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Third-Party Funding in International Arbitration: An Analysis of Policy Challenges and Practical Considerations

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Abstract

Third-party funding (TPF) has become a prominent feature in international arbitration, providing financial support to parties in exchange for a share of the eventual award. This paper examines the policy challenges associated with TPF and offers insights for parties, arbitral institutions, and policymakers. While TPF can enhance access to justice, reduce costs, and improve efficiency, it also raises concerns regarding conflicts of interest, confidentiality, and procedural control. The analysis explores regulatory frameworks and ethical considerations, including existing regulations and self-regulatory measures implemented by jurisdictions and arbitral institutions. Additionally, it examines ethical implications such as the impact on arbitrator independence and the duty of disclosure. Practical considerations for parties engaging in TPF are discussed, including funder selection, agreement negotiation, and conflict management. The paper underscores the role of arbitral institutions in responding to TPF and adapting their rules and procedures. Ultimately, it advocates for a balanced regulatory approach that fosters transparency, disclosure, and ethical standards while preserving the benefits of TPF in international arbitration. By addressing policy challenges and practical considerations, stakeholders can navigate TPF complexities and ensure equitable and efficient dispute resolution.

Keywords

Third-Party Funding, International Arbitration, Policy

1. What Is Third Party Funding

1.1. Definition of Third-Party Funding

Third-party funding refers to the practice of an entity providing financing to a

party involved in a legal dispute, with the expectation of receiving a return on the investment if the case is successful. In the context of international arbitration, third-party funding has become increasingly common as investors sue governments in treaty-based investor-state arbitration (ISDS).

Despite their increasing prevalence in international arbitration, the precise delineations of "third-party funding" remain subjects of substantial contention. A narrow definition covers only modern practice of case-specific non-recourse funding while a broader definition also takes account other forms of financing that are conceptually or functionally similar in the same market.

Under a narrow definition, third-party funding refers specifically to non-recourse investment provided by an unrelated third-party that is not a law firm (ICCA, 2018: p. 48)[1]. This means that the funder has no prior interest in the legal dispute, and their only interest is in providing financing to the claimant in exchange for a return on investment if the case is successful. The funder's repayment of the capital advanced and return on investment is limited to the claim proceeds recovered, if any.

However, there are also broader definitions of third-party funding that encompass other forms of financing that are functionally similar and provided in the same market for arbitration financing. This can include insurance products, legal contingency fee arrangements, philanthropic or pro bono situations, and other forms of financing where a third party provides funding for a legal dispute in exchange for a return on investment.

The precise definitions of third-party funding and third-party funders remain subject to considerable debate in the legal community, and there are varying opinions on what types of financing should be included in these definitions. Nonetheless, the use of third-party funding in international arbitration is expected to continue to grow, and it raises a range of legal and ethical issues that will need to be addressed.

1.2. The Development of Third-Party Funding in International Arbitration

Global business is an instrumental factor in the flourishing of arbitration. The increasing interconnectedness of the global economy has led to a rise in cross-border disputes, making arbitration an attractive mechanism for resolving such conflicts due to its neutrality and enforceability across jurisdictions. Multinational corporations often prefer arbitration over litigation due to its confidentiality and flexibility, allowing them to avoid potentially unfavorable or inconsistent outcomes in foreign courts. Moreover, the diversity of parties and legal systems involved in international transactions necessitates a dispute resolution mechanism that is adaptable to different cultural and legal contexts, further underscoring the relevance of arbitration in global business. Additionally, the emergence of specialized arbitral institutions and procedural rules tailored to international dis-

[1]International Council for Commercial Arbitration (ICCA) (2018), *Report of the ICCA-Queen Mary task Force on Third Party Funding in International Arbitration*, p. 48.

putes reflects the evolving needs of global businesses and contributes to the development of arbitration as a preferred method of resolving cross-border conflicts.

Third-party funding in international arbitration has been on the rise in recent years, reflecting the growth and maturity of the industry. This trend has been driven by a variety of factors, including the increasing complexity and cost of international arbitration, as well as the growing acceptance of third-party funding as a legitimate means of financing legal claims. The growth of third-party funding in international arbitration has also been accompanied by the development of a sophisticated and specialized market of funders, lawyers, and consultants. This market includes a range of players, from boutique funding firms that focus exclusively on international arbitration to large financial institutions that have expanded into the area of litigation finance.

