Master

Third-Party Funding and The Monetization of International Commercial Arbitration

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Abstract

Third-party funding has ancient origins and was once considered as the crimes of champerty and maintenance. Today, it presents a new way of investments for investors, while also benefiting the access to international commercial arbitration. This paper aims to evaluate third-party funding dynamic and controversial financing system and its potential effect on international commercial arbitration.

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"A mischief, though a mischief not to be cured by such laws, was that a man would buy a weak claim, in hopes that power might convert it into a strong one, and the sword of a baron, stalking into court with a rabble of retainers at his feet, might strike terror into the eyes of a judge upon the bench." – Jeremy Bentham *in* Cook on Costs.

I. Introduction

International arbitration is the preferred alternative dispute resolution mechanism for international transactions[1]. The complex nature of international arbitration claims can lead to expensive arbitration. It is widely accepted that international arbitration's worst features are costs[2]. As a result, innovative ways were found by users to fund their claims. Third-party funding represents an alternative means of funding[3]. Third-party funding arises when an entity that is not a party to a particular dispute provides financial support to the claim holder. This financial support can typically cover counsel's fees, arbitrators' fees, experts' fees, or witnesses' fees, if any, or pays an order, award, or judgment rendered against that party, or both[4].

Third-party funding raises critics from both legal scholars and modern capitalists. Some consider third-party funding firms as "Oz-like funder controlling the process from behind a curtain"[5], or "vulture investors"[6].

Concurrently, third-party funding is being reconsidered by numerous jurisdictions that once prohibited litigation funding[7]. Some even appreciate third party funding as

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[1] Queen Mary University of London and White & Case LLP, "2018 International Arbitration Survey: The Evolution of International Arbitration" <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> 97% of respondents indicate that International Arbitration is their preferred method of dispute resolution.

[2] Ibid.

[3] Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 919.

[4] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 11.

[5] Mark J. Goldstein, "Should the Real Parties in Interest Have to Stand Up? – Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration" (2011) Vol.8 Issue 4 Transnational Dispute Management < https://www-transnational-dispute-management-com.rproxy.tau.ac.il/article.asp?key=1745> accessed 16 November 2020.

[6] Mark Kantor, "Third-Party Funding in International Arbitration: An Essay About New Developments", (2009) Vol. 24 Issue 1 ICSID Review - Foreign Investment Law Journal 65.

[7] See for instance, the Hong Kong Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2016.

an economic necessity to fund the escalating costs of litigation[8]. International arbitration practitioners witness an increase in the use of this particular financial service[9]. In that context, the new 2021 ICC Rules of Arbitration, which came into effect on January 1st, 2021, explicitly refer to third-party funding. Nonetheless, third-party funding is still a grey zone. Its implementation is subject to debate among scholars, as it raises numerous legal and ethical questions in the International Arbitration community.

This paper aims to evaluate this dynamic and controversial financing system and its potential effect on international commercial arbitration.

First, the author describes the origins (II) and analyzes the economic interests of the different actors in third-party funding (III). Additionally, she assesses and discusses both the positive and the negative effects of third-party funding in international arbitration (IV). Then, she evaluates this phenomenon and focuses on the development of the current legal landscape (V).

The paper concentrates on matters particularly related to the international commercial arbitration system, as international investment arbitration is much more covered in the literature. However, most of the issues covered in this paper are also relevant for international investment arbitration.

II. Origins of Third-Party Funding

Historically, third party funding has been used in litigation for millennia[10]. The concept of third-party funding originated in the ancient Greek and Roman legal systems[11]. At these times, there was a pledge to safeguard justice by preventing any outsider who attempted to inject himself between the litigants and the judge[12]. This commitment to safeguard justice from outsiders continued into the Middle Ages. It

[8] Elayne E. Greenberg, "Ethical Guidelines for Dispute Resolution Professionals when Parties are Backed by Third-Party Funders" (2019) Arizona State Law Journal 134.
[9] See Annex 1.
[10] Michael K. Velchnik & Jeffery Y. Zhang, "Islands of Litigation Finance" (2017) Harvard John M. Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series 71, p. 5.
[11] Susan L. Martin, "Litigation Financing: Another Subprime Industry that has a Place in the United States Market" (2008) Vol. 53 Issue 1 Villanova Law Review 86.
[12] Jern-Fei Ng, "The Role of the Doctrines of Champetry and Maintenance in Arbitration" (2010) Vol. 76 (Issue 2) International Journal of Arbitration, Mediation and Dispute Management 208; Elayne E. Greenberg, "Ethical Guidelines for Dispute Resolution Professionals when Parties are Backed by Third-Party Funders" (2019) Arizona State Law Journal 135 ff. For more details about these ancient systems, see also Michael K. Velchnik & Jeffery Y. Zhang, "Islands of Litigation Finance" (2017) Harvard John M. Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series 71, p. 5 ff.

was codified with the doctrines of maintenance and champerty[13] in the common law system of England, which spread widely to other jurisdictions[14].

Then, voices were raised against such proscriptions. The development of ideas such as utilitarianism and distributive justice in the 1700s has made possible to question the purpose of these doctrines. The fear that vulnerable people could be used as puppets in staged legal battles between wealthy landowners was not sufficient to deny access to justice for the majority of the population[15]. It was in contradiction with the emerging ideas of this time. Philosopher like Jeremy Bentham wrote exhaustively on the topic of access to justice[16]. Bentham criticized the champerty and maintenance laws in place since medieval times. It was inconsistent with what he defined as the "fundamental axiom" of his philosophy: the principle that "it is the greatest happiness of the greatest number that is the measure of right and wrong". Courts began to realize that some outsiders can help advance justice and adopted a more nuanced approach towards third-party[17]. Nevertheless, it was still considered a violation of the public policy against stirring up excessive litigation and frivolous claims and as a safeguard against the extortion and oppression of indigent clients by wealthy funders[18].

One can logically ask if the history of third-party funding in litigation is relevant for third-party funding in international arbitration. The answer is positive. In *Bevan Ashford v. Geoff Yeandle*[19], the Vice Chancellor Sir Richard Scott held that the prohibition on contingency fees extends to arbitration, stating that "arbitration proceedings are a form of litigation,"and it is "quite impossible to discern any difference between court proceedings on the one hand and arbitrations proceedings on the other that would cause contingency fee agreements to offend public policy in the former case but not in the latter"[20].

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[13] Maintenance refers to the financial support by an unconnected third-party to maintain litigation. Champerty is a form of maintenance, in which the maintainer received a share of the proceeds. For a discussion on that, see Michael K. Velchnik & Jeffery Y. Zhang, "Islands of Litigation Finance" (2017) Harvard John M. Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series 71, p. 10 ff.

