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IDENTITY WITHOUT ACCOUNTABILITY: RETHINKING THIRD-PARTY FUNDING REGULATION

Nidhi Choube[1] & Somya Shrita[2]

I. ABSTRACT

Third-party funding (TPF) has moved from the margins to the mainstream of cross-border corporate arbitration, gradually reshaping the allocation of power in high-value disputes. However, the existing regulatory framework remains confined to a narrow conception of transparency, largely limited to disclosure of the funder's identity, without examining the substantive terms of funding arrangements. This paper argues that such an approach is insufficient. In practice, third-party funders often influence litigation and settlement strategies, including decisions on whether to pursue or resolve disputes, despite lacking formal accountability within the corporate structure. Essentially, there are three challenges that have not been explored much in relation to this change. Firstly, the funding agreement may give the party significant control over the proceedings, including the veto over the settlement, without any institutional or national limitation on this control. Secondly, the current conflict of interest regimes is inadequate to reflect the complex relationships between the arbitrators and the funders in the international arbitration community. Thirdly, there is the breach of confidentiality in cross-border disclosure of sensitive information to the funders, especially where different standards are applied in different jurisdictions. TPF facilitates the influence of external actors over significant outcomes without corresponding fiduciary obligations toward the corporation. Focusing on regulatory approaches adopted by leading arbitration centres and drawing from high-value funded disputes, the paper proposes a three-pillar framework combining corporate law obligations, strengthened institutional rules, and a model international provision. The objective is to realign arbitration practice with principles of corporate accountability in an increasingly globalised dispute resolution landscape.

[1] 8th Semester, 4th year, BBALLB (Hons.) Student at GD Goenka University, (India). Email: nidhichoube0@gmail.com
[2] 4th Semester, 2nd year, LLB (Hons.) Student at GD Goenka University, (India). Email: somyashrita@gmail.com

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II. KEYWORDS

Third-Party Funding, International Arbitration, Corporate Governance, Conflict of Interest, Regulatory Arbitrage.

III. INTRODUCTION

In the modern context of cross-border corporate arbitration, a new paradoxical reality has been witnessed. A corporation is a named party in an important international arbitration claim. The claimant is a corporation, and their counsel is present. However, the economic reality is entirely different. Behind the named party in the arbitration claim, the backbone and the economic driver of the claim is a third-party funder.

A third-party funder may broadly be understood as an external non-party who finances some or all of a party's arbitration or litigation costs in return for a share of the recovery if the claim succeeds. In practice, funding arrangements may also contain contractual rights enabling the funder to monitor the proceedings, receive case-related information, approve budgets, participate in settlement-related decisions, or terminate funding if the commercial prospects of the claim materially change. This makes the funder's role more substantial than that of a conventional financier.

However, the operational reality of TPF reveals that the funder's involvement is not peripheral but integral to the very essence of the dispute resolution process as it currently functions. Indeed, the key players in the TPF industry, such as Burford Capital, Omni Bridgeway, Therium, and Harbour, are governed by a highly advanced investment system that requires active involvement in the disputes they are funding. In contrast to conventional financiers, these players take enormous financial risks by investing millions of dollars in a dispute resolution process whose outcome is entirely dependent upon the result of the arbitration.

Therefore, the involvement of the funder is not passive. Rather, the TPF industry has built into the funding agreements various tools of oversight and control to ensure the successful investment of the funder. As extensively examined by the *ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration (2018)*[3], the

[3] ICCA-Queen Mary Task Force on Third-Party Funding in Int'l Arbitration, Report on Third-Party Funding in International Arbitration (2018) [hereinafter ICCA-Queen Mary Task Force Report]

funder is often privy to the monitoring of the dispute resolution process, the approval of legal costs, the receipt of privileged information, and the power to influence the choice of counsel and arbitrator.

It appears that regulator's response so far on the issue of third-party funding is superficial without delving deeper into the real issues at hand. In virtually all jurisdictions and sets of arbitration rules, the response so far has been remarkably simple: Just make it transparent. This is now the response of the ICC, the LCIA, SIAC, ICSID, and so on. In Singapore, the rules of disclosure have been enacted under the Civil Law Amendment Act 2017In Hong Kong, the same has been done under the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.It was the main recommendation of the ICCA-Queen Mary Task Force. In virtually all sets of rules, disclosure requires the disclosure of the existence of third-party funding to the tribunal and to the opposing party.

This is described as the "financialisation of dispute resolution," where the claim is being used as a form of investment. There is, however, a question as to whether merely disclosing the identity of the funder addresses the real issues that have arisen under TPF. Merely identifying the funder does not reveal the substance of the funder's role in the arbitration. Disclosure of identity may assist tribunals in checking potential conflicts of interest, but it does not disclose whether the funder has settlement veto rights, budgetary approval powers, access to privileged communications, influence over counsel or arbitrator selection, or a contractual right to withdraw support if the claim becomes commercially unattractive.

The regulatory problem, therefore, is not the absence of transparency altogether, but the narrowness of transparency as presently understood. Identity-based disclosure is a useful starting point, but it remains insufficient unless accompanied by scrutiny of the funder's control rights, economic incentives, and potential divergence from the funded corporation's interests.

A. Research Problem

Over the last 20 years, international commercial arbitration has transitioned to utilizing third-party funding as its primary means of financing. This transition occurred after third-party funding was historically only a rare funding option. All major institutions and jurisdictions have adopted the same regulatory response to these issues. Tribunals must have knowledge of funder's identities. The opposing party must know who is funding them. End of story. The ICC requires it. The LCIA requires it. All these institutions including SIAC, ICSID, Singapore and Hong Kong reach the same conclusion, that when each jurisdiction or institution evaluates third-party funding, all jurisdictions will require the party to disclose the funder's identities to each other.