The first known third-party funding arrangement in international arbitration dates back to the 1990s[2], but it was not until the early 2000s that third-party funding began to gain wider acceptance and use. In particular, the growth of the litigation funding industry in common law jurisdictions, such as the United States, the United Kingdom, and Australia, helped to spur the development of third-party funding in international arbitration.

Today, third-party funding has become an increasingly popular option for parties seeking to pursue international arbitration claims. According to a survey conducted by Queen Mary University of London in 2018, 37% of respondents reported having used third-party funding in international arbitration, up from 28% in 2015 (ICCA, 2018)[3].

Overall, the development of third-party funding in international arbitration has been a positive development for parties seeking to pursue complex and expensive claims. However, challenges such as enforcement issues, lack of uniformity in arbitration laws, and concerns about transparency and legitimacy persist, highlighting the ongoing need for harmonization efforts and continued innovation in arbitration practice to effectively address the needs of global business. Overall, while global business exerts a significant influence on arbitration, ongoing efforts are essential to ensure that arbitration remains a reliable and effective means of resolving international disputes in the face of evolving economic and legal landscapes.

1.3. The Participants and Procedure of Third-Party Funding

The dispute funding process involves several key players, including claim hold-

[2]The first known third-party funding arrangement in international arbitration can be traced back to the famous "Rainbow Warrior" case in 1990. In this case, the environmental organization Greenpeace did not have sufficient funds to pursue its claims against the French government and oil company in relation to the sinking of the Rainbow Warrior ship. As a result, Greenpeace obtained funding from a third-party funder, and the case proceeded to arbitration. This case is notable for being one of the earliest examples of third-party funding in international arbitration, and for raising important questions about the role and impact of third-party funders in the arbitration process.

[3]International Council for Commercial Arbitration (ICCA) (2018), *Report of the ICCA-Queen Mary task Force on Third Party Funding in International Arbitration*.

ers, funders, lawyers, and potentially funding brokers. Funding may be sought for a variety of costs related to a legal dispute, such as legal fees, out-of-pocket expenses, and costs associated with enforcement actions or appeals. Funding arrangements can be structured for a single claim or a portfolio of claims. Third-party funders, in the context of ISDS, are investment funds that invest in the potential value of treaty-based legal dispute outcomes. In exchange for financing the claim, funders take an interest in any eventual financial award on a non-recourse basis. A successful funder's business model relies on expertise in assessing legal claims, understanding how tribunals are likely to apply the law, providing case management and strategy advice, and enforcing awards.

The process and structure of third-party funding arrangements can vary widely, and there is often a high rate of rejection for cases presented to funders. While there are limited published statistics on rejection rates, anecdotal evidence and statements from some funders suggest that rates may be 90 percent or higher (ICCA, 2018: p. 25). However, as the number of funders entering the market grows and lawyers and their clients become more familiar with the requirements of funders, this rate may change.

Funders typically conduct detailed due diligence, using external counsel and potentially damages or technical experts, before making a decision to fund a claim. Approval must also be obtained from the funder's board or investment committee. The decision to fund is primarily based on the case merits, the economics of the proposed investment, and the enforceability of any award.

To be seriously considered by a funder, a potential opportunity must demonstrate a solid claim with a recoverable margin between the anticipated damages recovery and the anticipated budget for legal fees and costs. The facts, merits, parties, and their representatives all play an important role in this evaluation process.

From a practical perspective, third-party funding influences the arbitration process by providing financial support to parties involved in disputes. Typically, a party seeking funding submits their case to a third-party funder, who evaluates the merits and risks of the claim. If the funder decides to finance the case, they provide the necessary funds to cover legal fees, arbitration costs, and related expenses. Throughout the arbitration process, the funder may play an active role in strategic decision-making, including settlement negotiations and procedural choices. This involvement can range from periodic updates on case progress to more significant input on key decisions, depending on the terms of the funding agreement. Additionally, third-party funding may influence the selection of legal counsel and experts, as parties may seek advisors with experience working with funders or who are willing to accommodate funder preferences. Overall, third-party funding serves as a crucial resource for parties to pursue their claims in arbitration, shaping various aspects of the process, from case initiation to resolution.

