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Third Party Funding of Investment Arbitration

Maya Steinitz, Professor of Law

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THIRD-PARTY FUNDING OF INVESTMENT ARBITRATION

Author: Maya Steinitz

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A. The Rise of Litigation Funding
B. Definition and Forms of Litigation Funding
C. The Normative Debate in Favour and Against Third-Party Funding in Investor-State Arbitration
D. Effects on the Arbitration Process
E. National Law, International Law and Soft Law
F. The Effects on the International Arbitration Bar
G. Conclusion

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A. The Rise of Litigation Funding

1 The genesis of third-party funding is usually traced to Australia, where access to justice reforms took the form of allowing both class actions and third-party funding. Australia, like other Common Law jurisdictions, traditionally prohibited champerty—a non-party funding a party's lawsuit for profit—rendering it both a crime and a tort. But beginning in the 1990s, Australian legislatures commenced loosening champerty restrictions. Cracks in the prohibition first showed up in the context of bankruptcy, where it was uncontroversial that a trustee or liquidator may assign the bankrupt's claims in return for a share of the proceeds. From there, acceptance of the practice expanded more broadly into civil litigation. The real watershed moment however, came in 2005 when, in the joint landmark cases of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* and *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*, the Australian High Court authorized third-party funding, going so far as allowing funders to control the funded litigation.

2 In the early 2000s, Canada also proceeded to authorize third-party funding of litigation to support class actions. More broadly, Canada's cost-shifting rules, which require losing claimants to pay the cost of the prevailing defendants, as well as adverse cost orders—have spurred the need on the claimant's side for the insurance-like function that third-party funders provide.

3 Meanwhile, views on champerty were evolving in its birthplace, the United Kingdom. Following gradual legislative changes and corresponding judicial decisions, 2005 brought with it a landmark case, *Arkin v Borchard Lines Ltd*. In that case, the English Court of Appeal pronounced that third-party funding is acceptable and even desirable as a way of increasing access to justice. As a result,

> [I]nternational law firms based in the United Kingdom began utilizing litigation funding or seriously considering doing so, thereby creating competitive pressures on their competitors based in the United States. As of March 2008, "[e]ight out of 10 of London's top law firms [were] already using or assessing external funding for litigation and arbitration cases, […] marking a dramatic move of third-party funding into mainstream practice (Steinitz, 2011, 1281).

Meanwhile, litigation funding was also on the rise in the world of international arbitration, where the reach of regulators who might enforce a champerty prohibition is more remote.

4 From there, the global trend of legalizing litigation finance spread like wildfire. In recent years, countries as diverse as Germany, France, Hong Kong, Singapore, South Africa, Nigeria, and Israel have all opened their doors, at least partially, to litigation finance.

5 By 2018, 'some estimates placed the size of the litigation finance market at $50-$100 billion. This market in legal claims has attracted specialist firms, private equity, hedge funds, wealthy individuals, the public (through crowdfunding platforms), and sovereign wealth funds, among others, who are looking for high-risk high-reward investments or for a cause célèbre.' (Steinitz, 2019, 1073).

6 Investment arbitration, and international arbitration more generally, was one of the earliest 'asset classes' to develop. Around the same time that funding of claims in bankruptcy emerged in

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Australia, buying up unpaid ICSID awards—also a type of debt—was the first step in the emergence of the new market in investment arbitration claims (Euler and Bianco, 2013, 558). After successfully buying up and enforcing ICSID awards against defaulting sovereigns and as an extension of their investments in sovereign debt, certain hedge funds (referred to by some, in the sovereign distressed debt context, as 'vulture funds') concluded it could be equally lucrative to 'get in' on the investment—a large claim by a foreign investor against a sovereign—earlier than at the post-award enforcement stage, when the claim was still pending or even just contemplated. And thus, a new 'asset class' was conceived—investment claims (and international arbitration more broadly)—and a new global industry emerged. According to one leading funder, 'our experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding' (Erusalimsky, 2021).

7 There are many reasons funders find investment disputes attractive. Investment arbitrations are often very large disputes, thus justifying the transaction costs involved in conducting due diligence and drafting bespoke contracts. The respondents—States—are 'deep-pockets' (even impoverished states are relatively deep-pocketed compared to individual defendants or small companies), with assets that are relatively easy to find and attach. These respondents are also repeat players in the 'game' of attracting foreign investors as well as in the international lending markets and therefore have an incentive to pay awards rendered against them in order to be considered good players in international investment and financial markets. (Again, this is relatively speaking, some unenforced ICSID awards notwithstanding). The lawyers and law firms who regularly represent clients in investment arbitration comprise a relatively small set (→ *Law Firms and International Adjudication*). This allows funders to forge repeat-play relationships with lawyers and firms who then have an incentive to be cooperative (hopefully and usually, within the bounds of their fiduciary duties to their clients) both as the case is proceeding and also at the fee collection stage. Arbitration does not allow for appeals thus eliminating a second phase of disputing that can take years. In the early days, when the legality of third-party funding in many leading economies was still very much in question, arbitration's Wild West nature—being *de facto* outside the reach of lawyers' ethics regulators (Rogers, 2002)—was an added benefit. Finally, like other forms of litigation, investment arbitration does not correlate with general economic cycles; when markets experience a downturn, as they did in 2008, deals fall apart and litigation consequently ensues. (Other forms of litigation, such as that relating to bankruptcies and employment, also increases during such times as companies go through bankruptcies and employees get laid off). This counter-cyclical nature of litigation is another attractive feature, not only for the third-party funders but also for those who invest in them in order to diversify their own portfolios. For all of these reasons, investment arbitration fits the general high-risk/high-reward business model that underlies the litigation funding industry and that attracts third-party funders (and their own investors) (Steinitz 2013).

B. Definition and Forms of Litigation Funding

1. A Surprisingly Controversial Question: What is Third-Party Litigation Funding?

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8 Third-party funding (often referred to as 'litigation finance' or 'litigation funding') is, at its core, any practice through which a non-party funds a party's litigation. The Common Law tradition helpfully distinguishes between 'maintenance' —any instance of such funding—and 'champerty', which is maintenance for a profit (Black's Law Dictionary, 2019, 262).

