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THIRD-PARTY FUNDING: THE ROAD TO COMPATIBILITY IN INTERNATIONAL ARBITRATION

INTRODUCTION

Third-party funding has become an important resource utilized in global commerce and dispute resolution. It is an arrangement whereby an independent entity “finances the legal representation of a party involved in litigation or arbitration.”¹ Since 2012, it is estimated that the third-party funding market has increased by over five hundred percent, taking into consideration the number of active funding deals and the volume of potential cases for investment.² The rise in complex international arbitration cases has further encouraged a demand for third-party funding arrangements since the disputes involve large amounts of money in addition to high legal costs.³

In the last several years, the sentiment toward using third-party funding to finance international arbitration proceedings has shifted from reluctance to acceptance. Globally, the debate over the validity of third-party funding arrangements in inter-

1. Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 405 (2017).

2. James Delaney, *Mistakes to Avoid When Approaching Third Party Funders*, GLOBAL ARB. REV. (Apr. 15, 2014), <https://globalarbitrationreview.com/article/1033321/mistakes-to-avoid-when-approaching-third-party-funders>. Reports suggest that the global market for both litigation and arbitration is worth approximately \$10 billion and continues to grow. INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: THE ICCA REPORTS NO. 4, 17 (Apr. 2018), https://www.arbitrationica.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf; see Christopher Bogart, *Arbitration Academics Are Living in the Dark Ages*, FIN. TIMES (Oct. 16 2017), <https://amp.ft.com/content/926355de-c941-11e7-ab18-7a9fb7d6163e>. Burford Capital released that it had “over \$2 billion invested in and available to invest in the legal market.” BURFORD CAP., BURFORD QUARTERLY, 25 (Summer 2017), <https://www.burfordcapital.com/wp-content/uploads/2017/07/Burford-Quarterly-Summer-2017.pdf>.

3. William H. Knoll, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 543–44 (2000); see also *The Evolution of Judgment Enforcement: Research Reveals How Funding is Changing the Game*, BURFORD CAP. (July 7, 2016), <http://www.burfordcapital.com/blog/evolution-judgment-enforcement-research-reveals-funding-changing-game/>.

national arbitration focuses on what law governs; specifically, whether third-party funding should be regulated by domestic law, the seat of arbitration, or the place of enforcement.⁴ The heart of recent debate, however, concerns the lack of a standard framework to address third-party funding in international arbitration proceedings. There is no question that parties in international arbitration will continue to use third-party funding. It is time, therefore, to tailor the processes for addressing issues that arise when third-party funders are involved in cross-border disputes and investor-state claims.

The third-party funding industry includes entities such as specialized litigation firms, insurance companies, investment banks, and hedge funds.⁵ For a client to receive funding, a third-party funder must evaluate the merits and potential damages of the arbitration claim.⁶ If the claim has a high likelihood of success, the funder covers the cost of the arbitral proceeding, including legal and other expenses.⁷ In the event the claim is successful, the funder receives a portion of the recovered damages.⁸ If the claim is unsuccessful, however, the funder loses its investment and the client pays nothing.⁹ The funding agreement is subject to any applicable legal requirements, and it is tailored to accommodate the commercial interests of the client and the funder.¹⁰ In some instances, the third-party funder can acquire an entire judgment and retain all recovered assets in exchange for subsidizing the cost of enforcement.¹¹ The most important aspect of third-party funding, however, is that the party seeking the funding “does not pay any fees until

4. LISA BENCH NIEUWVELD & VICTORIA SHANNON, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 13 (Kluwer Law International 2d ed., 2017).

5. CATHERINE A. ROGERS, *Gamblers, Loan Sharks & Third-Party Funders*, in *ETHICS IN INTERNATIONAL ARBITRATION* 182 (2014); PIA EBERHARDT & CECILIA OLIVET, *PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM* 57 (Helen Burley ed., 2012).

6. Alexandra Dosman, *Is Third-Party Funding Responsible for N.Y.'s Thriving International Arbitration Market?*, LAW.COM (Sept. 24, 2018, 2:35PM), <https://www.law.com/newyorklawjournal/2018/09/24/is-third-party-funding-responsible-for-n-y-s-thriving-international-arbitration-market/>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See *The Evolution of Judgment Enforcement: Research Reveals How Funding is Changing the Game*, *supra* note 3.

cash proceeds are realized.”¹² In practice, given the substantial and unanticipated costs of disputes, third-party funding “enables parties with limited resources to pursue meritorious claims; reduces pressure on budgets and cashflow; reduces litigation [and arbitration] risk exposure; [and] takes legal costs and disbursements off [the] balance sheet.”¹³

This Note explores the implications of third-party funding on the practice of international arbitration, particularly with the expansion of arbitral institutions’ doctrinal rules to address the use of third-party funding. Much of the pre-existing research and literature has highlighted the issues that third-party funding poses in international arbitration proceedings, but fails to take a broader, more holistic approach to considering whether the continued use of third-party funding will change the current arbitration framework. Part I details the fundamentals of third-party funding and how it is used in the context of international arbitration. Part II provides a brief history of third-party funding, highlighting the shifting regulatory landscape of some major arbitral institutions. Part III discusses the benefits of third-party funding in international arbitration, including financing opportunities for undercapitalized parties and the potential to decrease frivolous claims, among others. Part IV analyzes the potential adverse effects of the current state of third-party funding, as it attempts to become part of a system with which it is not fully compatible. Finally, Part V provides a future outlook for third-party funding in international arbitration and proposes the creation of a Third-Party Funding Action Committee for funders, arbitral institutions, and practitioners to (1) spearhead initiatives aimed at the use of third-party funding in international arbitration disputes and (2) realize the effects that this phenomenon may have on the procedure and substance of these proceedings moving forward.

I. INTERNATIONAL ARBITRATION AND THIRD-PARTY FUNDING

Third-party funding is a familiar concept to litigation across jurisdictions, but the practice is still a developing phenomenon

12. *Id.*

13. James Carter, Jaime Curle & Dan Jewell, *Third-Party Funding: An International Outlook*, DLA PIPER (Dec. 13, 2018), <http://viewer.zmags.com/publication/1e97d32d#/1e97d32d/4>.

in international arbitration.¹⁴ A general explanation of the fundamentals of both international arbitration and third-party funding, therefore, will provide insight into the myriad ways third-party funding can be utilized in the context of international arbitration.

A. *International Arbitration*

Arbitration is “a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral adjudicatory procedures affording each party an opportunity to present its case.”¹⁵ The “neutrality” of international arbitration refers primarily to the arbitrator(s) presiding over the proceeding, but also to the place of the arbitration.¹⁶ Neutrality results in “assimilating or equating the arbitrator’s duty to be objective and independent and his duty to act, rather than as a national arbitrator, as an *international* one, immune to national prejudices and nationalistic tendencies, and open to the needs of the international community.”¹⁷ During the contracting process, parties include an arbitration clause whereby they agree to submit certain disputes, existing or future, to a private adjudicator for a final and binding decision.¹⁸

International arbitration, which involves arbitration between parties of different nationalities, has become “the principal method of resolving international disputes involving states, individuals, and corporations.”¹⁹ The two predominant types of international arbitration are international commercial arbitration, which involves disputes between private parties in international commercial transactions, and investment arbitration,

14. Valentina Frignati, *Ethical Implications of Third-Party Funding in International Arbitration*, 32 *ARB. INT'L* 505, 506 (2016).

15. GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 2 (Kluwer Law International 2d ed., 2015).

16. PIERRE LALIVE, *ON THE NEUTRALITY OF THE ARBITRATOR AND OF THE PLACE OF ARBITRATION* 32 (1984).

17. *Id.* at 32–33 (emphasis in the original).

18. NIGEL BLACKBAY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 13 (Kluwer Law International 6th ed., 2015).

19. *Id.* at 1.

which involves foreign investors asserting claims directly against states.²⁰

The growth of international arbitration is evident in the increasing caseloads of arbitral institutions and the creation of newly emerging arbitration centers.²¹ For example, the number of investment arbitration cases increased from thirty-eight cases in 1996 to four hundred and fifty known cases in 2011.²² According to an analysis of international arbitration statistics released for claims filed in 2018, almost all institutions saw an increase in claims compared to 2017, with the exception of the International Centre for Dispute Resolution (ICDR), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), and the Stockholm Chamber of Commerce (SCC).²³ A survey released by Queen Mary University of London in 2018 confirmed that arbitration is the preferred dispute resolution mechanism for cross-border commercial disputes.²⁴ The survey revealed that the five most preferred arbitral institutions are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), SIAC, HKIAC, and SCC.²⁵ Moreover, the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong, and Geneva.²⁶

Arbitration differs from litigation because it occurs by party agreement. Further, unlike litigation proceedings, a party cannot compel another to appear in court in an arbitration proceeding because the case is decided by a non-governmental ad-

20. CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 11–12 (3d ed. 2013).

21. Markus Altenkirch & Jan Frohloff, *International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions*, *GLOB. ARB. NEWS* (July 2, 2019), <https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>.

22. EBERHARDT & OLIVET, *supra* note 5, at 14.

23. *See* Altenkirch & Frohloff, *supra* note 21.

24. PAUL FRIEDLAND & STAVROS BREKOULAKIS, *QUEEN MARY U. OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION* 5–6 (2018), [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF) [hereinafter *2018 International Arbitration Survey*].

25. *Id.* at 9. A full list of arbitral institutions is available at <https://www.international-arbitration-attorney.com/arbitral-institutions-and-arbitration-courts/>.

26. *Id.*

judicatory body.²⁷ Due to the emphasis on party autonomy in arbitration proceedings, parties have greater freedom to agree on certain aspects of the procedural process, such as the seat of the arbitration, the arbitral tribunal, the scope and procedure for evidence taking, and the duration of the hearing.²⁸ While parties have great contractual freedom in arbitration, they cannot contract around rules related to an arbitrator's conflicts of interest for proceedings administered by an arbitral institution.²⁹ For ad hoc arbitrations, however, the parties determine the suitability of their arbitrators themselves, and could, although not highly advised, decide not to check for conflicts of interest.³⁰

B. Third-Party Funding

Third-party funding is “a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award, or judgment rendered against that party, or both.”³¹ The direct clients of third-party funders are the corporations, law firms, individuals, and sovereign states that initiate or defend against a claim.³² A client obtains third-party funding the same way, regardless of whether they are a claimant or respondent.³³ The client seeking third-party funding contracts with the funder³⁴ so that the funder receives a percentage or fraction of the proceeds from the case if the client prevails.³⁵ Third-party funding agreements can be centered around a single claim or a portfolio of claims.³⁶

27. BORN, *supra* note 15, at 3–4. Although the results of an arbitration are final and binding, a party must still enforce any decisions against an unsuccessful party in court. *Id.*

28. *Id.* at 11–12.

29. Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1665–67 (2013).

30. *Id.*

31. NIEUWVELD & SHANNON, *supra* note 4, at 1.

32. Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 872 (2015).

33. NIEUWVELD & SHANNON, *supra* note 4, at 2.

34. The “funder” is the entity that supplies the monetary resources.

35. NIEUWVELD & SHANNON, *supra* note 4, at 3.

36. Comm'n on Int'l Trade Law, *Possible Reform of Investor-State Dispute Settlement: Third-Party Funding*, at 2, U.N. Doc. A/CN.9/WG.III/WP.157 (2019).

In the event that the client loses the case or does not recover any money, the client does not have to repay the funder.³⁷ Consequently, the main actors involved in third-party funding arrangements are the funder, the client, and the client's lawyer.³⁸

The funder is usually an insurance company or a financial institution.³⁹ There are institutional funders that specialize in third-party funding, while others invest in litigation and arbitration claims as part of a wider portfolio of traditional financial investments.⁴⁰ The funder usually provides a plaintiff or defendant with a traditional loan or non-recourse funding, the repayment of which is contingent upon whether the funded party's claim is successful.⁴¹ Third-party funding agreements operate similarly to some insurance policies, particularly if a client retains an insurance policy with terms that provide for the insurance company to cover litigation or arbitration expenses.⁴²

Traditional insurance policies, however, usually require the insured to relinquish control over the management of the case and settlement negotiations, whereas third-party funders do not assume complete control of these processes in a case.⁴³ The funder requires the client to provide information about the case so that it can conduct a preliminary assessment of the claim or defense.⁴⁴ In some instances, the client may have to provide privileged information to the third-party funder, which may endanger privilege in the underlying proceeding.⁴⁵ The funder

37. NIEUWVELD & SHANNON, *supra* note 4, at 3.

38. Shannon, *supra* note 32, at 870.

39. *Id.* at 871.

40. Examples of third-party funders include Allianz Profess Finanz, BridgePoint Financial Services, Burford Capital Group, Calunius Capital, Fulbrook Management LLC, Global Arbitration & Litigation Services, Harbour Litigation Funding Ltd., IMF (Australia) Ltd., IM Litigation Funding, The Judge Limited, Juris Capital, Therium, Vannin Capital, and Gerchen Keller Capital.

41. Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Raneman Era*, 17 GEO. J. LEGAL ETHICS 795, 800 (2004); Shannon, *supra* note 32, at 871. Non-recourse funding is similar to a contingency fee arrangement that a client obtains from a law firm. NIEUWVELD & SHANNON, *supra* note 4, at 7.

42. NIEUWVELD & SHANNON, *supra* note 4, at 4.

43. *Id.*

44. *Id.* at 2.

45. Meriam N. Alrashid, Jane Wessel & John Laird, *Impact of Third-Party Funding on Privilege in Litigation and International Arbitration*, 6 DISP.

then analyzes the strengths and weaknesses of the claim or defense, the prospect of success on the merits, and the ability to recover from the losing party.⁴⁶ If the funder consents to finance the client's case, the funder gives the client monetary resources to pay its attorneys' fees and other evidentiary costs.⁴⁷ The client and the funder then negotiate a detailed funding agreement.⁴⁸ Depending on the law applicable to the substantive dispute and the laws of the procedural seat,⁴⁹ the funding agreement may include provisions for an adverse costs award if the funded party loses.⁵⁰

The lawyer's involvement in the third-party funding arrangement varies depending on the jurisdiction, venue, and

RESOL. INT'L 101, 102 (2012). For a more detailed explanation regarding privilege concerns in third-party funding arrangements, see *infra* Section IV.A.

