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Age of Third-Party Funding: Time for States to Permit and Regulate Third-Party Funding in Arbitration

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I. Introduction

Third-party funding allows those without the means to pursue a claim the ability to, and yet is still prohibited in many jurisdictions. Not only should those States permit third-party funding in arbitration, but they should also begin to regulate it. This lack of regulation can cause expensive satellite litigation due to issues arising from the confusion of what is permitted and what is not permitted from State to State. Permitting and regulating third-party funding is essential to ensure justice is distributed fairly to those with the means for pursuing a claim, and those who need assistance.

While conducting international arbitrations, it is important to understand when the use of third-party funding is permitted, or a potential award may be deemed unenforceable. With that, it is important to know the protocols involved when there is a third-party funder communicating with the lawyer and the client. Issues concerning these protocols could make an award invalid if the procedures are disregarded. To avoid this issue, the party would follow the States laws, but those States may be silent on third-party funding. It is also crucial to know when it is appropriate to disclose the presence of a third-party funder to the tribunal and opposing party. However, these rules are not yet laid out in many arbitral institutions and are cloudy when it comes to States laws. Rather it is on the parties to know the laws in each country and how those laws apply to third-party funders. Depending on where the arbitration is seated, it is important to know if the seat allows for the type of agreements involved in third-party funding. Until all States permit third-party funding, it is integral to understand the jurisdiction's rules on how they handle certain issues. These issues, even if regulated by law, still change with jurisdiction, but the core issues should be uniform throughout all jurisdictions.

Provided that the State or the arbitral rules which govern the proceedings allow for third-party funding, the parties must understand the impact these arrangements have on the arbitration. Some States and arbitral rules have restrictions on the amount of influence the third-party funder can have over the arbitration. Other States have yet to regulate this to address the proper level of control. With these agreements in place, it is essential to understand how to navigate issues about conflicts of issues and privilege when third-party funders are involved.

Because different States around the world are taking different approaches toward third-party funders, it is vital to understand these approaches and how to navigate them. Although third-party funders are becoming more prominent in modern times, not all States are as open as others. Violating a State's stance on third-party funders may be contrary to public policy and thus could make a favorable award invalid.

This paper will address the pros and cons of third-party funding and some of the fears that come along with a third-party funder funding an entire claim and why States may avoid permitting it. This paper will then describe how third-party funders have a certain power over a claim holder, which may be against public policy if gone unchecked, and how this influence should be regulated by the State. Next, this paper will address conflicts of interest that arise from third-party funding, mainly between the third-party funder and the arbitrator, as well as why disclosure should be mandatory. Then the paper will talk about the confusing concept of privilege regarding the documents involved in a third-party agreement. Lastly, this paper will address how some States around the world have addressed third-party funding and what other States should do to follow suit. Although most third-party funding is left unregulated, making some procedures mandatory would allow for smoother proceedings where a third-party funder is involved.

II. Third-party Funding Clashes with States Contingency Fee Laws

To understand why some States treat third-party funding differently than others, it is important to understand why many prohibit it. Third-party funding relationships involve a contract between the third-party funding corporation and the claim holder.[1] The funder provides money to allow the claim holder to pursue the claim in exchange for a share of a successful claim, whether by settlement, a court's judgment, or an arbitrator's award.[2] Funders and claim holders can also agree on a multiplier type of repayment structure, where the funder would win a certain percentage multiplied by the amount invested.[3] This benefits the plaintiff by allowing them to pursue a claim that they originally would not have been able to without funding.[4] The plaintiff is also not obligated to repay the third-party funder if the claim is unsuccessful.[5] Before the agreement, the third-party funder will consider a variety of factors including the probability of a successful claim, the potential liability for an unsuccessful claim, the amount of the claim and investment, the time until recovery, the legal merits, the collection risk, and the business context.[6] After these factors are considered, the third-party funder decides whether to become involved in the claim. Sometimes this decision is made before a claim is filed, or even before an attorney is involved.[7] The third-party funder would want the potential award to be high enough

[1] Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration, 101 Geo. L.J. 1649, 1654 ("Full Disclosure")
[2] *Id.*
[3] *Id.* For Example, the funder would invest a certain amount, and the agreement would state that they recover 10 times the amount invested, and so on.
[4] Dinsmore & Shohl LLP, Champerty and Maintenance in the Modern Era, (Jan. 22, 2016) https://www.lexology.com/library/detail.aspx?g=d1e2c6d9-bdf8-4520-a8e2-76ab91e9b98f (last visited Mar 20, 2023) ("Shohl")
[5] *Id.*
[6] John Beisner, Jessica Miller & Gary Rubin, U.S. Chamber Inst. for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States (2009) https://instituteforlegalreform.com/wp-content/uploads/media/thirdpartylitigationfinancing.pdf. (last visited Mar 17, 2023).
[7] Mark Kantor, *Third-Party Funding in International Arbitration: An Essay About New Developments,* 24 ICSID REV. 65, 74 (2009)

to ensure that the funder has a high rate of return for themselves and the claim holder.[8] Upon a successful claim, the share of the proceeds varies based on: the amount of money involved; the length of time until recovery; the projected value of the claim; and whether the claim is settled, goes to trial, or is appealed.[9]

Another method a plaintiff can utilize to offset the costs of pursuing a claim is the use of contingency fees, which are between a plaintiff and an attorney. These fees are defined in agreements whereby the attorney's compensation is dependent on the success of the representation.[10] Three variants of these agreements emerge: (1) a lawyer is paid a fixed hourly rate but only if successful; (2) a lawyer charges a flat hourly fee with a bonus if successful; (3) or a lawyer is paid a percentage of the recovery obtained for the client.[11] The United States has accepted contingency fees as a 'necessary evil' and is now lawful.[12] Issues arise regarding contingency fees in many Nations under the doctrine of maintenance and champerty and how those doctrines directly relate to the third-party funding structure.