[14]Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 15.

[15] Iain C McKenny, "Evolution of the Third-Party Funder", in Barton Legun (ed), *The Investment Treaty Arbitration Review* (5th edn, The Law Reviews 2020) 138.

[16] See for instance, Principles of Judicial Procedure (Bentham).

[17] See for instance, Dahms v. Sears case; British Cash and Parcel Conveyors v. Lamson Store Service (1908); Elayne E. Greenberg, "Ethical Guidelines for Dispute Resolution Professionals when Parties are Backed by Third-Party Funders" (2019) Arizona State Law Journal 136.

[18] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 14.

[19] Bevan Ashford v Geoff Yeandle (Contractors) Ltd [1999] Ch. 239 at 249D-G; [1998] 3 W.L.R. 172

[20] Ibid.

In the twenty-first century, many jurisdictions started to relax the rules against maintenance and champerty[21], given the variety of other safeguards against fraud and abuse that are embedded in legal systems today. The modern approach consists of determining whether the funding arrangements are contrary to public policy and unenforceable as a result.

In international arbitration, research suggest that the emergence of third-party funding goes back over a decade[22]. Third-party funding was first concentrated on litigation. Gradually, it was not viewed anymore as *ad hoc* investment opportunities but rather as an emerging industry[23]. This paved the way for the expansion of third-party funding into commercial arbitration. As more funders came on to the market, the need for more investment opportunities expanded[24].

III. Different Actors, Different Economic Interests

Before analyzing the benefits and legal policy concerns that third-party funding raises, it is necessary to understand why a funder would like to finance lengthy and costly proceedings with an uncertain outcome? Why claimants turn over funders? Why are law firms starting to sign preference agreement with third-party funders? What are the incentives that drive the actors to reach a funding agreement?

A. Interests of the Funder Party: Third-Party Funding as a Financial Instrument

First, third-party funding is part of the litigation finance industry[25]. Dispute funding transforms a legal claim into a financial asset[26]. The global financial crisis of 2008 developed a demand for alternative investments that are "not directly tied to or affected by the volatile and unpredictable financial markets"[27].

Meanwhile, international arbitration involves claims of high-values, assures rapid proceedings, and a high enforceability of arbitral awards worldwide. For this reason, third-party funding of international arbitration proceedings opens attractive

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[21] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 14, 44-48, 207-213.

[22] Pinsolle Philippe, "Comment on Third-Party Funding and Nationality Issues in Investment Arbitration" (2013) Vol.10 Issue 4 Transnational Dispute Management < www.transnational-dispute-management.com/article.asp?key=1987> accessed 2 October 2020.

[23] Iain C McKenny, "Evolution of the Third-Party Funder", in Barton Legun (ed), *The Investment Treaty Arbitration Review* (5th edn, The Law Reviews 2020) 139.

[24]Ibid.

[25] Maya Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding" (2011) Vol. 95 Minnesota Law Review 1275.

[26] ICCA Report, p. 49; Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 12.

[27] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 11.

investment opportunities[28] with great returns. The cost of arbitration funding for a typical commercial case, if successful, is usually referred to as "three times", or a share of the proceeds (between 20% and 50% of the amount collected by the funded party).[29] However, it is as risky, if not more, than an investment in the financial market. Indeed, if the arbitration fails, the investor loses her entire investment. The risk of total loss is *per se* existent[30]. Still, this industry is exponentially expanding globally[31]. Hedge-funds, banks, and other financial institutions (institutional investors)[32] are also entering and competing on this market, which once was initially closed to specialized litigation finance firms or insurance companies.

The investment strategy of third-party funding is comparable to the one of venture capital, and private equity: "a return of every dollar invested plus one more, or in other words, a net profit of 100%"[33]. Therefore, such portfolio return is very interesting to long term investors who need to generate capital growth[34]. In interest terms, the 100% profit would be compared to an investment return on the portfolio of 20% per annum over five years.

Moreover, to facilitate the funding agreement, funders often create a Special Vehicle Purpose[35] ("SPV"), making third-party funding very attractive to them. SPV are legal entity created by a parent company to isolate financial risk from it. SPV provides the funder with direct ownership of a specific asset, typically the arbitration claim, and it is also tax savings (if the vehicle is created in a tax heaven). In such a case, the funding agreement is not between the client and the funder, but between the SPV and the client. That way, the funder invests "risk-free" in the sense that her investment company would not be impacted if the outcome of the arbitration proceeding is not as expected.

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[28] Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 100 para 24.

[29] Duarte G Henriques, "Arbitrating Disputes in Third-Party Funding: A Parallel With Arbitration in The Financing Sector" (16 November, 2018) 3 <https://ssrn.com/abstract=3285723> accessed 15 November 2020.

[30] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 33.

[31] Burford Capital saw its profit raising by 400% between 2008 and 2014.

[32] Maya Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding" (2011) Vol. 95 Minnesota Law Review 1277.

[33] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 33.

[34] Ibid.

[35] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 184.

Another incentive for funders is the possibility to invest in "bundling claims"[36]: investments are made for several claims, held by the same party, turning those into a single portfolio. This allows the funders to diversify their portfolio, mitigates problems of adverse selection, and to absorb losses more easily[37].

Furthermore, the author notices that the risk that the investment will not be fruitful is drastically reduced because before agreeing to fund, funders perform an extensive due diligence of the case. The review-acceptance rate is 10-1, meaning that only one will be funded for 10 cases reviewed by the funders[38]. Before accepting to support a dispute, funders proceed to a risk management analysis of the claim by evaluating its legal, factual, practical, and political variables to determine risks, the likelihood of success, and the potential rate of return. On a practical note, the firm's minimum claim values range from $4 M to $7 M[39].

According to some critical mind, funders create a level of sophistication and precision that is almost shockingly unknown and unmanageable by sophisticated multi-national companies and the world's best law firms[40]. Some consider funders as "super-lawyers" even though most of them will reject this title.

B. Claimholder's Interest

The claimholder has various interests in being funded.

The first reason is that the claimholder may not have enough capital to pursue a meritorious claim, individually or through class action. Let us take the example of High-Tech start-up "A" which created with company "B", the joint venture "AB". B violated the terms of agreement of this joint venture. Therefore, A wants to take legal actions against B for violation of the contract. According to the joint-venture agreement, if any dispute arises, it shall be settled under the ICC Rules of Arbitration. However, A is constantly reinvesting its capital for R&D. In other words, A does not have enough resources to cover the arbitration's costs. Thus, the start-up will turn over a funder to palliate the lack of capital.

