crucial for evaluating the risks associated with enforcement and recoverability.

5.2.2. The circumstances surrounding the particular enforcement process are also important when assessing the effect of time on the committed capital and prospective return. For instance, if the defendant is a sovereign state with a track record of refusing to comply with judgments and awards, and/or a state against which numerous cases are pending a final decision and/or enforcement, funders may be reluctant to risk joining the long line of creditors waiting to enforce their claims. Therefore, engaging with an asset tracer to provide all this information to a funder is always beneficial. The decision ultimately depends on the risk appetite of each funder.

5.3. Merits of the case

5.3.1. Third-party funders will analyse the strengths and weaknesses of a potential dispute to understand the prospects of success. Funders usually prefer investing in a case where they believe the prospect of success is over 60%. This assessment will also affect Pricing. The riskier the case, the higher the Pricing. Therefore, funders usually receive a memorandum detailing the facts of the case and the legal team's strategy for addressing any potential weaknesses.

5.3.2. The seat of arbitration is a crucial factor in commercial arbitration for most funders. The seat will affect the finality and enforcement of the award. Thus, due to jurisdictional concerns, funders may prefer certain jurisdictions as seats, such as London, Geneva, Paris, or Singapore. On the other hand, in investment arbitration, where over 50% of cases do not have a seat, the key criteria will be the sovereign defendant and its track record of voluntarily complying with awards and/or judgments. Given the importance of enforcement, the legal team should address this topic in the funding memorandum.

5.4. Parties

5.4.1. Funders conduct background and conflict checks for both the claimant and the respondent. This is to assess the creditworthiness and credibility of the parties, and ensure they are not on any sanctions lists or involved in any criminal activity. Funders will consider several additional factors, including whether the client's representatives would be credible key witnesses and whether the client would be commercially sensible when presented with a settlement offer.

5.5. Legal team

5.5.1. Funders are investing not only in the dispute itself but also in the legal team, including the funded party's lawyers, quantum experts, asset tracers, and (where used) external counsel responsible for advancing the case at the hearing. Accordingly, it is an integral part of the funders' risk assessment to review the track record and background of the legal team, or, where no legal team has been engaged, proposing potential candidates. Otherwise, the funders may simply decline the opportunity if they are not satisfied with the existing legal team. Their assessment goes beyond the firm's brand, examining the individuals who will be part of the team, as well as their expertise and experience.

6. What effect does a portfolio funding arrangement have on suitability analysis?

***Summary guidance**: The structure of a funding arrangement, particularly where multiple cases are funded by a funder either for the same law firm or the same party or group of companies (referred to as a portfolio), may affect both the commercial terms which apply to that arrangement and the characteristics of claims which may be included in the portfolio.*

6.1. Portfolio funding is a financing arrangement that enables a funder to provide capital under a facility for multiple cases. A funder can provide portfolio funding in many ways, the most common being to provide funding for cases managed by the same law firm or originating from the same corporate client. This type of arrangement can cover a selected bundle of existing cases or the firm, party, or group's future disputes.

6.2. In the former structure, a law firm typically handles its cases on a CFA or DBA basis while entering into a facility agreement with a dispute funder. Depending on the fee arrangement the law firm prefers, the LFA might be structured differently. For example, the law firm might prefer working on a DBA structure with their clients, while the third-party funder provides cash flow through a law firm portfolio funding facility. Depending on the arrangement between the funder and the law firm, the firm may disclose that it has a facility in place with a particular funder, including the total capital available, and, in some cases, the remaining capital left to allocate. The level of detail disclosed can vary depending on the nature of the relationship between the funder and the law firm. This facility can also be used for the firm's ongoing or future cases. In this scenario, it is important to highlight that the borrower is the law firm. On the other hand, a law firm might be operating on a CFA basis where its several claimants are seeking funding. This arrangement can be structured so that the funder simply confirms that a case will be added to a bundle of cases, with the borrower being the client, not the law firm.

6.3. This arrangement with a law firm can work in two ways: funding may be provided for a bundle of existing cases, known as a closed-ended structure, or it can allow new cases to be added to the portfolio, known as open-ended portfolio funding. In closed-ended portfolios, funders calculate returns based on a fixed group of cases identified at the outset, enabling clear risk assessment and expected returns. In contrast, open-ended portfolios allow new cases to be added over time, requiring ongoing reassessment of portfolio performance.

6.4. This arrangement might be attractive to some funders because it allows them to cross-collateralise their investment across a portfolio of cases. Such diversification enables funders to offer more competitive Pricing, as the risk is spread across various types of cases in different jurisdictions involving different parties. Ideally, these cases will also have different timelines, which can mitigate duration risk as well. In practice, this means that recoveries from one or more strong-performing cases can be used to absorb losses or shortfalls from underperforming or unsuccessful ones, ensuring that the overall return profile of the portfolio remains intact. Therefore, cross-collateralisation ensures that funders' returns are not dependent on a single case, allowing investors to recover their invested capital and returns even if not all cases in the portfolio are concluded successfully.

6.5. The initial Pricing will be higher if the portfolio funding is structured as an open-ended facility. The risk is likely to be shared equally for the first few cases in the portfolio. However, from a mathematical perspective, the percentages or multiples applied in the Pricing will decrease with each new case added to the facility, as the larger the portfolio, the greater the potential for cross-collateralisation. Over time, as the investment risk diminishes, the approval process for new cases might become more streamlined and expedited.

6.6. Alternatively, portfolio funding can be provided for a bundle of identified existing cases for a law firm or a corporate client, which is referred to as a closed-ended portfolio. The funder evaluates the bundle of cases and provides a facility arrangement based either on a share of the proceeds or a multiple of the investment. Unlike single-case funding, where the risk is binary, the Pricing in closed-ended portfolio funding is lower because the returns are spread across multiple, usually unrelated, cases.

6.7. Despite differences in Pricing, the due diligence process for portfolio funding is fundamentally similar to that for single-case funding. Initially, the funder will assess damages, enforcement and recoverability issues, the merits of each case, and the parties involved and the legal team. For an open-ended funding facility, a funder might establish criteria for future cases based on their type and size, even though the approval process can become more streamlined over time. Thus, the significant difference lies in the Pricing of the portfolio deals rather than in the funding criteria for individual cases within the portfolio.

6.8. The parties involved should ensure they understand the structure of the funding facility, determine which type of funding arrangement best suits their commercial needs, and comprehend how the Pricing works under their LFAs. This will determine who the borrower is, how the capital will be spent, and how the proceeds will be distributed.

7. Types of LFAs

***Summary guidance**: There are now numerous types of LFAs available, including those to fund the legal representation and/or risk of adverse costs in single arbitrations, a portfolio of cases, appeals or challenges to awards, or enforcement actions. It is important for a funded party and its advisers to understand both the funding options and how the LFA terms will work in practice.*

7.1. As the funding industry has matured and expanded, there are now several different types of funding arrangements which may be offered by a funder. The type of LFA which may be entered into will depend on factors such as whether the case is a stand-alone case or one of a number of cases ongoing for the same firm or party, the stage of the case which has been reached, and the needs of the funded party beyond the funding of the arbitration process itself.

7.2. We address briefly below the principal types of funding which a funder may offer including:

i. Single-Case Funding

a) The traditional form of LFA is a single-case funding agreement. Usually these are non-recourse funding arrangements (in other words, not a loan): if the funded party is unsuccessful, the funder will not recover its investment.

b) The risk inherent in such non-recourse funding is factored into the terms offered by the funder, primarily in relation to the hoped-for outcome of a success for the funded party and how recoveries re then shared between the funded party and the funder as described in [Section 2] above.

c) Funders are investing in the dispute as an asset with the potential to generate a return on that investment. An experienced funder will therefore assess the risk profile of the dispute, the likely recoverability of sums awarded to the funded party, and the other "suitability" issues addressed above to develop the funding terms.

d) Terms are bespoke to the dispute, and the basis on which returns are structured will reflect the outcome of the suitability analysis, the preferences of the parties, and the outcome of their negotiations.

e) One issue which can lead to tension in the negotiation of funding terms is the desire on the part of both the funder and the funded party to ensure that each recovers an appropriate share of ecoveries in the event of success.

f) It is important for a funded party and its advisers to be confident that they understand how the funding agreement terms will work in practice.

ii. Portfolio Funding

a) Many funders now offer what are called portfolio funding models to law firms or corporate claimants (including insolvency practitioners) who have many concurrent disputes. The premise underpinning a portfolio funding model is that the risk, investment, and return are spread across a number of cases (either known or anticipated within a predefined eligibility criteria). The types of portfolio funding arrangement which are typically used are described in [Section 6] above.

b) The allocation of risk on the part of the funder across a portfolio of cases can significantly reduce the cost of capital and therefore enable the funder to offer more competitive or attractive Pricing in the context of the portfolio. That may make a portfolio arrangement more appealing to the funded party than the single-case funding alternative.

c) A portfolio funding arrangement may also incorporate matters where the funded party is defendant, as well as those where it is a claimant, particularly where there is also a counterclaim by the funded party.

d) While portfolio funding can offer a more attractive set of high-level terms to a funded party (in terms of Pricing the overall risk of the portfolio), the nature of this type of arrangement is inherently more complex as different cases will move on different timetables, outcomes will be likely to vary, and therefore the impact of a win, loss, or settlement of a component case in a portfolio arrangement must be well understood to ensure that each case is dealt with appropriately.

e) Care must be taken to understand the impact of cross-collateralisation of the portfolio, with the costs of losing cases being reimbursed from winning cases. The sequence and timing of wins and losses could cause unanticipated cash flow consequences unless all such scenarios are modelled in advance. Commonly some, but not all, of the proceeds of early winning cases will have to be held on trust to provide for the possibility of a late run of losing cases.

f) Law firms who offer terms to their clients via their own portfolio funding facilities must be mindful of their regulatory obligations, notably to avoid own-interest conflicts. Consequently, it may be appropriate for the client to receive advice on the funding terms from a separate law firm.

iii. Appeal and enforcement funding

a) A party may have sufficient funding to self-fund the first part of an arbitration process, obtaining an award in its favour on the merits and/or quantum. However, despite the limited routes of challenge or appeal available against most arbitration awards, this may not be the end of the matter.

b) Not only might a party have to defend against a challenge or appeal by the unsuccessful party, a successful claimant may be unable meaningfully to progress with enforcement against a non-paying award debtor without funding to conduct the enforcement action.

c) Although one of arbitration's most attractive features is the simplified recognition and enforcement mechanism which should be available in the 172 states which are party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (New York Convention), in reality, the existence of ongoing challenges to the award, either at the seat of the arbitration, or in the enforcement jurisdiction, can add significant cost and delay to the process of realising a recovery following a positive outcome on the merits. In this scenario, (at least where the funded party is the successful party) the risk profile is different to that in which the funded party has yet to succeed on the merits. However, the funder will still need to consider barriers to recoverability including the liquidity of assets in a jurisdiction which is a New York Convention signatory, as well as other factors such as, potentially, the need to pursue enforcement in multiple jurisdictions to recover the value of the award, in proposing funding terms for that enforcement phase. Much will turn on the identity and location of the award debtor, their assets and their willingness to resolve the residual dispute.