Maintenance and champerty date back at least as far as the Middle Ages.[13] These common law doctrines have long prohibited outside financing of litigation to a party outside the claim.[14] Maintenance is the act of a disinterested party to promote, encourage, or maintain a

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[8] Hussein Haeri, Clàudia Baró Huelmo & Giacomo Gasparotti, *Third-Party Funding in International Arbitration*, (Dec. 30, 2022) https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration. (last visited Mar. 2, 2023)
[9] Lawrence S. Schaner & Thomas G. Appelman, *The Rise Of 3rd-Party Litigation Funding*, Law 360. https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding (last visited Mar 3, 2023) ("Schaner")
[10] ARTICLE: A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements, 54 N.Y.L. Sch. L. Rev. 773, 775.
[11] *Id.*
[12] *Rooney v. Second A. R. Co*., 18 N.Y. 368, 373 (1858); (Ruling, what was before not only illegal but disreputable is now lawful, if not respectable.)
[13] Jason Lyon, *Revolution in Process: Third-Party Funding of American Litigation*, 58 UCLA LAW REVIEW 571 (2010).
[14] *See* Shohl, *supra* note 4.

lawsuit.[15] While champerty is an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds.[16] Many States strictly follow these doctrines and have outright prohibited contingency fees, and yet those same States have begun to abolish those doctrines or have determined that third-party funding in arbitration is permitted under certain protections. Third-party funding essentially extends contingency fees to non-lawyers.[17]

States that still follow the doctrines of maintenance and champerty still prohibit third-party funding. Those States should begin to follow the trend, allowing for third-party funding and removal, or placing different restrictions on these doctrines to allow for funding assistance. Selecting a seat that prohibits third-party funding, then seeking these funders' assistance could be disastrous to any award as it may be contrary to public policy.[18] Although in the modern era, the rules of champerty and maintenance have been relaxed in some jurisdictions, some jurisdictions place restrictions on third-party funders while others have no restrictions. Those jurisdictions that still prohibit contingency fees and in doing so, make the comparison and prohibit third-party funding in arbitration will fall behind in the arbitration realm.

Yet, third-party funding is different from attorney contingency fees in a few ways. One way is that funders in these agreements are not providing a service for a fee, but rather investing in an 'asset.'[19] Another important difference is that third-party funding has the potential to benefit the States economy as well as the plaintiff.[20] States understanding these differences will

[15] Dictionary of Law (6th ed.). London: Longman. p. 260. ISBN 0-582-43809-8
[16] BLACK'S LAW DICTIONARY 262 (9th ed. 2004)
[17] *See* Schaner, *super* note 9.
[18] *Id.*
[19] Article: Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 Minn. L. Rev. 1268, 1294.
[20] *Id.*

persuade them of the common good provided by third-party funding not only for the claim holder but also for the States economy.

III. Pros over the Cons of Third-Party Funding.

There are well-known benefits and oppositions to third-party funding. With the assistance of a funder, a claim holder who does not have the resources to bring about a claim would be able to. Parties that have a large number of resources could also use funders to take care of the legal issues while the company uses its time and resources into expanding the company rather than litigation and arbitration.[21] However, a downside that States take notice of is that third-party funding may give rise to unmeritorious claims as well as a concern with the high cost of what the third-party funders recoup on a successful claim.

Unmeritorious claims involve parties who do not have the proper resources to bring a claim and will use the funder to pursue an award, even though the claims are weak or non-existent. Even larger-scale companies with resources could use the funder's capital to bring about claims to slow down competitors. Although these risks may seem dangerous to States that prohibit third-party funding, it has been shown that third-party funders, in essence, prevent these types of claims from occurring.[22] Third-party funders do not simply accept any claim that is proposed, but rather conduct due diligence research on each case.[23] It is the funder's goal to make sure that they get a substantial return on their investment, thus curbing the issue of a surge of unmeritorious claims. States that fear unmeritorious claims need to understand that third-party

[21] International Arbitration Report. Issue 7 - September 2016, at 11. ("IAR")
[22] *Id.*
[23] *Id.*

funding is a business to make money and to get a return on its investment, the funders would not waste assets on unmeritorious claims.

Another downside to third-party funding is that they are driven by high returns on its investments. States may see this as a deterrent because they feel as though third-party funders take advantage of smaller claim holders and are not in the business of justice but rather to acquire money. After a successful award, the funder would normally recoup all legal fees and a percentage of the damages recovered.[24] The percentage of the damages recovered could be between twenty to forty percent.[25] A third-party funder, in most instances where the agreement allows, takes full responsibility for losses if the claim is unsuccessful, as well as the upfront cost of conducting due diligence research on the claim.[26] The high stakes incorporated with accepting and funding a claim result in a higher percentage of the award going to the funder. That said, a claim holder who was unable to pursue a claim and is now receiving sixty percent of the award is substantially more than nothing.

Although there are potential downsides to third-party funding, the assistance they provide to offended parties with little or no capital is a benefit that strongly supports States permitting third-party funding. Third-party funding corporations conduct their research on the case to ensure the claim is not unmeritorious, and the large percentage they claim of the award is due to their large contributions throughout the claim. Because the benefits of third-party funding outweigh the downsides, third-party funding should be accepted throughout all jurisdictions.