B. Research Question

To address the above-mentioned argument, the paper centers itself with 3 important questions. First, in cross border arbitration to what extent the current institutional or regulatory frameworks in third party funding address the arising legal issues from funder's control, conflict of interest, and cross border privilege fragmentation?

Second, whether TPF creates a corporate governance deficit in funded corporations and whether current company law together with securities regulation in the UK and US and India provides any accountability mechanism for directors and shareholders in such situations?

Third, what comprehensive regulatory framework is required in the domestic, international or arbitral system to address all the mentioned gaps and how can it be designed to prevent the regulatory arbitrage that jurisdictional fragmentation currently makes possible?

C. Research Objectives

The objectives of this paper are:

1. To examine whether the existing disclosure-based regulation of third-party funding in cross-border corporate arbitration adequately addresses concerns relating to funder control, conflicts of interest, confidentiality, and privilege fragmentation.
2. To analyse the corporate governance implications of third-party funding, particularly where funding arrangements affect settlement decisions, shareholder interests, fiduciary duties, and board accountability.

3. To compare the regulatory approaches adopted in key jurisdictions, including the United Kingdom, United States, Singapore, Hong Kong, and India, in order to identify areas of legal inconsistency and regulatory arbitrage.
4. To propose a coordinated regulatory framework combining corporate law obligations, strengthened arbitral institutional rules, and an international model provision for third-party funding.

D. Research Methodology

This paper adopts a doctrinal and comparative legal research methodology. It examines statutory provisions, arbitral institutional rules, judicial decisions, soft-law instruments, and scholarly commentary relating to third-party funding in international arbitration. The doctrinal method is appropriate because the paper analyses the legal status, scope, and limits of third-party funding through existing legal materials, including company law, securities regulation, arbitration rules, and case law.

The paper also uses comparative legal analysis to study the regulatory approaches adopted in the United Kingdom, United States, Singapore, Hong Kong, and India. This comparative method is necessary because third-party funding in cross-border arbitration operates across multiple legal systems, and the regulatory gaps identified in the paper arise largely from jurisdictional fragmentation. The study further relies on selected case examples to demonstrate how funder control, costs liability, privilege risks, and shareholder transparency concerns arise in practice.

The research is limited to doctrinal, comparative, and secondary-source analysis. It does not rely on empirical interviews, confidential funding agreements, or quantitative data from arbitral institutions, as such materials are generally inaccessible due to confidentiality in arbitration and private funding arrangements.

E. Literature Review

1. What the existing literature covered

In its 2018 publication, The ICCA-Queen Mary Task Force Report analysed all aspects of TPF, and serves as the definitive source of research on it. As a result of its analysis of the various types of funding agreements and the role of funders during the court process, as well the treatment of privilege, the report presents a thorough description of the way TPF operates and contains detailed information about the manner in which TPF is used to steamroll a party's potential objections.

The report contains an important limitation that this paper will address. The report indicates that funders control every aspect of the operation of the business by controlling legal costs, demanding up-to-date information about the status of cases, approving budgets, determining who will serve as arbitrators and receiving information on the development of key case-related confidential facts. The report does not place limitations on the activities that should be governed or prohibited in TPF matters. The report endeavoured to understand an issue but chose not to articulate a solution to it.

Jonas von Goeler's research into the financial structure of third-party funding arrangements is much needed quantitative foundation for what is sometimes lacking from other studies on TPF arrangements. His indication of average returns of twenty to forty percent from awards over three hundred million dollars explains the reasons for funders wanting to maintain control over the proceedings they fund. It is critical to understand the financial value represented by these stakes when determining what constitutes commercial value for settlement veto rights.

2. What existing literature missed

The work of F*rank Garcia*[4] provides an incisive theoretical critique of TPF in terms of investment treaties which is currently the most acute analytic challenge facing TPF industries in available TPF theory literature (critique of TPF). Garcia has shown that TPF essentially converts what should be legitimate claims for restitution for damages into "investment" assets thereby creating a tension between TPF funders (investor) and the actual requirements of legitimate courts of law seeking to dispense justice through legal processes.

[4] Garcia, supra note 5, at 2916.

In his study, *Pinheiro & Chitalia*[5] illustrate how TPF regulatory regimes differ across countries using India, Singapore, Hong Kong, England, Australia and the United States.

F. Research Hypothesis

Every institution that has looked at third party funding has landed on the same answer. Just disclose the funder's identity. The assumption behind this is that transparency is equal to accountability. If you know who the funder is, we think, the tribunal can check for conflicts, the other side can assess the litigation risk, and the system stays fair. This paper argues that assumption is fundamentally flawed. Knowing who the funder is tells you nothing about what they are allowed to do. It does not tell you how much control they hold over settlement decisions, legal strategy, or the choice of arbitrators.

It does not tell a listed company's shareholders that a private fund is shaping the outcome of a case that directly affects their investment. And it does not protect confidential legal documents from losing their privilege status when enforcement is sought in a different country. The result is a system where funders hold significant power with no corresponding accountability. Not because the law permits it deliberately, but because nobody has looked hard enough at what disclosure of a name actually does and does not achieve.

This paper argues that five specific gaps exist in the current framework and that all five can be closed without building new legal systems from scratch. The existing rules of company law, arbitral institutions, and international soft law already provide the foundation. What is missing is the framework to connect them. That is what this paper proposes.