d) Note that in investor-State arbitrations under the International Centre for Settlement of Investment Disputes (ICSID) not subject to the New York Convention, the enforcement mechanism under Article 54 of the ICSID Convention provides for the recognition and enforcement of awards made under that Convention as though they were final judgments of a court in the contracting states (of which there are 158).

iv. Awards monetisation

a) Awards monetisation is a type of funding which can proceed alongside appeal and enforcement funding.

b) The existence of an award in favour of the funded party enables a funder to offer funding immediately to improve liquidity for the funded party pending the realisation of the award. The risk profile here is similar to that identified for appeal and enforcement funding.

c) In some scenarios, a funder may offer to take an assignment to acquire the rights to enforce the award on the basis of an offer of value to the successful party, but care must be taken to ensure that such agreements are lawful in jurisdictions in which the enforcement proceedings may be required.

d) In that scenario, the successful party accepts a proportion of the value of the award and waives its right to some or all of the further recoveries, leaving the funder to take the lead in prosecuting recovery proceedings in various territories to recoup not only the value paid to the successful party, but also a return on that investment. As the recovery proceedings will still be in the funded party's or parties' name(s), their ongoing co-operation is usually required. This is one of the reasons why funders will more commonly offer to pay no more than a modest proportion of the value of the award up front to the funded party, with a share of the recoveries to follow once realised.

v. Adverse Costs Risks and Awards

a) In many jurisdictions, while taking into consideration the relevant or chosen arbitral rules and contractual terms, arbitration legislation makes provision for "costs to follow the event". In other words, the losing party should be liable for the costs of the winning party, including both the fees and costs of the arbitral institution and the tribunal, and the legal costs and expenses (such as expert fees) paid by the successful party.

b) Some jurisdictions may also require a post-dispute agreement or confirmation to enforce a contractual provision which stipulates that the parties will bear their own costs. This approach, sometimes referred to as "cost-shifting", is often a factor in settlement discussions, as a party has to weigh the risk of having to bear not only its own costs, but that of its opponent, if its claim, or defence, is unsuccessful.

c) In a funded scenario, a party may therefore require additional support from a funder to cover the adverse costs risk which may arise on the failure of the funded party's case. This can be done in a number of ways: examples include the obtaining of an ATE insurance product (the premium for which is usually funded by the funder), the provision of security for costs by the funder on behalf of the funded party, or the provision of a contractual indemnity that the adverse costs will be met by the funder in the event of failure of the funded party's case.

d) The funded party should raise enquiries to ensure the funds to meet such adverse costs have been truly ring-fenced, or consider seeking a guarantee from one or more of the major underlying investors in the fund (although it is rare that such guarantee would be provided). Such concerns do not tend to arise if the funded party instead has an ATE insurance policy in their name from a heavily regulated and well collateralised insurer.

e) Some funders may positively impose a condition in the LFA to require the funded party to incept ATE insurance to provide for the risk of an adverse cost order against that party. This may be particularly important in an arbitration scenario where the tribunal has no jurisdiction over the third-party funder absent an agreement to join it to the agreement to arbitrate (which is unusual, if not unheard of, in practice).

vi. Law Firm Finance

a) In addition to a funding arrangement using a portfolio of cases, some funders in some jurisdictions will enter into a direct funding arrangement with a law firm to enable it to progress growth and development without having to have regard to the cash flow from its ongoing cases (as described in [Section 6] above).

b) Such arrangements exist with certain law firms (particularly smaller specialist firms) and can assist the firm with a cash injection on terms which might not be available from a traditional finance provider.

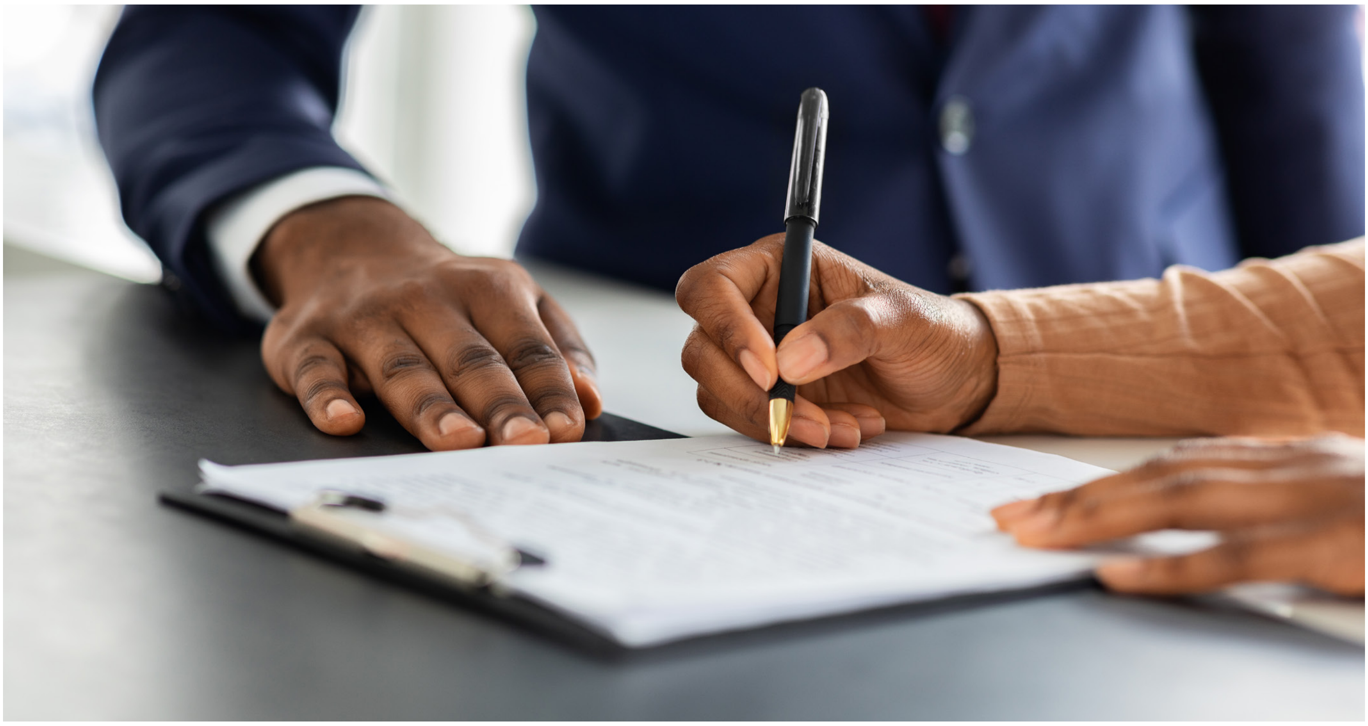
c) Whether such external investment in law firms for a proportion of profits is lawful varies from country to country, as do the alternative business structures (ABS) for those arrangements, where lawful. Firms relying on external finance must be careful to ensure that the terms and operation of the finance agreement do not impact upon the lawyer's regulatory duties to act in the client's interests.

vii. Loans

a) Before committing themselves to the cost of non-recourse funding, funded parties should consider whether they can raise the funding for the claim via a loan with their bank or another reputable lender. If they can, then the cost of funding in a win scenario will be materially lower. However, they will still be carrying the risk of repaying the loan in a loss scenario (including unenforceable "wins"). It may be possible to hedge that risk with insurance, with the total cost of interest on the loan and the premium on the insurance often being cheaper than a non-recourse funding premium.

b) The likely duration of the proceedings, including any related appeal or enforcement, will be particularly important when considering a loan. The loan terms may require repayment within a time frame that proves shorter than recovery of the claim proceeds. Plus, compounding interest in very long running proceedings could in some circumstances reverse the above assumption of this option being cheaper than non-recourse TPF.

c) The loan terms might well involve giving the lender the first charge on the claim proceeds (or even other assets of the funded party) and/or the provision of other collateral.



8. Terms of LFAs

Summary guidance: *LFAs are often high-value and complex commercial contracts. In addition to the core financial terms care and attention should be paid to terms relating to covenants, representations and warranties, control, the budget (and variations to it), distribution of proceeds, dispute resolution and termination. It is crucial that funded parties receive informed commercial and legal advice when negotiating the key terms and subsequently during the process of finalising the drafting of the LFA.*

8.1. Although an LFA relates to the conduct of an arbitration process and therefore those acting for the funded party will inevitably be involved in some aspects of securing the funding (e.g., summaries, merits opinions, scoping and estimating the cost of their work, etc.), it is important to bear in mind that an LFA is a commercial financing arrangement. Unless those acting for the funded party have significant expertise in LFAs, it may be prudent to recommend to the funded party that they obtain specialist advice on the terms of the proposed LFA. Some funded parties may make that election of their own volition, particularly if they also seek independent advice on any alternative funding terms that they may be seeking to negotiate with the lawyers they have instructed for the arbitration. There may be situations in which the lawyers acting in the arbitration would be placed in a conflict of interest with their own client if they are also advising on the LFA, or it may otherwise be inadvisable due to a material connection between the law firm and the funder.

8.2. Funding terms are often negotiated in two stages. In the first stage (referred to under [ii. Indicative Terms] in [Section 1]), the funder will set out their proposed key terms, including the formula for the funding premium in the event of success. The key terms, once accepted, will often be subject to a short exclusivity period during which the full funding terms will be debated, revised, and then signed. In some cases, the key terms will have set conditions precedent to finalising the funding such as for instance a detailed opinion on merits, quantum or enforcement, or the securing of ATE insurance.

8.3. We address below the types of terms which are common to a single-case funding agreement. Many of them are also applicable to appeal or enforcement funding, albeit with a different framework in terms of the approach to monitoring and other matters, particularly where enforcement or challenge proceedings are proceeding in parallel in the same or different jurisdictions. Some of the key variant terms relating to adverse costs funding have been highlighted above (See [Section 7] [v. Adverse Costs Risks and Awards]).