[24] *Id.*
[25] *Id.*
[26] *Id.*

IV. Third-Party Fundings Effect on the Proceedings

During international arbitration, disputes arise concerning influence, conflicts of interest, and privilege. These disputes are usually addressed in arbitral rules or State laws. However, introducing a third-party funder into the claim brings new challenges to the proceedings. These include the amount of power the funder holds and how they can influence the claim holder; conflicts of interests between themselves, the parties, and the arbitrators; and what information passed between the funder, the claim holder, and the attorney are privileged. States that permit third-party funding in arbitration should begin to regulate these concerns. Although many states leave this unregulated and rely on good morals and public policy to guide parties, these unclear guidelines can confuse proceedings.

A. Influence

When a third-party funder involves themselves financially in a claim, they also want to ensure that the claim succeeds. Depending on the extent that the funder is involved in case management, the funder may bring experience to the case or be able to assist in selecting counsel.[27] Funders have exercised different levels of control, ranging from receiving regular progress reports to receiving detailed reports with timelines and budgets, appointing attorneys, and conducting settlement talks.[28] The funder agreement with the claimant can state the amount of control the funder is authorized by the client.[29] This could include third-party funders having no control over the proceedings. Yet, when the funder controls the money of a claim and can pull funding when they wish, they will always have some influence over a claim.[30] The earlier the

[27] *See* Full Disclosure, *supra* note 1, at 1655.
[28] Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs,* 19 BOND L. REV. 225, 249-50 (2007)
[29] *See* Full Disclosure, *supra* note 1, at 1655.
[30] *Id.*

funder made its investment in a claim, the more involved it will be in case management.[31] Last of all, when a funder is invested in a claim and has control over it, its concerns include monitoring its investments, and not necessarily the interests of the claim holder.[32] States need to begin to regulate these types of agreements to ensure justice is awarded to the claim holder. States should regulate parties to disclose this agreement to the arbitrators, which would allow the tribunal the ability to ensure that the third-party funder is not applying undue influence over the funded party. Regardless of whether the permitting State regulates influence, the contract between the claim holder and the funder should follow the jurisdictions' rules at the seat of arbitration. States regulating this type of influence would avoid satellite litigation when a funded party refuses to pay the funder after the procedure because of the improper influence the funder applied over the arbitration.

B. Conflicts of interest

Interests between the third-party funder and client can diverge during the proceedings. This could happen when the claim holder wishes to pursue a claim and yet the funder wishes to accept a settlement offer. Issues would also arise when the defendant's settlement offer is of products or assets rather than cash.[33] A client accepting this would not allow the funder to recoup their investment but it would leave the client satisfied.[34] Also, a claim holder may wish to withdraw from the proceedings for various reasons and leave the funder in a loss of investment.[35] These conflicts could be addressed in the Funding Agreement between the claim holder and the funder. Yet, with the usual claim holder in need of capital, which is controlled by the funder, the

[31] *Waye*, *supra* note 28, at 254.
[32] *Id*. at 255.
[33] *Id.*at 238.
[34] *Id.*
[35] *Id.*

claim holder may feel obligated to forgo their interests for that of the funder. In these situations, it would be the job of the attorney to balance those interests.

i. Third-Party Funder and Attorney.

When the interests of the funder and the claim holder diverge, it becomes the attorney's responsibility to determine which interests must be pursued. Funding arrangements can also involve the relationship between the attorney and his client.[36] These arrangements require that attorneys acknowledge that they owe a duty of care and have fiduciary duties to the funder.[37] States should regulate this by making it against policy to have an attorney forgo their fiduciary duties to the client for the funder. Aside from these agreements, because the funder and the attorneys are repeat members of arbitration in their respective markets, it is expected that they will build relationships over time.[38] These relationships could make it harder for attorneys to distinguish between the client's needs and the funder's needs. Lastly, attorneys may direct clients to funding firms which they have built relationships with, even when the clients' circumstances suggest a different firm may better suit their needs.[39]

States should address and regulate these issues based on conflicts of interest by stating the appropriate level of required fiduciary duty between the attorney and client and attorney and funder. For example, Australia addressed some of these issues in the 2005 case, *Fostif Party Ltd. v Campbells Cash & Carry Party Ltd.*[40] There the court indicated that "although a funder could control the day-to-day litigation of a claim, the lawyer could not fully relinquish his duty to

[36] *See* Full Disclosure, *supra* note 1, at 1657.
[37] *See Waye*. *supra* note 28, at 237.
[38] *See Beisner, supra* note 6, at 8.
[39] *Id.*
[40] *See* Full Disclosure, *supra* note 1, at 1658.

faithfully represent the claim holder's interest."[41] On the other side of the spectrum is the Australian case, *Project 28 Pty Ltd v Barr*. In *Project 28*, the attorneys had no legal relationship with the claim holder.[42] The funder appointed the attorneys and instructed the claim holder that they could not instruct the attorneys without prior written consent from the funder.[43] Further, although the claim holder had the right to be consulted about settlements, the claim holder need not be consulted before the funder accepted any settlement offers negotiated with the defendant.[44] The New South Wales Court of Appeals found these restrictions acceptable and compared them to that of insurance companies having total control over a claim.[45] Unlike Australia, which has two ranges of acceptable attorney-client-funder relationships, States need a rule that avoids potential issues. For instance, the attorney should always pursue the client's interest, even if that interest is not always the best for the funder. Absent this rule regulated by State law, it would be difficult for a funder to agree to this provision since doing so could diminish their returns.

