

Ethical and Procedural Challenges of Third-Party Funding in International Arbitration

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ABSTRACT

The increasing commercialization of international arbitration has given rise to the widespread use of third-party funding (TPF), fundamentally altering the dynamics of arbitral proceedings. Third-party funding enables an external, non-party financier to support arbitration costs in exchange for a share of the proceeds, thereby enhancing access to justice for financially constrained claimants and promoting risk allocation in high-value disputes. However, the growing involvement of profit-oriented funders has generated complex ethical and procedural challenges that threaten the core principles of international arbitration. This study critically examines the ethical and procedural implications of third-party funding in international arbitration. It analyses the impact of TPF on party autonomy, confidentiality, and the professional responsibilities of counsel and arbitrators, with particular emphasis on conflicts of interest and tribunal independence. The study further evaluates procedural issues arising from third-party funding, including security for costs, transparency, and disclosure obligations. Through a doctrinal and comparative analysis of institutional rules and soft law instruments—particularly those of the ICC, SIAC, and UNCITRAL the research highlights the fragmented and inconsistent regulatory landscape governing third-party funding. The paper argues that while third-party funding serves as an important mechanism for facilitating access to justice, its unregulated expansion risks undermining the legitimacy and integrity of the arbitral process. It concludes by emphasizing the need for harmonized ethical and procedural norms that balance commercial realities with the foundational values of arbitration, including fairness, neutrality, and procedural equality.

Keywords- Third-Party Funding; International Arbitration; Ethical Challenges; Procedural Fairness; Security for Costs; Disclosure and Transparency.

I. INTRODUCTION

International arbitration has evolved from a private, consensual mechanism of dispute resolution into a highly institutionalized and commercially driven process. Originally conceived as an alternative to state court litigation—valued for its flexibility, confidentiality, and party autonomy—arbitration has increasingly become embedded within global commercial practice. The growing complexity of cross-border transactions, expansion of international trade, and proliferation of investment treaties have significantly increased both the volume and value of arbitral disputes. Consequently, arbitration has undergone a process of commercialization, wherein disputes are no longer viewed merely as legal conflicts but as economic assets capable of generating financial returns.

One of the most significant manifestations of this commercialization is the emergence and rapid growth of Third-Party Funding (TPF) in international arbitration. Third-party funding refers to an arrangement whereby an external entity having no prior connection to the dispute provides financial support to a party in arbitration in exchange for a share of the proceeds in the event of a successful outcome. While such arrangements were historically viewed with suspicion under doctrines of maintenance and champerty, modern legal systems have increasingly relaxed these prohibitions, recognizing TPF as a legitimate financial tool that enhances access to justice and risk management.

The rise of TPF is closely linked to the escalating costs of international arbitration. Expenses relating to arbitral tribunal fees, institutional charges, expert witnesses, legal representation, and procedural delays have made arbitration financially burdensome, particularly for small and medium enterprises and financially constrained investors. In this context, third-party funding offers a mechanism to shift financial risk away from claimants, allowing meritorious claims to be pursued that might otherwise be abandoned due to cost constraints. From a commercial perspective, arbitration claims have thus become investable assets, evaluated on the basis of risk, return, and enforceability.

However, the growing presence of third-party funders in arbitral proceedings has raised complex ethical and procedural challenges that strike at the core principles of international arbitration. Concerns relating to conflicts of interest, disclosure obligations, tribunal independence, control over proceedings, and security for costs have generated intense debate among scholars, practitioners, and arbitral institutions. The involvement of profit-driven funders may influence strategic decision-making, settlement dynamics, and procedural conduct, thereby potentially undermining the neutrality and integrity of the arbitral process.

Moreover, the absence of a uniform regulatory framework governing TPF in international arbitration has resulted in fragmented and inconsistent approaches across jurisdictions and arbitral rules. While some institutions mandate disclosure of funding arrangements, others remain silent, leaving tribunals to address these issues on a case-by-case basis. This regulatory uncertainty exacerbates procedural inefficiencies and raises questions regarding transparency and fairness.

Against this backdrop, the ethical and procedural implications of third-party funding represent one of the most pressing contemporary challenges in international arbitration. Understanding how TPF interacts with foundational arbitral principles—such as party autonomy, equality of arms, confidentiality, and impartial adjudication—is essential to ensuring that arbitration remains a credible and effective dispute resolution mechanism. This study seeks to critically examine these challenges and evaluate the adequacy of existing legal and institutional responses to the growing influence of third-party funding in international arbitration.