9 While everyone agrees with this general definition, that is often where the agreement ends. This is due to the fact that there is broad variability in the ways in which litigation funding arrangements are structured and because there is an overlap between litigation funding and other practices. Are *pro bono* legal services 'third-party funding'? Isn't insurance—the funding of *defendants'* legal costs—also a form of litigation finance? What about the contingent or conditional fees, through which lawyers effectively serve as the case's financiers in addition to serving as advocates? While these three examples all fall under the general definition of maintenance or champerty, it seems unlikely that they should be treated by legislatures, regulators, the courts, or arbitral tribunals in the same manner as third-party litigation funding. Currently, indeed, they are regarded as separate and distinct phenomena with different legislative and regulatory regimes applying to each.

10 Because there is increasing debate in multiple jurisdictions about how to regulate third-party funding, the question of how broadly or narrowly the boundaries encompassing practices relating to the funding of litigation are drawn and labelled 'third-party litigation funding' is not just conceptual but also consequential.

11 A recent report on third-party funding in international arbitration references as forms of litigation funding loans, corporate financing, equity-based and inter-corporate funding, as well as hybrids of the aforesaid (Report of the ICCA-Queen Mary Task Force, 2018). Third-party funding can even take the form of third-party funders acquiring equity—a partial, or even full, ownership stake—in a claimant entity. Also included in the same report as forms of litigation finance are specialized forms of insurance, sometimes referred to as 'before-the-event' and 'after-the-event' insurance. Both forms are specifically intended to cover the insured's liability for legal fees and costs incurred in relation to litigation. In terms of concrete examples,

> [I]n the international and transnational realm, attention grabbers include funding in the bet-the-company and bet-the-region mass torts litigation between thousands of Ecuadorian residents of the Amazon and the oil giant Chevron, and the atypical, nonprofit funding by the Anti-Tobacco Trade Litigation Fund, created by the Bloomberg Philanthropies and the Bill and Melinda Gates Foundation, which funded low- and middle-income countries that were defendants in the international investment arbitration against tobacco companies (Steinitz, 2019).

12 To illustrate the complexity and diversity of the ways in which litigation funding can take form, and the policy issues implicated, consider the case of *Phoenix Action, Ltd v Czech Republic*, (2009). In *Phoenix*, which was a treaty shopping case, no third-party funding was involved (And probably for that reason it has been overlooked by scholarship and case law on the topic of litigation funding). However, some of the common mechanics through which third-party funding can take place—namely assignment of claims and/or acquisition of a claimholder by an entity that is not an 'Investor,' as the term is defined in Bilateral Investment Treaties ('BITs') and the International Centre for Settlement of Investment Disputes ('ICSID') Convention—was at the

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heart of that case. And because the mechanics of the claim transfer in question were similar to some of those used in the third-party funding context, so was the core policy question in the case: who should be allowed to benefit from the (one-sided) protections that governments grant foreign investors through BITs and their associate dispute resolution mechanism, investment arbitration? Because of the similarities in the mechanics of the treaty shopping in *Phoenix* and of subsequent litigation funding practices, as well as the shared policy question of who should be allowed to avail themselves of the protection of BITs and of the benefits of investment dispute resolution processes—a policy question central to the entire field of international investment law—those considering third party funding of investment arbitration would benefit from including *Phoenix* in their consideration.

13 In *Phoenix*, two affiliated Czech companies (the 'Original Claimholders'), whose assets were seized by the Czech Republic, were acquired by a newly-formed Israeli company named *Phoenix. Phoenix* was wholly owned by the owner of the Original Claimholders. Said owner was being investigated by the Czech Republic for alleged tax and customs fraud. As part of that investigation, funds in bank accounts of one of the Original Claimholders was seized. The owner fled the Czech Republic to Israel, where he formed *Phoenix*. By forming a new Israeli entity and selling it the Original Claimholders, the owner attempted to create ICSID jurisdiction over what was, in essence, an entirely Czech dispute and to bring claims under the 1997 Czech Republic – State of Israel BIT. The tribunal ultimately accepted, in sum and substance, the Czech Republic's position that 'Phoenix's allegations as to a violation of its rights as a foreign investor fall outside the jurisdiction of the Tribunal mainly because "Phoenix is nothing more than an ex post facto creation of a sham Israeli entity created by a Czech fugitive from justice […] to create diversity of nationality"' (*Phoenix*, para 34).

14 The *Phoenix* tribunal also analysed the underlying fundamental policy – who gets to be protected by international investment law as embodied in the BIT regime. In accepting the Czech Republic's position, it reasoned that 'the object of the Washington Convention is to encourage and protect *international investment made for the purpose of contributing to the economy of the host State*' (*Phoenix*, para 87 (emphasis in the original)). It also admonished that 'The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with the sole purpose of taking advantage of the rights contained in such instruments, without any significant economic activity, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system. The Tribunal is of the view that if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment' ((*Phoenix*, para 93 (emphasis omitted)). In the same manner that the legitimacy of the quest of the sham entity formed in the *Phoenix* case to benefit from the ICSID/BIT regime was central in that case, the question of whether it is legitimate that third party funders, who do not perform any economic activity in the host states but rather enter the picture only after a dispute relating to an existing investment emerges, now benefit from investment arbitration has become central to the critiques of the entire phenomenon of third party funding of investment arbitration. (These critiques are discussed below (section C)).

2. Single Case Funding, Portfolio Funding, and Law Firm Funding

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15 The conceptual difficulty in defining what does and what does not constitute litigation finance notwithstanding, there is a consensus that two forms of funding are paradigmatic forms of litigation funding. One, which originated in Australia and the United Kingdom (see above) and became globally prevalent in the aftermath of the 'Great Recession', and another, which became commonplace in the very recent past and which can be regarded as a 'second wave' of litigation finance. The first, is for-profit funding, often by specialized litigation funding firms, of single cases through arrangements in which the funding is provided by the funder directly to the claimant. These arrangements are generally structured as non-recourse financing, namely the funder is not entitled to a return of its principal if the suit is unsuccessful. Funder's return is contingent upon the success of the lawsuit and is usually calculated as a percentage of the ultimate judgment, award, or settlement.