ii. Third-Party Funder and Arbitrator

Next arises the concern of conflicts of interest between the funders and the arbitrators. There are already arbitral rules that regard the impartiality of arbitrators on the tribunal. Third-party funding may violate these rules of impartiality indirectly and can cause issues in the proceeding. For example, a conflict of interest with an arbitrator could occur due to multiple appointments indirectly made by the same third-party funder, a relationship between the arbitrator's corporation and the third-party funder, or shares held by the arbitrator in the funder's

[41] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 85. ("*Fostif")*
[42] *See Waye*, *supra* note 8, at 242.
[43] *Project 28 Pty Ltd v Barr* [2005] NSWCA 240 at 70.
[44] *Id.* at 71.
[45] *Waye, supra* note 8, at 242.

corporation.[46] These conflicts may not be easily identified unless disclosed, and if discovered later in the proceeding, the arbitrator could be disqualified or an award could be denied recognition and enforcement.[47] Many arbitral rules are silent on third-party funders, but one could argue that when the funder contracts with the claim holder, the funder becomes an affiliate of the claim holder and thus will be implicated by enumerated IBA Guidelines.[48] Yet, the rules do not specifically address issues with third-party funders. Over the years, it would be difficult to find arbitrators not associated in some way with a party's funding corporation because of the volume of claims and the small, in comparison, pool of available arbitrators and funders that a claim holder can choose.

Although some States may be silent on disclosure, the ICC International Court of Arbitration has recently addressed conflicts between third-party funders and arbitrators in their 2021 ICC Rules of Arbitration. Article 11(7) states "each party must promptly 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 defen[s]es and under which it has an economic interest in the outcome of the arbitration."[49] Although the rule does not specifically state third-party funders, the Note To Parties And Arbitral Tribunals On The Conduct Of The Arbitration Under The ICC Rules Of Arbitration (2021) defines that as a non-party the funder needs to be disclosed if the funder has entered into an arrangement where it has an economic interest in the outcome of the arbitration.[50] The ICC has taken a substantial step

[46] *See* Full Disclosure, *supra* note 1, at 1667.
[47] *Id.*
[48] *Id.* at 1670.
[49] Int'l Chamber of Commerce, Arbitration and ADR Rules Art. 11(7) (2021) [hereafter ICC Rules]
[50] Note to Parties ICC Arbitration Rules 2021, https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (last accessed Mar 18, 2023)

toward ensuring that third-party funders are disclosed to the tribunal as per their governed rules, and this should be followed by other leading arbitral bodies.

However, if the funder is not disclosed to the opposing party or arbitrator, the arbitrator may not know of any issues. The question arises whether the State should make it mandatory to disclose their involvement to the arbitral body. One reason may be that the funder is concerned that the tribunal will consider that relationship when deciding costs.[51] Opposing parties have used the fact that third-party funders are involved to urge the tribunal not to split the costs and fees of arbitration. One such challenge in an ICSID case involved the sum of $80,000 owed to the funded party for costs and fees, which the non-funded party litigated.[52] The reason not to disclose could also be a strategic choice induced by the funder. Knowledge of such an agreement by the opposing party may affect their position on settlement amounts and other aspects of the arbitration.[53]

As described above, non-disclosure could result in challenges in the future when discovered. Even if the arbitral rules to which the arbitration is governed do not specifically address third-party funders the seat should. Singapore is an example where their law requires legal practitioners to disclose the existence of a third-party funding contract and the identity of the third-party funder to the court or tribunal and every other party to the proceedings, as soon as practicable.[54] Singapore is not the only State to adopt regulations on third-party funding, Hong Kong has also adopted rules on disclosing third-party funders. In 2017 Hong Kong added Part

[51] *See* Full Disclosure, *supra* note 1, at 1672.
[52] *ATA Constr., Indus. & Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/02, Order Taking Note of the Discontinuance of the Proceeding, P 34 (July 11, 2011), Finding that although the claimholder was funded by a large funding firm, this alone does not mean the funder must pay all fees, when fees are usually split. Ruled that both parties are to split fees.
[53] *See* Full Disclosure, *supra* note 1, at 1672.
[54] Legal Profession (Professional Conduct) Rules 2015, Government of Singapore, 01 March 2017 [49A].

10A to its Arbitration Ordinance which details the State's take on third-party funding.[55] Here, if a funding agreement is made, the funded party must give written notice of the fact that a funding agreement has been made; and the name of the third party funder before the commencement of arbitration or within 15 days after the funding agreement has been made.[56] With these two States following the trend to not only allow third-party funding but also to disclose to all parties their involvement can be used as a guide for States who wish to regulate disclosure.