Another motive concerns companies who want to maintain the cash flow to continue conducting business as usual. Thus, even if they have enough reserves to pursue a

[36] Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 928.
[37] Justice Not Profit, "Third Party Litigation Funding in the United Kingdom: A Market Analysis" (2015), 12 < https://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf> accessed 2 December 2020.
[38] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 186.
[39] This is only valid for the UK Market. See [37], p.16.
[40] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 186.

meritorious claim, they seek a mean to fund it[41]. That way, those well-resourced claimants hedge their legal costs risk[42] and reduce the burden of legal expenses on their balance sheet, although the corporate entity concedes a percentage of an award to the funder. In other words, this mechanism enables the corporation to not pay legal fees of the arbitration and to avoid a negative balance sheet impact[43]. To some extent, it transforms legal department into a profit center.

Moreover, as foreshadowed previously, funders surround themselves with skilled team that can carry strong expertise and precision about a case. The claimant, if its case has been approved for funding, will benefit from it. It also permits the claimholder to provides resources to retain top counsel for the arbitration.

This business model incentivizes the claimant to seek funding because it is a "risk-free" non-recourse funding for it[44]. If the funded party loses the claim, it is not required to compensate the funder's investment. Ultimately, third-party funding converts disputes from a traditional "win-lose" plan to a "win-do not lose" proposition. In other words, funders shoulder the risk of the arbitration.

C. Law Firm's Potential Interest

A recent trend in the arbitration community has seen big law firms entering a preferred supplier arrangement with third-party funders[45]. This preferred agreement allows the law firm's clients to benefit from preferred rates and a fast-tracked due diligence process[46]. It provides the law firm with a competitive advantage compared to other law firms who does not have such agreement. The clients profit from both, the lawyer advices and the funder's expertise and the economic analysis of the arbitration claim. The law firm offers lawyers and risk management experts to work on their claim and advise on a strategic decision about the case's conduct, especially in complex commercial arbitration such as infrastructure or construction arbitration.

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[41] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 11; Maya Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding" (2011) Vol. 95 Minnesota Law Review 10.

[42] Kelsie Massini, "Risk Vs. Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs" (2015) Vol. 7 Year Book on Arbitration and Mediation 326.

[43] Vienna Messina, "Third-Party Funding: The Road to Compatibility in International Arbitration" (2019) Vol. 45 Issue 1 Brooklyn Journal of International Law 443.

[44] Duarte G. Henriques, ., "Arbitrating Disputes in Third-Party Funding: A Parallel With Arbitration in The Financing Sector" (16 November, 2018) 3 <https://ssrn.com/abstract=3285723> accessed 15 November 2020.

[45] Mark Roe, "Third-Party Funding as an Alternative Litigation Financing Solution" (1 April 2020) Out-Law Analysis Pinsent Masons <https://www.pinsentmasons.com/out-law/analysis/third-party-funding-alternative > accessed 3 January 2021.

[46] Ibid.

IV. The Positive and the Adverse Effects of Third-Party Funding in International Arbitration

A. The Positive Effects

i. Access to Justice

Former President of the UK Supreme Court, Lord Neuberger opined that [third-party] funding is "the life-blood of the justice system"[47], which "helps maintain our society as an inclusive one (…) a society that can prosper"[48]. The worst characteristic of international arbitration is considered to be the "cost of arbitration"[49]. Most of the literature in both investment[50] and commercial arbitration agreed that third-party funding facilitates access to justice[51] to financially distressed claimants. Already in 2006, the High Court of Australia judged that "A litigation funder (…) organizes those asserting such right so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law"[52]. Indeed, who can pretend that subscribing to an arbitration clause means to give up claiming its rights in case of financial difficulties? We must keep in mind that the ultimate purpose of international arbitration is to allow companies and individuals to enforce their rights.

Moreover, third-party funding enables to level the playing field and permits a claim to proceed on its merits rather than on the respective parties' power[53]. This is particularly true for "David v Goliath cases" where a party is either under-resourced or out-resourced by its opponent. In this scenario, a lack of funds might prevent the weaker party to access arbitration, despite a robust case.

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[47] Lord Neuberger, "From Barretry, Maintenance and Champetry to Litigation Funding", Gray's Inn speech, May 8, 2013, para 52 <https://www.supremecourt.uk/docs/speech-130508.pdf>.

[48] Ibid, para 53.

[49] Queen Mary University of London and White & Case LLP, "2018 International Arbitration Survey: The evolution of International Arbitration" (May 2018) < https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>. According to 67% of the survey's respondents, cost is the worst feature of international arbitration.

[50] Sarah E. Moseley, "Disclosing Third-Party Funding in International Investment Arbitration" (2019) Vol. 97 Texas Law Review 1189.

[51] Ayodeji Akindeire, "Third-Party Funding in International Arbitration: Concept, Issues and the Need for a Regulatory Framework" (January 9, 2020) 11 <https://ssrn.com/abstract=3516668> accessed 15 November 2020; Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration,* (2nd edn, Wolters Kluwer 2017) 67; Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin. 920; Vienna Messina, "Third-Party Funding: The Road to Compatibility in International Arbitration" (2019) Vol. 45 Issue 1 Brooklyn Journal of International Law 447.

[52] Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited., (2006) 229 CLR 386.

[53] Woodsford Litigation Funding, Funding for International Arbitration (2019).

Described this way, third-party funding is an altruist act. Economists have defined altruism as the making of any transfer that is not compensated[54]. From a theoretical perspective (or an idealist vision), funders transfer capital to the demanding party to permit it to assert its rights, taking into account that they may not be compensated if the case failed. Nevertheless, funders accept this potential risk.

Some can argue that the "profitability" requirement refutes the last argument. As previously explain, third-party funding is progressively becoming an alternative investment product. Funders aim to gain a profit from their investment. Funding companies are not charity organization. The funding will only be granted when the case is likely to yield staggering results. In that case, the noble purposes of third-party funding which consist to restore a fair playing field between parties and to provide access to justice are inexistent, or at least only theoretical. However, the author cannot entirely agree with this reasoning. Lack of access to justice is not correlated to low damage awards or meritless claims[55]. Funders provide economic support to cases that are labelled "suitable", which mean to arbitration cases that present a possible high return on investment but where the party has limited financial resources, or when the company used that as a risk management method[56]. Hence, funders enhance access to arbitration for weaker economic parties.

ii. Potential Positive Impact on the Unconscionability Doctrine (a pro-arbitration impact)

From the author's point of view, third-party funding has a pro-arbitration impact because it allows to reduce the unconscionability doctrine that prevails in international arbitration. Unconscionability is an equitable doctrine used to set aside unfair agreements resulting from an inequality of bargaining power[57]. The unconscionability doctrine expresses that a court may refuse to enforce a contract or an individual term of a contract if it concludes that one party took advantage of a weaker party to obtain an unfair agreement[58]. Such a contract or term is said to be "unconscionable". The concept of unconscionability established in common-law countries exists also in civil

[54] William M. Landes and Richard A. Posner, "Altruism in Law and Economics." (1978) Vol. 68 Issue 2 The American Economic Review Altruism in Law and Economics 417.

