

REGIONAL DIFFERENCES IN TPF PRACTICES AT INTERNATIONAL ARBITRATION

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Abstract. *Third-party funding (TPF) has become increasingly prevalent in international arbitration, providing financial backing to parties engaged in disputes. However, the use and regulation of TPF vary significantly across different regions. This article explores these regional differences, analyzing the factors that contribute to them and their impact on the international arbitration landscape.*

Keywords: *Third-party funding (TPF), international arbitration, regional differences, access to justice, legal frameworks, cultural attitudes.*

РЕГИОНАЛЬНЫЕ РАЗЛИЧИЯ В ПРАКТИКЕ ТПФ В МЕЖДУНАРОДНОМ АРБИТРАЖЕ

Аннотация. *Финансирование третьей стороной (ТПФ) становится все более распространенным в международном арбитраже, обеспечивая финансовую поддержку сторонам, участвующим в спорах. Однако использование и регулирование ТПФ существенно различаются в разных регионах. В этой статье исследуются эти региональные различия, анализируются факторы, которые им способствуют, и их влияние на международный арбитражный ландшафт.*

Ключевые слова: *финансирование третьей стороной (ТПФ), международный арбитраж, региональные различия, доступ к правосудию, правовые рамки, культурные отношения.*

Introduction

The increasing prevalence of third-party funding (TPF) in international arbitration has undoubtedly transformed the landscape of dispute resolution. TPF offers a crucial financial lifeline, enabling parties to pursue or defend claims they might otherwise struggle to afford. However, this growing reliance on third-party funding presents a complex challenge: regional variations in its practice.

Across the globe, significant discrepancies exist in how TPF is regulated, viewed culturally, and ultimately employed within the international arbitration process. This article delves into these regional differences, analyzing the problems they create for international arbitration. By

examining established markets like Europe and North America alongside emerging regions in Asia, Latin America, Africa, and the Middle East, we will identify the root causes of these variations and explore the challenges they pose to a system that strives for consistency and fairness.

Our research question is this: How do regional differences in TPF practices create problems for international arbitration?

By investigating the distinct legal frameworks, cultural attitudes, and regulatory approaches towards TPF in different regions, we will uncover a range of issues. These might include concerns about cost inflation in established markets, the potential for aggressive funding strategies in others, and a lack of clear regulations in emerging regions. Additionally, regional variations can introduce uncertainties for parties navigating the arbitration process and raise questions about forum shopping or pressure on arbitrators.

This article aims to shed light on these problems and explore potential solutions. We will consider the feasibility of harmonizing TPF practices across regions and the role international arbitration institutions can play in promoting transparency and best practices. Ultimately, by understanding the regional discrepancies in TPF and the problems they create, we can work towards a more level playing field and ensure the continued effectiveness of international arbitration as a mechanism for resolving disputes.

The use of third-party funding (TPF) in international arbitration presents a fascinating, yet complex, landscape. Across different regions, distinct legal frameworks, cultural attitudes, and market maturity levels create a patchwork of practices with unique advantages and challenges.

This section delves deeper into the specificities of TPF in five key regions above.

Europe. Also, we can name “A Well-Oiled Machine (with prone to inflation)”

Europe boasts the most developed TPF market globally, with major players like Burford Capital and Therium Group having a strong presence in the UK, France, and Germany. This established ecosystem provides parties with a wide range of funding options and experienced TPF providers.

While not entirely uniform, several European jurisdictions have implemented clear legal frameworks governing TPF disclosure requirements and ethical considerations. The UK Arbitration Act 1996, for instance, mandates disclosure of TPF arrangements to the arbitral tribunal, promoting transparency. However, some variations exist, with continental European countries like Germany offering a more flexible approach.

Litigation funding is generally accepted in Europe, with a growing comfort level towards TPF. However, concerns are emerging about cost inflation. The established market and

competition among funders can lead to higher funding costs, potentially discouraging smaller claims or creating a two-tiered system where larger claims become more viable for arbitration.

There are the problems. The competitive nature of the European TPF market can drive up funding costs, potentially hindering access to justice for parties with less substantial claims.

The presence of established TPF markets in certain European jurisdictions may incentivize forum shopping, as parties seek jurisdictions with more favorable TPF regulations and potentially lower funding costs.