8.4. Portfolio funding and law firm finance arrangements are very different and go beyond the remit of these broad guidelines. As set out in [Section 6] and [Section 7], however, the treatment of recoveries within a portfolio structure is likely to be considerably different to that which is commonly put in place on single funded cases.

i. Definitions

a) The terms of an LFA can only be fully appreciated by careful consideration of the definitions, particularly if a defined term in use in the proceedings (or in day-to-day usage) has a different meaning for the purposes of the LFA.

b) If the LFA is just one of a suite of alternative funding arrangements (e.g., ATE insurance, CFA for the lawyers, etc.), it is clearly preferable to carefully align and adopt the same defined terms wherever possible.

c) To give one example, the definition of success for the purposes of triggering an allocation of value as between the funded party, the law firm and other advisers, and the funder, may be different from the funded party's assumption of what success is. In particular, where success is defined as recovery on enforcement, it is important to establish whether the funding being offered extends to the enforcement process, or whether the funded party is expected to pursue that phase on a self-funded or separately-funded basis. Likewise, it is quite often the case that the same firms acting in the arbitration will not necessarily undertake the work relating to enforcement. As a result, a definition of success which requires the successful outcome of a phase in which the firm ill not be involved, will leave the firm potentially exposed.

d) Where defined terms incorporate formulae for calculation of particular elements of the allocation of recoveries, it is important to ensure that these work by reference to the anticipated range of recoveries, and that they do not produce an incongruous result.

e) It is also important to consider whether the meaning of non-defined terms is clear to both parties where it may have an impact on interpretation and application of the terms of the LFA (and to define them if it transpires that the terms mean different things in the mind of the parties).

ii. Financial terms

a) The primary focus of the initial stages of negotiating funding terms will usually be financial return (funding premium/entitlement) due to the funder in the event of success, or Pricing as set out in [Section 2] above. As discussed above, this is commonly expressed either as a percentage of the value of the award, and/or a multiple of the amount funded. Funders will often seek the higher of either a percentage or multiple, although whether that appropriately reflects the risk/reward profile will vary from case to case. The structuring of returns to the funder may be affected by the applicable law(s).

b) Both percentage or multiple terms are often staged by duration, stages of the proceedings, or funding tranches (see further below).

c) If an early settlement is a real prospect, then the parties should consider an early break clause that provides the funder with a defined return that reflects the time they have invested in the case and the fact they have committed capital, but is materially lower than the return they can command if they are exposed to a longer-running dispute with significant capital deployed and at risk.

d) It is important to consider whether any multiple return is based on funding actually deployed, the funding committed, or the funding tranche incepted.

iii. Funding commitment, tranches and budget variation

a) Equally as important as agreeing the commercial terms of funding is agreeing to a realistic funding commitment that is likely to prove sufficient to see the case through to conclusion.

b) An all-too-common mistake is for funded parties and/or the legal representatives either to put insufficient thought into developing a realistic budget, or intentionally to put an unrealistically low budget to the funder. The consequences of an insufficient budget can be severe, including a pause in funding that can prejudice case preparation, a stand-off between client, law firm, and funder as to who should bear the budget overage, and, even if the funder does agree to do so, they may demand an increase in the Pricing. The budget should be bespoke to the case, but may be informed by similar past cases. Ideally, the budget preparation (and subsequent monitoring) will involve collaboration between the lawyers conducting the arbitration, and a cost specialist or a suitably experienced disputes financing advisor. It should be built bottom-up, task by task and phase by phase, rather than top-down based on the figure they would like to arrive at. Certain aspects of arbitrations are not capable of precise prediction, as the opposing party, the tribunal, or an expert witness may do something that incurs significant unanticipated costs. Consequently, funder budgets should include a contingency for such unforeseen events, as they arise in one or more forms in most cases. The budget should also provide for any upfront ATE insurance premium, with a caveat for cost-shifting jurisdictions. In addition, the funding terms and the budget should provide for sales taxes such as VAT (where applicable).

c) The budget once agreed by the funder will usually be appended to the LFA and related to the definition of the funding commitment. Any matters not included in the budget (such as the costs relating to enforcement proceedings or appeals) should be expressly carved out.

d) It should not be assumed that funders will agree to requests for funding variations as and when they arise later in the case, as such requests may be difficult or impossible for the funder to accommodate if the fund in question is either already fully committed or, more likely, the economics of the funding arrangement do not allow (i.e. the claimant would not be incentivised because all claim amount would go to funder's commission). However, it is sensible for the LFA to be clear whether reallocation between phases is permissible. There should also be a clearly defined procedure for how later budget variation requests should be raised by the funded party, how they are to be determined by the funder, how any related disputes are to be determined, and how any funding from another funder could be accommodated if the budget variation is refused by the original funder. Some LFAs provide for the legal representatives to further or fully discount their rates in the event of budget overage, or to provide undertakings to pursue the case to its inclusion, sometimes entirely on risk.

e) When the Term Sheet is received from the funder it should be scrutinised to understand whether any of the following apply:

- Is the funding commitment split into tranches, and if so, is that related to the Pricing structure, and is progress to the next tranche at the funder's discretion?

- Are there preconditions to the availability of some tranches such as a favourable report on enforcement prospects, or completion of a particular stage in the proceedings?

- Is there a cap on the funding available for a particular stage or components (e.g., experts), or can the funded party simply work within the overall agreed budget?

f) The subsequent LFA will expand on the points agreed in the Term Sheet and so must be carefully scrutinised. It will usually append a prescribed format for the periodic (often monthly) reporting and making of a funding draw-down request. Care should be taken to ensure the mechanism and timing of any queries on invoices and related payment timings match the parties' expectations.

iv. Representations and warranties

a) These statements are made by each of the parties to the other and will be terms of the LFA which, if breached, can lead to its termination or to other disputes between the funded party and the funder.

b) It is very important to ensure that the representations and warranties are verified on each side to ensure that neither party is misled as to the position of the other with respect to the facts. Many of these will have an ongoing element, and so great care must be taken to avoid inadvertent later breaches (a similar approach applies to covenants (see [v. Covenants] below)).

c) Commonly, in commercial agreements, representations and warranties may be qualified by reference to disclosures identified in a schedule. Such a schedule in the LFA ensures that the parties have certainty as to what is said to be within their respective knowledge at the time of entering into the LFA. In addition, most LFAs will require a representation or warranty that all information on the case has been sufficiently disclosed. Funders will ordinarily expect legal advisors to provide a "reliance letter", pursuant to which the legal advisor assumes a duty of care to the funder to the same extent as to their client with respect to, for example, advice on the merits.

v. Covenants

a) In addition to giving representations and warranties, a funded party will usually covenant (or undertake) to the funder to take actions which might positively affect prospects of success, or to refrain from taking actions which might adversely affect the prospects of success of the funded claim.

b) Generally, these covenants will relate to the maintenance of the funded party's interest in any asset which is the subject of the arbitration proceedings (assuming the proceedings do not relate to a disposal or deprivation of those assets).

c) A party's breach of a covenant would be a breach of the LFA, and therefore, it is important for the funded party not to covenant to steps which it cannot be certain of being able to sustain.

d) For example, a covenant that the funded party will continue to employ key witnesses might be unworkable in a situation in which the employees choose to leave. However, a funded party can properly covenant not, for example, to make a witness redundant.

vi. Distribution/Waterfall Provisions

a) The expression of these key commercial terms is vital to understanding the way in which a recovery in the arbitration will be allocated as between the funded party, the funder, ATE insurers (if applicable), and anyone else who is taking or sharing risk in the arrangement (most often the legal advisers, who may have agreed to suspend a portion of their fees in return for a share in the recoveries by way of an uplift on the suspended portion).

b) The Waterfall Provisions explain the priority in which the recovery ill be allocated, and the proportions in which it will be allocated. In cases where the recoveries have been lower than initially predicted, and/or the costs materially higher, the terms of the waterfall and any priorities agreement (PA, see Definitions above) may become more important than the underlying contractual entitlements of the individual stakeholders.

c) It is commonly the case that the first priority will be given to reimbursement of the funds advanced by the funder, as well as to any other party which has expended funds on the arbitration (which might include the funded party) or met an interim adverse cost order.

d) Thereafter, there are usually between two and four further tiers in which the funder and others who have risked part or all of their payment are entitled to shares of their contractual entitlements. If there are insufficient recoveries to allow full payment to all within the applicable tier, then the PA usually provides for pro-rating. The final tier usually provides for the balance to go to the funded party, although on occasions funded parties may have been able to secure a level of minimum return higher up the waterfall in order to align the interests of the parties.

e) The terms of the waterfall are often first recorded in the Term Sheet, which precedes the LFA. It is very important to ensure that the fundamental balance of interests reflected in the Term Sheet is mirrored accurately in the PA that is ultimately within or appended to the LFA. This may again require consideration of whether the defined terms and the formulae as applied in the waterfall provisions accurately project the outcomes discussed by the funder and the funded party. However, some variation may be required if an additional stakeholder (e.g., an ATE insurer) has to be added or assigned a different position within the waterfall.

f) In considering and negotiating the funding terms, it is important for the funded party to be aware of the potential range of net outcomes which, applying the waterfall, will result from putative levels of recovery. Modelling of these outcomes ought to be based on realistic appraisals of likely settlement and judgment awards.

vii. Termination Events

a) LFAs will ordinarily make provision for termination of the funding arrangement on the occurrence of specified adverse events in the funded case, such as loss on a preliminary issue, a material decline in the merits advice or economics of the case, refusal to follow counsel's advice on settlement offers, or a change of counsel absent funder consent.

b) Other termination events may include a decision or change in the law that makes it unlawful for the funder to continue to fund the claim, or a conflict of interest arising that prevents the funder from continuing to perform its obligations.

c) While funders will usually have regular updates, reporting, and meetings with the funded party to assess the case progression and monitor the funding budget, the parties need to have clarity as to what situations will result in the suspension or withdrawal of funding.

d) In particular, there should be precision around what level of adversity might lead to termination, and whether there are any opportunities to address potential termination events prior to such termination taking place.

e) It is important for the parties to consider whether each termination event is subject to the advice of the legal representatives, or in the funder's reasonable belief. If the parties disagree on whether a termination event has arisen, the LFA should provide for whether such disagreements are to be subject to an independent legal opinion, or any prescribed dispute resolution mechanism. For example, many LFAs include provision for the involvement of an independent senior lawyer to provide a view as to breach, as part of the dispute resolution mechanism in the LFA.

f) In termination situations that involve some form of breach by the funded party, the funder may be entitled to the return of its sunk investment in the case and all or a portion of its success fee, in the event that the case ultimately achieves a recovery. However, if the funder is electing to terminate because it no longer has the appetite to continue to fund the case, then the funder would ordinarily only be entitled to any return if and when the case is subsequently successful. The prior rights of an earlier funder will have to be taken into account in the negotiation of any replacement financing terms for the funded party, and the accompanying revisions to the PA.

g) An alternative approach may be to permit the funded party (or new funder) to reimburse the preceding funder's contributions, with interest, in exchange for a waiver of rights in any future recovery. This may make it more feasible for the funded party to obtain replacement funding.

viii. Other provisions

a) Whilst most LFAs are between the funded party and funder some funders seek to include the legal representatives as a party. It is generally expected that the legal representative should, as a minimum, sign the LFA in order to demonstrate that its terms have been acknowledged. Nonetheless, this issue should be approached with careful consideration by the legal representatives as it has the potential to put them in a conflict with their professional duties to their client. An alternative is for the LFA to include or append an irrevocable authority from the funded party to the legal representatives on certain key themes such as:

- To provide reasonable instructions at all times
- To act commercially

- To comply with orders of the tribunal
- To provide regular updates to and answer requests from the funder
- To minimise the exposure of the funder to adverse costs and/or maintain sufficient ATE insurance
- To hold all claim proceeds on trust and only distribute in accordance with the PA.

b) It is highly preferable for the LFA to expressly state that the funded party has complete control over the conduct of the claim, including whether and on what terms to settle. However, funded parties must accept that it is inevitable that by seeking funding for seven or even eight figure sums from a funder they are making the funder a significant financial stakeholder in the claim which in consequence has a legitimate right to impose reasonable provisions, such as the above irrevocable authority examples and in relation to termination. It is also common for certain key events to require the funder's consent not to be unreasonably withheld, such as:

- Discontinuing the claim;
- Change of legal representatives (or their payment terms);
- Pursuing a related claim;
- Seeking additional funding; and
- Disclosing the funding terms.

c) Whilst the LFA provides for the funder to meet the funded party's obligations to pay invoices that fall within the approved funding budget that does not alter the underlying contractual obligations between the funded party and its legal representatives, any ATE insurer, and other service providers which it is liable to pay. Consequently, if costs are incurred that go beyond the agreed funding budget, absent the funder's agreement to extend the funding, they will be the funded party's liability.

d) The maintenance of confidentiality, legal professional privilege, and common interest privilege are usually provided for in the LFA.

e) It is quite common for LFAs to provide that a funder can at any time assign or transfer rights under the agreements at its sole discretion.