IV. TPF IN CROSS - BORDER CORPORATE ARBITRATION: WHY THIS COMBINATION CREATES SPECIFIC PROBLEMS

Cross-border arbitration usually involves very high monetary claims. Disputes can be worth millions or even billions of dollars, which means funders can potentially earn

[5] Pinheiro & Chitalia, supra note 6,

very large returns. This makes such cases particularly appealing to major funding firms. As Jonas von Goeler notes in *Third-Party Funding in International Arbitration and its Impact on Procedure* [6]percentage returns on funded claims typically range from twenty to forty per cent of the award, or approximately three times the capital invested.

The estimated value of underlying awards is in hundreds of millions of dollars in major commercial arbitrations; the funders absolute returns are huge. Burford Capital's 2017 Annual Report disclosed a 736% return on its investment following the sale of its interest in the *Teinver v. Argentina* case, representing a gain of $94.2 million on an investment of approximately $13 million. Frank J. Garcia, writing in *Third-Party Funding as Exploitation of the Investment Treaty System*[7], notes that returns in specific cases can significantly exceed the 30-50% portfolio average.

The second important feature to note is the multi-jurisdictional environment of regulation, which simply means that a number of different countrie's laws might apply to one particular dispute. A single international arbitration case might involve a jurisdiction for the procedural law, a jurisdiction for the substantive law, one or several jurisdictions where enforcement of the award will be sought, as well as the jurisdictions of the parties and their counsel. All of this, therefore, makes regulation a highly advanced and sophisticated process.

For example, a Singapore-seated arbitration case between an English corporation and an Indian party, with a Dutch funder, where enforcement of the award is expected to be sought in France, involves five different systems of regulation, and nobody has overall control of the entire process. The point, therefore, is that just too many systems of law are involved, and nobody has overall control.

The third important feature is the 'corporate dimension,' and this is often not taken into consideration in the discussions of TPF. When the funded party is a corporation with a board of directors, shareholders, fiduciary obligations, and securities disclosure requirements, the picture is complex, and TPF raises questions of accountability that

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[6] Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure 30–31 (Kluwer Law Int'l 2016).

[7] Frank J. Garcia, Third-Party Funding as Exploitation of the Investment Treaty System, 59 B.C. L. Rev. 2911, 2916 (2018).

do not arise when the funded party is an individual or a small firm. The directors who enter into the TPF arrangement they make have a major discussion regarding the financial and strategic decisions of the company and thus owe a duty to the shareholders.

The shareholders have a vested interest in the outcome of the arbitration. The funding arrangement has the potential to affect the assets of the company or the settlement rights of the company. Since the shareholders have a vested interest in the company's success or loss, they are indirectly affected by this decision. However, the current laws in most jurisdictions do not require companies to seek board approval for such funding arrangements, and companies, especially listed ones, do not have the disclosure obligations in relation to these agreements to their shareholders. This is an accountability gap. Existing research has mainly viewed TPF as a mere procedural issue in arbitration, but in reality, it is a corporate governance issue because it has a direct impact on the management of companies and the manner in which decisions are made on behalf of the shareholders.

V. THE THREE CORE LEGAL PROBLEMS

A. Problem One: Funder Control Over Proceedings

The most important and least researched legal issue arising from the introduction of TPF in cross-border corporate arbitration is the issue of funder control. In simple terms, this issue arises because, although the claim is the property of the company, the funder, in some instances, has the ability to exert considerable control over the conduct of the claim. There are three types of funder control in finding agreements. These include settlement approval rights, whereby the funder must approve the settlement of the claim; information rights, whereby the funder is entitled to receive updates on the claim, including privileged communication between the funded party and legal counsel; and termination rights, whereby the funder reserves the right to terminate the claim upon reassessment of the commercial position. These rights, therefore, give the funder a level of control over the claim, which is not necessarily the property of the company, and therefore gives rise to the issue of funder control.

In fact, these are "normal" in third-party funding agreements. As M*ick Smith and Jeffery Commission explain in the Handbook on Third-Party Funding in International Arbitration* [8], control of strategy and settlement, information rights, and the right to terminate are standard commercial terms in funding agreements. In other words, this is simply how the system is designed to work. A funder may put a tremendous amount of money, sometimes even millions of dollars, into a case that may take several years to resolve. Since their profit is entirely dependent on the outcome of the case, they have a vested interest in the case. However, even though this is a logical argument from a business point of view, this is exactly the reason why the funders end up having a considerable say in the arbitration process.

The issue of control by funders is an even bigger problem in cross-border corporate disputes since it is not just one dispute at hand. The decisions made in cross-border arbitration have strategic consequences. The resolution of a single dispute can have an effect on the corporation's position in connected disputes in different jurisdictions. The resolution of a dispute can have an effect on the corporation's relationship with different states as counterparties, on its reputation in global commercial circles, and on its business operations in jurisdictions where the dispute is significant. However, once a veto power is vested in a third-party funder, things become different. The funder can either accept or reject a settlement proposal depending on their expectations for a return on investment without any consideration for the interests of the company. The main problem is that the company is unable to go against the decision of the funder. The company risks losing funding for its case altogether, which can weaken or destroy the case.

In the case of *Essar Oilfield Services Ltd v. Norscot Rig Management Pvt Ltd* (2016 EWHC 2361 Comm), the financial superiority of funders can be seen. *Pinheiro and Chitalia*[9]state that in this case, the English High Court held that the party which won was entitled to recover not only their legal costs but also their costs of third-party funding. This included very high returns on their investments, which could go up to 300% of the

[8] Mick Smith & Jeffery Commission, Standard Terms in Funding Agreements, in Handbook on Third-Party Funding in International Arbitration 168–169 (Nikolaus Pitkowitz ed., 2d ed., Juris 2025).
[9] Kaira Pinheiro & Dishay Chitalia, Third-Party Funding in International Arbitration: Devising a Legal Framework for India, 14(2) NUJS L. Rev. 265 (2021).

amount invested. These returns were treated by the court as part of the costs under the English Arbitration Act 1996.