46. *Id.* Some additional factors that funders consider when evaluating a claim are: (1) counsel that has been selected for the case and how they will be compensated, (2) value of the claim, (3) amount of money needed in advance, (4) issues of jurisdiction, (5) expected duration for the proceeding, and (6) settlement prospects. Brooke Guven & Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement* 5–6 (Columbia Ctr. for Sustainable Inv., Working Paper, 2019), <http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Dispute-Settlement-FINAL.pdf>.

47. Shannon, *supra* note 32, at 872.

48. NIEUWVELD & SHANNON, *supra* note 4, at 12. Although not an exhaustive list, funding agreements usually include valuation methods for calculating the maximum amount that a funder will contribute to the claim and the rate of return that the funder will receive if the claim is successful. *Id.*

49. The “procedural seat” of the arbitration, which is decided by the parties, determines the applicable procedural law, otherwise known as *lex arbitri*. Claudia Salomon & Irina Sivachenko, *When International Arbitration Becomes Domestic*, LAW360 (Nov. 14, 2018, 2:07 PM), <https://www.lw.com/thoughtLeadership/When-International-Arbitration-Becomes-Domestic>. This has important practical and legal implications, such as the role of local courts in relation to the arbitration. *Id.* Sometimes, the seat serves as the actual location where the arbitral proceedings take place (although not always, as the location of the hearing and the legal “seat” are not mutually exclusive). *Id.* If the seat and the hearing are held at the same location, parties should consider convenience and ease of physical access, the pool of available and experienced arbitrators, and the official language of the seat as well as its cultural practices. *Id.*

50. For context, “[a]n adverse costs award requires the losing party to pay some or all of the winning party’s costs of representation, which may include attorney’s fees, evidentiary costs (including those for documents and witnesses) and administrative fees (including fees of the arbitral institution).” NIEUWVELD & SHANNON, *supra* note 4, at 2.

applicable law in the case. The representing lawyer must adhere to the rules of professional responsibility and ethics of the jurisdictions in which they are licensed to practice.⁵¹ Additionally, the lawyer may be subject to certain ethical rules of the dispute resolution venue.⁵² Some ethical controversies related to the lawyer's role in a third-party funding arrangement include, but are not limited to: (1) the maintenance and champerty doctrines, (2) how much influence the funder may have over the legal representation, (3) whether lawyers may refer their clients to funders, (4) conflicts of interest involving the attorney-funder and attorney-client relationships, (5) the possible disclosure of third-party funding arrangements to the court or tribunal or to the opposing side, (6) the reasonableness of attorney's fees, (7) the funder's influence over settlement negotiations, and (8) the possible waiver of attorney-client privilege for documents and information disclosed to the funder.⁵³

Generally, parties decide to use arbitration because of the enforceability of awards,⁵⁴ the ability to avoid specific legal systems or national courts,⁵⁵ and the opportunity for parties to select arbitrators.⁵⁶ Traditionally, arbitration was considered the cheaper and quicker alternative to litigation; however, in major international disputes with millions of dollars at stake,⁵⁷ the

51. *Id.*

52. *Id.*

53. *Id.* at 7, 13–16.

54. *2018 International Arbitration Survey*, *supra* note 24, at 2, 7. It is relevant to note that if the losing party does not comply with the award, the prevailing party must seek a judgment from a court to enforce the award.

55. *Id.*

56. *Id.*

57. *See* CHARTERED INSTITUTE OF ARBITRATORS CIARB COSTS OF INTERNATIONAL ARBITRATION SURVEY 2011 1, 13 (2011), <https://www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIARB-Cost-of-International-Arbitration-Survey.pdf> [hereinafter *CIARB Costs of International Arbitration Survey 2011*]. According to the survey, the average cost of international arbitration is approximately GBP 1,580,000 (USD 2.6 million or EUR 2 million, using September 2014 exchange rates) for claimants, and approximately twelve percent less for respondents. *Id.* This survey was based on 254 arbitrations conducted between 1991 and 2010, and included data from over twenty arbitral institutions, including, but not limited to the ICC, LCIA, AAA, and SCC. *Id.*; *see also* EBERHARDT & OLIVET, *supra* note 5, at 7 (showing that in 2009/2010, 151 investment arbitration cases registered at ICSID involved corporations demanding at least USD 100 million from states).

process can become longer, costlier, and more complex.⁵⁸ This has facilitated the emergence of third-party funding in international arbitration.⁵⁹

II. HISTORY OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

Third-party funding in international arbitration is a relatively fast-developing phenomenon, forcing major arbitral tribunals to address third-party funding in their respective institutional rules.⁶⁰ The rise of third-party funding, however, has not come without obstacles. Many jurisdictions and corporate interests have sought to block or limit this practice based on old common law doctrines, such as maintenance and champerty.⁶¹ The doctrine of maintenance refers to the intermeddling of someone who provides financial assistance to either party in the action to defend a claim, when said provider holds no connection or valid interest in the claim itself.⁶² Champerty is a type of maintenance in which the intermeddler enters into an agreement with a party to the action for the sole purpose of being compensated from the proceeds of the action.⁶³

In medieval Europe, the wealthy funded the legal claims of the poor as a means to attack personal or political enemies.⁶⁴ The ideas of maintenance and champerty came into being to mitigate fears that intermeddling in litigation encourages speculative lawsuits, needlessly disrupts the peace of society, and leads to corrupt practices of law.⁶⁵ Some jurisdictions argue that third-party funding undermines traditional efforts to keep maintenance and champerty out of legal claims, since the

58. BORN, *supra* note 15, at 12, 14.

59. Susanna Khouri, Kate Hurford & Clive Bowman, *Third-Party Funding in International Commercial and Treaty Arbitration—A Panacea or a Plague? A Discussion of the Risks and Benefits of Third-Party Funding*, 8 *TRANSNAT'L DISP. MGMT.* 1, 1 (2011).

60. *See infra* notes 143, 153, 161, and 163 regarding rule propositions of major arbitral institutions.

61. NIEUWVELD & SHANNON, *supra* note 4, at 14.

62. Kerry M. Diggins, 14 *AM. JUR. 2D CHAMPERTY, MAINTENANCE, ETC.* §1 (2009).

63. *Id.*

64. Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, 76 *INT'L J. OF ARB. MEDIATION, AND DISP. MGMT.* 208, 208–13 (2010).

65. *Id.*

third-party funder (1) is not involved in the legal claim, (2) compensates a party to help further the claim, and (3) receives returns on the investment. For instance, the Supreme Court of Ireland ruled that the common law prohibitions on champerty and maintenance remain in force, thereby restricting the availability of third-party funding in that jurisdiction.⁶⁶

Traditionally, the doctrines of maintenance and champerty have been applied in litigation practices,⁶⁷ but these doctrines also extend to arbitration proceedings, even though arbitration is a private dispute resolution mechanism.⁶⁸ Although arbitration allows parties to avoid some of the constraints of appearing before a court, there are also several similarities between litigation and arbitration proceedings.⁶⁹ Arbitrators consider and decide disputes similar to judges in the national courts.⁷⁰ Further, like disputes involved before courts, arbitration, particularly international arbitration, can involve large amounts in dispute.⁷¹ Arbitral awards, moreover, are just as binding as court judgments.⁷²

Despite these similarities, it was not until 1998 that a court realized the relationship between arbitration and the doctrines of maintenance and champerty.⁷³ In the United Kingdom case *Bevan Ashford v. Geoff Yeandle*, Vice Chancellor Sir Richard Scott held that the prohibition on contingency fees extends to arbitration, stating that “the law of champerty ought to apply .