C. Privilege

International arbitration itself has limited authority concerning the appropriate treatment of privileges and international sources generally provide little guidance.[57] There is less material and guidance when a third-party funder is introduced. Common law jurisdictions follow the concept that the privilege belongs to the client. There the client could waive the privilege. In these types of jurisdictions, the general rule is that the parties are obligated to disclose all documents about the case unless they are protected by privilege.[58] Civil law jurisdictions act differently regarding privilege and document disclosure. There, the attorney-client privilege is protected by the doctrine of 'professional secrecy.'[59] This doctrine is founded on the lawyer's ethical obligations and cannot be waived by the client.[60] Since the disclosure requirements

[55] Cap.609 Arbitration Ordinance, Government of Hong Kong, Part 10A Third Party Funding of Arbitration, 2017. ("Arbitration Ordinance")
[56] *Id.* at 98U(1).
[57] Int'l Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018), http://www.arbitrationicca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf (last visited Mar 21, 2023) ("ICC Report")
[58] Meriam N Alrashid, Jane Wessel & John Laird, *Impact of Third Party Funding on Privilege in Litigation and International Arbitration*, 6 Disp. Resol. Int'l 101, 103 (2012). ("Meriam")
[59] *Id.* at 104.
[60] *Id.*

required by common law jurisdictions are unknown in civil law countries, their rules of privilege have developed differently and are enforced by criminal sanctions.[61]

The issue with third-party funders and privilege resides in the fact that third-party funders require information to decide whether to provide funding.[62] This information includes the funder's evaluation of the case; the documents relating to the negotiation of the funding agreement; and separate legal opinions from independent counsel on the strength of the case.[63] After it is decided to fund, the funder would require regular updates from the lawyer to ensure the proceedings are going accordingly.[64] Issues arise regarding the funding agreement and whether they are privileged or not. These types of documents raise concerns in determining if a State should permit third-party funding, and more importantly, whether a State should regulate these documents differently than other third-party documents.

i. Common Law Jurisdictions

Under some common law jurisdictions, such as England, documents created for a client by a lawyer when constructing his retainer will either be protected by litigation privilege and/or legal advice privilege. Conflicts arise when deciding if the funding documents are protected by those privileges. Litigation privilege has been defined as communication between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the dominant purpose of being used in litigation must be confidential.[65] Legal advice privilege is to protect confidential communications between a lawyer and client for giving and receiving legal

[61] *Id.* at 105.
[62] *See* ICC Report, *supra* note 57, at 118.
[63] *Id.*
[64] *Id.*at 119.
[65] Winterthur Swiss Insurance Co & Or v AG (Manchester) Ltd (in Liquidation) & Ors [2006] EWHC 839 (Comm Ct)

advice.[66] Documents made under litigation privilege and legal advice privilege must remain confidential. As noted above, the documents provided to and from the funder, if used for a dominant purpose of being used in litigation, or legal advice on funding, could be protected. Disclosing documents to third parties generally waives privilege because confidentiality is lost.[67] However, the documents could be protected from waiver if the documents are provided on express terms of privilege and are not intended to be waived such as the use of a non-disclosure agreement.

The United States has a variety of state rules and doctrines concerning privilege which makes it more difficult to determine if documents sent to and from third-party funders are covered under privilege. Federally, the United States follows attorney-client privilege and the work product doctrine. The attorney-client privilege protects communication between lawyer and client to provide legal advice.[68] These communications, much like the legal advice privilege above, only protect communication with the dominant purpose of providing legal advice and only between lawyers and clients. The work product doctrine initially protected a lawyer's interview, statements, memoranda, correspondence, briefs, mental impressions, and countless other items of work-product[69] but has since been codified.[70] With regards to third-party funding agreements, some American courts do not include these types of agreements as work products. Those documents have been deemed as having waived all privilege protection because of the disclosure to a third party.[71] Various states in America have issued opinions cautioning practitioners to ensure their clients understand that they risk waiver of privilege when providing

[66] *Three Rivers District Council & Ors v The Bank of England* [2004] EWCA Civ 218.
[67] *See* Meriam, *supra* note 58, at 107.
[68] Restatement (Third) of the Law Governing Lawyers, §§ 68, 70.
[69] *See Hickman v Taylor,* 329 US 495, 511 (1947).
[70] Fed. R. Civ. P. 26(b)(3).
[71] *Leader Technologies, Inc v Facebook, Inc*, 719 F Supp 2d 373 (2010)

privileged documents to third parties who merely have a financial obligation to the claim.[72] United States federal courts appear to disfavor maintaining privilege when a party releases documents to a third-party financier and the states appear to follow. For a funder to take a claim, they would need these types of documents, regulating these documents as non-disclosable in arbitration could alleviate privilege issues in common law jurisdictions.

ii. Civil Law Jurisdictions

Civil law countries protect the confidentiality of all information regarding a client that comes into the attorney's possession. This is due to ethical rules of the profession or the relevant domestic criminal code and not the rules of evidence as in the United States.[73] Germany, for example, holds that client documents held in a lawyer's possession are protected from disclosure and are enforced under the German Criminal Procedure Code.[74] This only pertains to documents under the control of the lawyer. As well as in France, the lawyer must not divulge information obtained from the client.[75] Again, the client is not bound by this obligation.[76]

iii. Arbitration Institutions and Tribunals

With multiple types of jurisdictions and a variety of rules and regulations regarding privilege, it becomes difficult to determine which rules will apply in international arbitration. In the absence of international rules or standards, arbitrators often look to national sources.[77] Privilege in international arbitration is handled through a complex interaction of domestic rules,

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[72] New Jersey Advisory Commission on Professional Ethics, Opinion Number 691 (2001); *see also* Pennsylvania State Bar Association Committee on Legal Ethics and Professional Responsibility Opinion Number 99-8 (February 2000).
[73] *See* Merriam, *supra* note 58, at 116.
[74] German Criminal Procedure Code, s 97
[75] French New Criminal Code, Art 226-13
[76] *See* Meriam, *supra* note 58, at 117.
[77] *See* ICC Report, *supra* note 57, at 120.