[55] Galo M. Marquez Ruiz, "Uber v. Heller: Can Third-Party Funding Limit Unconscionable Arbitration Agreements?", 17 October 2020 Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/10/17/uber-v-heller-can-third-party-funding-limit-unconscionable-arbitration-agreements/> accessed 1 December 2020

[56] See part III above.

[57] Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII), para 54.

[58] <https://ca.practicallaw.thomsonreuters.com/w-026-3497?transitionType=Default&contextData=(sc.Default)&firstPage=true>

law countries[59]. For instance, under Swiss Law, the unconscionability doctrine can be found in art. 21 of The Code of Obligations[60].

For an arbitration agreement to be unconscionable three conditions must be met. First, the agreement is too onerous to exercise. Additionally, the party must not have acknowledged the implications of the clause, and finally if there existed a possibility to bargain, there must have been inequality of bargaining power[61].

The recent case of Uber Technologies Inc v. Heller[62] raises a question: what would have been the outcome if the claimant could have obtained third-party funding?

Heller, a driver for UberEats, started a class action against Uber Technologies Inc. ("Uber"), a company that created software (phone apps) to arrange ridesharing and food delivery. The class action seeks two points: 1) a declaration that he and the other drivers were employees of Uber, and 2) $400 million in damages for unpaid minimum standards entitlements under Ontario's Employment Law (e.g., the ESA).

To work for Uber, drivers are presented with a standard form services agreement and must click "I agree" twice to accept it[63]. Heller clicked on the contract (powered on Uber App) and agreed to terms that he did not have any power to negotiate. His only option was to accept it or reject it. The contract stated that Heller was an independent contractor. Any legal problem he might have had with the company had to be resolved by the International Chamber of Commerce in the Netherlands, not a court. In other terms, the contract included an arbitration clause, which means that Heller could not sue Uber in Court, but only through arbitration. Mr. Heller did not know how much arbitration would cost until he brought the case. He found that basic fees for the process were at least $14,500. As an UberEats driver, he earned less than $32,000 per year, before taxes. However, Uber brought a motion to stay Heller's proposed class action favoring arbitration because he had agreed to that. Heller appealed to the Court of Appeal for Ontario and this one determined that the arbitration clause was invalid on two grounds, which one was the unconscionability doctrine. Uber appealed to the Supreme Court of Canada ("SCC"). The SCC dismissed Uber's appeal and upheld the

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[59] Franco Taisch, "Unconscionability in a Civil Law System: An Overview of Swiss Law" (1992) Vol.14 Issue 3 Loyola of Los Angeles International and Comparative Law Review 530.

[60] CR CO I SCHMIDLIN, art. 21 para 13, 14; Franco Taisch, "Unconscionability in a Civil Law System: An Overview of Swiss Law" (1992) Vol.14 Issue 3 Loyola of Los Angeles International and Comparative Law Review 531.

[61] Galo M. Marquez Ruiz, "Uber v. Heller: Can Third-Party Funding Limit Unconscionable Arbitration Agreements?", 17 October 2020 Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/10/17/uber-v-heller-can-third-party-funding-limit-unconscionable-arbitration-agreements/> accessed 1 December 2020.

[62] Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII).

[63] Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII) para 7.

Court of Appeal's judgment on the basis that the Arbitration Clause was unconscionable because there is an inequality of bargaining power that prevents the weaker party from adequately protecting their interests in the contracting process, and an improvident transaction.

However, a judge from the minority argued that: "the appeal should be allowed and a stay of proceedings should be granted on the condition that Uber advances the funds needed to initiate the arbitration proceedings […] the courts should respect the parties' agreement to arbitrate"[64]. She stressed Freedom of Contract, which promotes the stability of contractual relations, and is of central importance to any commercial and legal system[65].

Therefore, the inclusion of third-party funding in an arbitration clause would develop the doctrine of unconscionability into a more concrete concept and prevent dilatory tactics[66]. Indeed, to assume that all arbitration clauses which are not negotiable are unconscionable would conclude that all adhesion contracts are not arbitrable. This approach strongly threatens the principle of freedom of contract and arbitration. Third-party funding would prevent this threat and would instead encourage parties to enroll in arbitral procedures[67]. In that fashion, the unconscionability doctrine will be sparked only by the particular position of a claimant and not an ambiguous perception that unilaterally blundersome clauses are invalid. Third-party funding will not automatically bypass the unconscionability doctrine, but it could help rebalance the scale of justice by serving as an empowering instrument that facilitates access to arbitration for all its users[68]. Also, this approach protects freedom of contract. Nevertheless, the author thinks that this rationale is valid only if the arbitration clause had not reflected the administrative filing fees' costs. She suggests that parties unable to start the arbitration should seek for external funding before attending local court.

B. Downsides of Third-Party Funding on the International Arbitration System

Funders' presence in international arbitration proceedings raises ethical concerns related to arbitrator impartiality, attorney-client privilege, and conflict of interests.

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[64] Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII), para 199.

[65] Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII), para. 107.

[66] Galo M. Marquez Ruiz, "Uber v. Heller: Can Third-Party Funding Limit Unconscionable Arbitration Agreements?", 17 October 2020 Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/10/17/uber-v-heller-can-third-party-funding-limit-unconscionable-arbitration-agreements/> accessed 1 December 2020.

[67] Ibid.

[68] Ibid.

i. Confidentiality is threatened

In the context of international arbitration, confidentiality directs all parties involved not to disclose information to any third parties[69]. Even still, no standardized approach exists[70] with respect to confidentiality in international commercial arbitration[71]. However, Institutional arbitration rules, national laws, and individual party agreements may provide such a legal basis for a duty of confidentiality[72].

In the case that the parties are bound by confidentiality obligations, their privacy expectations collide with funders' interests[73] at almost every stage of the funding process.

During the pre-funding stage, prospective funders request the party seeking fund to provide minimum information surrounding the claim[74]. These information are privileged because they involve either communications protected by professional secrecy[75] or analysis by a client's counsel in preparation for legal proceedings[76].

Once the funding agreement is reached, the case monitoring phase begins. It implicates the sharing of pieces of information that are not publicly available between the funded party and the funder[77]. Thus, the funder will usually know about the arbitration as much as the funded party and its counsel[78], even though the funder is virtually considered a non-signatory party in the arbitration[79].