16 The second is the funding of portfolios (also referred to as 'pools') of cases. This form of funding emerged as a main mechanism through which funders contract with and provide the funding directly to law firms. The diversification that the portfolio provides, as well as the fact that it is often used to contract directly with law firms rather than with the claimant, is understood to reduce the risk for funders, thereby enhancing the economic efficiency of the funding arrangement as a whole. Portfolios of cases can however, also be put together by a business, or some other entity such as a government, that serves as the client and engages with the funder for the funding directly, though this appears to be less common. 'Structuring finance around multiple claims under either model usually involves some form of cross-collateralization, meaning that the funder's return is dependent upon the overall net financial performance of the portfolio as opposed to the outcome of each particular claim.' (Report of the ICCA-Queen Mary, 2018, 38) Whether portfolio funding is permissible, or whether it violates certain rules of professional conduct such as prohibition on fee sharing between lawyers and nonlawyers, is an issue of much controversy (NYC Task Force, 2020).

17 A related, expanding practice is that of investing directly in a law firm. While portfolio funding is often provided directly to the firm (not the client) it is tied to a set of cases, with a collateral and a contingent interest in that set of cases. In other words, this form of financing involves a loan, a lending facility, or some other ad hoc financing. Law firm finance, conversely, entails taking an equity stake (ie ownership) directly in the law firm itself. Here again, Australia and the United Kingdom led the way. In the mid-1990s, Australia substantially overhauled its approach to competition policy generally and consequently states began to permit nonlawyer investment in law firms. In 2007, England passed the Legal Services Act, which allowed nonlawyers to acquire a financial interest in law firms (including listing law firms on stock exchanges). And in 2021, Arizona became the first American state to allow such direct ownership of law firms by nonlawyers, undoubtedly setting up a race (a so-called 'race-to-the-top' or a 'race-to-the-bottom,' depending on one's views) amongst other American states in coming years.

18 Such law firm funding comes with its own advantages and risks and will undoubtedly affect in myriad foreseen and unforeseen ways the way individual cases are managed; the systemic administration of justice in the area of investment disputes; the structure of law firms, including those that participate in and shape the investment arbitration world; and the careers of lawyers (Steinitz, 2022). For example, as the ability to invest directly in law firms expands and becomes mainstream, investment in individual cases may become comparatively less attractive for those

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interested in investing in the legal sector. Thus, we may see more investments in international arbitration boutiques (see below) than in investment arbitration cases. This may limit the amount of capital available for individual cases, raising its costs. For example, the funding available for an expropriated company, such as Rurelec (discussed more fully below), may become more expansive. However, lawyers who will be able to 'cash out' by selling their ownership stake in an arbitration boutique to investors will benefit. Another example of new winners and losers as this market in law firms develop, is that by making investors one step removed from cases, we may remove the temptation of funders to intervene in the management and settlement of any individual arbitration, which would be a benefit. But this distancing of the funders from the cases may also make it more difficult to track who the ultimate beneficiaries of the ISDS system are, such lack of transparency may further fuel the legitimacy crisis of the system. Furthermore, new forms of conflict could arise (Imagine, for example, a lawyer in the firm representing the claimant in an arbitration investing, directly or indirectly, in the law firm representing the respondent in the same case). To date, law firm investment has been extremely limited, since it is almost universally prohibited and since it has not significantly caught on in the two jurisdiction which allowed it (Australia and the UK). However as Arizona opens its doors to law firm investment in the United States, and other American states, including California, Washington, Illinois and Utah, are all actively considering similar reforms or even taking their first steps in that direction (Steinitz 2022), it is not far-fetched to speculate that these cutting-edge developments in the United States, with its very large legal sector, may prove to be an accelerant and a tipping point in the global expansion of the new market in law firms in the same way that the expansion of litigation funding into that jurisdiction, following the 2008 financial crisis, has proven to affect that particular market.

C. The Normative Debate in Favour and Against Third-Party Funding in Investor-State Arbitration

1. In Favour: Access to Justice, Levelling the Playing Field, Efficiency and Corporate Finance

(a) Access to Justice and Levelling the Playing Field

19 The most common reason cited in favour of litigation finance is its potential to increase access to justice. Arbitration, like litigation, is notoriously expensive and, simply put, third-party funding enables claimants who have meritorious cases to bring claims they would otherwise be unable to pursue. In its starkest form, third-party funding should enable, specifically, impecunious investors, including those who have been expropriated, to bring meritorious claims against bad-actor States.

20 Beyond merely enabling access to the arbitration system, having access to capital can level the playing field. Imagine a small company whose main asset has been expropriated. Even if it has a highly meritorious claim, it may not have sufficient capital to withstand a long legal battle and may be forced to settle early at a steep discount of the true value of its claim. Financing from a third party can give it the breathing room to continue arbitrating until a fair settlement offer comes along, or through to an award on the merits.

21 An unusual but intriguing case of litigation funding enhancing access to justice is the case of *Philip Morris v Uruguay*. In that case, the Bloomberg Foundation (through its 'Campaign for

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Tobacco-Free Kids') provided *pro bono* funding to Uruguay's ultimately winning defense of its tobacco plain packaging laws in an investment arbitration brought by Philip Morris. This case is unusual because the funding was not for profit (ie maintenance rather than champerty) and because it was provided to the respondent, not the claimant. But it is a good illustration of the levelling effect that litigation funding may have, and it provides an opportunity to check one's sympathy/antipathy towards third-party funding as a tool available for claimants only. Financing is a utility; whether it is used for good or bad depends on the user, not on the existence of funding.

22 Back to the usual, claimant-funding scenario. A reader from a jurisdiction that allows using contingency fees may regard the resources of the plaintiffs' bar as sufficient to provide the financing necessary to provide access to justice and to level the playing field. However, many jurisdictions do not allow contingency or conditional fees (ie lawyer funding). In addition, even where available, the funding available from the plaintiffs' bar is limited and, ultimately, providing financing is not the core competency of lawyers and law firms. The commingling of the financing function and the advocacy function creates conflicts of interest between the financier-lawyer and her client which is why jurisdictions such as Australia and Canada chose to separate the two functions and introduced both class actions and third-party funding but retained limitations on contingent fees. The European Union is also advancing in the direction of allowing class actions hand-in-hand with third-party funding, but not necessarily with continent fees (Responsible Private Funding of Litigation, European Parliamentary Research Service, 2021).

(b) Efficiency and Third-party Funding as Corporate Funding

23 Having a third party fund a case means such funder has the incentive, as well as the bargaining power, to monitor the lawyers and thus lower the cost of the arbitration. Further efficiencies can be gained by doing away with the monopoly over funding that attorneys enjoyed in jurisdictions which allow providing representation on a contingent or conditional fee basis.