The basic point to note in this context, however, is that there appears to be a gap in regulation concerning the actual degree of control that a funder may exercise. As Catherine A. Rogers explains in Chapter 5 of the Handbook of Third-Party Funding, none of the rules of any institution provides that there are no clear limits to important issues, whether a funder may influence settlement decisions, whether a funder may approve of legal expenses, or whether a funder may influence the choice of arbitrators.[10] While the ICC, LCIA, SIAC, and ICSID require parties to reveal the identity of the funder, none of them regulates the funder's authority or power.

In the report by the *ICCA-Queen Mary Task Force*[11] although the funder can "monitor legal fees, require progress reports, insist on approval of expenditure, have a say in the selection of arbitrators, and receive regular updates on significant developments," there was no recommendation on which of these activities should or should not be regulated or prohibited. However, the problem is that although one is aware of the funder, one is not in control of their power. Therefore, although transparency is present, their influence is not regulated, which is why this is a serious problem.

B. Problem Two: Conflict of Interest

Although the issue of conflicts between arbitrators and third-party funders is now expressly recognised, the regulatory response remains only partially adequate. The IBA Guidelines on Conflicts of Interest in International Arbitration were revised in 2024 and now engage more directly with third-party funders and insurers.[12] General Standard 6 recognises that third-party funders and insurers may have a direct economic interest in the prosecution or defence of the dispute, may exercise controlling influence over a party, or may influence the conduct of proceedings, including the selection of arbitrators. The revised Guidelines further indicate that a

10 Catherine A. Rogers, Gamblers, Loan Sharks & Third-Party Funders, in Handbook on Third-Party Funding in International Arbitration 69, 69–89 (Nikolaus Pitkowitz ed., 2d ed., Juris 2025).
11 ICCA-Queen Mary Task Force Report, supra note 2.
12 Int'l Bar As'sn, IBA Guidelines on Conflicts of Interest in International Arbitration (2014), https://www.ibanet.org/document?id=IBA-guidelines-on-conflicts-of-interest-in-international-arbitration-2014

funder may, in appropriate circumstances, be considered to bear the same identity as a party for the purpose of assessing arbitrator independence and impartiality.

This development directly addresses part of the earlier criticism that funder-related conflicts were treated only indirectly. However, it does not eliminate the underlying accountability problem. The 2024 Guidelines still operate primarily as a disclosure and conflict-assessment instrument; they do not define with precision what amounts to "controlling influence," nor do they prescribe substantive limits on settlement veto rights, budgetary approval, access to privileged communications, or influence over counsel and arbitrator selection. Therefore, the difficulty is no longer that funders are invisible within the conflict framework. The more accurate concern is that the framework recognises funder influence but does not regulate the permissible scope of that influence.

The problem is particularly significant in cross-border corporate arbitration because the arbitral community is comparatively concentrated, with repeat appointments, institutional affiliations, professional networks, and funder relationships often overlapping across major institutions such as the ICC, LCIA, SIAC, and ICSID. The 2024 IBA Guidelines improve the position by requiring funder-related relationships to be considered where they may affect arbitrator independence or impartiality. However, disclosure of the funder's identity, or even recognition that the funder may have controlled influence, does not necessarily reveal the economic structure of the funding arrangement. An arbitrator may know that a party is funded by a particular funder, but may still not know the funder's expected return, the degree of control over settlement, whether the funder influenced the choice of arbitrator, or whether the funder has repeat relationships with the arbitrator in other funded proceedings.

As Nikolaus Pitkowitz and Maximilian Albert Müller note, there remains a lack of consensus regarding the proper scope of disclosure: whether it should be confined to the funder's identity or extend to the funding agreement's operative terms and the degree of funder control. The 2024 IBA revision strengthens the conflict framework by acknowledging that funders may have direct economic interests and controlling influence.

Nevertheless, most institutional rules still remain closer to an identity-disclosure model than a control-disclosure model. The essential gap, therefore, is not that funders are wholly absent from conflict rules, but that the existing rules do not require systematic disclosure of the very facts most relevant to assessing conflicts: settlement control, arbitrator-selection influence, repeat appointments, economic exposure, and the funder's practical role in shaping the proceedings.

C. Problem Three: Confidentiality and Cross-Border Privilege

The third major problem relates to confidentiality, which is one of the biggest reasons for choosing arbitration as a means of dispute resolution as opposed to going to court. The problem, however, arises in the context of third-party funding, whereby a company seeking funding is required to reveal detailed information regarding its case in order for the funder to assess and monitor it. The problem, however, is that the funder is a third party, a commercial entity, and not a part of the case in the first place, which may partly violate the promise of confidentiality by introducing a third party that has access to detailed information regarding the case.

The first part of the confidentiality issue is quite simple: the funder now has access to the company's confidential information. If the funder has invested in other businesses within the same or similar industries, or if the funder itself has personnel who change roles, there exists the possibility that this confidential information can be used, directly or indirectly, in a manner which might be harmful to the company it has funded. *Pinheiro and Chitalia* [13], concede the point that the reality of the situation is the fact that TPF cannot exist without the communication of the information, which would otherwise be subject to the confidentiality of the arbitral proceedings.