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[69] Gary Born, *International Commercial Arbitration*, (3rd edn, Wolters Kluwer 2020).

[70] The UNCITRAL Model Law on ICA contains no provision regarding confidentiality.

[71] Janys Matthis, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 97 para. 17.

[72] Ibid.

[73] Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 100 para. 24.

[74] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 197; ICCA Report 29; Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration,* (2nd edn, Wolters Kluwer 2017) 68; Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 100 para. 26.

[75] The author notes that the common law tradition refers to it as "attorney-client privilege". The policy behind protecting lawyer and client information and communication is finally almost the same.

[76] ICCA Report 117.

[77] Idem.

[78] Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 100 para. 24.

[79] Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 922.

A majority of the common-law doctrine considers that communications with the third-party funder for purposes of preparing for potential or actual legal proceedings would fall within the protection of litigation privilege[80], but this is not necessary the case for civil-law countries.

The concern that naturally arises is that the funder uses the information gathered on the opponent in subsequent disputes affecting or directly involving the other party[81]. For instance, if the funder is specialized in funding cases in a particular industry, the opponent could rightfully fear that any shared information in the course of this specific arbitration could be used against it in another arbitration[82]. This concern is even more significant by the fact that funders prefer to keep their involvement confidential and rely on a confidentiality agreement[83]. Hence, the party looking for confidentiality might not even be aware that a funder is involved.

There are two conflicting interests. On the one hand, the funded party has legitimate interests in revealing information to obtain funding and, on the other hand, parties and their counsels have valid reasons to preserve confidentiality[84]. The question arises as to how confidentiality interests are respected while allowing the disclosure of any relevant information? Matthys recommends minimum systemic regulations[85]. It means that the funded party is obliged to disclose the presence of a funder[86]. It would permit the counter-party to initiate appropriate measures to ensure compliance with

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[80] Norton Rose Fulbright, International Arbitration Report, Issue 7 (2016), p. 5; Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 199; Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration,* (2nd edn, Wolters Kluwer 2017) 70.

[81] Jonas V. Goeler, "Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings", 21 July 2016, Kluwer Arbitration Blog available at < http://arbitrationblog.kluwerarbitration.com/2016/07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/> accessed 14 November 2020.

[82] Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 100 para. 27; Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 922.

[83] Jonas V. Goeler, "Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings", 21 July 2016, Kluwer Arbitration Blog available at < http://arbitrationblog.kluwerarbitration.com/2016/07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/> accessed 14 November 2020

[84] Ibid [81].

[85] Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 102 para. 31 ff.

[86] Janis Matthys, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020) 113 para. 76.

its confidentiality needs[87]. The author recommends - in addition to that - the use of individual party agreement such as a non-disclosure agreement stipulated between the funded party and a third-party funder. The non-disclosure agreement can also be stipulated between a potential funded party and its prospective third-party funder. It allows them to tailor their confidentiality needs and obligations.

ii. Independence of the Parties Is Jeopardized

The first concern relates to **arbitrator impartiality**. As a general principle, arbitrators have to be independent and impartial[88]. It requires arbitrators to disclose "any circumstances likely to give rise to justifiable doubts as to their impartiality or independence"[89]. If this rule is not respected, it might put the arbitration at risk: the other party can challenge the arbitration on this ground. This would cause undue delay and increasing costs. More crucially, if the conflict of interest is discovered after the arbitral tribunal rendered the final award, it might well be unenforceable or unrecognizable under article V(2) of the New York Convention.

Funder's presence may trouble the expectation of independence and impartiality of the arbitrators. In fact, arbitrators are being asked to sit on the advisory board of third-party funders[90]. Conflicts of interest may also arise if an arbitrator is repeatedly appointed in cases involving the same third-party funder[91]. Another case of conflict of interest may arise when "one party (P1) is funded by funder (F) and X is the presiding arbitrator in one arbitral dispute (A1), but also serves as counsel to the claimant in another unrelated arbitration (A2) and the claim is funded by the same funder F"[92].

Moreover, funders are powerful procedural stakeholders. They have a direct economic interest to ensure a successful outcome. Consequently, they are generally involved in the continuous administration of the case[93]. As in any investment, investors (which are funders) want to monitor their investment. They may exercise high degrees of control in order to protect it and ensure that the case is prosecuted consistent with the

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[87] Jonas Von Goeler, *Third Party Funding in International Arbitration and its Impact on Procedure*, (Wolters Kluwer 2016) 308-309.

[88] See for instance art. 9, para. 1 of SCAI Rules of International Arbitration; art. 5.3 of the LCIA Arbitration Rules; Art. 11.1 and 11.4 of the HKIAC Administrated Arbitration Rules.

[89] Art. 10, para. 1 of the SCAI Rules of International Arbitration.

[90] Woodford Litigation Funding has an investment advisory panel where prominent arbitrators are seating; See also Moseley Sarah, Disclosing Third Party Funding in International Investment Arbitration (2019).

[91] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 199; Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 923.

[92] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 200.

[93] Sebastián Torres Linke, "Third-Party Litigation Funding in International Arbitration: Conflicts of Interest with Arbitrators" (thesis, University of Münster 2019).

assumptions and analysis that facilitated the funding in the first place[94]. Some reports indicate that a third-party funder has directly appointed an arbitrator or physically appeared at an arbitral hearing[95]. According to the ICCA report, third-party funding arrangement can contain provisions that entitle the funder to terminate the agreement in case of a breach of the agreement or a fundamental change in the likelihood of success[96]. In short, funders exercise control over the conduct of a case. In addition to that, a professional funder is generally involved in numerous disputes. This creates a financial incentive for arbitrators who financially rely on future nominations, to render favorable decisions to such a powerful "party". All these elements are making conflicts of interest between funders and arbitrators susceptible to appear.

Currently, these possibilities of conflict of interest are decreasing as arbitral institutions and/or national laws require the parties to disclose such information. The IBA Guidelines on Conflict of Interest in International Arbitration of 23 October 2014 introduced the first international standard set of principles on this issue[97]. Even still, they do not expressly refer to third-party funding relationships[98]. Hence, an important step toward regulating third-party funding in commercial arbitration has been taken by the ICC. According to the art. 11 (7) of the 2021 ICC Rules "each party must inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration". This disclosure requirement seeks to avoid conflict of interest and thereby ensure the enforceability of an award[99]. Still, there remain leading institutional rules that do not specifically refer to third-party funding in international commercial arbitration[100].