24 Beyond potentially rendering the arbitration itself more efficient, 'financing legal fees and expenses and moving risk off corporate balance sheets are more efficient and far friendlier from an accounting perspective - factors that matter greatly to general counsel, CFOs and publicly traded companies in general.' (Bogart, 2017) An example of litigation finance as corporate finance is the case of *Guaracachi America, Inc. (USA) and Rurelec plc (United Kingdom) v Plurinational State of Bolivia*. In that case, claimant Rurelec filed an arbitration claim against Bolivia for the expropriation of one of its power plants. According to its funder, Rurelec did not need capital to pay for litigation costs but rather needed capital to continue to grow. However, the expropriation led to a decline in the company's creditworthiness and that decline, in turn, meant that traditional lenders were only willing to offer financing at very high interest rates. Both the expropriated plants and the pending claims were not recognized as assets by such lenders. However, the litigation financier felt it was within its core competency (unlike a traditional lender) to assess the value of the arbitration claim, use it as collateral, and offer a loan at a lower rate. That loan was reportedly used to expand the claimant's business while the arbitration was pending.

2. Against: Unintended Beneficiaries (Financiers), Non-meritorious Cases and Deleterious Effects on Developing Nations

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(a) Unintended Beneficiaries

25 At the background of the debate on the desirability of third-party funding of investor-state disputes is the status of investment arbitrations, also referred to as the Investor-State Dispute Settlement system ('ISDS'), as public law disputes. As one author puts it, by setting up the investment arbitration regime,

> [S]tates have enabled privately contracted adjudicators to determine the legality of sovereign acts and to award public funds to businesses that sustain loss as a result of government regulation. This undermines basic hallmarks of judicial accountability, openness, and independence. Above all, the lack of security of tenure of arbitrators in a one-sided system of state liability […] makes the adjudicator dependent on prospective claims and thus biased […] against respondent governments [] because they receive appointments only if investors bring claims (Van Harten, 2007, 5).

Furthermore, many arbitrators work at corporate law firms whose business model is to represent large corporations of the type that often ends up bringing investment claims against governments. This seems too many to be at odds with the ultimate goal of the system and its only fundamental justification, which is that by providing a high-quality (impartial, neutral, not susceptible to corruption, etc) forum for investor–State dispute resolution, the ISDS system encourages investment and economic growth generally and in low-income countries in particular.

26 This critique that third-party funding has turned the ISDS system into an investment opportunity needs to be viewed within the larger context of the current crisis of legitimacy facing the system. The ISDS system, which was designed in the mid-twentieth century during the waning days of colonialism, has been under great, and growing criticism in recent years. The system provides, by design, asymmetrical protection: protection to foreign investors against host states without reciprocal rights of action for the host States or affected communities and other constituencies. The host States are often developing nations and the affected communities can be among the poorest in the world. The legitimacy crisis of the ISDS system is such that the Council of the European Union has charged the European Commission to represent the EU and its Member States in discussions at the United Nations Commission on International Trade Law (UNCITRAL) with the goal of reforming and even entirely redesigning the system. The Council characterized the ISDS system as

> [A] procedural framework for disputes between international investors and hosting states, [which] relies on arbitration procedures. However, there have been growing concerns among states and stakeholders about the system's reliance on arbitrators, given its lack of transparency, issues over the predictability and consistency of their decisions, and the excessive costs involved (Multilateral Investment Court: Overview of the Reform Proposals and Prospects, 2020).

27 With third-party financiers—with no connection to the underlying investments and no contribution to any economic development that such investments may have created —among the key ultimate beneficiaries of the ISDS system, the optics and, according to some, the actual

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legitimacy of the already embattled system, is taking an additional hit. An early report on the rise of third-party funding of investment arbitration characterized the issue in the following terms:

> The boom in arbitration has created bonanza profits for investment lawyers paid for by taxpayers. Legal and arbitration costs average over US$8 million per investor-state dispute, exceeding US$30 million in some cases. Elite law firms charge as much as US$1,000 per hour, per lawyer […]. Arbitrators also earn hefty salaries, amounting up to almost US$1 million in one reported case. These costs are paid by taxpayers, including in countries where people do not even have access to basic services. For example, the Philippine government spent US$58 million defending two cases against German airport operator Fraport; money that could have paid the salaries of 12,500 teachers for one year or vaccinated 3.8 million children against diseases such as TB, diphtheria, tetanus and polio (Eberhardt, 2012, 7).

(b) Incentives to Bring Non-meritorious Cases and Deleterious Effects on Developing Nations

28 As with third-party funding of litigation generally, a core concern with the rise of third-party funding of investment arbitration is that the availability of capital, provided by those seeking high-risk high-reward cases, is creating incentives to bring speculative or even outright non-meritorious cases. To the critics, ‘it seems morally objectionable to allow speculation in the context of ISDS, where outcomes can result in devastating economic implications for developing nations.’ (Santosuosso and Scarlett, 2019, I-15) For them, the solution is to reinstate the age-old prohibition on third-party funding, a prohibition which in the Common Law world was embodied in the doctrine of champerty but which existed in one form or another in all legal systems until the turn of this century (and which many jurisdictions still retain).

29 Critics argue that because lower-income countries are more likely to have a weaker rule of law, the likelihood of a successful arbitration against them is higher than cases brought against high-income, more developed nations and that this creates an incentive to invest specifically in cases against lower-income countries leading to ‘more claims being directed at the least-developed countries’ that are already disadvantaged by the current ISDS system (Santosuosso and Scarlett, 2019, I-13). According to these critics, the high-risk high-reward nature of third-party funding creates a market for non-meritorious claims, including against the most disadvantaged respondents. ‘As “the investment arbitration system is becoming increasingly integrated with the speculative financial world,” it is expected that funders will continue to “further fuel the boom in arbitrations [and] increase costs for cash-strapped governments”’ (Santosuosso and Scarlett, 2019, I-14).

30 Furthermore, because many investment claims are premised on contentions that new regulation, such as environmental regulation, consumer protection, labour rights, and human rights, aimed at protecting constituencies within the host States—as was the case in the *Philip Morris v Uruguay* case—the ultimate effect is that ‘TPF can impact governments’ willingness and ability to regulate investment in order to advance sustainable development aims’ (Güven and Johnson, 2019). In this way, criticism of the entry and, indeed, the prevalence of third parties making profit off of the ISDS system adds fuel to the fire of the more general discontent with the current system for investor-state dispute resolution.