The second issue is the issue of legal privilege in different countries, and this is a more complex issue, but it can be explained in simple terms. When a funded corporation discloses privileged legal documents to the funder in the context of a cross-border arbitration, the privilege position of such disclosure varies significantly from one jurisdiction participating in the arbitration. Under the English system of law, the common interest privilege doctrine was applied analogously to the funded/funder

[13] Kaira Pinheiro & Dishay Chitalia, Third-Party Funding in International Arbitration: Devising a Legal Framework for India, 14(2) NUJS L. Rev. 277 (2021).

relationship in the context of Winterthur Swiss Insurance Co. v. AG, as recognized in the *ICCA/Queen Mary Task Force Report on Arbitration Privileges*[14] which generally allows disclosure of privileged documents to a funder with a common financial interest without the disclosure amounting to a waiver of privilege.

In *Winterthur Swiss Insurance Co. v. AG* case, the court looked at whether documents shared between a funded party and their funder could remain legally protected under what is called "common interest privilege." The court said yes. The reasoning was that both the funder and the company being funded share a strong enough financial interest in the outcome of the case that sharing documents between them does not count as giving up confidentiality.[15]

This became an important reference point for the UK funding industry, effectively giving funders and funded parties the freedom to exchange sensitive case information without worrying about it being used against them later. The ICCA-Queen Mary Task Force in 2018 endorsed this approach but advised parties to always sign a solid confidentiality agreement before sharing anything sensitive, just to be safe. Under the United States federal system of law, the courts have been inconsistent on this issue. *In Miller UK Ltd v. Caterpillar Inc*, the court took a strict approach. It said that for common interest privilege to apply, the parties must share a legal interest in the case, not just a financial one. Since a funder's interest is purely about getting a return on their investment rather than any genuine legal stake, the court found that sharing documents with a funder amounted to waiving privilege over those documents entirely.[16]

This is a significantly harsher outcome than the English or Australian positions, and it creates serious risks for companies in US proceedings who assume their communications with funders are protected. Not all US courts apply this strict standard, but enough do that it remains a live and unresolved problem. *Asahi Holdings (Australia) Pty Ltd v. Pacific Equity Partners Pty Ltd* case added an important and often

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[14] ICCA-Queen Mary Task Force on Third-Party Funding in Int'l Arbitration, Report on Third-Party Funding in International Arbitration (2018) [hereinafter ICCA-Queen Mary Task Force Report].
[15] Winterthur Swiss Insurance Co v AG (Manchester) Ltd [2006] EWHC 839
[16] Miller UK Ltd. v. Caterpillar, Inc., No. 10-cv-03770, 2015 U.S. Dist. LEXIS 175659 (N.D. Ill. Nov. 20, 2015)

overlooked complication. The court agreed that common interest privilege applies once a funding agreement is signed and the funder is formally on board. However, it drew a clear line at the stage before the deal is signed.[17] During the period when the funder is still evaluating the case and deciding whether to invest, they have no legal stake in it yet.

That means any documents shared with the funder at that early stage are not protected. This matters enormously in practice because the most sensitive information about a claim, things like its weaknesses, the internal assessments, the legal strategy, is almost always shared at exactly that early stage when the funder is making up its mind. So even in countries that broadly accept common interest privilege, there is a real and underappreciated risk that the most important documents are not actually protected.

The position in Singapore is not clear. In India, there is no clear position. In other words, the same action of sharing documents with the funder can be safe in one country and risky in the other.

The issue here is the problem created when different countries have different rules on legal privilege. For instance, a company might share confidential legal strategies with the funder, but the funder might not be bound by the rules of legal privilege.

A funded claimant who has shared legal strategies with the funder under the assumption that common interest privilege applies in Singapore might lose the documents in U.S. enforcement proceedings under the Miller line of authority. This is a big problem in the area of international arbitration because companies cannot be sure that their confidential documents will be protected in all jurisdictions. This is also a big problem in the area of regulation, as no current rules address this issue of legal privilege.

[17] Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 2) [2014] FCA 481

VI. GAP ANALYSIS: WHAT HAS BEEN ADDRESSED AND WHAT HAS BEEN IGNORED

The existing literature on third-party funding has already addressed the fundamental and common aspects of the system. First, the literature has already addressed the fundamental issue of what third-party funding is, how it works, and the rate at which it is expanding in international arbitration. Another issue addressed is the disclosure of the funding arrangements, such as security for costs, whether the funded parties should offer financial guarantees, and whether the funding costs can be recovered after a successful case, especially in the recent decision in the case of *Essar Oilfield Services Ltd v. Norscot Rig Management Pvt Ltd.*[18]

Despite the vast amount of written work and research completed on third-party funding, some of the most important questions have never really been addressed. The first of these questions is that, while many commentators agree that third-party funding has an impact, or even a controlling influence, on the case, none of them goes any further than that to discuss the parameters of that influence.

All of them stop at disclosure, merely telling the tribunal that a funder exists, without ever really addressing the question of what a funder is permitted, or forbidden, to do. With TPF, decisions are made by directors of companies. However, the literature does not explore the question of whether the directors are held accountable and whether the shareholders should be informed of these significant financial arrangements. The literature continues to focus on the arbitration procedure and not on company law. Third, the cross-border privilege issue discussed above, where confidentiality can be maintained in one country but not in the other. Fourth, the funder's accountability for costs, which would be speculative if the case fails or if there are risky or abusive claims. Fifth, the regulatory arbitrage issue, where the countries involved have different laws, and the parties and funders can benefit from these differences.