2. Policy Debates on Third-Party Funding in Investment Arbitration

Third-party funding has become a topic of great interest in the context of in-

vestment arbitration, raising questions that go beyond the specific legal frameworks and decisions of individual cases. Due to the involvement of states, investment arbitration necessarily touches upon a range of policy issues that are different from those in private commercial disputes. Compared to international commercial arbitration, investment arbitration is expected to be more transparent, which subjects the incentives, viability, and scope of investment claims to more scrutiny and policy assessments.

Therefore, it is essential to examine whether and to what extent third-party funding aligns with the goals of modern investment treaty law. To do so, it is important to assess the impact of third-party funding on three broad categories: 1) the impact on investors; 2) the impact on states; and 3) the impact on the development of the law.

2.1. The Impact on Investors

The availability of third-party funding may lead to an increase in investment arbitration cases as it reduces the costs and risks associated with pursuing a claim. With third-party funding, claimants can convert their interests in the outcome of a claim into a more liquid form, while also transferring some or all of the litigation risk to the funder. As a result, investors may be more likely to pursue claims that they would otherwise have been unwilling or unable to pursue, thus influencing their decision-making in favor of arbitration.

Moreover, the availability of third-party funding can also have an impact on investors' decisions to remain engaged in or exit the host state. Investment treaties are typically viewed as tools for attracting and retaining foreign direct investment, but it is uncertain whether these treaties influence investment decisions in a particular host country. Furthermore, the impact of investment arbitration and its associated remedies on investment decisions to remain invested or exit and seek to cash out is not well understood.

Finally, investment arbitration can negatively affect investor retention and long-term investor-state relationships by crowding out cooperation through powerful dispute settlement mechanisms and remedies. The increased likelihood of early payout and exit can be detrimental to the long-term resilience of a project. Third-party funding may exacerbate these effects by introducing additional behind-the-scenes stakeholders who are more interested in expectation damages than non-monetary settlements, and by reducing the cost and risk to the claimant of bringing a case, making investment arbitration even more attractive than it would be without third-party funding.

2.2. The Impact on States

The availability of third-party funding can have implications for a government's ability to regulate investment in pursuit of sustainable development objectives. Governments require policy space to achieve public interest objectives and respond to changing circumstances, but they also need to avoid discouraging good faith actions taken to achieve economic, social, and environmental aims. There-

fore, it is important to examine whether and how third-party funding can increase the risks of overdeterrence, such as by targeting certain governments or types of claims and increasing the likelihood of funder-favourable outcomes.

Third-party funders may find claims in extractive industries and infrastructure particularly attractive due to their potentially large payouts. Governments that rely on private investment in these industries as a development strategy may be more susceptible to investment arbitration cases, especially if the regulatory frameworks governing them are relatively new, changing, or contentious. In these cases, investors may have a stronger hand in settlement negotiations when the threat of an investment arbitration case arises. The presence of a third-party funder may further increase the claimant's bargaining power, potentially leading to a settlement that increases the cost of maintaining the measure, deterring the government from similar actions in the future. This can be particularly problematic in the context of the extractive industry and infrastructure, where robust government regulation is necessary to mitigate potential environmental, social, and economic harms.

2.3. The Impact on the Development of Law

Third-party funding in investment arbitration has the potential to influence the development of investment law in a direction that is more favorable to funders and claimants. Rather than focusing on the issue of frivolous claims, it is important to consider whether third-party funding encourages marginal claims that stretch the reach of investment law in unintended and potentially undesirable directions, such as to primarily challenge government conduct taken in good faith to advance legitimate public interest objectives.

Moreover, funders may not necessarily be averse to risky claims, as such claims can push the development of the law in funder- or claimant-friendly directions if successful. Access to resources and sophisticated insider knowledge are also important determinants of success in investment disputes, and funders can provide both types of advantages through direct contributions of insight and expertise and via the retention of top law firms. In addition, funders can strategically support disputes in order to push the law in directions that favor their interests, and portfolio funding enables them to bundle novel long-shot cases with favorable potential for rule change together with less risky claims.