The second concern regards the counsel, and more broadly, the **attorney-client relationship**. Independence is the bulwark and hallmark of professional practice[101]. The notion of independence establishes what we call "professionalism". Professional

[94] ICCA Report 75.
[95] ICCA Report 74.
[96] ICCA Report 28.
[97] IBA Guidelines on Conflict of Interest in International Arbitration, para. 3.
[98] IBA Guidelines on Conflict of Interest in International Arbitration, p. 20 ff, para. 1.
[99] Jonathan Barnett, "Third-Party Funding Finds its Place in the New ICC Rules", 5 January 2021 Kluwer Arbitration Blog < http://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/> accessed 6 January 2021.
[100] For instance, the SCAI Rules and the LCAI Rules do not require specific disclosure for third-party funding.
[101] Emma Oakley and Steven Vaughan, "In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms" (2019) Vol. 46 Issue 1 Journal of Law and Society 87.

independence means the capacity to make rational choices free from any influences[102]. The rules requiring professional independence are designed to protect the legal system and the legal profession by ensuring that lawyers exercise independent judgment[103].

However, the practical features of the funding system challenge both the concept of [attorney] independence and the rules designed to guarantee it. Third-party funding agreements often require keeping the funder updated on any significant development, or strategic decision made by the counsel of the funded party.

Funders play not only the financing role, but they also sit at the decision table of the lawyer and its client, as advisors and strategists. As Woodsford Litigation Group's CEO reported: "in addition to cash, we also invest our expertise. The Woodsford team included a number of high-caliber legal and financial experts, who stand ready to assist the claimant's legal team at all stages of the arbitration. Our objective is to assist, but not to interfere"[104]. The lawyer's remuneration depends indirectly on the funder. The worry that "an attorney's primary loyalty will, as a practical matter, rest with the person or entity who pays him"[105] is relevant in this case. As the Swiss Federal Court have mentioned, the lawyer has a commercial interest to side with the funders, due to the prospect of repeated business with the funder[106].There is a risk that the funders' interests are put before those of the client. The attorney-client relationship is confused by such involvements. Is the lawyer really independent from the funder? Which party and interests does the attorney represent? Who is in control of the claim? It is clearly a grey zone. In almost every jurisdiction, professional code of conduct mandates lawyers to act in their client's best interests.

iii. Risk on the Efficiency of International Arbitration

While there is no direct evidence that third-party funding leads to an increase in frivolous claims[107], some scholars believe that third-party funding promotes

[102] Idem, p. 91.
[103] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 194.
[104] Norton Rose Fulbright, International Arbitration Report, Issue 7 (2016), p. 4.
[105] Douglas R. Richmond, "Other People's Money: The Ethics of Litigation Funding." (2005) Vol. 56 no. 2 Mercer Law Review 669.
[106] ATF 131 I 223 consid. 4.6.3.
[107] Kelsie Massini, "Risk Vs. Reward: the Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs" (2015) Vol.7 Yearbook on Arbitration and Mediation 327.

litigation[108] where it would not have otherwise occurred because it can persuade parties to initiate a dispute. It can open the floodgates to trivial claims[109].

The other risk related to frivolous claims is that third-party funding may lead to arbitration proceedings being treated as business ventures, which is unethical as the justice system should not be the place for business ventures[110].

Nonetheless, we consider these risks groundless. Funders conduct extensive due diligence on the claim to evaluate the chance of success[111], they will not "throw away their money on frivolous litigation"[112]. Since the case's profit and success are intertwined, they are more likely to act as gatekeepers, filtering frivolous claims rather than promoting it[113].

V. Evaluation

In view of these pros and cons analysis, we cannot argue that third-party funding should be unregulated nor banned. This industry will continue to grow. Experts values it at exceeding $10 billion[114]. However, the process to obtain funding from a funder can compromise the confidentiality principle that is embedded in international

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[108] David Abrams and Daniel L. Chen, "A Market for Justice: A First Empirical Look at Third Party Litigation Funding" (2013) Vol. 15 Journal of Business Law 1075 cited in Newman & Hill: "*Whilst there is no conclusive evidence that the third-party funding of claims promotes frivolous litigation, at least one study indicated that third party funding does lead to an increase in litigation and court caseloads"*.

[109] Lisa B. Nieuweld and Victoria Shannon, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017) 69; Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 925; Lawrence Newman and Richard D. Hill, *The Leading Arbitrators Guide to International Arbitration* (3rd edn, Juris Publishing 2014).

[110] Kelsie Massini, "Risk Vs. Reward: the Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs" (2015) Vol. 7 Yearbook on Arbitration and Mediation 328; Vienna Messina, "Third-Party Funding: The Road to Compatibility in International Arbitration" (2019) Vol. 45 Issue 1 Brooklyn Journal of International Law 451.

[111] Norton Rose Fulbright, International Arbitration Report, Issue 7 (2016), p. 4; Clive Bowman, Kate Hurford and Susanna Khouri, "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" (2011) Vol. 8 Issue 4 Transnational Dispute Management; Deric Yeoh, "Third-Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field" (2016) Vol. 33 no.1 Journal of International Arbitration 117.

[112] Sebastian Perry, 'GAR Article: Third-Party Funding: The Best Thing since Sliced Bread?' (2012) Global Arbitration Review 222.

[113] Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?" (2017) Vol. 35 no. 4 ASA Bulletin 925; Deric Yeoh, "Third-Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field" (2016) Vol. 33 no.1 Journal of International Arbitration 117.

[114] See Financial Times, "Lawsuit funders raise £10bn from yield-hungry investors" <https://www.ft.com/content/926355de-c941-11e7-ab18-7a9fb7d6163e>

commercial arbitration. Legal mechanism should be established to avoid such occurrence and to ensure the protection of the counter-party.

Besides, as discussed earlier, third-party funding increases the risk of conflict of interest between funders and arbitrators. Nevertheless, the author thinks that the disclosure requirement established by the ICC is essential for reaching a balance between the ethical concerns of third-party funding, the legal policy response to third-party funding, and the attractive benefits offered by funding agreement.

We cannot have positive effects without having negative ones. The international arbitration community, especially the institutions, can reduce the adverse effects by enacting new rules related explicitly to third-party funding.

VI. Conclusion

Third-party funding has ancient origins and was once considered as the crimes of champerty and maintenance. Today, it presents a new way of investments for investors, while also benefiting the access to international commercial arbitration. One can reasonably ask if third-party funding is not setting up the stage for the monetization of international commercial arbitration. As discussed earlier, third-party funding may have evolved from its original purposes. Third-party funding is becoming an investment product for the funder and a legal device for the claimholder. Funders do not fund cases only for access to justice, but for the potential attractive return of this investment. From this perspective, arbitration finance provides a new alternative to the classic investments on the financial markets. This might result in the emergence of new unregulated financial products[115].