like those listed above, and institutional rules.[78] Most commentators view that domestic privileges should apply rather than international standards.[79] The various domestic laws that may be relevant include the law of the jurisdiction where communications took place or the relevant document was created; the law of the jurisdiction where the document is physically located or held; the law of the jurisdiction where the counsel of each party is licensed and/or practices; the law of the jurisdiction where each party resides; the law of the jurisdiction in which disclosure is sought; the law of the seat of the arbitration; the law governing the substance of the dispute or the law about which the legal advice was provided; the law governing the arbitration agreement and/or the law of the country with the "closest connection" to the events.[80] In practice, tribunals often apply the closest connection test to avoid complex analysis.[81]

The IBA Rules of Taking Evidence authorizes the arbitral tribunal to determine the legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.[82] IBA Rules of Taking Evidence Article 9.4 gives instructions to the arbitral tribunal on which rules to apply.[83] Article 9.4 states:

> In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
>
> (a) any need **to protect the confidentiality** of a Document created or statement or oral communication made in connection with and for **the purpose of providing or obtaining legal advice**;

[78] *See* Meriam, *supra* note 58 at 120.
[79] *See* ICC Report, *supra* note 57, at 120.
[80] Al Rashid, Wessel & Laird, *The Impact of Third Party Funding on Privilege in Litigation and International Arbitration*, p. 126.
[81] *See* ICC Report, *supra* note 57, at 126.
[82] IBA Rules of Taking Evidence, 2020, Art. 9.2(b).
[83] IBA Rules of Taking Evidence, 2020, Art. 9.4.

> (b) any need **to protect the confidentiality** of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
>
> (c) the expectations of the Parties and their advisors at the time the legal impediment **or privilege** is said to have arisen;
>
> (d) any possible waiver of any applicable legal impediment or **privilege by virtue of consent**, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
>
> (e) the need to maintain fairness and equality as between the Parties, particularly **if they are subject to different legal or ethical rules.**[84]

Unlike the IBA, institutional rules are generally less specific about privilege and generally do not specify the criteria a tribunal may wish to consider. They usually do not include whether to apply strict rules of evidence. For example, Article 27 of the UNCITRAL Rules states that "at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine."[85] As well as "the arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered."[86] Another example is the ICC Arbitration Rules Article 22 which state the arbitral tribunal "may adopt such procedural measure as it considers appropriate, provided that they are not contrary to any agreement of the parties."[87] The ICC Rules also give the arbitral tribunal the power to take measures for protecting trade secrets and confidential information.[88] With arbitral rules giving deference to the arbitral tribunal, and the arbitral tribunal giving deference to the domestic laws, State laws should address third-party funding documents. Since third-party funders are not part of an arbitration

[84] *Id.* (emphasis added)
[85] UNCITRAL Rules of Arbitration (2021) at Art. 27(3)
[86] UNCITRAL Rules of Arbitration (2021) at Art. 27(4)
[87] *See* ICC Rules, *supra* note 49, Art. 22(2).
[88] *Id.* at Art. 22(3).

agreement, and thus have not agreed to arbitrate, a State should make the agreement and the research documents privileged. This would ensure that the party receiving the funding is judged on the merits of the case, and not on the fact they needed financial assistance.

V. Worlds Stance on Third-Party Funding

States can turn to other States around the world as a guide on the ways to address third-party funding. Many States that now permit them, have put into their laws guidelines on how to address issues listed above. While other states have merely allowed for third-party funding and have placed no restrictions on the above issues. No restrictions on some of the issues addressed already would add to confusion at the seat of arbitration. This confusion could deter parties from choosing the State as a seat for the arbitration.

It would be hard to talk about third-party funders around the world without starting with Australia. Australia boasts the largest third-party industry for over the last 20 years.[89] As discussed above, the 2006 case *Fostif* opened the door to the use of such funding and gave the funders a large degree of control over the proceeding.[90] The Australian court made it analogous to insurance cases and yet does not allow contingency fees as of right and the plaintiff must apply for it through the appropriate channels.[91] States that wish to address the level of appropriate influence that third-party funders can have over claim holders should put into law the appropriate level. Australia's courts decided on the appropriate level, yet States that permit third-party funders should address these issues, for the benefit of all parties.

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[89] International Law in Domestic Courts: The Impact of Third-Party Financing on Transnational Litigation, 44 Case W. Res. J. Int'l L. 159, 165

[90] *See Fostif, supra* note 41.

[91] Paul Buitendag, Rena Solomonidis & Gerald Manning, *The contingency fee revolution in Australia*. International Bar Association, Dec 13 2022. https://www.ibanet.org/contingency-fee-revolution-in-australia (last visited 3 Mar 2023)

Singapore revised its Civil Law Act of 1909 in 2017 to abolish the tort of maintenance and champerty.[92] This allowed the use of third-party funders without fear of tort action. The revised law also details what is a Third-Party Funder and how they can become qualified to operate in Singapore.[93] Singapore has long held that contingency fees are prohibited, by following the rules of champerty and maintenance, yet with the abolition of the doctrine in 2017, it is expected that the prohibition will be lifted.[94] States who have prohibited maintenance and champerty, but wish to now allow for third-party funders in arbitration should follow Singapore's changes. With Singapore's competitiveness as a preferred arbitral seat, their legislation will further enhance laws in favor of third-party funding in international arbitration.[95] States that also wish to become a preferred seat would have to follow suit.