The presence of third-party funding in investment arbitration is likely to have an impact on the outcomes of particular decisions and the contours of the law, expanding the potential for claims and host state liability beyond what is desired by states and other stakeholders. Therefore, it is important to carefully consider the impact of third-party funding on the development of investment law and its potential consequences for states and other stakeholders.

3. Practical Issues of Third-Party Funding in Investment Arbitration

The RSM Production Corporation v. Saint Lucia (2014) case is considered to be

the first investment arbitration case where disclosure of third-party funding was sought. In this case, RSM Production Corporation alleged that Saint Lucia had violated its obligations under the US-Saint Lucia bilateral investment treaty, and sought damages of more than $100 million.

During the arbitration proceedings, the tribunal ordered RSM to disclose the identity of its third-party funder, as well as details about the funding arrangement, including the amount of funding received and the terms of the funding agreement. The disclosure was sought in relation to costs, not in relation to potential conflicts of interest.

One of the arbitrators, Professor Zachary Douglas, wrote an Assenting Opinion that strongly criticized the use of third-party funding in investment arbitration, describing it as a "novel phenomenon" that "raises difficult ethical and procedural questions." This Opinion led to a challenge against him by RSM, who argued that he should be disqualified from the case due to his bias against third-party funding. The claimant's grounds for the challenge were as follows:

> "The description of third-party funders as 'mercantile adventurers' and the association with 'gambling' and the 'gambler's Nirvana: Heads I win and Tails I do not lose' are, in Claimant's view, radical in tone and negative and prejudge the question whether a funded claimant will comply with a costs award. Additionally, Claimant derives from [the arbitrator's] determinations that his alleged bias against the funders extends to Claimant as the funded party as well. Claimant contends that the language used by [the arbitrator] cannot be qualified as a neutral discussion of the issues or a mere rhetorical emphasis." (RSM Production Corporation v. Saint Lucia, 2014: para. 42)

The other two arbitrators rejected the challenge for the following reasoning:

> "The expressions used by [the challenged arbitrator] in his Assenting Reasons, such as 'gambling,' 'adventurers' and the reference to the 'gambler's Nirvana' are strong and figurative metaphors. However, in our view, these expressions primarily serve the purpose of clarifying and emphasizing the point [the challenged arbitrator] purports to make, namely the paramount importance, in his opinion, of third-party funding of a party in connection with a request for security for costs. We do not regard it to be established that these terms reveal any underlying bias against third-party funders in general or Claimant in particular. The means of expressing a point of view or articulating an argument may vary from one arbitrator to another, and different arbitrators possess varied characteristics, including their habits of drafting decisions and the wording used. As long as such wording does not clearly reveal any preference for either party, it cannot serve as a ground for a challenge…. As we require an objective standard to be met, Claimant needs to establish facts indicating [the challenged arbitrator]'s lack of impartiality. However, in this case, the facts presented are that [the challenged

> arbitrator] issued his Assenting Reasons with the contents as described by Claimant. These facts, however, are as such not sufficient to constitute a lack of impartiality. The underlying arguments, as presented by [the challenged arbitrator] and the wording, in our view, do not cast reasonable doubt upon [the challenged arbitrator]'s capacity to issue an independent and impartial judgment in the present arbitration." (RSM Production Corporation v. Saint Lucia, 2014: paras. 87 and 90)

This case has been widely discussed, in large part because of its strong stance on third-party funding. In practice, third-party funding raises new issues, and the following discussion will focus on four areas: 1) control of the case; 2) confidentiality; 3) conflicts of interest and disclosure; and 4) enforcement of the award.