Funded parties should consider whether this right should be conditioned to avoid the risk of becoming funded by funds from an unregulated entity that they would not want to be associated with (or which might generate a conflict of interest either with the party's representation or with the members of the tribunal).

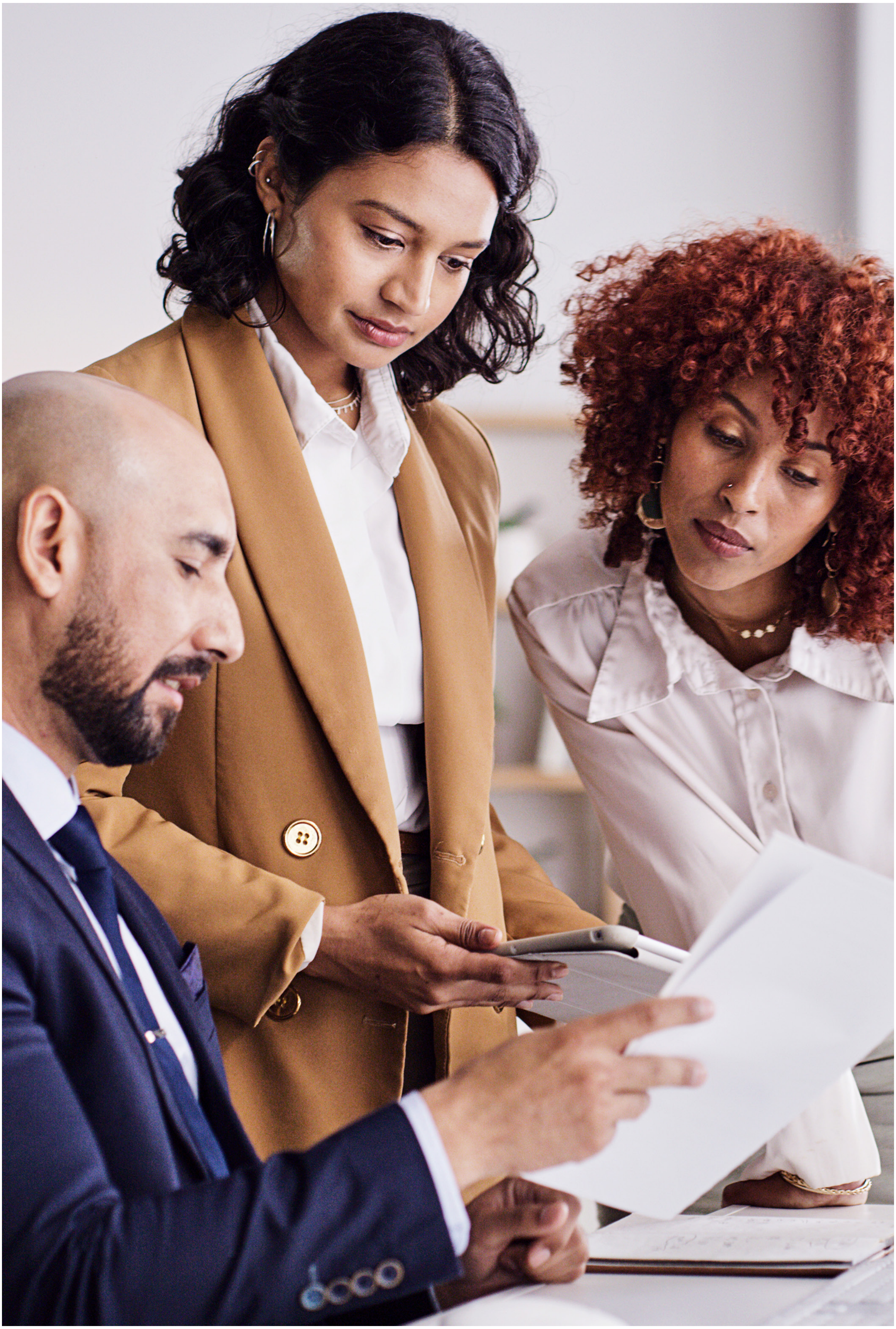
f) Where the claim is brought on behalf of two or more claimants the obligations under the LFA may by default be termed to be joint and several. This would need to be carefully considered and may not be appropriate in some circumstances depending on the relationship between the claimants and the respective sizes of their claims.

g) While it is in no party's interest for there to be collateral disputes between the funder and the funded party or any other party to the LFA terms, it is sensible to provide for the possibility that such disputes may arise.

h) In that scenario, it is important for the parties to consider and choose an appropriate governing law for the LFA and a forum for the resolution of those disputes which is appropriate to the nature of the LFA.

i) While it is unlikely that any experienced law firm or funder would choose a substantive law which renders the LFA unlawful, the choice of law and of forum may have an impact on the way in which disputed terms are construed and applied by the decision-making panel. Moreover, changes in the substantive law may arise during the life of the LFA, such that parties should have a mechanism for addressing such changes in law where they have a bearing on the legality or enforceability of the LFA.

j) In circumstances in which the funding of the proceedings relates to an arbitration which itself is subject to privacy or confidentiality provisions, the preferred forum for a dispute about the LFA may well also be arbitration. A common alternative for limited disputes that require a speedy decision (e.g., whether to accept an offer to settle) is expert determination. We address disputes between funders and funded parties in more detail in [Part 2].



9. ATE: Where does it come in? Is it worth it?

Summary guidance: *ATE insurance can form part of an overall funding structure for a case (or a portfolio of cases) to protect the funded party from adverse costs risks. The ATE policy will respond in the event that the funded party is subject to adverse costs liability. However, such ATE insurance is not always suitable, affordable, or even available, depending on the circumstances applicable to the particular case or portfolio. Where it can be obtained, it provides an additional layer of support to the funded party.*

9.1. ATE insurance: What is it and is it worth it?

9.1.1. An ATE insurance policy provides assurance to a claimant lodging an action (or a respondent asserting counterclaims) that if its claims (or counterclaims) are unsuccessful, the insurer will cover any adverse costs award against the insured party. A party's decision on whether an ATE policy is worth purchasing will depend on several factors, including the nature of the party's funding arrangements, an evaluation of the risks of an adverse costs award, and a party's financial ability to satisfy any such award.

9.2. What is an ATE policy?

9.2.1. ATE insurance is a form of legal expenses insurance that is purchased to manage the insured party's risk of being ordered to pay the other sides' costs.

9.2.2. The premium for ATE insurance is often payable upfront, although in some instances a party can negotiate a premium that is paid only in the event the insured party is successful (i.e. a contingent premium). In other cases, the premium for ATE insurance is staged, with a portion being paid up front and the remaining portion being deferred and contingent. The time at which ATE insurance is purchased can also impact upon Pricing. As a general rule, the closer in proximity to the final hearing ATE insurance is sought (especially in circumstances where the final hearing is slated within three to six months), the more difficult to obtain and expensive ATE insurance can become.

9.3. Funding requirements and security for costs

9.3.1. It is sometimes the case that a party's funding arrangements or its financial status may necessitate the purchase of ATE cover.

9.3.2. For example, some funders will require the funded party to obtain an ATE policy, as most funding arrangements do not cover an award of adverse costs. If a funded party does not wish to purchase ATE cover, the funder will typically require the funded party to agree that any adverse costs award will be the sole responsibility of the funded party and not the funder.

9.3.3. ATE insurers will conduct their own conflict checking and due diligence on any substantial case they are asked to insure. Whilst they will often be encouraged if they know a reputable funder has agreed to risk their investment in a case, it cannot be assumed an insurer will offer cover. There is a relatively small pool of ATE insurers, as it is a niche market. Additionally, on occasion, there can be issues to resolve in terms of licensing and tax of ATE insurance depending on the insured's domicile. Consequently, it is advisable to approach insurers, usually via a broker, at an early stage in the process of seeking funding.

9.3.4. When ATE insurance is being considered at the inception of a funded matter, it is important to ensure that paid ATE premiums are accounted for within the funding budget, and that the reimbursement of any ATE claim and payment of deferred and contingent premiums are covered by the PA. ATE premiums should likewise be factored into any outcome modelling, and ATE insurers will likely require that they be consulted on any settlements involving a "haircut" on initial sums claimed.

9.3.5. If doubts exist regarding a party's ability to satisfy a costs award, the counter-party may seek security for costs. The counter-party is especially likely to seek security for costs in cases where the party is not self-funding the arbitration (e.g., where a contingency arrangement or TPF arrangement is in place), or where there are serious questions as to whether the party asserting the claim is impecunious and therefore would be unable to satisfy an adverse cost award should one arise. In those instances, purchasing an ATE policy may prove a less costly alternative to depositing security with the tribunal. If doubts exist over whether the ATE policy provides sufficient security to the defendant (e.g., because the claimant might breach its terms), an AAE or deed can often be purchased from the insurer at a modest additional cost.

9.4. Evaluating the risks of an adverse costs award

9.4.1. A key factor in deciding whether to obtain ATE insurance is the risk that a party will be assessed with an adverse costs award. In addition to considering the relative merits of a party's claims and the counter-party's defences, one should also consider the impact that the applicable institutional arbitral rules and the law of the seat may have on a tribunal's decision to allocate costs between the parties. Further, there are differences in costs allocation approaches in commercial and investment arbitration.