66. *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2017] IESC 27, ¶¶ 51, 54 (Ir.). The court’s decision does not address international arbitration proceedings in particular, but it will have implications for future arbitrations seated in Ireland. *Id.* The Chief Justice Denham has left the possibility of creating a modern champerty doctrine to the legislature. *Id.*

67. Diggin, *supra* note 62, §1.

68. Lisa Bench Nieuwveld, *Third Party Funding – Maintenance and Champerty – Where Is It Thriving?*, KLUWER ARB. BLOG (Nov. 7, 2011), <http://arbitrationblog.kluwerarbitration.com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/>.

69. Adejorin David Abiona, *Arbitration v. Litigation: Birds of a Feather?*, LINKEDIN (June 12, 2017), <https://www.linkedin.com/pulse/arbitration-v-litigation-birds-feather-adejorin-d-abiona-abiona>.

70. *Id.*

71. *Id.*

72. This is true for most jurisdictions that are signatories of The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959) (the “New York Convention”).

73. *See generally* *Bevan Ashford v. Geoff Yeandle (Contractors) Ltd.*, [1998] Ch 387 (Eng).

. . . to arbitration proceedings as [i]t applies to [litigation] proceedings in this court.”⁷⁴ The Vice Chancellor explained that he found it “quite impossible to discern any difference between court proceedings on the one hand and arbitration proceedings on the other that would cause contingency fee agreements to offend public policy in the former case but not in the latter.”⁷⁵ This case was pivotal in explaining that the doctrines of maintenance and champerty were derived from public policy and extended to private dispute resolution methods, including arbitration.⁷⁶

Despite Ireland’s recent stance on third-party funding arrangements, most historic rules prohibiting third parties from financing arbitration are being phased out in a number of jurisdictions,⁷⁷ thus creating opportunities for third-party funders and the parties involved in arbitrations.⁷⁸ Third-party funders are arguably different from the traditional champertor⁷⁹ because they can finance the defense side of a dispute.⁸⁰ Third-party funders also expand their investment profiles to include counterclaims and cross-claims in multiparty disputes or investment treaty arbitrations.⁸¹ As emphasized, ordinary contingency fees and traditional loans may be unable to accommodate such claims.⁸² Third-party funders, therefore, “can help level the playing field by providing funding for defendants to compete with plaintiffs’ access to both contingency fees and third-party funding.”⁸³

The rules against maintenance and champerty have been relaxed in jurisdictions such as England,⁸⁴ Australia,⁸⁵ and the

74. *Id.* at 395.

75. *Id.*

76. Although this is a case from the United Kingdom, most jurisdictions that permit third-party funding in arbitration proceedings agree with this rationale. Sherina Petit & Daniel Jacobs, *Maintenance and Champerty: An End to History Rules Preventing Third-party Funding?*, in NORTON ROSE FULBRIGHT INTERNATIONAL ARBITRATION REPORT, 9 (2016).

77. *Id.*

78. *Id.*

79. Susan Lorde Martin, *Financing Plaintiffs’ Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 75 (1999).

80. Shannon, *supra* note 32, at 876.

81. *Id.*

82. *Id.*

83. *Id.*

84. David Neuberger, *From Barratry, Maintenance and Champerty to Litigation Funding*, HARBOR LITIG. FUNDING (May 8, 2013),

United States,⁸⁶ where third-party litigation and arbitration funding is now permitted. The current sentiment among most jurisdictions is to encourage access to justice⁸⁷ and consider whether financing arrangements are contrary to public policy such that they are unenforceable.⁸⁸ For example, in England and Wales, an arrangement constitutes maintenance or champerty if there is impropriety, such as “disproportionate profit or excessive control on the part of the third-party funder,” which runs afoul of strong public policy interests.⁸⁹

The doctrines of champerty and maintenance have not deterred all jurisdictions from permitting third-party funding in international arbitration proceedings.⁹⁰ Singapore and Hong Kong are two of the most recent jurisdictions that have introduced legislation expressly allowing third-party funding in international arbitration.⁹¹ In 2013, the Hong Kong Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitrations seated in

https://www.harbourlitigationfunding.com/wpcotent/uploads/2015/09/lord_neuberger_harbour_annual_lecture_8_may_2013.pdf.

85. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1083 (2013).

86. The current regulatory landscape in the United States is unclear, since each state has its own laws regarding the permissibility of funding arrangements. NIEUWVELD & SHANNON, *supra* note 4, at 130, 158–59. It is estimated, however, that roughly three-quarters of states in the United States would declare a third-party funding arrangement valid. *Id.* The 9th Circuit also opined on this issue by stating, “[t]he consistent trend across the country is toward limiting, not expanding, champerty’s reach.” *Del Webb Comtys., Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011). More importantly, “[a]n outsider’s involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery.” *Del Webb* at 1157 (citation omitted).

87. Petit & Jacobs, *supra* note 76.

88. *Id.*

89. *Id.*

90. Zachary Krug, Charlie Morris & Helena Eatock, *Getting the Deal Through: International Arbitration*, WOODSFORD LITIG. FUNDING (Dec. 28, 2017), <https://gettingthedealthrough.com/area/94/article/29199/litigation-funding-2018-international-arbitration/>.

91. Ronnie King & Rob Palmer, *Third Party Funding of Arbitration in Singapore and Hong Kong: A Comparison*, ASHURST (Feb. 13, 2017), <https://www.ashurst.com/en/news-and-insights/legal-updates/third-party-funding-of-arbitration-in-singapore-and-hong-kong-a-comparison/>.

Hong Kong.⁹² As a result, in 2016 and 2017, the government approved amendments to the Arbitration Ordinance to provide that the doctrines of maintenance and champerty no longer apply to third-party funding of arbitration proceedings.⁹³ Further, in 2017, Singapore's parliament passed the Civil Law Amendment Act and the Civil Law (Third Party) Regulations 2017, which effectively abolished maintenance and champerty as common law torts, thus permitting third-party funding in international arbitration.⁹⁴ The Singapore Institute of Arbitrators also introduced a set of guidelines that third-party funders are expected to follow.⁹⁵ Interestingly, unlike in Singapore, the Hong Kong legislation made no distinction between domestic and international arbitration, so funding is permitted in both.⁹⁶ In October 2019, however, the Law Ministry in Singapore announced that third-party funding can be used in "domestic arbitration, certain proceedings in the Singapore International Commercial Court and mediations connected with these proceedings."⁹⁷

There has been limited discussion about the permissibility of third-party funding of arbitration or litigation in civil law jurisdictions, as these legal systems did not implement restrictions on maintenance and champerty.⁹⁸ It is predicted, however, that the "substantial use of arbitration in many civil law countries," such as those in Latin America, will soon open up the debate.⁹⁹ At the 12th annual ICC Latin American International Arbitration Conference, Lex Finance, a prominent third-party funder in Latin America, predicted investments of

92. See Arbitration and Mediation Legislation (Third Party Funding) (Amendment), (2016) Cap. 609 (H.K.) [hereinafter 2016 Hong Kong Arbitration Ordinance Amendment]. An updated version of bill was passed in 2017, with minimal changes to the original. See Arbitration and Mediation Legislation (Third Party Funding) (Amendment) (2017) Cap. 609 (H.K.) [hereinafter 2017 Hong Kong Arbitration Ordinance Amendment].