3.1. Who Controls the Case

The level of control that a funder may have over the arbitration and the claimant's decision-making process can be a concern for various parties involved in the proceedings. This issue may also impact the legality of the financing arrangement, particularly in common law jurisdictions where the doctrines of maintenance and champerty still exist. In practice, however, most third-party funding arrangements are structured to ensure that the funder does not exert control over the case or the claimant, as this is crucial in avoiding potential legal challenges to the funding agreement. Even in civil law jurisdictions that permit the sale or assignment of claims, many funders still adopt the common law model, although there are some cases where funds in such jurisdictions aim to purchase and aggregate claims, thereby taking over control. While third-party funding arrangements do not seek excessive control, they often contain provisions to safeguard the funder's investment. The provision of ongoing funding is subject to compliance with the terms of the funding arrangement and the merits of the case. The possibility of the funder terminating the agreement due to breach or a change in the likelihood of success may result in indirect control over the claimant.

Another issue related to control is the extent to which the funder wishes to monitor its investment actively. At a minimum, the funder may require progress reports on the case, the right to monitor fees and approve expenses, notification of significant developments, and direct access to the claimant's legal team. Some funders may play a highly active role, attending meetings and hearings, being copied on correspondence, and providing input on strategic matters. Some clients may view this active involvement by the funder as a value-added beyond the provision of capital, including budget management and legal, strategic, or technical expertise.

3.2. Confidentiality

Disclosure of privileged information is generally required for obtaining third-party

funding and maintaining a funding relationship, which may raise concerns about the potential waiver of privilege. If privileged information is shared with a third party, confidentiality and privilege are generally considered waived. This could lead to disclosure requests in arbitration proceedings or related national court proceedings. It should be noted that third-party funders are not bound by the same obligations as attorneys once they possess a client's confidential information. To mitigate the risk of waiving privilege, it is common practice to enter into non-disclosure agreements and limit the information shared early on.

Issues of privilege are particularly complex in international arbitration, where tribunals use conflict-of-laws analysis to determine which national law applies to the determination of privilege. International standards are also developing to address different potentially applicable national rules and determine when waiver has occurred.

3.3. Conflict of Interests and Disclosure

The issue of potential conflicts of interest among arbitrators has been a primary concern regarding the involvement of third-party funders in international arbitration. Questions have arisen as to whether, and to what extent, disclosures should be made to allow arbitrators, parties, and institutions to assess potential conflicts involving funders. There are several factors that contribute to increased interest in this issue, including the close relationships between a small group of law firms and funders, the concentration of the funding industry in international arbitration cases, and the increasing number of cases involving third-party funding. Potential conflicts of interest for arbitrators in funded cases can arise in a variety of scenarios. It is important to address these issues to ensure transparency and fairness in the arbitration process.

1) The scope of disclosure

Typically, arbitral tribunals order disclosure of the third-party funder's identity, but rarely require disclosure of the funding arrangement's terms, which is usually not related to arbitrator conflicts. In *South American Silver v. Bolivia* (2016), Bolivia requested that the claimant reveal the identity of the funder and the funding agreement's terms, despite the claimant previously disclosing the existence of third-party funding. Bolivia argued that disclosure and security for costs were necessary due to the claimant's financial difficulties and the third-party funding's existence. In support of its argument, Bolivia referenced the 2014 IBA Guidelines "that third-party funders should be equated with the funded party to verify the existence of conflict of interests, and that the funded party is obliged to disclose any relationship that exists between her (including third-party funders) and the arbitrators." (South American Silver v. Bolivia, 2016: para. 29).

South American Silver (SAS) agreed to disclose the name of its funder but argued that "the terms of SAS's funding agreement are irrelevant to the issues in dispute in this arbitration and that the terms of that agreement are confidential, commercially sensitive, and that SAS and the funder would incur prejudice if the Tribunal ordered SAS to disclose the terms of the funding agreement." (South

American Silver v. Bolivia, 2016: paras. 38 and 40)

The tribunal adopted the standard that "the mere existence of a third-party funder is not an exceptional situation justifying security for costs." (South American Silver v. Bolivia, 2016: para. 74). In the end, the tribunal requested disclosure of the name of the funder "for purposes of transparency, and given the position of the Parties" but determined that there was no basis to order disclosure of the terms of the funding arrangement.