Hong Kong was traditionally hostile towards third-party funding, for the same reason as Singapore. Although Singapore abolished champerty and maintenance, Hong Kong did not go that far. Instead, Hong Kong declared that the common law offenses of maintenance and champerty do not apply to third-party funding of arbitration.[96] Hong Kong now requires that third-party funders have procedures in place for addressing conflicts, have sufficient capital, and that the agreements set out; a degree of control, who is responsible for adverse costs, and how they may terminate the agreement.[97] This termination requirement will prevent third-party funders from withdrawing without reason. States that desire to permit third-party funding while still holding a restriction on maintenance and champerty could use Hong Kong as an example. If

[92] Civil Law Act of 1909, Government of Singapore, Revised in 2017 [5A].
[93] *Id.* at [5B]
[94] *See* IAR, *supra* note 21.
[95] *Id.* at 8.
[96] Arbitration Ordinance, *supra* note 55, at [98K].
[97] *Id.* at [98Q].

those States wish to include tighter restrictions on the relationship between third-party funders and the claim holder should follow Hong Kong.

The United States allows contingency fees for a lawyer in litigation. It is not a far leap to go from allowing an attorney to recover thirty percent of fees to a funder getting those fees. However, not all states apply the doctrine of champerty the same way. Only a minority of states have abandoned these doctrines, while others enforce them in differently.[98] For example, Minnesota strictly applied these doctrines until 2020 when the Supreme Court of Minnesota abolished the restrictions prohibiting third-party funding.[99] While, on the other end, Delaware holds champerty to be illegal if the other party does not have a legal or **equitable** interest in the claim.[100] Like Minnesota, States that have held champerty illegal for hundreds of years with fear of the issues above should address issues by codifying them. Minnesota for example addressed unmeritorious claims in their Rules of Civil Procedure.[101]

While in India, the Arbitration and Conciliation (Amendment) Act 2015 and its 2019 amendment neither regulate nor prohibit third-party funding.[102] Unlike Singapore and Hong Kong, when India was confronted with the doctrines of maintenance and champerty in the case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, the Privey Council determined that

[98] *See* Whose Claim, *supra* note 19, at 1289.
[99] *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 236 (Minn. 2020). "This appeal arises from a contract … whereby appellant purchased an interest in respondent's personal injury suit. When respondent settled her suit and did not abide by the terms of the contract, appellant sued respondent to enforce the contract. Both the district court and the court of appeals held that appellant could not enforce the contract because it violated Minnesota's common law prohibition against champerty." The Supreme Court of Minnesota abolished its prohibition against champerty finding that , yet still allowing courts to determine if the funding agreements between parties are unconscionable.
[100] *See* Whose Claim, *supra* note 17, at 1289. (emphasis added)
[101] *See, Maslowski*, 944 N.W.2d at 239.
[102] Hussein Haeri, Clàudia Baró Huelmo & Giacomo Gasparotti *Third-Party Funding in International Arbitration*, Dec. 30, 2022

those English doctrines are not applicable in Indian laws.[103] Rather, the principles would apply to an arrangement that is inequitable, extortionate, or unconscionable.[104] Although the 2019 amendment helped establish India as a regional arbitration center, it failed to address the issue of third-party funders.[105] Instead, they have to rely on 'cautious arbitral institutions' when regulating third-party funders in international arbitration.[106] States that want to attract arbitrations should regulate, in some way, how third-party funders should operate. This would allow for parties to act on State law, rather than arbitral institutions.

In the European Union (EU), the EU Legal Affairs Committee submitted a report to the EU's International Legal Finance Association which entails recommendations on how the EU should handle third-party funding. Of these recommendations, the report suggested regulating third-party funders and their relationships with the parties.[107] The report wanted to prevent third-party funders the ability to control the legal proceedings.[108] It also wanted to prevent the third-party funders from abandoning the claimant mid-claim.[109] This report recommendation also would require that the third-party funder would be held liable for costs to the defendant if they

[103] R*am CoomarCoondoo v. Chunder Canto Mookerjee*,[1876] 2 AC 186, 208 (PC) Holding, that "the English laws of maintenance and champerty are not of force as specific laws in India. A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being per se opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid." at 186.
[104] *Id.* at 210.
[105] Pranav V Kamnani and Aastha Kaushal, 'Third-Party Funding of Arbitration in India: The Road Not Taken', Indian Journal of Arbitration Law (Issue 6, January 2022)
[106] *Id.* at 1741
[107] European Parliament, Committee on Legal Affairs, 'Draft Report with recommendations to the Commission on Responsible private funding of litigation' (Special Rapporteur: Axel Voss) (17 June 2021) Doc 2020/2130(INL), https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf (Last visited Mar 28, 2023)
[108] *Id.*
[109] *Id.* at 11

happen to lose the claim.[110] This report would also make it mandatory to disclose the presence of a third-party funder to all parties and to make the agreement available to all parties.[111]

The International Legal Finance Association responded to the report in a letter on 7 March 2022, strongly rejecting the ideas and recommendations of the report.[112] The basis of their rejection falls on the fact that the recommendation is based on the common law jurisdiction of Australia, while the EU is made up of civil law jurisdictions.[113] They also argue that the EU has the freedom to contract, which allows for third-party funding and its terms.[114] The letter also attacks the disclosure requirement, indicating that the disclosure would only benefit the non-funded party, allowing them to go on a fishing expedition for privileged information regarding the strategy of the case.[115] In all, the rejection is based on the fact that third-party funding has been around for several decades without strict regulation and the risk always falls on the funding corporation. Member States of the EU have also already built case laws about third-party funding, with which the recommendations would interfere. For example, Austria fully endorses third-party funding and has used them in their class action mechanisms with great success.[116] France has stated that not only is third-party funding accepted, but it is embraced. Germany, The Netherlands, Sweden, and Denmark all endorse third-party funding with restrictions being set by public policy and good morals.[117]