93. See 2016 Hong Kong Arbitration Ordinance Amendment, rs. 98K, 98L.

94. See Civil Law (Third Party) Regulations, (2017) Cap. 43 (Sing.).

95. *Id.* § 4.

96. See generally 2017 Hong Kong Arbitration Ordinance Amendment; see also King & Palmer, *supra* note 91.

97. Quentin Pak, *Singapore Expands the Permissibility of Third-Party Legal Finance*, BURFORD CAP. (Oct. 11, 2019), <https://www.burfordcapital.com/blog/singapore-expands-the-permissibility-of-third-party-legal-finance/>.

98. See Krug, Morris & Eatock, *supra* note 90.

99. See *id.*

more than \$16 billion in Latin American arbitration proceedings over the next several years.¹⁰⁰ Some of the most popular inquiries for third-party funding in Latin America involve civil engineering and construction matters, which require high costs related to expert valuations and long hearings.¹⁰¹ Most sectors in the region, ranging from mergers and acquisitions to intellectual property matters, however, also seek third-party funding,¹⁰² which reflects an increasing demand throughout the legal industry in line with predicted investment projections.

III. BENEFITS OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION PROCEEDINGS

Generally, an important benefit of third-party funding is that it increases access to justice for parties who cannot otherwise afford to pursue a meritorious claim.¹⁰³ Although international arbitration is often seen as a less expensive option than litigation, this is not necessarily true.¹⁰⁴ There are various fees asso-

100. Donald Hayden & Mark Migdal, *The Rise of Third-Party Funding in International Arbitration*, DAILY BUS. REV. (Dec. 28, 2017), <https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2017/12/28/the-rise-of-third-party-funding-in-international-arbitration/>.

101. Zachary Krug & Helena Eatlock, *Snapshot on Litigation Finance in Latin America*, KLUWER ARB. BLOG (Sept. 24, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/09/24/snapshot-on-litigation-finance-in-latin-america/>.

102. *Id.*

103. ABA COMM'N ON ETHICS 20/20, ALTERNATIVE LITIGATION FINANCING WHITE PAPER FILED AS INFORMATIONAL REPORT WITH HOUSE OF DELEGATES 5 (Feb.

2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_20_20/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf [hereinafter *ABA White Paper*].

104. Trusz, *supra* note 29, at 1663. Apart from fees related to legal services, experts, and discovery in domestic litigation,

parties in arbitration must pay . . . to compensate the arbitrators, a registration fee to the administering institution, and institutional fees arising during the arbitration (such as time spent on the case by the secretariat or registrar). International arbitral tribunals additionally are given discretion to shift the costs of the arbitration or the legal fees of the winning party to the losing party. Further increasing the cost of arbitration.

ciated with international arbitration proceedings that place a substantial burden on the parties, such as administrative fees of arbitral institutions, legal fees, expert fees, and compensation of the arbitrators, among others.¹⁰⁵ Third-party funding, therefore, is particularly appealing to clients¹⁰⁶ because it allows a party to pursue a claim while shifting to the funder the burden of cost and financial risk of losing.¹⁰⁷ It also allows lawyers to work on the case without the risk of nonpayment.¹⁰⁸ Jurisdictions like Australia and England have seen a rise in third-party funding due to diminished public resources to subsidize civil claims.¹⁰⁹ In support of third-party funding arrangements, the High Court of Australia noted that it is a “fundamental human right to have equal access to independent courts and tribunals.”¹¹⁰ The High Court reasoned that the judiciary should not refuse the presence of funders because, in certain circumstances without the funder’s financial resources, a client would only have a theoretical chance of bringing a claim.¹¹¹

Third-party funding in international arbitration could be especially beneficial in cases where the parties have disparate resources, such as where a claimant is up against a state party.¹¹² All persons with meritorious claims should have access to justice through arbitral proceedings.¹¹³ Third-party funding, however, is not only utilized by parties with limited financial resources.¹¹⁴ Parties with adequate financial resources may choose third-party funding as a way to manage potential finan-

105. *Id.*

106. *Id.*

107. NIEUWVELD & SHANNON, *supra* note 4, at 8.

108. ABA *White Paper*, *supra* note 103, at 4–6.

109. Khouri, Hurford & Bowman, *supra* note 59, at 4.

110. *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 ¶ 144 (Austl.).

111. *Id.*

112. Christopher Bogart, *Third-Party Financing of International Arbitration*, in *THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION*, INTERNATIONAL CHAMBER OF COMMERCE 52 (Bernardo M. Cremades & Antonias Dimolitsa ed., 2013) (describing that third-party funding is desirable since “arbitral justice is often thwarted by cost, process and risk.”).

113. *Id.* at 51 (emphasizing that arbitration finance provides “[o]pen and equal access to arbitration for parties that want to make use of it—not just in theory but also in practice—is a fundamental characteristic of any meaningful legal system.”).

114. Khouri, Hurford & Bowman, *supra* note 59, at 4.

cial risks involved with pursuing or defending a claim.¹¹⁵ Corporate legal departments and treasurers have realized the benefits of third-party funders to eliminate legal expenses from their quarterly reports.¹¹⁶ Although the corporate entity concedes a percentage of an award to the funder, the company pays no legal fees for the duration of the legal proceeding and avoids a negative balance sheet impact.¹¹⁷

Third-party funding also has the potential to decrease the prevalence of claimants bringing frivolous claims.¹¹⁸ Proponents of such a theory posit that a third-party funder will usually perform a preliminary investigation into the claim to weigh the benefits and risks involved in funding the claim.¹¹⁹ Third-party funders have teams of litigators, investors, and risk managers to determine whether a claim is viable and a good investment.¹²⁰ As a result, few claims submitted to third-

115. *Id.*

116. Dosman, *supra* note 6.

117. *Id.*

118. Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration* 7 (Grotius Centre for Int'l Legal Studies Working Paper No. 2012/1, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078358.

119. *Id.*

120. Stephen Jagusch, *Third Party Funding in International Arbitrations*, in *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* 211 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014). During the preliminary legal assessment of a claim, third-party funders will consider factors such as:

the prospects of success (including jurisdictional obstacles, the merits and defenses); possible counter-claims; the terms of the relationship between the parties including contracts, the arbitration agreement and/or investment treaty and all relevant laws; the arbitral institution and the likely or actual composition of the tribunal; the seat of the arbitration; the quantum of the claim; the opponent's known attitude towards the voluntary settlement of arbitral awards and its capacity to pay; the projected time until recovery; and the risks associated with enforcing an award (including, when considering enforcement under the New York Convention, whether the opponent has sufficient assets in a signatory state).