9.4.2. While tribunals generally have broad discretion in how they allocate costs, the starting point for this decision may vary depending on the institutional rules adopted. For example, the default position under the London Court of International Arbitration (LCIA) Rules is that costs should "reflect the parties' relative success and failure in the award or arbitration".[1] In contrast, the 2021 International Chamber of Commerce (ICC) Rules do not provide a default position, but merely encourage the tribunal to "take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner".[2]

9.4.3. The law of the seat can also impact costs allocation. For commercial arbitrations seated in England, the default position under the English Arbitration Acts of 1996 and 2025 is that "costs follow the event", meaning an unsuccessful party will be required to pay all or at least a proportion of the successful party's costs.[3] In contrast, no statutory rule on costs allocation exists in France, which has largely adopted the UNCITRAL Model Law on International Commercial Arbitration.

9.4.4. In the context of investor-State Dispute Settlement (ISDS), the majority of tribunals historically employed a "bear your own costs" approach as the default rule. However, there appears to be a movement in more recent years by some tribunals that party conduct and relative success may impact upon cost allocation to some extent. For example, Rule 52 of the 2022 International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules states that tribunals should consider "the

[1] 2020 LCIA Rules, Article 28.4 (*"The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues . . . "*).

[2] 2021 ICC Rules, Rule 38.5 (*"In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."*).

[3] See, e.g., Sections 59-65 of the Arbitration Act 1996 which contain detailed provisions concerning the costs of arbitration, and apply unless the parties have agreed otherwise (apart from section 60, which is mandatory).

outcome of the proceeding", "the conduct of the parties during the proceeding", the "complexity of the issues" and "reasonableness" of costs when making its allocation decision.[4]

9.4.5. In practice, adverse costs awards against a respondent State appear to be more likely to follow an investor's successful pursuit of a claim, whereas adverse costs awards against an investor are more likely to be made only when the investor's claims lack legal merit, and/or the investor, and/or its counsel displays undesirable conduct in the proceedings which justifies costs being assessed against it. Despite the trend towards the "costs follow the event principle" in ISDS cases, generally speaking, the amount of costs awarded to a party in an ISDS case is still proportionately small; it almost never represents the full amount of the arbitration and legal costs incurred.

9.5. Conclusion

9.5.1. ATE insurance is an important tool to manage a party's risk against an adverse cost award and any security for cost order. The benefits of obtaining ATE insurance must be balanced carefully against the cost of such insurance and the risk of an adverse cost award being issued.

[4] 2022 ICSID Rules, Rule 52.

Part 2:
Arbitration involving a funded party

10. How much involvement does the funder have in the conduct of arbitration?

Summary guidance: Most funders take a relatively hands-off approach to the funded matter post-financing; most funders do not involve themselves in the day-to-day management of the dispute, over which the funded party, with input from its counsel, retains ultimate control. However, funders do "monitor" the case, which includes receiving regular updates on how the case is progressing and being notified of any material developments.

10.1. From a funder's perspective, they are unlikely to want to be any more involved than is necessary to protect the investment. Too much involvement by a funder can also add an extra layer of costs to the dispute.

10.2. Where the funders are experienced former disputes practitioners, they may be available to provide high-level strategic advice and project management assistance, which can be helpful for claimants, especially in the case of businesses which don't have an in-house disputes function or prior familiarity with arbitration as a dispute resolution mechanism.

10.3. At a minimum, funders will want to be involved in key decisions such as settlement discussions, and often, the choice of arbitrator, mediator, counsel and/or experts. LFAs should clearly address such points and the question of control over the conduct of the proceedings.

10.4. As funders will be paying the relevant invoices for the case and managing the budget, they will inevitably be consulted on any strategic decisions that would involve a change to how the original budget is to be spent.

10.5. The level of funder's involvement in a funded case will also be slightly dictated by the funding regime and relevant local laws in a given jurisdiction. In a number of jurisdictions, historic doctrines of champerty and maintenance (which are concerned with third parties influencing the legal process) have been, or are being, phased out or relaxed so as not to restrict access to third party funding. Different jurisdictions take different approaches with relevant public policy considerations being the focus. In Australia, courts have decided third parties can both fund and control litigation. In England and Wales, courts will only still apply the doctrines of champerty and maintenance if there is evidence of impropriety (e.g., dishonesty) in the TPF arrangement. The Singapore Law Society Guidance Note on Third Party Funding, although not mandatory, suggests lawyers should advise their clients that the LFA should specify the nature and scope of the funder's role (including, *inter alia*, assisting with strategic or tactical decisions).

10.6. It is worth remembering that, because funders do not receive any reimbursement or return on their investment unless there is a recovery, their interest is aligned with the funded party in ensuring there is a successful outcome. In this way, a strategic alliance is often formed between the funder and funded party, and concerns about control in such cases should rarely arise.

11. When to disclose or raise funding issues in arbitration

***Summary guidance:** It is important for funded parties and their counsel to be aware of, and to comply with disclosure obligations relating to their funding arrangements, whether mandated by the applicable rules, the lex arbitri, or any other professional rules. Early disclosure of the existence of third-party funding, and of the identity of the funder, can avoid or mitigate the risk of a potential conflict of interest adversely affecting the progression of the proceedings.*

11.1. It is highly recommended to disclose funding as early as possible. This is required or strongly encouraged in the rules or guidance notes from various arbitral institutions.[5] By disclosing that a case is being funded and the identity of the funder, it allows parties, counsel, and arbitrators to make any disclosures that could be relevant and thereby protect the award from being challenged subsequently due to non-disclosure of funding or non-disclosure by parties, counsel and arbitrators of relationships or contact with the funder.

11.2. Often, a claimant obtains funding before the start of the arbitration. When that is the case, the disclosure of funding and identity of the funder should be disclosed when the case is commenced to the administering institution (if any), parties, counsel and arbitrators (as soon as possible when the identity of the arbitrators is known) to ensure that any conflicts of interest can be identified early. Subject to the applicable rules, the disclosure need not be set out in a pleading, such as the notice or demand

[5] *See*, e.g., ICSID Arbitration Rules (2022), Rule 14(1): "A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person. At the beginning of the arbitration or "immediately" after concluding the funding arrangement, the party is to file such notice (and any updates) with the Secretary-General, who in turn is to transmit it to the parties and any arbitrator proposed for appointment or appointed in the proceeding (Rules 14(2)-(3))."; SIAC Rules (2025), Rule 38.1: "A party shall disclose the existence of any third-party funding agreement and the identity and contact details of the third-party funder in its Notice or Response or as soon as practicable upon concluding a third-party funding agreement." *See also* ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021), para. 28: "In addressing possible objections to confirmation or challenges . . . [r]elationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award should also be considered in the circumstances of each case." *See also* SCC Policy on Disclosure of Third Parties with an Interest in the Outcome of the Dispute, Section A: "Each party is encouraged to disclose, in its first written submission in an SCC arbitration, the identity of any third party with a significant interest in the outcome of the dispute, including but not limited to funders, parent companies, and ultimate beneficial owners. Prospective or appointed arbitrators shall take the information disclosed into account in making any disclosure or statement of independence and impartiality pursuant to Article 18 of the SCC Rules. Parties are further encouraged, during the course of the arbitration, promptly to disclose the identity of any third party who acquires a significant interest in the outcome of the dispute."

for arbitration, and can be a separate disclosure via correspondence concurrent with or close in time to the commencement of the arbitration.[6]

11.3. Sometimes, funding for a case is obtained midstream during the arbitration. In that event, it is highly recommended that the party (or counsel on its behalf) disclose the new funding and identity of the funder as soon as possible, so that any necessary disclosures by other arbitration participants can be made as well. When midstream disclosure of funding is made, all parties, counsel, and arbitrators should raise any potential conflict issues or make any disclosures as soon as possible.

11.4. The existence of a funding arrangement may also require disclosure in the case of an application for consolidation of multiple proceedings or joinder of a party to a proceeding. For example, provisions were introduced in the 2025 SIAC Arbitration Rules which require the disclosure of a funding arrangement in an application for consolidation or joinder,[7] recognising that the involvement of a third-party funder in a case sought to be consolidated or party joined may impact the requisite disclosures and potential conflicts of the related cases and/or additional parties could impact the appropriateness of consolidation or joinder in certain circumstances.

11.5. While the likelihood of there being any actual conflicts due to the fact of funding is low, failure to disclose entities with a financial interest in the outcome of the case may create a risk at the award enforcement stage that can be obviated by timely disclosure. As a result, at any stage of the arbitration process when funding is obtained, it should be disclosed as soon as possible, and the arbitral tribunal should have an opportunity to make any relevant disclosures in response, if any.

[6] If a respondent is being funded by a third-party (in the broadest sense, including an insurer for example), that should be disclosed concurrent with or very close in time to the filing of the answer or responsive pleading. When disclosure of funding is made, all parties, counsel and arbitrators should raise any potential conflict issues as soon as possible upon receiving notice that a party is being funded.

[7] See, SIAC Rules 2025, Rules 16.2(e), 18.2(f) (requiring "a statement of the existence of any third-party funding agreement" in respect of any arbitrations sought to be consolidated or any party, including the additional party sought to be joined).

12. Conflicts of interest

Summary guidance: *Disclosure of a TPF arrangement may, in certain circumstances, give rise to concerns about conflicts of interest affecting, in particular, the arbitral tribunal. The existence of a putative conflict alone may not, however, result in the resignation or removal of an arbitrator if timely disclosure is made or the circumstances do not otherwise support a conclusion that the conflict of interest should lead to such an outcome.*

12.1. The involvement of a funder in an arbitration proceeding may present conflicts of interest issues in relation to an arbitrator. The most obvious, but uncommon, scenario would be that the arbitrator has a financial stake in the entity that is providing funding to a party in the arbitration, and therefore ruling in favour of the funded entity would help the bottom line of the entity in which the arbitrator has a stake. More common scenarios include where an arbitrator has been appointed or seeks appointments from claimants in different arbitrations that are funded by the same funder, or where the funder is funding other claims in which the arbitrator and/or their law firm serves as counsel. However, the fact that an arbitrator has been appointed in multiple cases where a funder is involved, but where such arbitrator has not been appointed by the funded party, does not necessarily raise any issue of conflict.

12.2. Various sources governing potential arbitrator conflicts of interest have been updated to address TPF in arbitration. In its latest iteration, the IBA Guidelines on Conflicts of Interest 2024 (IBA Guidelines) were notably amended to provide that funders to arbitration parties may, under certain circumstances, be equated to those parties for purposes of assessing potential conflicts of interest. Specifically, under the IBA Guidelines' General Standard 6(b), "[a]ny legal entity or natural person having a controlling influence on a party, 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". Accordingly, when assessing a possible conflict of interest, arbitrators must consider not only the specific parties to the proceeding but also any third-party funders or insurers involved. This presupposes that the identities of those entities have been disclosed to the arbitrator and the other parties to the proceeding, a requirement that is not universal in arbitral rules and laws.