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D. Effects on the Arbitration Process

31 Third-party funding creates unique challenges with respect to a set of interlocking issues: disclosure and conflicts of interests; costs and security for costs; privilege, confidentiality, and secrecy. The following paragraphs treat each issue discreetly but in a manner that allows the reader to see the interconnections amongst them.

1. Disclosure, Conflicts of Interest and Party in Interest

32 One of the very first third-party funding-related issues to have arisen in investment arbitration, in *S&T Oil Equipment & Machinery Ltd v Romania*, was the question of disclosure. In that case, the question was whether, in a dispute between the funder and the claimant which was ancillary to the arbitration itself, the funding agreement must be disclosed. In *S&T Oil Equipment v. Juridica Investments,* an American court, hearing the dispute between the funder and the claimant, concluded that in such context the funding agreement must be disclosed. While not the typical scenario in which the questions arises—namely, not in the context of whether the existence of funding, the identity of a funder, and parts or all of a funding agreement should be disclosed to the tribunal, and/or the administering institution, and/or the opposing party in the course of the arbitration—*S&T Oil* served as the proverbial canary in the coalmine when it came to the complications that third-party funding introduces into the arbitration process generally, and the question of disclosure specifically.

33 A more typical case was *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic,* in which the question was whether the identity of the funder should be disclosed and whether the funder should be subject to the same confidentiality requirements as the parties. The tribunal decided that the identity of the funder needed to be disclosed so that the arbitrators could check whether any conflicts of interests existed and that the third-party funder would be subject to the general obligation of confidentiality applicable (*EuroGas v Slovak Republic*, Procedural Order No 3, 2015, para 23). But it did not require the disclosure of the funding agreement or any of the funding terms.

34 In *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, the tribunal went a step further and ordered the disclosure of the existence of funding, name and details of the funder, and the terms of the funding (*Muhammet v Turkmenistan*, Procedural Order No 3, 2015). It based its decision on the tribunal's inherent power to preserve the rights of the parties and the integrity of the process. Importantly, the tribunal listed the reasons disclosure could be appropriate:

> It seems to the Tribunal that the following factors may be relevant to justify an order for disclosure, and also depending upon the circumstances of the case:
> a. To avoid a conflict of interest for the arbitrator as a result of the third-party funder;
> b. For transparency and to identify the true party to the case;
> c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;
> d. If there is an application for security for costs if requested; and

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e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives (*Muhammet Çap v Turkmenistan*, Decision on Jurisdiction, 2015).

35 In another example, in *South American Silver v Bolivia*, the claimant voluntarily disclosed the existence of a funder. The tribunal then ordered that the funder's identity also be disclosed. However the tribunal rejected a request that the terms of the financing be disclosed because that request was made in the context of a request for security of costs and the tribunal decided that, having declined the request for security of costs, there was no need to make a finding as to whether, under the terms of the funding agreement, the third-party funder would assume an eventual costs award in favour of the respondent (*South American Silver v Bolivia*, Procedural Order No 10, 2016).

36 As the review of international law and soft law shows (below), and as the cases discussed above illustrate, it is now fair and prudent to say that disclosure of, at a minimum, the fact of funding and identity of the funder is now at least strongly encouraged, if not required in international arbitration, and that tribunals are authorized to order further disclosure if circumstances justify such further disclosure.

2. Costs and Security for Costs

(a) Effect of Third-Party funding on Cost Awards

37 Arbitral tribunals typically allocate the costs of the arbitration ('cost shifting') at the conclusion of a case. The question has therefore arisen as to whether the existence of third-party funding should affect the allocation of costs to the detriment of the claimant who, nominally, is not paying for the costs out-of-pocket but rather has those costs covered by the funder.

38 Tribunals have typically held that the participation of third-party funding is irrelevant to the question of the allocation of costs ie that it is not a basis to deny the recovery of costs. The tribunal in *South American Silver v Bolivia* surveyed the jurisprudence and occluded that

> [T]he decisions of investment tribunals that have awarded costs against claimants have affirmed that the existence of a third-party that finances the claimant is not, by itself, a factor that should be taken into account in the determination of costs' and that 'while the existence of a third-party funder may be an element to be taken into consideration in deciding on a measure as the one requested by Bolivia, this element alone may not lead to the adoption of the measure (*South American Silver v Bolivia*, Procedural Order No 10, 2016, paras 73 and 75).

39 In declining to consider the existence of third-party funding in its cost determination, the *Kardassopoulos v The Republic of Georgia* tribunal reasoned that

> [W]hile not directly applicable, the Georgia / Greece and Georgia / Israel BITs both provide in their respective dispute settlement provisions that a Contracting Party shall not raise as an objection at any stage of the proceedings the fact that the

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investor has received compensation or an indemnity under an insurance contract in respect of all or part of the damages incurred […] it 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' (*Kardassopoulos v The Republic of Georgia*, para 691).

40 Conversely, in an unusual scenario, in *Quasar de Valores SICAV SA et al v The Russian Federation*, where the claimant was not contractually obligated to reimburse the funder (who was a shareholder) if it won the case, the tribunal denied the funded claimant an award of costs to avoid granting it a windfall (ie an award of costs that the claimant did not, in fact, incur) (*Quasar de Valores v Russian Federation,* Award, 2012, para 217). While this is an unusual scenario—as typically funders contract for a right of reimbursement of the funded costs—it does highlight why parties might battle over disclosure of funding agreements, thus potentially raising the total costs of the arbitration, with millions of dollars for a cost award potentially hanging in the balance.

41 Parties may similarly battle over disclosure of the funding terms for another reason related to allocation of costs. According to some commentators, 'it is settled law in England and the US that if a non-party funder is exercising "control" over the proceedings, the funded party or the party's attorney, then the court may issue a cost order directly against a non-party funder' (Sahani and Nieuwveld, 2017, 265).

42 In *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd*, in which the English High Court upheld an award issued by an international tribunal, it awarded the claimant both its costs and the funders 'success fee' after concluding that the claimant 'had no option, but to obtain this funding from this third-party funder' because of abusive conduct by respondent (*Essar v Norscot*, Judgment, 2016, para 69). In so doing, the English High Court also upheld the tribunal's interpretation of the ICC rules, which authorized the tribunal to award 'other costs,' as including the fee paid to the funder. '[O]ther costs, where they were so directly and immediately caused by the losing party […] extended in principle to the costs of obtaining third party legal funding' (*Essar v Norscot*, Judgment, 2016, para 69).