[18] Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)

VII. REGULATORY FRAGMENTATION: THE ACTIVE EXPLOITATION PROBLEM

Big corporations and professional funders know this system very well and take advantage of it. They structure the arbitration in such a manner that they pick and choose the various elements from the various jurisdictions. In the case *R (PACCAR Inc) v. Competition Appeal Tribunal* which is the most disruptive case in the recent history of third-party funding in England, the Supreme Court found that funding agreements where the funder receives a percentage of the damages recovered are actually a type of arrangement called a damages-based agreement, or DBA, under a 1990 statute.[19]

The problem is that DBAs come with strict legal requirements that almost no standard funding agreement had ever been designed to meet. The result was that a huge number of existing funding contracts in the UK were suddenly at risk of being unenforceable. The practical fallout was immediate and serious. Funders had to urgently restructure their contracts, ongoing cases were thrown into uncertainty, and the enforceability of many litigation funding agreements became vulnerable where the funder's return was calculated by reference to a percentage of damages. However, the issue should not be treated as resolved.

The Litigation Funding Agreements (Enforceability) Bill 2024, which was introduced to reverse the effect of *PACCAR*, did not proceed after the 2024 general election. The Civil Justice Council's Final Report of 2 June 2025 recommended legislation to clarify that litigation funding agreements are not damages-based agreements, and the Government later confirmed that it intended to legislate "when parliamentary time allows." As of the current legislative position, however, *PACCAR* has not been reversed, and litigation funding agreements remain exposed to uncertainty under the Damages-Based Agreements Regulations 2013 where they fall within the statutory definition of a damages-based agreement.

This continuing uncertainty strengthens the central argument of this paper: a self-regulatory and disclosure-centred approach to funding remains structurally fragile,

[19] R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal [2023] UKSC 28

because one judicial decision can unsettle an entire funding market in the absence of clear statutory rules. to funding had always been. The industry had operated for years under informal norms with no proper legal foundation, and one Supreme Court decision was enough to destabilise a significant part of the market overnight.

In Singapore, the Civil Law (Amendment) Act 2017 established a framework for identity disclosure and capital adequacy of qualifying funders. It has two key components: on the one hand, the identity of the funder has to be disclosed, and on the other, the funder has to meet certain criteria of financial capacity. As a matter of fact, as noted by *Chen Siyuan and Louis Lau Yi Hang in their Handbook on Third-Party Funding,* the Singapore framework follows a "light touch" approach, according to the Singapore Ministry of Law, which has established a regime that gives precedence to party autonomy with disclosure as the central tenet.[20]

According to *Pinheiro and Chitalia*[21], they cited a consultation paper issued by the Ministry of Law in Singapore, stating that information need only be disclosed as to who the funder is, and this need only be done "as soon as is practicable." The important thing is that although Singapore appears to be transparent on the surface, it does not tackle the real issue of control. Hence, it is called "transparency theatre."

In the case of Hong Kong, under the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017**,** and the corresponding Code of Practice, funders are prohibited from having control. According to a journal by *Pinheiro and Chitalia*[22],the new framework in Hong Kong is based on the ALF Code and the Law Reform Commission's recommendations. On a cursory reading, this appears to be a robust measure. It confirms that funders should merely provide the funding and should have no role in decision-making. However, the problem is that the law does not clearly define what 'control' means. It prohibits funders from having control, but does this mean having control over the settlement of the case? Does this

[20] Chen Siyuan & Louis Lau Yi Hang, Singapore, in Handbook on Third-Party Funding in International Arbitration 697, 697–726 (Nikolaus Pitkowitz ed., 2d ed., Juris 2025).
[21] Kaira Pinheiro & Dishay Chitalia, Third-Party Funding in International Arbitration: Devising a Legal Framework for India, 14(2) NUJS L. Rev. 275 (2021).
[22] Kaira Pinheiro & Dishay Chitalia, Third-Party Funding in International Arbitration: Devising a Legal Framework for India, 14(2) NUJS L. Rev. 289 (2021).

mean having control over the costs incurred? Does this mean having control over updates on strategy? As a result, this is a difficult rule to enforce.

The position of TPF in India is also noteworthy. It has been held by the courts that while the legality of TPF has been established, it cannot be said to be illegal. t was established through the judgment of the Privy Council in *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, [23], and this position has been affirmed by the Supreme Court in Bar Council of India v. A.K. Balaji, (2018) 5 SCC 379[24] ,*Pinheiro and Chitalia*[25] point out that the Arbitration and Conciliation Act of 1996 does not recognise the concept of TPF. The 2019 Amendment also did not address the issue, even though it recognised the need for reform.

The issue of confidentiality, disclosure, and costs also remains unaddressed. It needs to be noted that India is now also getting involved in international arbitration, and the lack of regulation of TPF can result in its misuse. In the case *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876) and *A.K. Balaji v. Bar Council of India* (2018) India's legal history with third party funding takes a different path. In 1876, the Privy Council confirmed that the strict English rules against maintenance and champerty, which are old doctrines that historically made it illegal to fund someone else's lawsuit, do not apply in India. Over a century later, the Supreme Court of India in the A.K. Balaji case reaffirmed this, confirming that third party funding is valid and permissible under Indian law. Some Indian states including Maharashtra, Gujarat, Madhya Pradesh, and Uttar Pradesh have gone further and made specific amendments to the Civil Procedure Code to formally recognise funding arrangements in litigation. India is therefore relatively permissive on TPF, but this openness has not been matched with a regulatory framework to govern how funding arrangements should actually work in practice.

At the institutional level, ICSID Rule 14 now requires mandatory disclosure of funder identity and interest, which was introduced in the 2022 ICSID rules amendment. All the major institutions, namely ICC, LCIA, and SIAC, now require disclosure.

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[23] Ram Coomar Coondoo v Chunder Canto Mookerjee (1876) SCC OnLine PC 19

[24] Bar Council of India v A.K. Balaji, (2018) 5 SCC 379.

[25] Kaira Pinheiro & Dishay Chitalia, Third-Party Funding in International Arbitration: Devising a Legal Framework for India, 14(2) NUJS L. Rev. 267-268 (2021).