12.3. Additionally, several institutions have amended their arbitration rules or issued guidance notes to mandate or authorise the tribunal to direct[8] disclosure of the existence of TPF. For example, Article 11(7) of the 2021 ICC Arbitration Rules imposes on the disputing parties the obligation to "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." The stated purpose for that obligation is "to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3)" to disclose any facts or circumstances concerning the arbitrator's impartiality or independence.

12.4. Article 44 of the Hong Kong International Arbitration Centre's (HKIAC) 2018 Arbitration Rules likewise requires that disputing parties disclose the identity of any funders on an on-going basis. The Singapore International Arbitration Centre (SIAC) has recently implemented the seventh edition of its Arbitration Rules, which contains a similar requirement (Rule 38) as that of Article 44 of the HKIAC Rules, and also prohibiting a party from entering any TPF arrangement after the constitution of the tribunal which may give rise to a conflict of interest and empowering the tribunal to "direct the party to withdraw from the third-party funding agreement" (Rule 38.4).

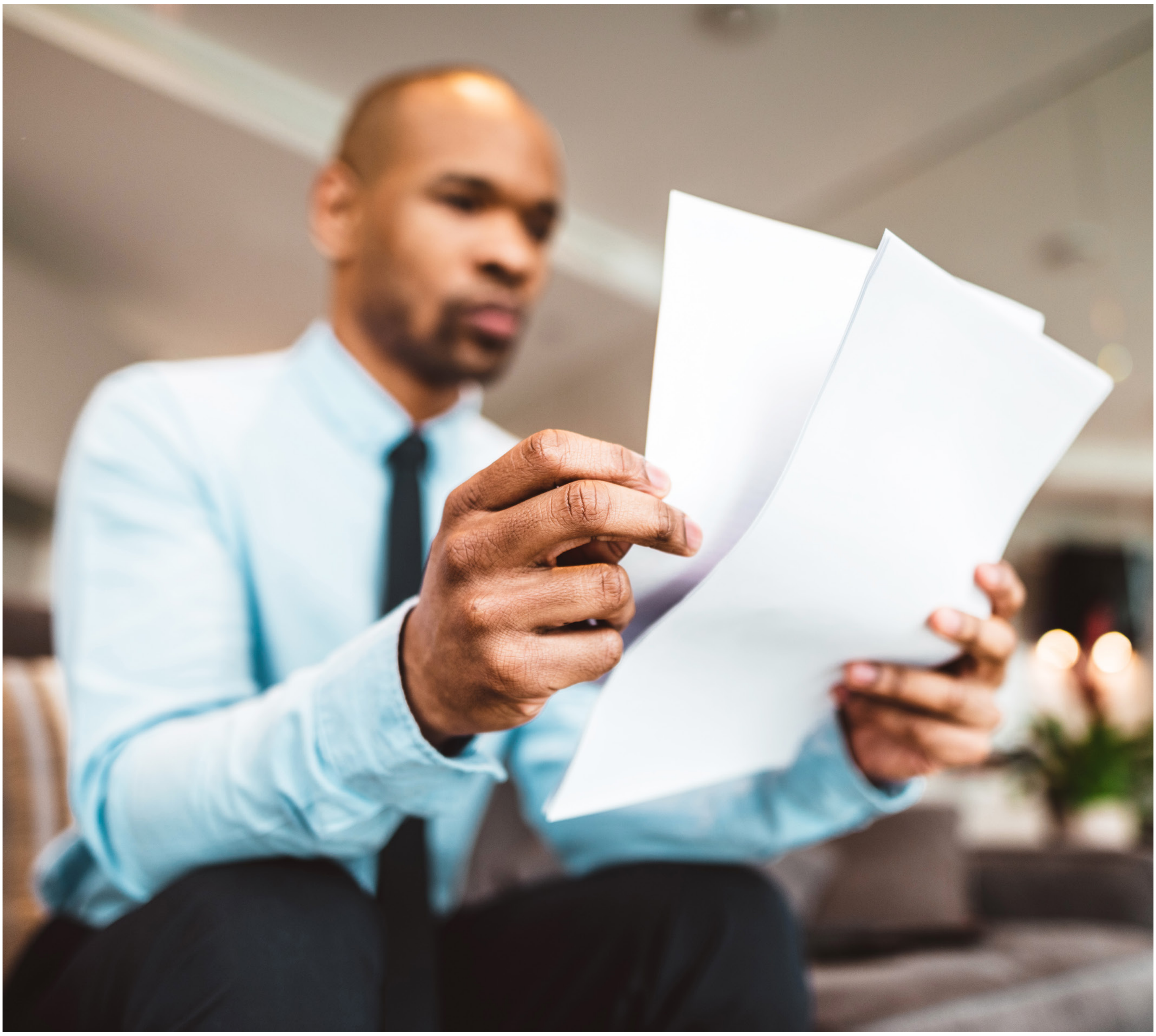
12.5. In the field of investor-State Arbitration, the 2022 ICSID Arbitration Rules provides at Rule 14 that disputing parties have an ongoing obligation to disclose the name and address of any third-party that "has received funds for the pursuit or defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding".

12.6. Although arbitral institutions tend increasingly to favour disclosure regarding the involvement of third-party funders in the cases they administer, some major arbitral institutions, such as the LCIA and the SCC, have yet to implement rules mandating such disclosures. However, disclosure may still be required depending on the applicable *lex arbitri*. For example, the Singapore legislature adopted the Legal Profession (Professional Conduct) Rules 2015, pursuant to which "a legal practitioner must disclose to the court or tribunal, and to every other party to those proceedings (a) the existence of any third-party funding contract related to the costs of those proceedings; and (b) the identity and address of any Third-Party Funder involved in funding the costs of those proceedings." Similarly, Hong Kong has passed an Ordinance No. 6 of 2017 providing that "the funded party must give written notice of (a) the fact that a funding agreement has been made; and (b) the name of

[8] See, SIAC Rules (2025), Rule 38, SIAC Practice Note 01-17.

the third-party funder." In the United States, a bill was introduced in the House of Representatives on 11 July 2024 requiring disclosure of third parties having a right to receive payment based on the outcome of a civil action. The Nigerian Arbitration and Mediation Act 2023 also expressly legitimises third-party funding of arbitrations seated in Nigeria and court proceedings relating to arbitrations in Nigeria and introduces a disclosure requirement of such third-party funding.

12.7. In sum, disclosure of the existence of and/or the identity of TPF may be warranted given the varying positions of such disclosures under institutional arbitral rules and/or the *lex arbitri* of popular seats of arbitration. The duty of disclosure may be ongoing and not limited to the pre-constitution of the tribunal. There is some uncertainty as to whether courts will enforce awards in which the arbitrations or the enforcement proceedings relating to those arbitrations involve TPF in jurisdictions that have not enacted any laws regarding the legitimacy of such funding.



13. Disclosure, confidentiality and privilege

Summary guidance: The confidentiality of a TPF arrangement may conflict with the funded party's disclosure obligations. Reconciliation of this type of conflict may be possible if regard is had to the applicable principles at an early stage.

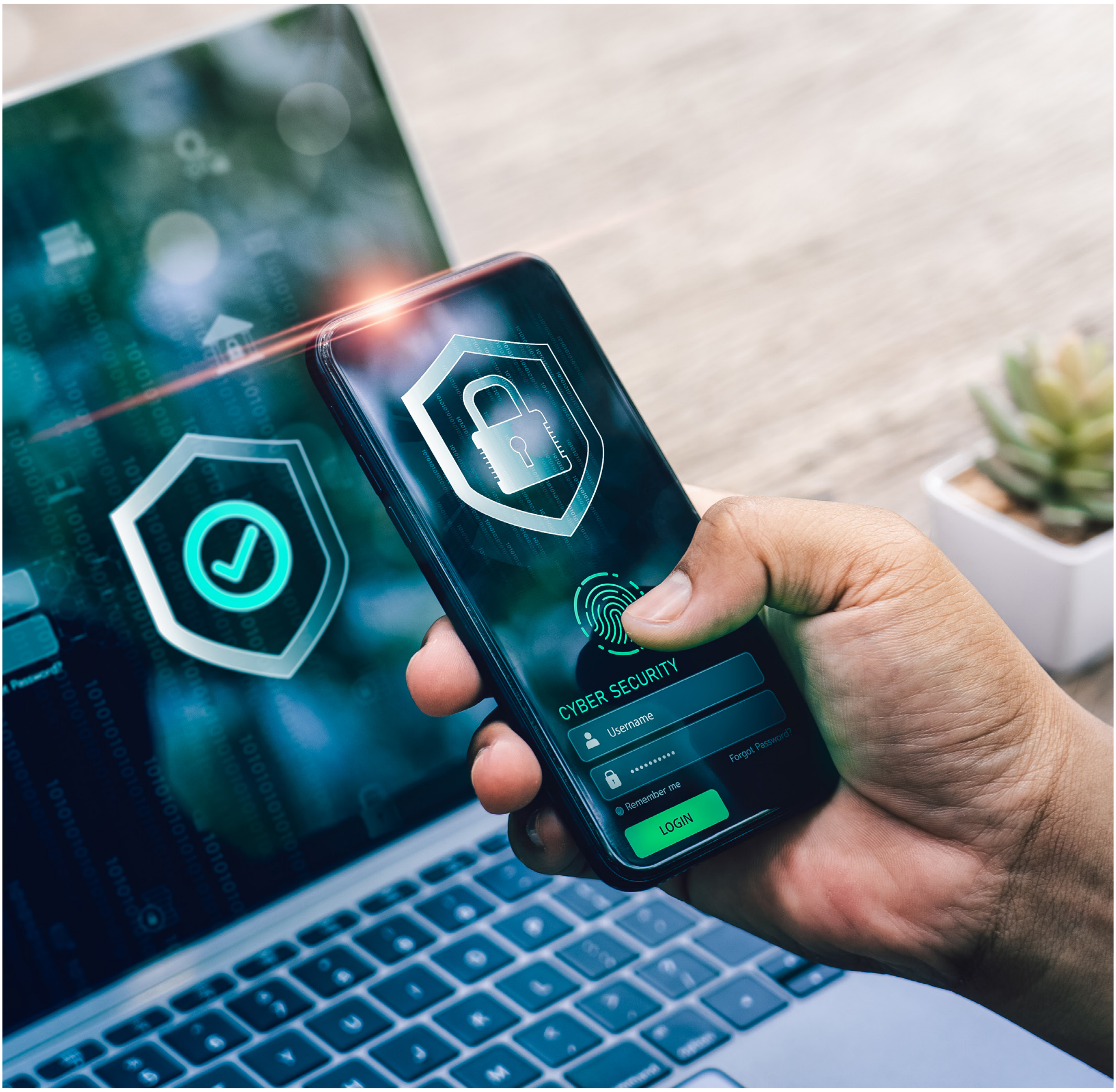
13.1. In the UK, as an example, arbitration agreements typically come with implied confidentiality obligations unless expressly excluded. However, the involvement of a third-party funder introduces an additional source of complexity to these obligations (e.g., the possibility that the entity managing the investment is a separate entity from the funder or an affiliate company). As a result, it is necessary to ensure that confidentiality provisions and the arbitral forum rules on disclosure are reconciled, and confidentiality is extended to enable communication with all interested parties in the matter, which may include brokers and insurers. Consequently, it is crucial to ensure that third-party funders preserve all information and documentation confidentiality according to the governing law.