II. ETHICAL DIMENSIONS OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

The increasing participation of third-party funders in international arbitration has introduced a range of ethical concerns that challenge the foundational principles of arbitral justice. While third-party funding may enhance access to justice and promote efficiency, it simultaneously raises questions regarding party autonomy, professional ethics, and the independence and impartiality of arbitral tribunals. These ethical dimensions assume particular significance in arbitration, where procedural safeguards are largely shaped by party consent rather than mandatory public law norms.

2.1 Impact on Party Autonomy

Party autonomy constitutes the cornerstone of international arbitration, empowering parties to determine the applicable law, procedural rules, composition of the tribunal, and conduct of proceedings. The introduction of third-party funding, however, has the potential to dilute this autonomy. Although funders are formally non-parties to the dispute, funding agreements often grant them varying degrees of influence over strategic decisions, including the selection of counsel, choice of arbitrators, settlement negotiations, and continuation or termination of proceedings.

Such influence raises ethical concerns when a funder's commercial interests conflict with the funded party's legal or reputational interests. For instance, a funder may prioritize early settlement to secure returns, whereas the claimant may seek a final award to establish legal precedent or vindicate contractual rights. Where funders exert *de facto* control over the conduct of arbitration, the notion of genuine party autonomy becomes questionable. This is particularly problematic in investor-state arbitration, where public interests may be implicated and the claimant's objectives extend beyond mere financial recovery.

Moreover, confidentiality an essential attribute of arbitration may be compromised when sensitive information is shared with funders for due diligence and monitoring purposes. In the absence of clear ethical boundaries and disclosure norms, the involvement of third parties risks transforming arbitration from a consensual dispute resolution mechanism into a commercially driven process influenced by external financial actors.

2.2 Ethical Responsibilities of Counsel and Arbitrators

The presence of third-party funding also complicates the ethical obligations of legal counsel and arbitrators. Counsel representing funded parties must navigate potential conflicts between their professional duty to act in the best interests of their client and the commercial expectations of the funder. Ethical dilemmas may arise where counsel is pressured to adopt litigation strategies favored by the funder, particularly in relation to procedural aggressiveness, cost allocation, or settlement decisions. This may undermine counsel's independence and compromise the integrity of legal representation.

From the perspective of arbitrators, third-party funding raises acute concerns regarding independence and impartiality. Arbitrators may have undisclosed professional, financial, or repeat-appointment relationships with funders, which could give rise to justifiable doubts as to their neutrality. Given that funders are often active participants across multiple arbitral proceedings, the risk of systemic conflicts is significantly heightened.

The ethical challenge is further exacerbated by inconsistent disclosure requirements across arbitral regimes. In the absence of mandatory disclosure of funding arrangements, arbitrators may unknowingly adjudicate disputes involving entities with whom they have prior associations. This undermines confidence in the arbitral process and exposes awards to challenges based on apparent bias or lack of independence. Consequently, ethical accountability in the context of third-party funding necessitates enhanced transparency and a recalibration of professional responsibility standards applicable to both counsel and arbitrators.

III. PROCEDURAL IMPLICATIONS OF THIRD-PARTY FUNDING

Beyond ethical considerations, third-party funding has profound procedural consequences that affect the conduct and fairness of arbitral proceedings. Issues such as security for costs and disclosure obligations have emerged as focal points of procedural debate, revealing tensions between efficiency, fairness, and equality of arms.

3.1 Security for Costs

One of the most contentious procedural issues arising from third-party funding is the question of security for costs. Respondents often argue that the presence of a third-party funder indicates the claimant's inability or unwillingness to bear adverse cost orders, thereby justifying an application for security. Tribunals, however, have adopted divergent approaches, reflecting the absence of a consistent doctrinal framework.

While some tribunals consider third-party funding as a relevant factor in granting security for costs, others caution against treating funding per se as evidence of impecuniosity. Automatically equating third-party funding with financial weakness risks penalizing claimants for seeking legitimate financial assistance and may deter access to justice. At the same time, respondents face legitimate concerns regarding enforceability of cost awards, particularly where the funded claimant lacks assets.