Id.

party funders are accepted.¹²¹ This, in turn, may contribute to a decrease in the number of frivolous and unmeritorious claims that are submitted to an international tribunal because those denied after a funding investigation likely will not proceed.¹²²

From a third-party funder's perspective, international arbitration is a promising area of investment due to the high monetary values of claims,¹²³ the speed of the proceedings,¹²⁴ and the enforceability of arbitration awards.¹²⁵ Typically, third-party funders receive between twenty to fifty percent of the recovery award.¹²⁶ There is, however, potential for a third-party funder to realize a greater return. In *Teinver v. Argentina*, Burford Capital¹²⁷ funded a claim against Argentina and received a 736 percent return.¹²⁸ Burford Capital initially invested \$13 million in the matter and sold their interest on the secondary market for \$107 million, for a gain of \$94.2 million.¹²⁹

Third-party funding provides a solution for the high cost of enforcing an award.¹³⁰ After an arbitral tribunal releases the

121. De Brabandere & Lepeltak, *supra* note 118, at 7.

122. *Id.*

123. CI Arb Costs of International Arbitration Survey 2011, *supra* note 57, at 1, 9.

124. Knull & Rubins, *supra* note 3, at 535.

125. The New York Convention gives a party legal standing to enforce a contract-based arbitration award. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. To date, the New York Convention has 160 contracting states. *Id.*; see also *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries>. Therefore, any party that obtains a judgment in their favor can take that award to any of the contracting states and seek to enforce the award. *Id.*

126. Jagusch, *supra* note 120, at 209 n.6.

127. Burford Capital promotes itself as "a leading global finance firm focused on law and the largest provider of litigation finance in the world." See *The Evolution of Judgment Enforcement: Research Reveals How Funding is Changing the Game*, *supra* note 3.

128. *Burford Annual Report 2017*, BURFORD CAP. 23 (2017), <http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>. The Respondent Argentina sought annulment following an arbitral award in favor of Teinver in excess of \$325 million. *Id.* Ultimately, the annulment committee denied Argentina's request. *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, ¶ 258 (May 29, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10552.pdf>.

129. *Burford Annual Report 2017*, *supra* note 128, at 23.

130. *2018 International Arbitration Survey*, *supra* note 24, at 5, 37.

award in a case, often times the losing party refuses to pay and the prevailing party must commence proceedings in a court to receive an order enforcing the award.¹³¹ Enforcement of arbitration awards remains a significant challenge.¹³² A 2016 Judgment Enforcement Survey administered by Burford Capital found that the costs of enforcement proceedings could amount to more than fifty percent of the trial costs.¹³³ In the last five years, eighty-six percent of the private practice lawyers who participated in the survey noted that they have at least one client that has not been paid the full value of a successful arbitration award.¹³⁴ The same survey outlined that approximately one-third of surveyed law firms indicated that their clients' combined unenforced judgments exceeded \$10 million,¹³⁵ and fourteen percent of surveyed law firms reported that their clients' combined unenforced awards were valued at more than \$50 million.¹³⁶ Third-party funding is an attractive resource to assist clients who seek to transform an arbitral award into a judgment debt eligible for payment.¹³⁷

IV. POTENTIAL ADVERSE EFFECTS OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

The availability of third-party funding results in an increase in claims that can be brought to an international arbitral tribunal,¹³⁸ which could result in a strain on tribunals in terms of capacity and availability. Third-party funding can also encourage investors to demand higher award claims.¹³⁹ This leads to arbitration proceedings being treated as business ventures, since allowing entities whose sole interest is profit to fund arbitrations may encourage the commodification of legal claims.¹⁴⁰ The existence of third-party funding could encourage artificial inflation of the damages requested in an award or settlement,

131. *Id.* at 37.

132. See *2016 Judgment Enforcement Survey*, BURFORD CAP. 2, 8 (2016), <http://www.burfordcapital.com/2016-judgment-enforcement-research-survey/>.

133. *Id.* at 8.

134. *Id.* at 2.

135. *Id.*

136. *Id.*

137. See *The Evolution of Judgment Enforcement: Research Reveals How Funding is Changing the Game*, *supra* note 3.

138. Jagusch, *supra* note 120, at 217 n.32.

139. De Brabandere & Lepeltak, *supra* note 118, at 8.

140. Jagusch, *supra* note 120, at 217.

since the funded party knows that it will ultimately split a successful award with the third-party funder.¹⁴¹

A. Impact on Arbitral Proceedings

The most problematic issues with third-party funding arise during the actual arbitral proceeding. A party that considers using a third-party funder in an international arbitration proceeding must consider various factors, such as the involvement of multiple jurisdictions, the applicable arbitral rules, the law of the seat of the arbitration, the governing law of the underlying agreements, any applicable international treaties, and the law of the jurisdiction where the award will be enforced.¹⁴² Since third-party funding in international arbitration proceedings is still a developing concept, there are various issues that parties may experience due to the lack of harmonization of the rules and protocols related to the use of third-party funding.

Liability for payment and the enforceability of awards are issues that could arise when using third-party funding in an arbitration proceeding. A party may be concerned that the opposing side is not solvent enough to pay if an award is executed against it. To ensure solvency, the party usually submits a request that the opposing side reserve a sum of money to satisfy the eventual award or costs order. Although most arbitral rules give the tribunal the power to award security costs and claims, either expressly or by implication,¹⁴³ a tribunal will often lack

141. De Brabandere & Lepeltak, *supra* note 118, at 8.

142. Mark R. Cheskin & Hans H. Hertell, *Applicable Law to the Contract, Arbitration Agreement and Arbitration Procedure*, FED. BAR ASS'N (Fall 2015), <http://www.fedbar.org/Sections/International-Law-Section/Global-Perspectives/Fall-2015/Applicable-Law-to-the-Contract-Arbitration-Agreement-and-Arbitration-Procedure.aspx>.

143. LCIA and SIAC both expressly provide these powers. London Court of International Arbitration, ARBITRATION RULES, arts. 25.1(i) & 25.2 (2014), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Singapore International Arbitration Centre, INVESTMENT ARBITRATION RULES, rs. 24(j), 24(k) (2017), <http://siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf> [hereinafter SIAC Investment Arbitration Rules]. The rules of the ICC and the United Nations Commission on International Trade Law (UNCITRAL) do not make specific references to security for costs, but it is recognized and accepted that they fall within the general power awarded to tribunals. International Chamber of Commerce, ARBITRATION RULES, art. 5 (2017), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017->

the jurisdiction to make an order for security costs against a funder because it is not a party to the arbitration agreement.¹⁴⁴ This poses a new obstacle in remedying a party's concern regarding the security for a future award in a case involving a third-party funder.

Further, with regard to the allocation of costs and related cost orders, new objections regarding the recovery of costs have emerged specifically directed toward the use of third-party funding. For instance, parties have argued that if the prevailing party uses a third-party funder, that party should be denied recovery costs since it did not bear the financial burden of the proceeding itself.¹⁴⁵ To date, this argument has not been a

Arbitrationand-2014-Mediation-Rules-english-version.pdf; United Nations Commission on International Trade Law, ARBITRATION RULES, art. 26 (2014), <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRALArbitration-Rules-2013-e.pdf>. The International Centre for Settlement of Investment Disputes (ICSID) grants tribunals the power to order provisional measures, which parties have used to seek security for costs. International Centre for Settlement of Investment Disputes, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, r. 39 (2006), <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>.

144. Stavros Brekoulakis, *The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report*, KLUWER ARB. BLOG (Feb. 18, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/02/18/the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-applications-the-icca-queen-mary-task-force-report/>.