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[110] *Id.*
[111] *Id.* at 19.
[112] *Letter from Gibson, Dunn & Crutcher LLP on behalf of the International Legal Finance Association to Andreas Stein, European Commission, DG Justice and Consumers* (Mar. 7, 2022), https://uploads-ssl.webflow.com/5ef44d9ad0e366e4767c9f0c/624e001be42a159b53492bb8_ILFA%20-%20Memo%20to%20the%20European%20Commission%20on%20the%20Voss%20Report.pdf (last visited Mar 28, 2023)
[113] *Id.* at 3.
[114] *Id.*
[115] *Id.* at 8.
[116] *Id.* at 12.
[117] *Id.* at 14.

On 13 September 2022, the European Parliament voted in favor of adopting the report which would regulate third-party funding in arbitration.[118] This adoption would regulate third-party funding, making each State in the EU identical regarding third-party funding. Some possibilities of regulation include placing a cap on the recovered percentage to forty percent.[119] The EU would also subject the funders to a fiduciary duty owed to the claimants, meaning the funder must act in the best interest of the claim holder.[120]

Deciding to regulate third-party funders for a State could be a daunting task. Looking at other States, and how they have done it could assist a State in this task. If a State wishes to allow third-party funders in arbitration but wishes to keep the doctrines of maintenance and champerty could follow States like Hong Kong. If a State wishes to allow third-party funders a huge swath of control, they can follow Australia. States should begin to regulate third-party funders and follow models that best fit their goals.

VI. Conclusion

There is a debate on whether third-party funding is appropriate and lawful. Arguments of the increase of unmeritorious claims were once a fear of those opposing the idea of third-party funding in international arbitration. This fear is lessened by the mere fact that third-party funders conduct rigorous analysis and research before taking on a claim. The third-party funder's only goal is to get a high return on investment. Because of this goal, the fear of unmeritorious claims is unfounded.

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[118] Robert Wheal & Oliver Dean, *The End of the Regulatory Vacuum in Europe and a New Era for International Arbitration in Ireland? Developments in Third-Party Funding Regulation,* WhiteCase (Oct. 27, 2022) https://www.whitecase.com/insight-alert/end-regulatory-vacuum-europe-and-new-era-international-arbitration-ireland (last visited Apr. 25, 2023)
[119] *Id.*
[120] *Id.*

Although third-party funding has quickly gained notoriety in the international arbitration arena, its similarities to the doctrine of maintenance and champerty should not be ignored. Many States still see maintenance and champerty doctrines as valid and prohibit third parties from participating in a claim to which they merely receive a portion of the award. States have begun to allow third-party funding in arbitration while still holding those doctrines applicable in litigation.

Third-party funders control the money in a claim, and because of this, they have a great deal of influence over the proceedings. While the claim holder may be seeking a just remedy, the funder will be seeking a large monetary award. If the claim holder acts in ways the funder does not approve, the funder may withdraw from the claim, leaving the claim holder with the bill. This gives a great deal of power to the funder. To avoid these issues, States should make it a policy that the funding agreement between the funder and claim holder must ensure that the funder has limited control, and is unable to withdraw funding without reason.

There are perceived and actual potential conflicts of interest in any international arbitration. When a third party is introduced into the claim issues may arise between the funder and the arbitrator. If the funder is not disclosed to the arbitrator and the opposing party, the arbitrator may not know there is a conflict. Non-disclosure could result in expensive satellite litigation in the future when the agreement is discovered. There may be some reasons why withholding disclosure is a strategic choice, like deciding on costs. However, some States and the ICC have begun to make third-party disclosure mandatory. Making disclosure mandatory would alleviate satellite litigation, but also including in the rules that the tribunal may not use such a relationship to judge costs or awards would make third-party funders more open to disclosure.

Privilege is still a confusing concept in international arbitration. The main question with third-party funders is if the agreement, and shared documents, are covered under the rules of the privilege of the seat or arbitral rules. This can be alleviated in part by the signing of non-disclosure agreements in many jurisdictions, but you must first determine if these types of agreements are against public policy. Until there is a universal rule on privileged documents, it is up to the arbitrator to determine which rules and laws to follow. Knowing the laws of the seat, where the documents are held, all States involved, and the arbitral rules is important when determining what documents should be shared with the funder. States regulating the disclosure of these documents could speed through discovery and prevent a 'fishing' expedition from the non-funded party.

Third-party funding has found its way into many States around the world. Singapore and Hong Kong are some of the more recent States to include third-party funding in their national laws with the EU passing regulations soon. As this trend continues and more States want a strong international arbitral presence, more States will come to the same conclusion. As this happens, it is still important to know which States permit third-party funding and which States prohibit it.

Strict regulation of third-party funding has yet to occur, and yet third-party funding has thrived anyways. With no regulation, blurred lines of what is allowed and not will lead to expensive satellite litigation. To reduce these costs, States should regulate that third-party funders disclose their presence at the outset of the claim. This would allow the tribunal to determine the appropriateness of the funder and address any concerns before the proceedings. States should make it a policy that funding agreements should be privileged information, and the tribunal should not be allowed to use the presence of a funder as a weighing factor for costs or damages. Third-party funding allows a smaller company with little capital to pursue a claim from

an offender without fear of losing what capital they have. With proper regulation of third-party funders, justice will be available to everyone harmed while conducting international business.