The procedural challenge lies in striking a balance between protecting respondents from unjust financial exposure and preserving the claimant's right to pursue meritorious claims. The discretionary nature of security-for-costs determinations, coupled with inconsistent tribunal reasoning, contributes to procedural unpredictability and undermines uniformity in arbitral practice.

3.2 Transparency and Disclosure Standards

Transparency and disclosure represent the most critical procedural implications of third-party funding. Disclosure of funding arrangements is widely viewed as essential to identifying potential conflicts of interest and safeguarding tribunal independence. Several arbitral institutions and soft law instruments have begun to address this issue by encouraging or mandating disclosure of the existence, though not necessarily the terms, of funding agreements.

Despite these developments, disclosure standards remain fragmented. Questions persist regarding the scope, timing, and extent of disclosure, including whether funder identities, funding terms, or control rights should be revealed. Excessive disclosure may compromise confidentiality and strategic autonomy, while insufficient disclosure risks procedural unfairness and challenges to arbitral awards.

The lack of harmonized disclosure norms places an undue burden on tribunals to fashion ad hoc solutions, leading to inconsistent procedural outcomes. As third-party funding continues to proliferate, the development of coherent and balanced transparency standards becomes imperative to maintaining the legitimacy and procedural integrity of international arbitration.

IV. INSTITUTIONAL AND SOFT LAW RESPONSES TO THIRD-PARTY FUNDING

The rapid expansion of third-party funding in international arbitration has compelled arbitral institutions and rule-making bodies to respond through procedural reforms and soft law instruments. While no uniform regulatory regime governs third-party funding, institutional rules increasingly acknowledge its existence and attempt to mitigate ethical and procedural risks through disclosure and conflict-management mechanisms. However, significant divergence persists in the scope and intensity of these responses.

4.1 Treatment under the ICC Framework

The International Chamber of Commerce (ICC) Arbitration Rules have adopted a cautious yet pragmatic approach to third-party funding. While the ICC Rules do not expressly regulate funding arrangements, the 2021 amendments empower arbitral tribunals and the ICC Court to require disclosure of the existence and identity of third-party funders. This disclosure is primarily aimed at safeguarding arbitrator independence and preventing conflicts of interest rather than regulating the substantive terms of funding agreements.

The ICC's emphasis on transparency reflects a preference for case-specific discretion over rigid regulation. By refraining from mandating disclosure of funding terms, the ICC seeks to preserve confidentiality and party autonomy. However, this restrained approach has been criticized for inadequately addressing issues of funder influence and security for costs, leaving tribunals with limited guidance in managing the procedural consequences of funding arrangements.

4.2 *Treatment under the SIAC Framework*

The Singapore International Arbitration Centre (SIAC) has emerged as one of the most progressive institutions in addressing third-party funding. The SIAC Investment Arbitration Rules and subsequent practice notes explicitly recognize third-party funding and require parties to disclose the existence and identity of funders at an early stage of proceedings. This proactive stance is complemented by Singapore's domestic legislative framework, which expressly permits third-party funding in international arbitration.

SIAC rules further empower tribunals to consider third-party funding when determining issues such as security for costs and allocation of costs. By integrating funding considerations into procedural decision-making, SIAC aims to enhance transparency while preserving procedural fairness. Nevertheless, concerns remain that institutional endorsement of third-party funding may accelerate the commercialization of arbitration and entrench asymmetries between well-funded repeat players and less sophisticated parties.

4.3 *UNCITRAL and Soft Law Instruments*

UNCITRAL has addressed third-party funding primarily through soft law mechanisms rather than binding regulation. The UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration and recent reform discussions under Working Group III recognize third-party funding as a factor influencing procedural fairness, disclosure, and arbitrator independence. These developments reflect a growing consensus that transparency is indispensable in funded arbitration, particularly where public interests and state accountability are involved.

In addition, soft law instruments such as the IBA Guidelines on Conflicts of Interest in International Arbitration have played a pivotal role in shaping best practices. By treating funders as entities equivalent to parties for conflict-of-interest purposes, the IBA Guidelines extend ethical scrutiny to previously unregulated actors. While these instruments lack binding force, they exert considerable normative influence and contribute to the gradual harmonization of arbitral standards.

Despite these initiatives, UNCITRAL's approach remains largely facilitative rather than prescriptive. The absence of enforceable funding regulations underscores the reliance on tribunal discretion and party cooperation, perpetuating uncertainty and inconsistency across arbitral proceedings.