However, this institutional approach has only solved the easy problem of "who is the funder?" but in so doing, has totally ignored the hard problem of "what does the funder control?" In short, the institutions have succeeded in achieving consensus on the "transparency" problem but have totally failed to address the "real" problem of funder control, which is the real risk.

The concept of arbitrage in this case is quite simple. For instance, in the case where Singapore has a disclosure requirement, but India does not, sophisticated players can choose the rules that work in their favour. In the case where Hong Kong prohibits the use of control but does not define it, the counsels' draft agreements to technically comply but functionally retain control. Finally, the United Kingdom illustrates how regulatory fragmentation can persist even in a mature arbitration and litigation market. After *PACCAR*, funding agreements that provide for funder remuneration as a percentage of damages remain potentially vulnerable unless they comply with the statutory regime governing damages-based agreements.

Although legislative reversal has been proposed and recommended, it has not yet been implemented. This creates an incentive for funders and parties to restructure funding arrangements, alter return models, or select dispute resolution forums in ways that minimise exposure to the *PACCAR* risk. The UK position therefore demonstrates not a completed legislative solution, but an ongoing regulatory gap that sophisticated parties may actively navigate. of the funding agreements as DBAs, the market simply restructures the agreements to avoid the regulatory category. It is not just fragmentation but the creation of inconsistencies, and what this means is that even in the case where a country is trying to properly regulate the issue of TPF, it would not work because the rules in the other countries would be more liberal.

VIII. THE CORPORATE GOVERNANCE DEFICIT

This part of the paper addresses the problems which have generally been ignored by many researchers, which is the corporate governance deficit that is created inside funded corporations due to the absence of any law regulating Third party funding.

A. Accountability Gap

The major funders in the TPF space, Burford Capital, Omni Bridgeway, Therium, and Harbour, do not look at cases individually in isolation. Instead, they manage a portfolio of many cases at the same time, similar to how investors manage a portfolio of stocks. Their goal is to maximise overall returns across all cases, not just to achieve the best outcome in any single dispute. Because of this, their interests can conflict with the interests of the specific company they are funding.

B. The Fiduciary Duty Question

When company directors agree to third party funding (TPF) arrangements, they often hand over control of settlements to an outside funder. This is a problem because that funder has its own financial interests, which do not always match what is best for the company.

Under English law (Section 172 of the Companies Act 2006) and US Delaware law, directors have a legal duty to act in the best interests of the company and its shareholders.

Here is where it gets problematic. If a funder has the right to block a settlement that the board believes is a good deal for the company, then the board has effectively handed its decision-making power to the funder. The case drags on based on what will give the funder the best financial return. The company could end up with a worse outcome or even lose entirely. The directors signed off on the arrangement. The funder used its veto. The current legal framework does not clearly place blame on anyone. This paper argues that it should.

C. The Shareholder Transparency Gap

This problem becomes even more serious for companies listed on a stock exchange. Consider a funder who takes 35% of a $500 million award. That is clearly significant information for shareholders. It affects how much the company's legal claim is worth, how the case is run, when and whether it settles, and what the company actually walks away with.

Under existing laws including the FCA in the UK, the SEC in the US, and SEBI in India, companies are required to disclose important information that could affect the value of their assets. In many cases, this must be done immediately. So, when listed companies quietly enter into major funding arrangements without telling their shareholders, this may not just be a gap in the rules around TPF. It could already be a breach of securities law.

Strangely, most of the regulatory debate around TPF disclosure has focused on telling the tribunal and the other side in a dispute about the funder's involvement. Almost no attention has been paid to the arguably more important question of whether the company's own shareholders have a right to know. The consequences of this accountability gap are not hypothetical. The following cases demonstrate what happens in practice when no framework exists to assign responsibility.

The Sysco v. Burford Capital case showed what happens when a funder's financial interests completely override a company's own business judgment. Sysco, a Fortune 500 company, wanted to settle its litigation. It was a rational commercial decision made by the company's own board. But because of the funding arrangement in place, the funder effectively had the power to prevent the settlement and force the case to continue on the basis of what would produce the best return for the funder, not what was best for Sysco.

No court stepped in. No law was broken. The funder acted entirely within its contractual rights. The case demonstrated in stark terms that a major corporation can be stripped of control over its own legal strategy, with no legal framework to assign responsibility or provide a remedy[26].

Norscot Rig Management v. Essar Oilfields- This case revealed the sheer financial scale at which third party funding operates and the consequences it can have for the losing side in a dispute. The tribunal in this arbitration allowed the costs of third-party funding to be recovered from the losing party, which in practice meant that Essar was ordered to pay not just Norscot's legal costs but also the funder's return on its investment.

That return was either 300% of the amount funded or 35% of the total recovery. This was not a minor administrative cost. It was a massive financial liability that Essar had

[26] Sysco Corp. v. Glaz LLC et al., N.D. Ill., Case No. 23-C-1451 (2023)

no part in agreeing to and no ability to scrutinise or challenge. The case forced the question of whether it is fair for a losing party to bear the cost of a funding arrangement they knew nothing about and had no say over.[27]

Excalibur Ventures LLC v. Texas Keystone Inc (2016, England) - This case addressed a different problem, which is what happens when a funder backs a case that turns out to be completely without merit. The English Court of Appeal confirmed that in such circumstances, funders can be ordered to pay the winning party's legal costs directly. This was a meaningful accountability mechanism and an important precedent. However, it has significant limitations. It only applies in England. It only kicks in where the funded case was a total failure with no real merit whatsoever. And crucially, there is no equivalent rule in international arbitration across most jurisdictions. So, while Excalibur established that funders are not completely untouchable, it also highlighted how narrow and jurisdiction-specific that accountability actually is[28].