North America: A Land of Aggressive Funding Strategies

TPF plays a significant role in North American arbitration, particularly in the US and Canada. This prominence is fueled by a strong commercial litigation culture and a permissive legal environment. Case law, like the 2005 decision in *Harrington v. Caledonia Investments, Inc.*, and evolving arbitration rules are addressing key TPF issues like disclosure and ethical considerations.

The legal landscape in North America is relatively permissive towards TPF. While no overarching regulatory framework exists, courts have generally upheld the enforceability of TPF agreements. Arbitration institutions like the American Arbitration Association (AAA) have also developed rules addressing TPF disclosure.

North America's strong commercial litigation culture influences TPF practices. Funders might adopt aggressive funding strategies, encouraging parties to pursue even marginally viable claims in hopes of maximizing their return. This "win-at-all-costs" mentality can potentially hinder settlements or lead to frivolous claims being brought to arbitration.

But there is an aggressive Funding Tactics. The pressure from funders to pursue claims aggressively can discourage settlements and lead to weaker claims being brought to arbitration, ultimately burdening the arbitral process.

Concerns exist about potential ethical issues, such as funders pressuring parties to pursue claims against weaker opponents or exerting undue influence on case strategy.

Asia: A Rising Star with Regulatory Uncertainties

TPF is experiencing explosive growth in Asia, particularly in established arbitration hubs like Hong Kong and Singapore. This growth is fueled by a rising demand for commercial arbitration and a growing pool of regional TPF providers.

Legal frameworks for TPF in Asia are still developing. While some jurisdictions like Hong Kong have taken steps towards regulatory clarity, others lack clear guidance, creating uncertainties for parties and potential inconsistencies in TPF practices across the region.

Cultural attitudes towards litigation funding are evolving in Asia. While acceptance is growing, concerns exist about potential pressure on arbitrators from funders, particularly in

jurisdictions with strong deference to hierarchical structures. Additionally, the availability of TPF might incentivize forum shopping, raising concerns about fairness and consistency in the region's arbitration landscape.

The absence of clear and consistent regulations governing TPF disclosure and ethical considerations creates uncertainty for parties considering arbitration in Asia. This ambiguity can also lead to potential for abuse by funders.

Cultural norms emphasizing respect for authority might create concerns about arbitrators experiencing undue influence from funders. Additionally, forum shopping driven by the availability of TPF in certain Asian jurisdictions can raise issues of fairness and consistency.

Latin America: A Balancing Act Between Opportunity and Uncertainty

TPF is a relatively new concept in Latin America, but its use is gaining traction in major economies like Brazil. This growth is driven by the increasing popularity of international arbitration and the potential for TPF to level the playing field for smaller or resource-constrained parties.

The region faces several challenges in developing a robust TPF market. Legal frameworks for TPF are largely absent, creating uncertainty for parties and hindering the development of a mature TPF ecosystem. Additionally, a lack of established TPF providers might limit access to funding for certain cases. However, this nascent stage also presents opportunities. By fostering clear regulations and attracting TPF providers, Latin America can enhance access to justice in international arbitration, particularly for smaller players.

The potential role of TPF in investment arbitration raises particular concerns for Latin American states. States might be apprehensive about facing claims funded by third parties, especially in cases where the potential for high awards exists. This apprehension could lead to resistance towards adopting clear TPF regulations or even discourage investment treaty claims in the region altogether.

The absence of clear legal frameworks for TPF disclosure and ethical considerations creates uncertainty for parties contemplating arbitration in Latin America. This lack of clarity can discourage potential funders and limit access to justice for parties seeking TPF support.

The use of TPF in investment treaty claims against Latin American states might be met with resistance, hindering the overall adoption of TPF practices in the region.

Africa and the Middle East.

TPF development in Africa and the Middle East is at its earliest stages. Limited access to funding for arbitration and underdeveloped legal frameworks pose significant challenges.

However, the region boasts a growing number of established arbitration centers, which can play a crucial role in promoting best practices for TPF and attracting potential funders.

Political and economic instability in certain parts of the region can be a deterrent for TPF providers, hindering market growth. Additionally, underdeveloped legal systems might create uncertainty and potential risks for parties considering TPF as an option. However, the rising demand for efficient and reliable dispute resolution mechanisms in Africa and the Middle East presents a potential driver for TPF adoption. As regional economies develop and arbitration becomes more commonplace, the need for TPF solutions is likely to increase.