145. See Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia, ICSID Case No. ARB/05/18 & ARF/07/15, Award, ¶¶ 679, 686 (March 3, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0445.pdf>. In this case, claimants Kardassopoulos and Fuchs requested that the court award them the costs of the proceedings and legal representation. *Id.* The Republic of Georgia argued that the claimants should not be granted these costs if they succeeded in their argument, since they were funded in part by a third party. *Id.* The court held that the claimants should be able to recover for costs, reasoning that “[i]t is difficult to see why in this case a third party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery.” *Id.* ¶¶ 691–92. See *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, ¶ 20 (Aug. 13, 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw3318.pdf>. With regard to third-party funding and security for costs, the tribunal in *RSM* stated:

the general concerns . . . should be addressed by the Administrative Council in its rule-making capacity. . . . Until the

relevant basis to deny such recovery; however, this is a new issue that tribunals will have to grapple with in cases where parties use third-party funders. Parties will also be required to use greater diligence when considering the viability of their claim because if not, a funded claimant may be able to recover not only the costs of the arbitration, but also the premium or success fee paid to the funder if they prevail.¹⁴⁶

Another issue posed by third-party funding involves whether a party's sharing of confidential or privileged information with a third-party funder waives privilege. Article 9 of the International Bar Association (IBA) Rules, which deals with the admissibility and the assessment of evidence, states:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production of any Document, statement, oral testimony or inspection for . . . legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.¹⁴⁷

This language emphasizes the need for the tribunal to balance issues of privilege, while leaving room to navigate potential conflict of laws or public policy concerns.¹⁴⁸ There is no single set of rules governing the scope of discovery and applicability of evidentiary privilege; this is something that the parties have autonomy to agree on in arbitral proceedings.¹⁴⁹ However, the application of privilege may become complicated if the parties

Administrative Council is more explicit about the matter, an individual tribunal should not be using general language of unlimited elasticity to accomplish the result which the tribunal regards as appropriate.

Id.

146. *Essar Oilfield Servs. Ltd v. Norscot Rig Mgmt Pvt* [2016] EWHC (QB) 2361 (Eng.) (upholding an award from an ICC arbitration seated in London, which awarded the claimant not only its legal costs of the arbitration, but also the cost of paying the funder the success fee on the basis that the Respondent had caused the claimant to seek funding because of its “reprehensible conduct going far beyond technical breaches of contract.”).

147. INT'L BAR ASS'N, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 9.2(b) (2010), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

148. PETER ASHFORD, *THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION: A GUIDE* 148–49 (2013).

149. Javier H. Rubinstein & Britton B. Guerrina, *The Attorney-Client Privilege and International Arbitration*, 18 J. INT'L ARB. 586, 586, 590–91 (2001).

come from jurisdictions with differing rules about privilege and the privileged evidence may be located at an additional jurisdiction.¹⁵⁰

This means that tribunals must figure out the different competing rules for privilege.¹⁵¹ Most arbitral institutions have not yet addressed the privilege issue with regard to third-party funding in their rules. The HKIAC, however, recently initiated this debate with its rules.¹⁵² In 2018, HKIAC released an updated set of rules, and, pursuant to Article 45.3(e), parties are allowed to discuss confidential information related to an arbitration “to a person for the purposes of having, or seeking, third party funding.”¹⁵³ While the issue of waiver is still a largely undecided matter among the various arbitral institutions, parties seeking funding should “ensure that all communications with funders are made pursuant to non-disclosure agreements.”¹⁵⁴

There is also potential for conflicts to arise in funded cases regarding whether disclosure of the use of a third-party funder, and the identity of the funder, is necessary to prevent conflicts. This is especially important in international arbitration because the parties have a role in appointing arbitrators,¹⁵⁵ and there is a relatively small population of practitioners “who act as both arbitrators and advocates, who themselves are/have been involved in funded matters.”¹⁵⁶ The International Bar Association (IBA) was the first organization to take a position on funding when it published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”). The IBA Guidelines state that parties shall disclose:

any relationship, direct or indirect, between the arbitrator and the party . . . or between the arbitrator and any person or

150. Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L.Q. 345, 346, 381 (2013).

151. *Id.*

152. *See* Krug, Morris & Eatlock, *supra* note 90.

153. HONG KONG INTERNATIONAL ARBITRATION CENTRE, ADMINISTERED ARBITRATION RULES, r. 45.3(e) (2018), https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf [hereinafter HKIAC Rules].

154. *See* Krug, Morris & Eatlock, *supra* note 90.

155. Yenew B. Taddele, *Why Party-Appointed Arbitrators: A Reflection*, ABYSSINIA L. (Sept. 28, 2018), <https://www.abysinialaw.com/blog-posts/item/1830-why-party-appointed-arbitrators-a-reflection>.

156. *See* Krug, Morris & Eatlock, *supra* note 90.

entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.¹⁵⁷

This was an important step in the right direction for the incorporation of third-party funding into the doctrinal rules of an organization that has substantial influence in international arbitration. Absent a rule, disclosure of third-party funding to an arbitral tribunal or an opposing party is considered voluntary¹⁵⁸ and is regulated by the funding agreement that exists between the client and the third-party funders, most of which contain a confidentiality clause that would prevent disclosure.¹⁵⁹

Nevertheless, several major arbitral institutions have followed in the footsteps of the IBA by addressing the existence of third-party funding with the obligation to disclose conflicts. The ICC addressed potential conflict disclosures for arbitrators and dictated that third-party funding is a circumstance that the arbitrator should consider as a potential conflict.¹⁶⁰ In 2017, the SIAC released Investment Arbitration Rules that specifically give arbitral tribunals the option to order disclosure of the existence of third-party funding or the identity of the funder.¹⁶¹ The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) provides guidelines that go as far as to recommend that parties disclose the use of funding to the institution “at the earliest opportunity.”¹⁶² Arti-

157. INT'L BAR ASS'N, GUIDELINES ON CONFLICTS OF INTEREST, r. 7a (2014), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918>.

158. De Brabandere & Lepeltak, *supra* note 118, at 16.

159. The relationship between a party to the arbitral proceedings and their third-party funder is controlled by a funding agreement. Trusz, *supra* note 29, at 1654–55, 1672. This funding agreement is a contract entered into between the party and the funder once the funder has decided to financially contribute to party's participation in the proceedings. *Id.* The funding agreement specifies the amount of control that the third-party funder plays in the arbitration, whether or not the funder agrees to pay adverse costs and provide security for costs, and may contain a confidentiality clause that does not allow disclosure of the existence of a funding agreement. *Id.*

160. *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, ¶ 24, INT'L COURT OF ARB. (Jan. 1, 2019), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>.