13.2. Funders can be approached at very different stages of arbitration. As a result, they will require all the relevant information and documents to be disclosed to complete their due diligence process. Therefore, having an NDA in place before any discussions or document exchanges is important. These NDAs should clearly identify the parties to the agreement, as well as outline the scope of information covered, the funder's confidentiality obligations, and the consequences of a breach.

13.3. Due to the structure of a funding facility, the funder may need to disclose confidential information to its representatives, parent company, affiliated entities, and insurers involved in the funding process. Hence, these circumstances should be considered in the NDA. The party seeking funding may require the funder to obtain consent each time it shares confidential information with its affiliates, but this would likely frustrate the process and cause delays. Therefore, it would be more time-efficient and beneficial for all parties involved to identify those who should be within the confidentiality circle from the outset. Additionally, it might be useful to include a term about how the information will be managed once the relationship between the parties ends. It is also important to remember that once the funding is in place, monthly or quarterly disclosure might be required to inform the funder about important developments during the arbitration process. The nature and scope of these updates are usually determined under the relevant LFA.

13.4. Funders' obligation in relation to confidentiality and privilege has been highlighted under Article 7 of the ALF Code of Conduct for Litigation Funders, which states that "A funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity."

13.5. Therefore, the funders must ensure that all privileged information and documents disclosed during the funding discussions and due diligence process have been managed according to the relevant applicable law.



14. Non-party advance on costs: The institutions

Summary guidance: *Institutions will usually be reluctant to accept payment of an advance on costs or for the costs of the arbitration from a non-party, especially where a party is, or is related to, a sanctioned entity. Payment of such advances by a funder will likely require disclosure to the institution (and thereby to the other party/parties and the Tribunal) of the funding relationship.*

14.1. In the context of institutional arbitration, an "advance on costs" refers to the deposits collected by the institution and held on account to cover the anticipated or estimated costs of the arbitration. These costs will typically include the tribunal's fees and expenses, as well as the fees and expenses of the institution, but may also include other costs, such as that of a hearing or tribunal secretary, as applicable. Many institutions also offer fundholding services for *ad hoc* arbitrations, whereby the institution holds deposits on account and makes payments on the costs of the arbitration from those deposits at the direction of the parties and tribunal during the course of an arbitration.

14.2. Institutions maintain discretion on how they calculate the advance on costs, but will typically determine the maximum anticipated fees under the applicable fee structure and include an additional buffer to cover potential expenses. Additional deposits may then be collected during the course of the arbitration to take account of any changes in circumstances or claims. The deposits are then applied by the institution towards the actual costs of arbitration by way of interim and final payments to the tribunal members, as per the applicable rules and practice notes, with any unused portions being returned to the parties in proportion to their contribution at the conclusion of the arbitration.

14.3. The rules of most major arbitral institutions refer to the advance on costs being made by the parties themselves, with each party being jointly and severally liable for the costs of the arbitration. They do not generally refer to the advance on costs being accepted from non-parties or address how such payments would be treated. Despite this, most institutions will accept payments by non-parties if the source of such funding is properly disclosed, and the institution is sufficiently satisfied that the source of funding will not run afoul of any sanctions and/or anti-money laundering regimes to which they must adhere.

14.4. As a practical matter, advances on costs are often made by a parent company or other related entity, but can also be made by an insurer or third-party funder, subject to any applicable rules and practice notes, as well as the circumstances of the case. For example, as per Sections 4.2 and 15.5 of the LCIA's Guidance Note for Parties and Arbitrators, the LCIA will only accept payments made from a bank account held in the name of one of the parties to the arbitration or their legal representative, but will not accept and will return any funds received from other third parties, including third-party funders.

14.5. In order to promote transparency and avoid potential conflicts of interest, arbitral institutions typically require a party to disclose its relationship to any non-party payor and the circumstances of such payment. These checks are also required for the institutions themselves to comply with anti-money laundering obligations, ensure compliance with sanctions requirements, and obtain approvals/licenses where necessary, and avoid inadvertent disclosure of confidential information to a non-party.

14.6. The specific terms and procedures for collection of an advance on costs vary across arbitral institutions and depend on various factors, such as the number of arbitrators, complexity of the dispute, and applicable fee structure (i.e., hourly or *ad valorem*). If a party is unclear as to any requirements for acceptance of a non-party advance, they should seek guidance from the institution itself to understand not only the applicable rules, but the institution's specific processes for receiving non-party advances.

14.7. While the payment of an advance on costs is important, the return of any unused deposits must also be taken into account. As the deposits collected will likely exceed the final determination on the costs of arbitration, any unused deposits will ultimately be returned to the parties in the proportion they were received. Institutions will generally not return unused deposits to a non-party, so agreement should be reached with any non-party payor in advance as to how returned deposits will be treated at the conclusion of an arbitration.

14.8. When considering TPF and in negotiating LFAs, parties and funders alike should consider the specific requirements of the applicable institution as these may impact the funding relationship and include provisions on how non-party advances will be paid and how refunds will be treated under such relationship.

15. Security for costs and other interim relief related to funded parties

Summary guidance: *Security for costs is an interim remedy which may be ordered against a party with a claim or counterclaim, for the costs of that claim or counterclaim, where the other party can show that there is a risk that the claimant or counter-claimant may not be able to meet an adverse costs liability. The grounds on which such orders are made depend on a number of factors. While the existence of a third-party funding arrangement may prompt such an application, it does not necessarily follow that the fact a party is funded justifies the making of an order for security.*

15.1. Security for costs

15.1.1. Security for costs is a legal order requiring a party to provide financial assurance to cover the opposing party's legal costs if the claim is unsuccessful. Although English courts have been ordering security for costs against third parties, this has been only relatively recently adopted in arbitration. As a result, there has been a significant increase in the number of security for costs applications in arbitration cases.

15.1.2. The grounds for applying for security for costs will be determined by the applicable law and relevant institutional rules. While security for costs may be considered by some to be widely available in international arbitration, in practice, it is only ordered in very particular circumstances, and a party seeking security for costs from the other party is likely to have to meet a high evidential bar in order to persuade a tribunal that such an order is necessary. In arbitration cases under English law, for example, tribunals have the authority to order a claimant to provide security for costs, including both the arbitration's administrative fees and legal costs. This has been adopted by the Chartered Institute of Arbitrators (Ciarb), which has published a Guideline for dealing with applications for security for costs.[9]

15.1.3. Arbitrators should consider, at a preliminary high level the parties' prospects of success, the claimant's ability to satisfy an adverse costs award, and whether it is fair to require security. When considering the application for a security for costs order, arbitrators should be extremely careful not to prejudge or predetermine the merits of the case itself. The involvement of a third-party funder, in itself, should not

[9] Ciarb Guideline 5 on Security For Costs

be interpreted by arbitrators as an indication regarding the prospects of success on its merits. Similarly, the involvement of a third-party funder should not, in itself, be interpreted as an indication of impecuniosity or poor financial condition of the funded party.

15.1.4. Under Ciarb Guidelines, costs in arbitration should be understood as the legal costs of the parties as well as the arbitrators' fees and expenses, fees and expenses of the arbitral institution (if any) and any other costs (non-legal) of the parties.

15.1.5. Therefore, since adverse costs can be awarded against a funded party, funders may either provide indemnity to the claimant for adverse costs and hedge their risk by requiring the funded party to purchase an ATE insurance policy, including a situation in which the claimant may obtain the ATE policy directly, with the funder covering the premiums. Funders are likely to require ATE policies to have an AAE attached to it to ensure that the insurer cannot avoid or cancel the policy.

15.1.6. The typical approach of many arbitration institutions focuses on procedural predictability, relying on explicit rules that grant tribunals defined powers to order security for costs under specific conditions, such as evidence of a claimant's inability to pay. While this ensures consistency and safeguards respondents, it often lacks the flexibility to consider broader fairness or access to justice, which is central to Ciarb's framework. Ciarb's Guideline on Applications for Security for Costs[10] offer a more comprehensive approach. It encourages arbitrators to weigh factors such as the apparent preliminary strength of the claim and defence, the claimant's ability to satisfy an adverse costs award, the enforceability of such an award, any history of non-payment, and the overall balance of prejudice when assessing the merits of an application for security for costs. This approach ensures that security for costs is not used as a tool to block access to justice and gives tribunals the flexibility to consider the unique circumstances of each case, working toward a fair and balanced outcome.

15.2. Recovery of TPF costs: relevant case law

15.2.1. In certain circumstances, tribunals can include TPF costs as part of a costs award in arbitration. As a result, the successful party may retain a more significant portion, or in some cases, the entirety of their awarded proceeds. By way of illustration, this principle was established in the UK in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)*, where the English

[10] Ciarb Guideline 5 on Security For Costs

court recognised a tribunal's discretion to award TPF costs. It was later reaffirmed in *Tenke Fungurume Mining S.A. v Katanga Contracting Services S.A.S. [2021] EWHC 3301 (Comm)*. In Essar, the respondent challenged the award under section 68 of the English Arbitration Act 1996, arguing that the sole arbitrator had exceeded his powers by including TPF costs as part of the award. The challenge, however, was unsuccessful. The judge held that the tribunal indeed had the authority to award such costs, relying on section 59(1)(c) of the Act, which refers to the "legal or other costs of the parties." The phrase "other costs" was thus given a broad interpretation, allowing it to encompass TPF expenses. A key factor was the tribunal's finding that the defendant deliberately placed the claimant in a dire financial position, leaving the claimant with no practical choice but to seek external funding. It is, therefore, a welcome development that English-seated arbitral tribunals have the discretion to award TPF costs. Nonetheless, whether such costs are ultimately granted depends heavily on the particular circumstances of each case. This approach stands in contrast to English court litigation, where the narrow definition of costs provided under Part 44 of the Civil Procedure Rules does not allow for the recovery of TPF costs.

15.2.2. Tribunals may also incorporate ATE insurance premiums into TPF costs, viewing them as essential and integral elements. Tribunals examine the reasonableness of these costs, as illustrated in the Essar case, where the awarded TPF costs were three times the amount of the claimant's legal and arbitration expenses.

15.2.3. Therefore, funding costs may be recoverable if the funded party can demonstrate to the tribunal that both the necessity of resorting to TPF and the amount of those funding costs are reasonable under the circumstances, and where the recovery of such costs comes within the scope of the tribunal's discretion as a matter of the law of the seat, or under the applicable institutional rules.