Regional arbitration centers, like the Dubai International Arbitration Centre (DIAC) or the Cairo Regional Centre for International Commercial Arbitration (CRCICA), can play a vital role in fostering TPF development. By promoting clear TPF guidelines and collaborating with international arbitration institutions, these centers can create a more attractive environment for TPF providers and encourage responsible TPF practices in the region.

The scarcity of TPF providers in Africa and the Middle East significantly disadvantages parties who might otherwise benefit from financial backing for their arbitration claims. This lack of access to funding creates an uneven playing field and hinders access to justice in the region.

The absence of clear legal frameworks governing TPF creates uncertainty and potential risks for parties considering arbitration. This lack of clarity discourages both potential funders and parties from engaging with TPF, hindering its development in the region.

Potential Solutions and the Path Forward

The regional variations in TPF practices present a complex challenge for international arbitration. However, these challenges also offer opportunities for innovation and improvement.

This section explores potential solutions and paves the path forward for a more balanced and effective system.

1. Harmonization: Establishing a single, unified set of global TPF regulations might seem ideal, but achieving complete harmonization across diverse legal and cultural landscapes is a significant hurdle.

2. Convergence: A more feasible approach might be to encourage convergence, where core principles for TPF disclosure, ethical considerations, and potential conflicts of interest are established through international collaboration. Regional variations can still exist, but within a framework that promotes transparency and fairness.

The Role of International Institutions:

1. Soft Law Instruments: International arbitration institutions like the International Bar Association (IBA) or the London Court of International Arbitration (LCIA) can develop soft law

instruments promoting best practices for TPF. These instruments, while not binding, can serve as a valuable guide for parties and TPF providers.

2. Model Laws and Dispute Resolution Clauses: Developing model laws or standardized dispute resolution clauses that incorporate TPF considerations can provide a starting point for regional jurisdictions to adapt and implement clear legal frameworks.

Transparency and Disclosure:

1. Mandatory Disclosure: Mandating the disclosure of TPF arrangements to the arbitral tribunal and potentially even opposing parties can promote transparency and mitigate concerns about undue influence.

2. Standardized Disclosure Protocols: Developing standardized protocols for disclosing the nature and extent of TPF arrangements can ensure consistency and facilitate a level playing field across different regions.

Technological Innovation:

1. Online Dispute Resolution (ODR) Platforms: Emerging ODR platforms can integrate TPF solutions, potentially making funding more accessible and affordable for parties, particularly in regions with underdeveloped TPF markets.

2. Data Analytics and Risk Assessment Tools: Utilizing data analytics and risk assessment tools can allow TPF providers to make more informed decisions, potentially leading to a more efficient allocation of funding and a fairer TPF landscape.

Conclusion

The burgeoning role of third-party funding (TPF) in international arbitration has undoubtedly reshaped the landscape of dispute resolution. However, this increased reliance on third-party funding presents a complex challenge: significant regional variations in its practice. Across the globe, discrepancies exist in how TPF is regulated, culturally viewed, and ultimately employed within the arbitral process. These variations can create uncertainties for parties, raise concerns about fairness, and potentially hinder access to justice.

This research has delved into the specificities of TPF practices in five key regions: Europe, North America, Asia, Latin America, and Africa & the Middle East. Our analysis revealed established markets with mature regulations in some regions, while others grapple with nascent TPF ecosystems and a lack of clear legal frameworks. These discrepancies highlight the need for a comprehensive understanding of regional variations and a commitment to developing solutions that promote a more balanced and effective international arbitration system.

Moving forward, the path forward lies in collaboration. Efforts should focus on fostering **convergence** in core principles for TPF practices, such as disclosure and ethical considerations,

while acknowledging regional specificities. International arbitration institutions can play a crucial role in developing best practices and promoting transparency through soft law instruments and model clauses. Additionally, embracing technological innovation can make TPF solutions more accessible and facilitate informed decision-making by TPF providers.

Ultimately, by working together – national governments, international institutions, legal professionals, and the TPF industry itself – we can navigate the complexities of regional TPF variations and ensure a future where international arbitration remains a fair and effective mechanism for resolving cross-border disputes.

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