(b) Effect of Third-Party funding on Security for Costs

43 Third-party funding also has implications for a tribunal's decision regarding whether or not to order security for costs. Furthermore, as mentioned above, a complicating factor is the question of a tribunal's jurisdiction to issue an order for security for costs against a funder which is a not party to the arbitration agreement nor a party to the arbitration.

44 Respondents seeking security for costs application sometimes argue that the fact that a claimant requires third-party funding is evidence of impecuniosity which renders such a claimant less likely to be able to satisfy an award of costs if it loses, thus necessitating a security for costs. Conversely, claimants and funders have advanced, largely successfully, as in *South American Silver*, the counterarguments that since third-party funding is largely non-recourse (ie a losing claimant does not need to pay funder its investment back) then such funding does not compromise a claimant's financial position and therefore should not factor into a determination of whether to order security for costs. Claimants and funders have also pointed out that in a significant number of cases, third-

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party funding is used by a well-resourced claimant as a means of corporate finance, not by an impecunious one in need of funding to pursue a claim, and that therefore the fact that third-party funding has been resorted to is not an indication of inability to pay costs if those are awarded.

45 The tribunal in *South American Silver v Bolivia* summarized both the standard and preceding cases on point.

> With respect to the economic situation of the party requesting the security for costs, the standard established by arbitral tribunals, both in ICSID and UNCITRAL cases, when considering the lack of resources, varies, but is very high. Thus, for example, in *EuroGas v Slovak Republic* [...] the tribunal rejected the request for security for costs reaffirming the decision of other tribunals (including of *RSM v Saint Lucia*) that it is necessary to prove the exceptional circumstances, and that it had not been proven that the claimant had failed to make the payments in the arbitration or in other arbitrations, and noting also that neither the financial difficulties nor the fact of having third-party funding constitutes per se exceptional circumstances warranting security for costs (*South American Silver v Bolivia*, Procedural Order No 10, 2016, para 61).

46 As with other questions, nuance and context are everything. Therefore, at least two decisions have gone against this grain. In *RSM Production Corporation v Saint Lucia*, and in *Manuel García Armas et al v Venezuela,* the existence of funding, combined with other factors, did tip the balance in favor of an order for security for costs. In *RSM*, for example, the ad hoc Committee presiding over the annulment proceedings took into account the fact that claimant abandoned the proceedings, repeatedly failed to pay the costs for administering the arbitration, had launched multiple parallel litigation and arbitration proceedings that substantially overlapped with that arbitration, and at least one of these proceedings was held by the presiding arbitrators to be 'manifestly without legal merit' (*RSM v Grenada*, para 66). In related proceedings, the tribunal awarded security for costs, based on its prior finding that the claimant was consistently unable or unwilling to advance the expenses and fees of the arbitration and that the tribunal believed claimant was also unable or unwilling to satisfy awards. The tribunal then went on to hold that '[t]he third party funding exacerbates the concerns engendered by RSM's conduct […]. It places an unfunded RSM and the third-party funder(s) in the inequitable position of benefitting from any award in their favor yet avoiding responsibility for a contrary award' (*RSM v Saint Lucia,* 2019, para 76).

47 ICSID's proposed rule amendments (below), if adopted, will 'codify' the consensus that has emerged from this line of cases and instruct a tribunal that it 'may consider' third-party funding with regard to a party's ability to pay a costs order, but also adds the caution that 'the existence of third-party funding by itself is not sufficient to justify' a security for costs order (Proposals for Amendments of the ICSID Rules, Working Paper #4, 2020).

3. Privilege, Confidentiality, and Secrecy

48 Two types of concerns come under this heading. One is whether and to what degree the funding arrangement is subject to confidentiality such as in the *South American Silver* and *EuroGas* cases. This issue implicates contractual confidentiality obligations which may be contained in the funding agreement, intellectual property rights that a funder may have in a financial product it is offering, and the disclosure analysis discussed above. The other, is whether and under what circumstances

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evidentiary protections—such as the 'attorney-client privilege' (in Common Law jurisdictions) and 'professional secrecy' (in Civil Law jurisdictions)—extend to a third-party funder when, for example, an attorney shares otherwise privileged information with the funder (Related evidentiary protections are 'legal privilege,' also known as 'work product protection,' and 'common interest privilege'). Or, in other words, the question is whether and under what circumstances does sharing information with a funder constitute a waiver of these evidentiary protections. This issue implicates primarily national law, which creates and protects such privileges, as determined through a conflicts of law analysis, as well as local rules of legal ethics, such as an attorney's obligation to maintain confidence and secrecy. This issue was raised in *Manuel García Armas v Venezuela,* in which the court decided that claimants had to disclose the text of the financing agreement to the tribunal in order to safeguard the integrity of the procedure (*Manuel García Armas v Venezuela*, Procedural Order No 9, 2018, para 2).

49 Further complicating the matter, various domestic laws may be relevant. These include jurisdictional laws that pertain to things like where a communication took place, where a relevant document was created, the physical location of a document, where counsel for each party is licensed or practises, where each party resides, and in which country disclosure is being sought. Other relevant factors include which country had the closest connection to the events as well as which countries laws govern the seat of the arbitration, the substance of the dispute, and the arbitration agreement itself (Report of the ICCA-Queen Mary, 2018, 126).

50 As to the first issue, this substantially overlaps with the questions, already discussed above, of whether, to what degree, and under what circumstances can and should a tribunal order disclosure. To generalize, the existence of funding and the identity of the funder are not privileged. But specific provisions of a funding agreement may be deemed confidential pursuant to contractual obligations between the funder and the claimant, and a party seeking disclosure has an uphill battle persuading a tribunal to order disclosure.

51 As to the second issue, generally speaking, '[f]or information that is determined to be privileged under applicable laws or rules, tribunals should not treat that privilege as waived solely because it was provided by parties or their counsel to a third-party funder for the purpose of obtaining funding or supporting the funding relationship' (Report of the ICCA-Queen Mary, 2018, 117). However, the determination of whether a privilege applies in any given case can be quite a complex matter given that arbitral rules and national arbitration laws generally leave this evidentiary question to the discretion of the arbitrators. And the (non-binding) IBA Rules on the Taking of Evidence are also silent on the matter. All they do, in this context, is generally authorize arbitrators to 'exclude from the evidence or production any document because of legal impediment or privilege under legal or ethical rules determined by the tribunal to be applicable'; authorize tribunals to decline ordering production 'on grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling'; and admonish tribunals to consider the parties' expectations at the time privilege has arisen (Arts 9(2), 9(2)(e), and 4(c) of the IBA Rules).