2) Who bears the burden of disclosure

The general principle that funders should be disclosed poses the question of who is responsible for making such disclosures. Arbitral tribunals cannot compel third-party funders to disclose their involvement in the arbitration, as they are not parties to the proceeding. Therefore, the burden of disclosure typically falls on the parties themselves, either voluntarily or in response to a request from an arbitrator or an order from the tribunal.

For example, IBA General Standard 7 requires parties to inform arbitrators:

> "A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration...The party shall [make required disclosures] on its own initiative at the earliest opportunity…shall perform reasonable enquiries and provide any relevant information available to it."

However, parties may not be aware of every relevant fact that could give rise to a conflict of interest. For instance, they may not know if their funder has supported other cases in which the same arbitrator was appointed. Therefore, systematic disclosure is needed to ensure that arbitrators can investigate and identify potential conflicts of interest.

Some parties may argue that arbitrators have a duty to request disclosure in every case to fulfill their obligation to investigate potential conflicts. However, this duty is best exercised during the appointment process, before the tribunal is constituted. As a practical matter, most arbitrators undertake to investigate unknown potential conflicts of interest as part of their efforts to ensure a fair and effective handling of the dispute. This may include requesting disclosure of the funder's existence and identity.

Existing rules and guidelines offer two competing approaches to managing disclosure and potential conflicts with third-party funders. Some sources simply empower arbitrators to order disclosure or consider potential conflicts, while others obligate parties and their counsel to disclose the presence and identity of funders as a matter of course at the earliest possible stage.

3) Enforcement of awards

Due to the consensual nature of arbitration, arbitral tribunals typically lack jurisdiction to issue a costs order against third-party funders. These funders are not parties to the arbitration agreement and do not have a formal role in the proceedings. However, this presents an issue for prevailing states that cannot collect costs from an impecunious claimant or seek reimbursement from a third-party funder that was initially prepared to share in the risk of the claim.

The rise of third-party funding has also highlighted structural concerns regarding the increasing caseloads in investment arbitration and the potential financial strain on states. Investment treaty arbitration typically involves states as respondents and they are usually unable to bring counter-claims. As a result, even when a state wins the case, it generally does not receive compensation and has to bear the costs of its own defence. Therefore, if the availability of funding increases the number of cases brought, this could pose a unique burden on states, particularly small states and those facing domestic economic challenges.

4. A Regulatory Overview on Third-Party Funding in International Arbitration

Monitoring third-party funding in arbitration is essential for ensuring transparency, accountability, and ethical conduct throughout the process. This involves various measures, including upfront disclosure of funding arrangements, thorough due diligence on funders, careful review of funding agreements, and management of conflicts of interest. Transparency in funding terms, coupled with ongoing assessment of funding's impact on arbitration proceedings, helps maintain fairness and integrity. Compliance with regulatory requirements and adherence to ethical standards are paramount, necessitating continuous monitoring and training initiatives to promote professionalism among arbitrators, legal practitioners, and parties involved. Through these efforts, stakeholders can effectively monitor third-party funding and safeguard the credibility and efficacy of the arbitration process.

4.1. Institutional Regulations

Arbitral institutions generally have different rules and guidelines regarding third-party funding in international arbitration, but most of them require the parties to disclose the existence of third-party funding arrangements to the tribunal and the other parties.

Some institutions, such as the ICC and LCIA, have issued specific guidance on third-party funding and its disclosure, while others, such as the SIAC, have incorporated provisions on third-party funding in their arbitration rules.

In December 2015, the ICC Commission on Arbitration issued "Decisions on Costs in International Arbitration" (ICC Commission, 2015). In footnote of this report the Commission provides a different definition of a third-party funder:

> "A third-party funder is an independent party that provides some or all of the funding for the costs of a party to the proceedings (usually the clai-

mant), most commonly in return for an uplift or success fee if successful."

The Report does not require disclosure of the existence and identity of the funder, but instead provides as follows:

"The tribunal might also consider discussing with the parties, at the outset of the arbitration or during the proceedings (typically at the first case management meeting), other aspects of cost management, including… sensitive matters, such as whether there is third-party funding and …whether the identity of the third-party funder (which could be relevant to possible conflicts of interest) should be disclosed."