IX. THE PROPOSED FRAMEWORK

A. The first reform is better corporate governance

The first line of action will occur through existing company law and stock market rules with increased regulatory guidance. The company's board of directors will have the ultimate responsibility for approving third party financing where the funding request or dispute is significant enough to impact the value of the company's assets. The minimum threshold is that the funding will have a potential pay-out exceeding five percent of the total/equity of the company.

The board of directors will also have to demonstrate that they have performed some due diligence regarding the third-party funding agreement. Specifically, the board will need to disclose what right is being granted to the third-party funder, whether the third-party funder may block settlement of the company's pending litigation, and whether the third-party funder's financial arrangement serves the company's best interest.

[27] Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)
[28] Excalibur Ventures LLC v Texas Keystone Inc & Ors [2016] EWCA Civ 1144

Third-party funder contracts that contain clauses giving the third-party funder a one-sided right of veto for settlement of the company's claims will be deemed unenforceable as they will be treated as being contrary to established company law, just as any other provisions contained in a contract that attempt to circumvent established company law would. In some cases, third-party funders may still have the right to participate in settlement negotiations but only with the board of director's prior approval.

Companies listed on a stock exchange will also have an additional obligation to provide their shareholders with regular reports disclosing any significant third-party funding arrangements entered into by the company. The Financial Conduct Authority (FCA), the Securities and Exchange Commission (SEC), and the Securities and Exchange Board of India (SEBI) should issue clear guidance confirming that existing disclosure rules apply to material third-party funding arrangements entered into by listed companies.

B. The Second Reform is about Fixing Arbitration Rules

Currently, many institutions only require the party to identify their funder but do not require the disclosure of any other limitations the funder may have regarding rights of approval/barring settlements, choice of arbitrators, or any financial interest in the arbitration result. The arbitrators themselves should be obligated to disclose whether they have previously been appointed to arbitrations by the same funder in the previous seven years (this is also a time frame for disclosure currently required under some international guidelines) to prevent the possibility of undisclosed conflicts of interest.

Where a funder is exercising their rights by controlling settlements or selection of lawyers, they should be liable to contribute to the cost of the other party if the party funded by the funder loses the arbitration. This concept has already been applied by the English courts and should be extended to all leading arbitration institutions.

There should also be a shared set of rules about legal privilege, so that documents shared with a funder do not automatically lose their confidential status when enforcement is sought in another country. This directly fixes the cross-border privilege problem discussed earlier in the paper.

C. The Third Reform is making a Global template through UNCITRAL

UNCITRAL should be treated not as a body yet to begin work on third-party funding, but as an institution whose existing work can be developed further. UNCITRAL Working Group III, under its investor-State dispute settlement reform mandate, has already considered third-party funding through materials such as A/CN.9/WG.III/WP.157, A/CN.9/WG.III/WP.172, and A/CN.9/WG.III/WP.219, including draft provisions on procedural reform and possible solutions for third-party funding. More recent Working Group materials also continue to address third-party funding as part of procedural and cross-cutting ISDS reform.

The contribution of this paper, therefore, is not to suggest that UNCITRAL should address third-party funding for the first time, but to argue that its existing ISDS-focused work should be extended and adapted into a broader model framework for cross-border corporate and commercial arbitration. Though the Model Provision would not have binding effect in any country, it would be a universally accepted form of template that countries could adopt, modify and insert into their own laws and apply consistently across the globe.

The main purpose of the proposed reform is to build on UNCITRAL Working Group III's draft treatment of third-party funding and convert it into a more comprehensive template capable of operating beyond investor-State arbitration. Existing UNCITRAL materials already address matters such as disclosure and possible regulation of third-party funding, but the present paper argues that a fuller framework is required for corporate arbitration.

Such a framework should define third-party funders, require disclosure of both funder identity and material control rights, prohibit unilateral settlement vetoes that undermine the funded corporation's independent decision-making, preserve privilege and confidentiality across jurisdictions, and clarify when funders may be exposed to adverse costs consequences.

In essence, the proposed model framework would complement UNCITRAL Working Group III's ISDS reform process while filling a separate gap in international commercial arbitration. UNCITRAL's current work is principally directed toward investor-State dispute settlement, whereas third-party funding also raises acute governance concerns in private cross-border corporate disputes. Extending the UNCITRAL approach to commercial arbitration would reduce regulatory arbitrage across major arbitration hubs and prevent sophisticated parties from exploiting differences between disclosure-only regimes, undefined control restrictions, and inconsistent rules on privilege, costs, and corporate accountability.

X. CONCLUSION

Disclosure of funder identity is not regulation. It was the easiest thing every institution could agree on, and it became a substitute for addressing how much power funders actually hold.

What this paper found is that funders routinely hold settlement veto rights, access privileged legal communications, and can pull funding entirely, with no institutional rule defining how far those rights can go. An arbitrator who knows Burford Capital is involved still does not know their financial stake or how many times they have been appointed in Burford-funded cases. A company that shares its legal strategy with a funder in Singapore can lose those documents entirely in US enforcement proceedings. A listed company can enter a funding arrangement creating hundreds of millions in contingent liability without telling its board or its shareholders. None of this is unlawful. That is precisely the problem.

The three-pillar framework proposed here addresses this directly. Mandatory board approval and shareholder disclosure through existing FCA, SEC, and SEBI frameworks. Full disclosure of funder control rights, a seven-year arbitrator lookback, and a cross-border privilege protocol at the institutional level. A UNCITRAL Model Provision to make regulatory arbitrage structurally unviable.

Control without accountability is wrong. Right now, that is exactly what the system permits.

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