52 The analysis may also differ regarding documents provided during the funder's due diligence phase—ie before they have in fact become a claimant's funder—in contrast to after a funding agreement has already been entered into. If a funder vetted and then declined to invest in a matter, the case for protecting the information shared with the funder diminishes. Furthermore, a

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respondent may seek a funder's own internal evaluation of a funded case—one that it actually took on or one that it assessed and passed on—ie information that may not have been part of a communication with either the claimant nor their attorney.

53 Another variable is whether documents and information are sought during the arbitration versus during arbitration-related litigation, whether one proceeding in parallel to the arbitration or an enforcement action.

4. Rules of Ethics

54 While many jurisdictions do not directly regulate third party funding and third party funders, attorneys representing funded parties would be well advised to be mindful that such funding may implicate and complicate their adherence to the rules of professional conduct that apply to them in the jurisdictions in which they are licensed to practice law. For example, an attorney licensed in New York but appearing in an ICSID arbitration elsewhere is still subject to New York's Rules of Professional Conduct. This means, for example, that she must adhere to her responsibility to exercise independent judgment irrespective of any interreference in such judgment a funder may attempt; she must adhere to her duties of loyalty and zeal even when a funder pulls in a direction different than the client's desires (eg when a funder wishes to settle a case that a client wishes to continue to pursue); she must adhere to confidentiality requirements which may preclude her from sharing certain information and attorney's impressions with the funder; she must resolve conflicts of interest between the client and the funder in favour of the client even though the funder is paying her fees; and she must adhere to her duties as an officer of the court (for example, to prioritize certain public interests in justice over profit maximization, which a funder might prefer). Notoriously, in international arbitration, complex choice of law rules apply to the question of which rules of professional conduct an attorney is subject to, with the possible effect of subjecting an attorney to rules of professional responsibility in a jurisdiction she is not licensed in (eg those of the seat) and is unfamiliar with or creating ambiguity as to which rules of procedure applies (Rogers 2002).

E. National Law, International Law and Soft Law

55 While initially tribunals were on their own trying to figure out the novel set of questions presented by the existence of a third-party funder, States, inter-governmental organizations, and arbitral institutions have all started responding of late to the rise of third-party funding.

1. National Law

56 At the domestic level, there has been a general, global trend towards legalizing third-party funding at least in some forms. Among the liberalizing jurisdictions are Common Law and Civil Law jurisdictions on all continents including, Australia, the UK, the US, Canada, Germany, France, Singapore, Hong Kong, Nigeria, South Africa, and Brazil. All of these jurisdictions have recently loosened champerty or champerty-like restrictions. The European Parliament expects third-party funding 'to play a growing role in the provision of litigation services in the coming years, as climate and environmental litigation cases could increase and as the aftermath of the

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ongoing COVID-19 pandemic could lead to a substantial number of claims' (Responsible Private Funding of Litigation, European Parliamentary Research Service, 2021).

57 Simultaneously, liberalizing jurisdictions couple the legalization of third-party funding with some form of regulation. For example, in Canada, where third-party funding is largely restricted to class actions, the '*de facto* regulator of [third-party funding]' has become the class action judge. Court approval of the funding agreement is required… '[T]he court must be satisfied that the agreement is fair and reasonable' (Third-Party Litigation Funding: A Review of Recent Industry Developments, 2020). In Australia, litigation funders are subject to financial regulation requiring licensing and adherence to the Australian Securities and Investments Commission (ASIC) Managed Investment Scheme (MIS) regulations. And in the United States, the farthest-reaching reform took place in Arizona where, as of 2021, third parties are now allowed to invest not only in lawsuits but also in law firms; however investors and law firms who choose to go down that road undertake to comply with an extensive regulatory regime which, among other things, extends the application of the rules of legal ethics to the financiers and subjects them to the jurisdiction of the Arizona Supreme Court, irrespective of whether they have any other contact with the jurisdiction and even if the investment is fully passive (Steinitz, 2022).

58 That said, not all jurisdictions have gone down the path of liberalization. Some have clarified that non-party funding of litigation remains unlawful. An example is Ireland, where, in May 2017, the Supreme Court of Ireland ruled, in the case of *Persona Digital Telephony Ltd v The Minister for Public Enterprise*, that the common law prohibitions on maintenance and champerty remain in force. Similarly in New York State, the influential New York City Bar Association recently clarified that while portfolio funding may be socially desirable, it is not lawful under current New York law (NYC Task Force, 2020).

2. International Law

59 In additional to legislative reforms and regulatory initiatives at the domestic level in countless jurisdictions with respect to third-party litigation funding generally, and with respect to investment arbitration specifically, States have started to respond to the challenges presented by the rise of third-party funding of investor-State disputes by addressing the issue in BITs and in free trade agreements (FTAs). In 2016, Canada and the European Union ratified the first trade agreement to directly address third-party funding, the Comprehensive Economic and Trade Agreement (CETA), which provides a definition of third-party funding and requires disclosure of the identity of the funded party to the opposing party and the tribunal (CETA, Art 8.1). The expectation is that future BITs and FTAs will follow suit and address the issue of third-party funding. A number of BITs currently under negotiation address third-party funding explicitly. For example, the draft European Union-Vietnam Free Trade Agreement and the European Union's proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership (TTIP), if finalized, would regulate third-party funding, as would the draft French Model BIT and draft Slovak Model BIT (EU-Vietnam, Art 3.28; EU-TTIP, Art 8; Draft French Model, Art 7; Draft Slovak Model, Art 21).

Electronic copy available at: https://ssrn.com/abstract=3873523

60 The European Commission recently announced that it will commence negotiations to modernize the Energy Charter Treaty and in so doing will include provisions on third-party funding.

61 In 2018, ICSID published a set of proposed changes to its rules. With respect to third-party funding, the proposed rules include a definition of third-party funding and a requirement to disclose the existence of funding and the identity of the funder. While the proposed rule does not contemplate further disclosure as of right, it does note that a tribunal has the power to order such disclosure where appropriate.