Besides this financial regulation concern, third-party funding is on the way to disrupt the international commercial arbitration system positively. Arbitration finance can strengthen the evolution of arbitration as a reliable and robust alternative dispute resolution system.

The progress in the development, recognition and understanding of third-party funding will undoubtedly continue in 2021. In the Covid-19 area and beyond, corporations are facing unprecedented economic stresses and increasing pressure on cash-flow. In that context, third-party funding offers an opportunity to handle these risks.

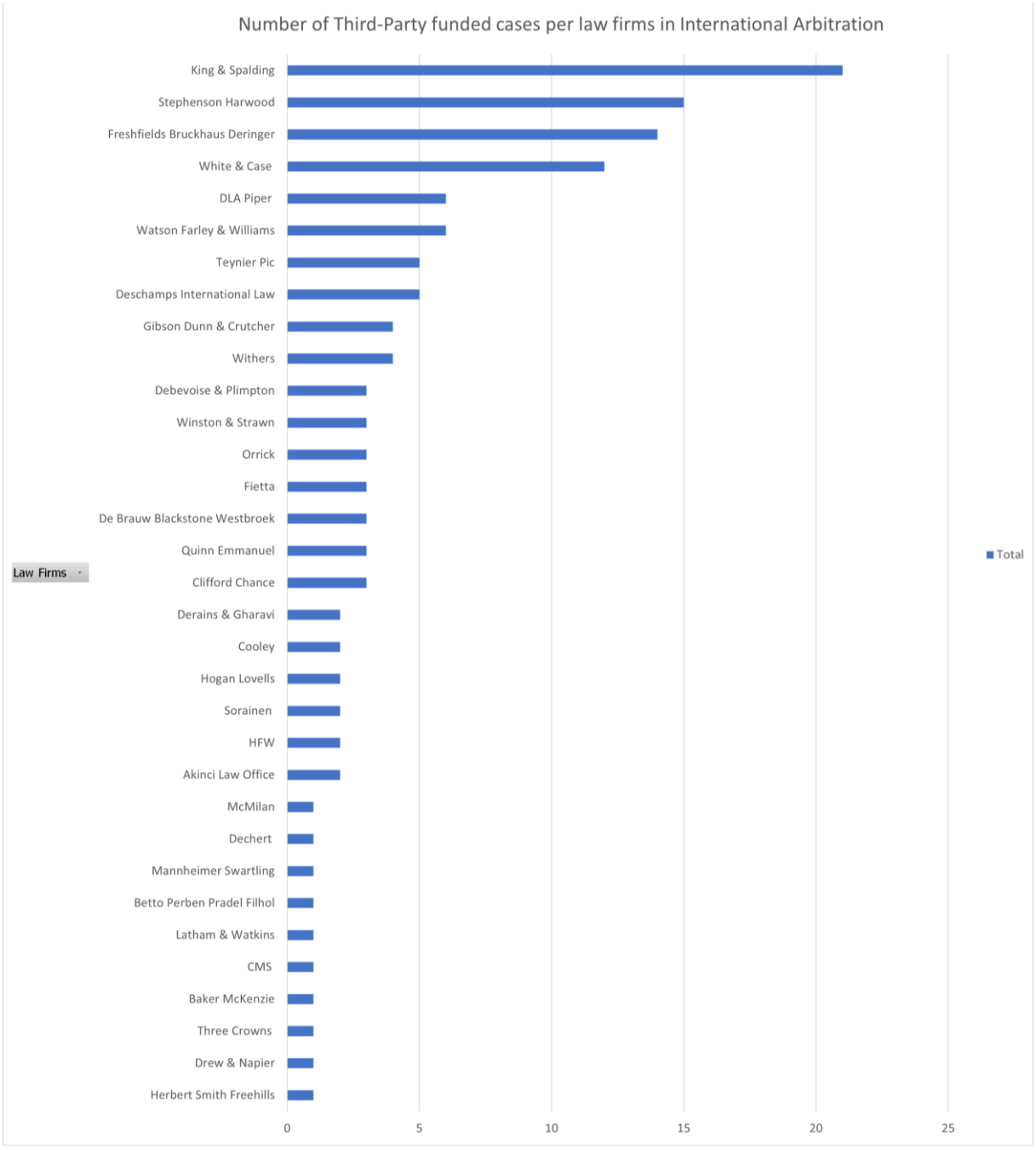
However, as described in this paper, there are significant drawbacks to third-party funding. As this system involves many different types of funding agreements, the

[115] Caroline Dos Santos, "Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?" (2017) Vol. 35 no. 4 ASA Bulletin p. 929.

approach we preconize is to regulate it in light of the industry's new needs and development, as the ICC has recently done. The other arbitral institutions must follow ICC initiative to include specific rules related to third-party funding in international commercial arbitration. Indeed, the issue is not anymore about whether or not third-party funding should be permitted. The debate is moving to the regulatory issues to enhance its efficiency.

Annex 1: The increasing use of third-party funding in International Arbitration

This graph is based on the data provided by the GAR 100 Survey (13th edition).



Bibliography

Articles:

Abrams, David S. and Chen, Daniel L., "A Market for Justice: A First Empirical Look at Third Party Litigation Funding" (2013) Vol. 15 University of Pennsylvania Journal of Business Law 1075

Akindeire, Ayodeji, "Third-Party Funding in International Arbitration: Concept, Issues and the Need for a Regulatory Framework" (January 9, 2020) <https://ssrn.com/abstract=3516668> accessed 15 November 2020

Barnett Jonathan, "Third-Party Funding Finds its Place in the New ICC Rules", 5 January 2021 Kluwer Arbitration Blog < http://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/> accessed 6 January 2021

Bowman Clive/Hurford Kate/Khouri Susanna, "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" (2011) Vol. 8 Issue 4 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=1747> accessed

Dos Santos Caroline, "Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?" (2017) Vol. 35 no. 4 ASA Bulletin pp. 918-936

Goldstein Marc J., "Should the Real Parties in Interest Have to Stand Up? - Thoughts About A Disclosure Regime for Third-Party Funding in International Arbitration" (2011) Vol.8 Issue 4 Transnational Dispute Management < https://www-transnational-dispute-management-com.rproxy.tau.ac.il/article.asp?key=1745> accessed 16 November 2020

Greenberg Elayne E., "Ethical Guidelines for Dispute Resolution Professionals when Parties are Backed by Third-Party Funders" (2019) Arizona State Law Journal 131

Henriques Duarte G., "Arbitrating Disputes in Third-Party Funding: A Parallel With Arbitration in The Financing Sector" (16 November, 2018) <https://ssrn.com/abstract=3285723> accessed 15 November 2020