V. BALANCING ACCESS TO JUSTICE AND ARBITRAL INTEGRITY: RISKS VERSUS BENEFITS OF THIRD-PARTY FUNDING

The normative debate surrounding third-party funding in international arbitration ultimately revolves around the tension between enhancing access to justice and preserving the integrity of the arbitral process. Third-party funding undeniably offers significant benefits, particularly in enabling financially constrained parties to pursue legitimate claims and mitigating the deterrent effect of high arbitration costs. In this respect, TPF serves as an equalizing mechanism that redistributes financial risk and democratizes access to international dispute resolution.

From an efficiency perspective, third-party funders contribute to early case assessment and discipline, as funding decisions are typically based on rigorous evaluation of legal merits and enforceability prospects. This market-based screening function may reduce frivolous claims and promote procedural economy. Furthermore, the availability of funding can facilitate settlement by introducing sophisticated risk-management strategies and alternative dispute resolution incentives.

However, these benefits must be weighed against the systemic risks posed by the growing financialization of arbitration. The profit-oriented nature of third-party funding may distort procedural behavior, incentivize excessive claims, and undermine the non-adversarial ethos of arbitration. Concerns regarding loss of party autonomy, compromised confidentiality, and arbitrator bias threaten the legitimacy of the arbitral process and expose awards to post-award challenges.

The absence of comprehensive regulatory oversight exacerbates these risks, allowing funders to operate in a largely opaque environment. Without clear ethical and procedural safeguards, third-party funding risks transforming arbitration into a speculative enterprise driven by return on investment rather than justice and legal certainty.

A balanced approach is therefore essential—one that acknowledges the practical necessity of third-party funding while imposing proportionate safeguards to protect arbitral integrity. Mandatory disclosure of funder identity, enhanced conflict-of-interest checks, calibrated security-for-costs standards, and institutional guidance on funder participation represent viable pathways toward achieving this balance. Rather than prohibiting third-party funding, international arbitration must evolve to accommodate it within a principled and transparent framework that reinforces, rather than undermines, its foundational values.

VI. CONCLUSION

Third-party funding has emerged as one of the most transformative developments in contemporary international arbitration, reflecting the broader commercialization and financialization of dispute resolution. While TPF has undoubtedly enhanced access to justice by enabling financially constrained parties to pursue meritorious claims, its increasing prevalence has simultaneously exposed significant ethical and procedural vulnerabilities within the arbitral framework.

This study has demonstrated that the involvement of third-party funders challenges core principles of arbitration, particularly party autonomy, confidentiality, equality of arms, and tribunal independence. Ethical concerns relating to funder influence over strategic decisions, potential conflicts of interest involving counsel and arbitrators, and dilution of client-centered representation underscore the need for clearer professional responsibility standards. Procedurally, issues such as security for costs and inconsistent disclosure practices reveal a lack of coherence and predictability that undermines procedural fairness and legal certainty.

Institutional and soft law responses—most notably under the ICC, SIAC, and UNCITRAL frameworks—represent important but incomplete steps toward regulating third-party funding. While disclosure-based mechanisms have gained prominence as a means of managing conflicts of interest, the absence of uniform standards regarding the scope, timing, and consequences of disclosure has resulted in fragmented arbitral practice. The reliance on tribunal discretion, though consistent with arbitral flexibility, has produced inconsistent outcomes and heightened the risk of post-award challenges.

The central normative challenge, therefore, lies in striking an appropriate balance between facilitating access to justice and preserving the integrity and legitimacy of the arbitral process. A prohibitionist approach to third-party funding is neither realistic nor desirable in light of modern commercial realities. Instead, what is required is a harmonized framework of ethical and procedural norms that recognizes the legitimacy of TPF while subjecting it to proportionate safeguards.

Such harmonization should include mandatory disclosure of the existence and identity of third-party funders, robust conflict-of-interest screening mechanisms, principled guidelines on security for costs, and clearer ethical duties for counsel and arbitrators in funded proceedings. Greater convergence between institutional rules, soft law instruments, and domestic legal frameworks would enhance transparency, predictability, and confidence in international arbitration.

In conclusion, third-party funding is no longer a peripheral phenomenon but an integral feature of the arbitral landscape. The future credibility of international arbitration depends on its ability to adapt to this reality through coherent, balanced, and harmonized ethical and procedural regulation that aligns commercial pragmatism with the foundational values of arbitral justice.

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