CIETAC suggests that parties receiving funding "shall notify in writing, without delay" to the parties, the arbitral tribunal and the administering institution the "existence and nature" of the arrangement, together "with the name(s) and address(es) of the funder(s)". (The CIETAC Investment Arbitration Rules, 2013)

In making its decision on the costs of arbitration, the arbitral tribunal has the discretion to take into account the presence of third-party funding and whether the party in question complied with the disclosure obligations regarding such funding (The CIETAC Investment Arbitration Rules, 2013).

Similarly, SIAC does not prohibit third-party funding, but requires parties to disclose the existence of any third-party funding arrangements to the tribunal and to the other parties (Singapore International Arbitration Centre Investment Arbitration Rules, 2023). The rules also allow the tribunal to take into account any third-party funding arrangements when awarding costs, and to order the disclosure of information related to the third-party funding.

Overall, the regulation of third-party funding in international arbitration by arbitral institutions aims to ensure transparency and fairness in the proceedings, while balancing the interests of the parties and the funder.

4.2. National Regulations

Different countries have taken varying approaches to regulating third-party funding in international arbitration. There are specific legal systems and regulations governing third-party funding in various jurisdictions. While some jurisdictions have embraced third-party funding and have developed comprehensive regulatory frameworks to govern its use in arbitration and litigation, others have implemented more restrictive or ambiguous regimes.

For example, jurisdictions like England and Wales, Singapore, and Hong Kong (China) have established clear legal frameworks for third-party funding, including regulations that outline permissible funding arrangements, disclosure requirements, and ethical standards. These jurisdictions typically allow third-party funding in arbitration and litigation cases, subject to certain conditions aimed at ensuring transparency, fairness, and ethical conduct.

In contrast, jurisdictions such as the United States have historically imposed restrictions or prohibitions on third-party funding, primarily due to concerns

about champerty and maintenance, which are doctrines aimed at preventing unscrupulous speculation in litigation. However, some U.S. states have started to relax these restrictions, while others still maintain prohibitions or impose stringent requirements on third-party funding arrangements.

Examples of rules and regulations related to third-party funding in international arbitration in different countries include:

England: Third-party funding is widely accepted in England and is subject to the voluntary Code of Conduct issued by the Association of Litigation Funders. The Code sets out various requirements for funders, such as ensuring that they have adequate resources to meet their funding obligations and that they do not interfere with the conduct of the arbitration.

Singapore: Singapore allows third-party funding in international arbitration in Civil Law (Amendment) Act 2017, which states "A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty."[4]

France: Third-party funding is not permitted in France for criminal proceedings or certain civil proceedings, such as family law cases. In commercial arbitration, the use of third-party funding is generally allowed, but the funder may be required to disclose their identity to the court or arbitral tribunal.

Germany: Third-party funding is generally allowed in Germany, but certain restrictions apply. For example, funders may not interfere with the conduct of the proceedings or exert undue influence over the parties. In addition, in some cases, funders may be required to disclose their identity to the court or arbitral tribunal.

United States: The use of third-party funding in international arbitration is generally permitted in the United States, but regulatory frameworks vary by state. Some states, such as New York, have established rules governing the disclosure of third-party funding arrangements, while others have not. The American Bar Association has also issued guidelines for the use of third-party funding in litigation.

Overall, the approach to regulating third-party funding in international arbitration varies by country and may depend on a variety of factors, such as cultural attitudes towards litigation funding, the nature of the legal system, and the needs of the parties involved in the arbitration.

5. Conclusion

In conclusion, the rise of third-party funding in international arbitration presents a complex array of challenges and opportunities that require careful consideration and analysis. While there have been some significant efforts to address the most pressing issues, such as conflicts of interest and security for costs, there are other

[4]Civil Law (Amendment) Act 2017, §5(b)(2).

systemic concerns that merit further exploration and debate. As this area continues to evolve and change, it is important that we engage in open and forward-looking discussions to ensure that third-party funding is properly regulated and that the interests of all stakeholders are protected. Ultimately, these issues will be of critical importance to states, investors, and other actors in the international arbitration arena, and it is essential that we approach them with the necessary rigor, attention, and care.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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