16. Case management involving a funded party: Jurisdiction, timetable, and settlement facilitation

Summary guidance: The LFA should require the funded party, through its legal counsel, to provide regular updates to the funder about developments in the proceedings.

16.1. It is in the collective interest of the funder, the funded party, and its legal counsel for the funder to be updated regularly about developments in the underlying proceeding. Each has an interest in assessing the impact of substantive developments in the proceeding on the likelihood of success on the merits of the claims brought in the proceeding. Additionally, each has an interest in assessing the impact of procedural developments in the arbitration on the overall duration and budget of the proceeding.

16.2. The funder typically will provide legal counsel with a standard template to be used to report to the funder on developments in the proceeding. The template usually will require the legal counsel to provide the funder with updates about case developments in the proceeding, which should include procedural milestones being met in the arbitration and the impact of any procedural orders rendered by the tribunal on the remainder of the proceeding. The template may also require legal counsel to summarise substantive case developments that impact the strategy for pursuing the claims in the arbitration. Finally, the template usually will require legal counsel to specify the legal fees and expenses that have been incurred during the reporting period, which will be tracked against the original budget. Funders may require the provision of a satisfactory report as a condition for payment of legal fees and expenses for the reporting period.

Summary guidance: Changes to the scope of work and/or expenses that impact the budget should be agreed in writing by the funded party and the funder.

16.3. Two key elements of a budget for a funded matter are the total amount of legal fees and expenses that has been allocated for the matter, as well as the anticipated timing of those disbursements. The funded party and its legal counsel should communicate any case developments that will require revisions to the scope of legal work and/or case expenses to the funder in a timely manner. Failure to do so might result in the revised scope of legal work and/or case expenses that deviate from the budget not being covered by the funder. Material amendments to the budget for the funded matter should be agreed in writing in order to avoid subsequent uncertainty.

***Summary guidance:** Absent express provisions in the LFA, the funded party, through its legal counsel, controls the case strategy regarding prosecution of the claims in the arbitration.*

16.4. The funded party and the funder may agree in the LFA on the funder's level of input and involvement in the arbitration, including deciding the funded party's case strategy for prosecuting its claims in the arbitration. Agreements regarding the degree of control that a funder may exercise over the prosecution of the claims must comply with applicable laws, such as the laws governing the LFA, the seat of arbitration, and/or enforcement jurisdictions.

***Summary guidance:** The LFA should include express terms regarding potential settlement of the dispute.*

16.5. Settlement may occur at any stage of the proceeding or even after the tribunal renders an award. Additionally, settlement offers may be in the form of monetary compensation or other in-kind or commercial arrangements. At the very least, the funded party should be informed of any settlement discussions, including offers for settlement and terms on which the funded party may be willing to accept settlement. If the funded party and the funder agree on the settlement terms, then the proceeds from the settlement will be allocated in accordance with the LFA. Most LFAs contain a provision that if the funded party rejects a settlement offer against the advice of its legal counsel, or accepts a settlement offer that is below the threshold acceptable to the funder, then either party may refer the settlement offer to a third-party neutral who will render a binding decision on whether the settlement offer must be accepted per the terms of the LFA.

17. Costs recovery, including recovery of costs of funding: Helping the tribunal to understand the economics

Summary guidance: *In many arbitrations, the principle applied to costs is that the successful party's costs are paid by the unsuccessful party. However, the costs of funding (to a successful funded party) may not be recoverable on this basis, depending on the applicable laws and rules.*

17.1. Recovery of costs in arbitration depends on many factors, including the arbitration forum, the language of the arbitration agreement and the governing arbitration rules.

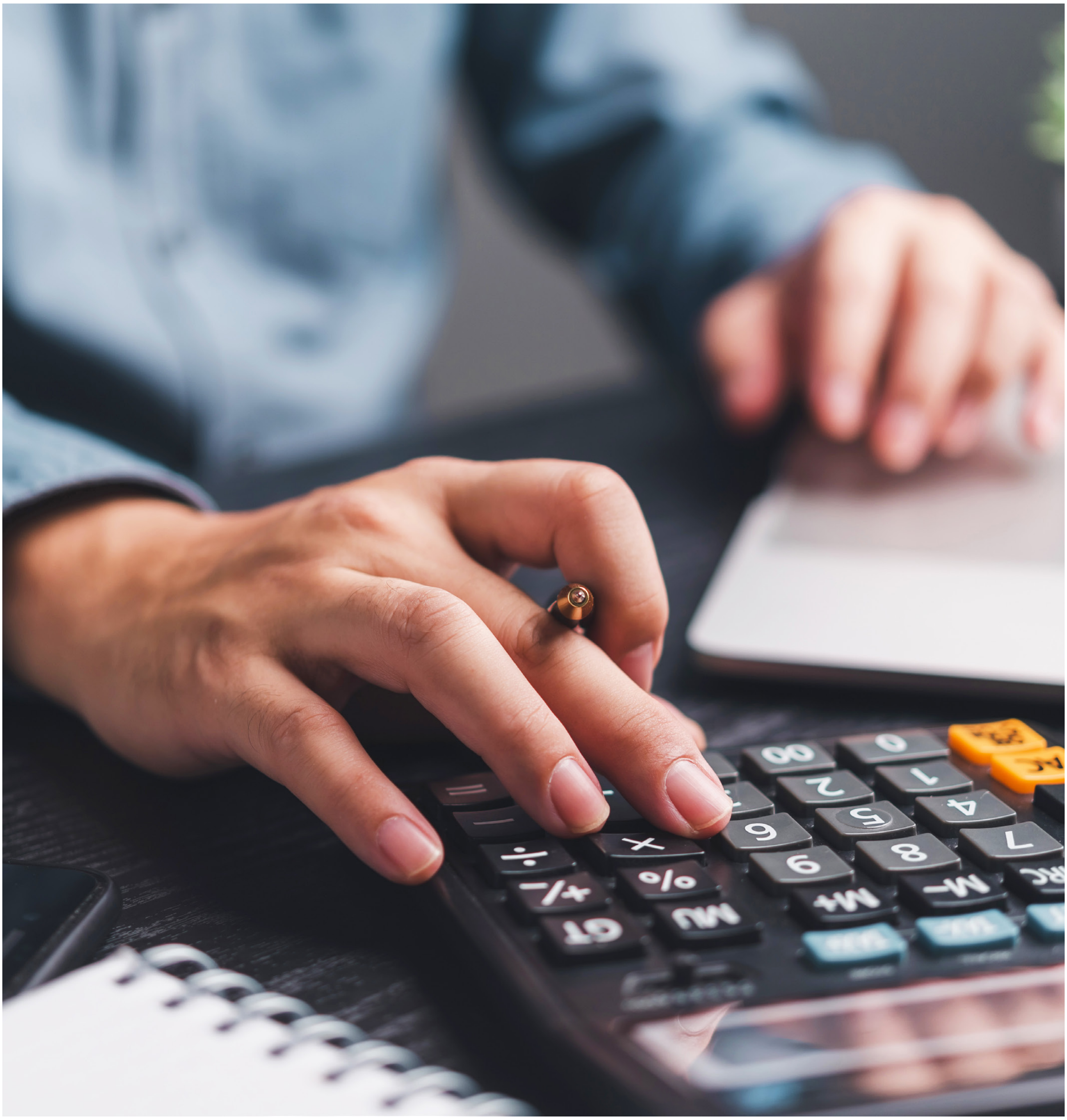
17.2. Where the arbitration forum is one where litigants typically bear their own costs, there must be a specific basis for a tribunal to have discretion to award some or all costs to a prevailing party in arbitration. Sometimes, the arbitration agreement specifically provides for the right of parties to seek arbitration costs. In the absence of such language, some arbitration rules will allow a tribunal discretion to award costs if both sides seek costs, implicitly evidencing an agreement among the parties that the tribunal has the discretion to award costs. Where the forum does not provide for recovery of costs by the prevailing party and no other circumstances support the tribunal having discretion to award costs, there may be no basis for a party to seek recovery of costs.

17.3. Assuming there is a basis to seek recovery of arbitration costs, such costs typically extend to attorneys' fees and expenses, expert fees and expenses, logistical support services (for example, translation and stenography), hearing venue costs, and the administrative costs of the arbitration. Seeking to recover the costs of TPF is an additional bucket of costs which, as set out in [Section 16] above, may be permitted in some jurisdictions.

17.4. In order to ensure that any request for payment of the funder's fee might be considered by the tribunal as part of their award, it is critical that the fact of funding is disclosed as soon as the funded party has executed its agreement with the funder. It is important that parties should check and comply with the rules and guidance governing disclosure of funding in the arbitration forum and the administering arbitral institution.

17.5. There have been examples of courts awarding the funder's fee, as well as the costs incurred in the proceedings. Such cases usually take into account the conduct of the respondent and its potential impact on the need of the claimant to obtain funding for the arbitration (see [Section 16] above).

17.6. If a claimant plans to seek recovery of the funder's fee in the arbitration, the claimant will need to be able to quantify the funder's fee amount payable at the time of the claimant's cost submissions. Ideally, the claimant should request that the funder quantify the funder's fee as of a date certain, after the end of the substantive events of the arbitration for the claimant to include in its cost submissions.



18. Settlement figure disputes

Summary guidance: Sometimes a funder and a funded party will disagree regarding the treatment of a settlement sum. The forum for resolution of such disputes should be specified in the LFA terms so that they can be resolved as quickly as possible.

18.1. Most LFAs contain a warranty by the funded party that it will act in accordance with the advice of its lawyer, and in accordance with any civil procedure rules which govern the dispute.

18.2. In addition, most funders typically include additional provisions to deal with resolving any disagreements over whether or not to settle (and for what amount). A common provision is one that provides that, in the event the funded party does not act in accordance with the advice of its lawyer about what to do with a settlement offer, the funder can refer the settlement offer to an independent lawyer (or settlement mediator), whose identity is set out in the LFA and agreed by both funded party and funder when the LFA is signed. Alternatively, the LFA may include some other form of dispute resolution clause to address this situation.

18.3. Where the disagreement is referred to a settlement mediator, the mediator will review both the merits of the case and the settlement offer made by the respondent, and will provide, in writing, their recommendation as to whether or not the settlement proposal should be accepted. The funded party and funder agree in advance to be bound by the decision of the settlement mediator.

18.4. Regardless of whether such a provision is contained in the LFA, it is usual for the funder to ask the funded party what their view of success looks like for their claim. This is a critical conversation to ensure that expectations for all parties are managed from the outset. It also informs the strategy the funded party will want to adopt with their legal advisor to maximise their chances of success in securing a settlement offer early on, and to make sure interests are aligned in achieving a successful outcome.

Should you require any further information or have any queries, please contact our Legal Team at legal@ciarb.org.

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