161. SIAC Investment Arbitration Rules, *supra* note 145, r. 24(l).

162. Carlos Suplicy de Figueiredo Forbes, *Recommendations Regarding the Existence of Third-Party Funding in Arbitrations Administered by CAM-*

cle 44.1 of HKIAC's rules states that if a funding agreement is made, the funded party must give (1) written notice that a funding agreement has been made, and (2) the name of the third-party funder.¹⁶³

When a third-party funder finances an arbitration proceeding, it breaks the linear client-lawyer relationship, creating a triangular client-funder-lawyer dynamic.¹⁶⁴ The funder looms in the background of the proceeding, conferring periodically with the client and the lawyer. Depending on the nature of the funding agreement, the funder may exercise almost full control over the case,¹⁶⁵ or the funder may observe the situation from the sideline.¹⁶⁶ Since every investor cares about the income received from the money invested, it is reasonable to think that most funders might want to influence the case to some degree and engage their own legal team in the process.¹⁶⁷ Ultimately, the right to decide partially passes to the one who funds the whole process.¹⁶⁸ When the client might want to settle with another party without going further with the arbitration, the funder might not be willing to agree, and instead may try to push the case forward because such a deal would not bring expected profits.¹⁶⁹ In this instance, the lawyer, who *by law* owes a fiduciary duty to the client, shifts their duty to meet the requirements of the funder, reinforcing the unique functionality of the triangular funder-client-attorney relationship.¹⁷⁰

V. FUTURE OUTLOOK

Ensuring the integrity of arbitral proceedings is of the utmost importance, and it is precisely because of this that third-party funding has come under scrutiny. It is crucial to ascertain whether any aspect of third-party funding creates a conflict of

CCBC, CTR. FOR ARB. AND MEDIATION (July 20, 2016), <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ra-18-2016-financiamento-de-terceiros-em-arbitragens-cam-ccbc/>.

163. HKIAC Rules, *supra* note 155, at rs. 44.1(a)–44.1(b).

164. NIEUWVELD & SHANNON, *supra* note 4, at 7–10.

165. This is often referred to as the “hands on” approach. *Id.* In this situation, the funder exercises almost full control over the case by deciding the arbitrator, lawyer, and the position of the party up until the final order. *Id.*

166. This is considered the “hands off” approach. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 7–14.

170. *Id.*

interest that could jeopardize the virtue of the arbitral tribunal. In its report on third-party funding, the International Council for Commercial Arbitration (ICCA) Task Force looked at the issue of third-party funding regulation and the viability of imposing international best practice guidelines.¹⁷¹ Ultimately, the ICCA provided limited guidance, instead adopting the view that less regulation of third-party funding activities would promote a greater understanding of how third-party funding works¹⁷² and facilitate consistency in dealing with the issues that third-party funding poses in international arbitration.¹⁷³ The problem with this finding, however, is that limited regulation may not be the best method to resolve how current arbitral procedures can adapt to accommodate third-party funding. Most attempts thus far to regulate third-party funding around the world have focused on one type of conduct or problem that has arisen in courts or the media, rather than addressing the phenomenon in its entirety. In the countries that do regulate third-party funding, there are a mix of regulations, ethical guidelines, and funder self-regulations, which leads to confusion about the meaning of the rules.

Regulatory attempts have been unsuccessful because the regulations often address only one aspect of third-party funding at a time, such as attorney ethical conduct¹⁷⁴ or limits on the funder's rate of return.¹⁷⁵ Funders do not conduct funding in isolation.¹⁷⁶ There are several actors involved in a third-party funding arrangement, including attorneys, clients, and funders.¹⁷⁷ Another actor that is generally overlooked is the decision-making body that adjudicates the claim, as it is the decisionmaker's final assessment that determines whether the funder gets a return on its investment and, depending on the damages, the funder's rate of return. Regulating funders alone or trying to regulate funders by regulating lawyers are both ineffective strategies.

171. See generally 2018 International Arbitration Survey, *supra* note 24.

172. See generally *id.*

173. See generally *id.*

174. NIEUWVELD & SHANNON, *supra* note 4, at 14–16.

175. *Id.* at 12.

176. Sahani, *supra* note 1, at 415.

177. *Id.*

A. *Arbitral Institution Rule Provisions*

Although several major arbitral institutions have proposed new rules to address certain aspects of third-party funding,¹⁷⁸ there is a more pressing need to regulate the interactions between all of the actors involved in a third-party funding arrangement. The ultimate goal should be to establish a standard for third-party funding relationships that ensures fairness for all involved in the system. Arbitral institutions must start by providing a standard definition of third-party funding, and the definition should consider a variety of factors.

A proposed example could define third-party funding as an agreement to fund a specific claim or defense of a legal party. Further, the third-party funder must be (1) a natural or legal entity, and (2) a party external to the underlying legal relationship in dispute. The funder is entitled to receive a monetary advantage linked to a successful award. The funder would not, however, be entitled to any monetary compensation from its client if the claim fails. Further, the attorney of the funded party should partake in the funding agreement as the primary beneficiary of the funding or trust of the proceeds. The consideration of each of these features, especially the degree of control, would depend on the particular circumstances of the case. Overall, the existence of a third-party funding structure focused on the interactions between all parties involved is necessary to increase the transparency of the process. The true utility of having a categorized regulatory framework is the ability to cross-reference transactional, procedural, and ethical regulations in an effort to achieve clarity and predictability.¹⁷⁹

B. *Third-Party Funding Action Committee*

The way to achieve clarity and predictability is through creating a Third-Party Funding Action Committee. This committee would comprise of representatives from various entities, such as arbitral institutions, funders, bar associations, practitioners, states, and investment treaty drafters, all of which have the ability to guide international arbitration proceedings. The focus of the committee would be to conduct a fact-finding phase to determine whether the elements of third-party fund-

178. See *supra* notes 143, 153, 161, and 163 regarding recent rule propositions of major arbitral institutions.

179. Shannon, *supra* note 32, at 862.

ing are working in practice, subject to the new institutional rules that have already been implemented. Great strides have been made regarding the use of third-party funding in international arbitration, but the lingering question is where to go from here.

Once the fact-finding phase is over, the committee should convene to evaluate the use of third-party funding in international arbitration proceedings, with a particular focus on whether this phenomenon is changing the pre-existing arbitration framework. This could include, but is not limited to, analyzing whether the presence of a funder causes separate procedural requirements concerning conflict checks, or whether a tribunal is more amenable to ordering security for costs. Much of the research and literature on third-party funding in international arbitration, like the ICCA Task Force's 2018 International Arbitration Survey, has highlighted the issues but failed to consider whether the continued use of third-party funding is changing the current arbitration framework. After the committee has generated an exhaustive list of elements that constitute a framework with which third-party funding can operate, the committee should report its findings in a working paper released to the public.

CONCLUSION

The use of third-party funding arrangements in international arbitration provides an example of a mechanism introduced into a system with which it is not fully compatible. It is for this reason that arbitral institutions are tasked with altering their frameworks to incorporate this funding phenomenon.

Ultimately, the client, lawyer, and funder have one common goal, which is to win the case and recover damages. The emergence and increased allowance of third-party funding in international arbitration could change the existing arbitral system. Only time and careful monitoring will reveal the ways in which the current arbitral system may need to adapt to accommodate third-party funding. To keep up with the emerging trends, some type of standardized approach needs to be realized, in which all parties involved in the funding agreement understand their respective roles. Additionally, a forum for feedback from the larger community of scholars, regulators, courts, funders, attorneys, and clients is necessary to develop and advance these ideas. It is only with diverse views and perspectives that

the legal field will be able to conclude whether the arbitral institutions' efforts regarding their rule amendments are adequate to accommodate the use of third-party funding in international arbitration, or whether a greater change to the overall arbitration framework will be necessary in the future.

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