Jern-Fei Ng, "The Role of the Doctrines of Champerty and Maintenance in Arbitration" (2010) Vol. 76 Issue 2 International Journal of Arbitration, Mediation and Dispute Management 208

Kantor Mark, “Third-Party Funding in International Arbitration: An Essay About New Developments” (2009) Vol. 24 Issue 1 ICSID Review - Foreign Investment Law Journal 65

Landes William M., and Richard A. Posner, "Altruism in Law and Economics." (1978) Vol. 68 Issue 2 The American Economic Review 417-21

Massini Kelsie, “Risk Vs. Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs” (2015) Vol. 7 Year Book on Arbitration and Mediation 323

Messina Vienna, “Third-Party Funding: The Road to Compatibility in International Arbitration” (2019) Vol. 45 Issue 1 Brooklyn Journal of International Law 433

Moseley Sarah E., “Disclosing Third-Party Funding in International Investment Arbitration” (2019) Vol. 97 Texas Law Review 1181

Oakley Emma and Vaughan Steven, “In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms” (2019) Vol. 46 Issue 1 Journal of Law and Society 83

Perry Sebastian, “Third-Party Funding: The Best Thing Since Sliced Bread?”, (2012) Global Arbitration Review (reporting on GAR Live London debate) available at <https://globalarbitrationreview.com/third-party-funding/third-party-funding-the-best-thing-sliced-bread > accessed 3 December 2020

Pinsolle Philippe, “Comment on Third-Party Funding and Nationality Issues in Investment Arbitration” (2013) Vol.10 Issue 4 Transnational Dispute Management < www.transnational-dispute-management.com/article.asp?key=1987> accessed 2 October 2020

Richmond Douglas R, "Other People's Money: The Ethics of Litigation Funding." (2005) Vol. 56 no. 2 Mercer Law Review 649

Roe Mark, “Third-Party Funding as an Alternative Litigation Financing Solution” (1 April 2020) Out-Law Analysis Pinsent Masons <https://www.pinsentmasons.com/out-law/analysis/third-party-funding-alternative> accessed 3 January 2021

Ruiz Galo M. Marquez, “Uber v. Heller: Can Third-Party Funding Limit Unconscionable Arbitration Agreements?”, 17 October 2020 Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/10/17/uber-v-heller-can-third-party-funding-limit-unconscionable-arbitration-agreements/> accessed 1 December 2020

Steinitz Maya, “Whose Claim Is This Anyway? Third-Party Litigation Funding” (2011) Vol. 95 Minnesota Law Review 1268

Susan Lord Martin, "Litigation Financing: Another Subprime Industry that has a Place in the United States Market" (2008) Vol. 53 Issue 1 Villanova Law Review 83

Taisch Franco, "Unconscionability in a Civil Law System: An Overview of Swiss Law" (1992) Vol.14 Issue 3 Loyola of Los Angeles International and Comparative Law Review 529

Velchnik Michael K. & Zhang Jeffery Y., "Islands of Litigation Finance" (2017) Harvard John M. Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series 71.

Von Goeler Jonas, "Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings", 21 July 2016, Kluwer Arbitration Blog available at < http://arbitrationblog.kluwerarbitration.com/2016/07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/> accessed 14 November 2020

Yeoh Deric, "Third-Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field" (2016) Vol. 33 no.1 Journal of International Arbitration 115

Books:

Born Gary B., *International Commercial Arbitration*, (3rd edn, Wolters Kluwer 2020)

Lisa Bench Nieuweld & Victoria Shannon Sahani, *Third-Party Funding in International Arbitration*, (2nd edn, Wolters Kluwer 2017)

Matthys Janis, "How To Balance Third-Party Funding and Confidentiality in International Arbitration", in Daniel Girsberger/Christoph Müller (eds), *Selected Paper on International Arbitration* (Vol. 5 Stämpfli Verlag AG 2020)

McKenny Iain C, "Evolution of the Third-Party Funder", in Barton Legun (ed), *The Investment Treaty Arbitration Review* (5th edn, The Law Reviews 2020)

Newman Lawrence W & Hill Richard D, *The Leading Arbitrators Guide to International Arbitration* (3rd edn, Juris Publishing 2014)

Rogers Catherine A., *Ethics in International Arbitration* (Oxford University Press 2014)

Von Goeler Jonas, *Third Party Funding in International Arbitration and its Impact on Procedure*, (Wolters Kluwer 2016)

Thesis

Torres Linke Sebastiàn, "Third-Party Litigation Funding in International Arbitration: Conflicts of Interest with Arbitrators" (thesis, University of Münster 2019)

Law and Arbitral Institution Rules:

HKIAC Administrated Arbitration Rules

Hong Kong Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2016

ICC Rules of Arbitration

London Center for International Arbitration

Swiss Rules of International Arbitration of the Swiss Chamber Arbitral Institution

UNCITRAL Model Law on International Commercial Arbitration

Guideline

IBA Guidelines on Conflict of Interest in International Arbitration (2014).

Cases-Law:

ATF 131 I 223

Bevan Ashford v Geoff Yeandle (Contractors) Ltd [1999] Ch. 239 at 249D-G; [1998] 3 W.L.R. 172.

Campbells cash and Carry Pty Ltd v. Fostif Pty Limited

Uber technologies Inc. v. Heller, 2020 SCC 16 (CanLII)

Reports:

ICCA-Queen Mary Task Force, Third-Party Funding in International Arbitration Report n.4 (April 2018) < https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf>
(cited: ICCA Report)

Justice Not Profit, "Third Party Litigation Funding in the United Kingdom: A Market Analysis" (2015) < https://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf> accessed 2 December 2020

Norton Rose Fulbright, International Arbitration Report, Issue 7 (2016) < https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf?la=en&revision=2b95e882-b426-4aa1-952e-6270bebf896b> accessed 3 December 2020

Queen Mary University of London and White & Case LLP, "2018 International Arbitration Survey: The evolution of International Arbitration" (May 2018) < https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>

Woodsford Litigation Funding, Funding for International Arbitration (2019) < https://woodsfordlitigationfunding.com/wp-content/uploads/2019/11/Woodsford-White-Paper-Funding-for-International-Arbitration.pdf> accessed 8 December 2020

Others:

Lord Neuberger, "From Barretry, Maintenance and Champetry to Litigation Funding", Gray's Inn speech, May 8, 2013 <https://www.supremecourt.uk/docs/speech-130508.pdf>.

Financial Times, "Lawsuit funders raise £10bn from yield-hungry investors", <https://www.ft.com/content/926355de-c941-11e7-ab18-7a9fb7d6163e >

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Le 04.02.2021

Yael Nahmani