62 Similarly, the United Nations Commission on International Trade Law ('UNCITRAL') Working Group III on ISDS Reform is considering changes to its rules governing international arbitration proceedings, including as they relate to third party funding. As it currently stands, the draft reform states that 'Regulations on third-party funding may be implemented through various means, such as through inclusion […] in arbitration rules' (Possible Reform of Investor-State Dispute Settlement, UNCITL, 2021).

3. Institutional Rules and Soft Law

63 The International Bar Association ('IBA') was the first international organization to respond to the rise of third-party funding in international arbitration. In 2014, it issued guidance which defined the term 'third party funder' and required disclosure of any relationship, direct or indirect, 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 and 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 (IBA Guidelines on Conflicts of Interest in International Arbitration, 2015, 14-16).

64 Arbitral institutions have started responding to the rise of, and indeed prevalence of, third-party funding in commercial arbitration by amending their rules (Given that investment arbitrations can be administered by such institutions, and given the general crossover and spill-over effects between the commercial and investment international arbitration ecosystems, those practicing or studying investment arbitration will benefit from monitoring developments in international commercial arbitration and vice versa). For example, in 2017, the International Chamber of Commerce Court of Arbitration (ICC) issued guidance according to which 'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case' (Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2019, 5-6). The Brazilian Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) also adopted a definition of Third-Party Funding. The Singapore International Arbitration Centre ('SIAC') adopted a Practice Note where it defined 'external funder' and addressed the standard of practice and conduct for arbitrators in arbitration proceedings where external funders are involved (Practice Note on Arbitrator Conduct in Cases Involving External Funding, 2017). The new SIAC Investment Arbitration Rules of 2017 allow arbitrators to order the disclosure of the existence of third-party funding, the identity of the funder, the details of the third-party funder's interest in the outcome of the proceedings, and whether the funder has committed to undertake adverse costs liability

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(Investment Arbitration Rules of the Singapore International Arbitration Centre, 2017). The China International Economic and Trade Commission (CIETAC) now requires, pursuant to its 2017 International Arbitration Investments, disclosure of third-party funding to opposing parties and the tribunal, of the 'existence and nature' of the funding arrangement and the identity of the funder and empowers tribunals to order further disclosure as appropriate (China International Economic and Trade Arbitration Commission International Investment Arbitration Rules, 2017, Art 27).

65 Also of note is the comprehensive report authored by the ICCA-Queen Mary Task Force on Third-Party Funding, which is the result of a robust process involving representatives of various stakeholders such as arbitrators, attorneys, third-party funders, representatives of arbitral institutions and academics. The report surveys the prevalent forms of international arbitration funding, and discusses issues of disclosure and conflicts, privilege and confidentiality, and costs and security for costs.

F. The Effects on the International Arbitration Bar

66 An often-overlooked effect of the rise of third-party funding on international arbitration is the effect that the new finance niche is having on the lawyers and law firms who practice international arbitration, including the ways in which practitioners in this field organize and practice law.

67 As third-party funding started gaining acceptance globally around the time of the 2008 global financial crisis—which hit law firms particularly hard—the new industry found a natural partner in arbitration practitioners. These arbitration practitioners had their own reasons to leave the London-based 'Magic Circle' firms and American 'BigLaw' firms but may not have had the means to strike out on their own, especially as they continued to practice large, high-stakes, prestigious and lucrative investment (and commercial) arbitration cases (Simons, 2021).

68 Among the reasons is the fact that an international arbitration practice is an uncomfortable fit in the mega-firms. Serving as an arbitrator (as opposed to counsel) does not afford the opportunity to leverage multiple associates, as required by the business model of the mega-firms, therefore such service is less lucrative for the firms despite being highly desirable to its arbitration practitioners. Another reason is that arbitration leads to conflicts of interest with the mega-firms' more lucrative corporate (transactional) work. When such conflicts arise, it is the arbitration practitioners who are directed by firms' management to yield.

> [A]nother reason spurring the trend has been that international arbitration isn't like other practice areas, where practitioners often rely on repeat business from big firms' anchor clients. In international arbitration, lawyers secure many of their clients through the strength of their personal reputations. That involves a lot of networking and legwork that may not be as easy for international arbitration lawyers to focus on if they're at a big firm (Simons, 2021).

69 Enter litigation funding. Litigation funders created a new alternative; they have offered experienced arbitration practitioners the resources to pursue international arbitration practice at the same level as they have done at the elite firms but through their own, smaller platforms, without conflicts with transactional work, and often with more competitive pricing and the ability to offer

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'alternative fee structures'. Third-party funders enabled arbitration practices to spin off as independent boutiques both by offering a steady, repeat-play relationship with a large, reliable and safe source of funding for individual cases that prospective clients could not themselves fund as well as for portfolios of cases (Steinitz 2022). These institutional relationships decreased the risk and uncertainty involved in the entrepreneurial enterprise of starting a new law firm. The alignment of small law firms with large and resourced backers enabled the newcomer firms to compete with established law firms. For example, the financial backers enabled the boutiques—already competitive because of their smaller and cheaper infrastructure and general nimbleness—to offer alternative fee structures which are incompatible with the business models of the mega firms. The result has been a constant trickle of spin-offs of mega-firm arbitration groups into international arbitration boutiques (Simons, 2021).

70 As jurisdictions in the Common Law world (Australia, UK, and on a limited basis the US) start allowing third-party funders to invest in litigation by becoming co-owners of law firms, arbitration boutiques are emerging as a favourite investment class. This is for the same reason that when third-party funding started gaining acceptability some twenty years ago, their cases—international arbitrations—were among the very first litigation-type funders were eager to invest in. While beyond the scope of this entry, such developments will have wide-reaching effects on which cases are pursued in arbitration, the length of a typical arbitration, the level of settlements, which cases are not settled but rather are arbitrated through to a hearing on the merits, the extent and type of individual and institutional conflicts of interests, which arbitral institutions are preferred, and more. These developments may also profoundly affect lawyers' careers. For example, funding could potentially enable lawyers with more diverse backgrounds, usually not represented in the 'elite' mega-firms, to also start boutique firms (Steinitz, 2022).

G. Conclusion

71 In sum, third-party funding has become a formidable force affecting every facet of international arbitration, be it at the level of an individual case, the law firms who specialize in them, the institutions that administer them, and, most importantly, the balance of power between investors and host states as they arbitrate disputes and bargain in the shadow of the finance-fuelled ISDS system.

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