WHEN PEER PRESSURE IS NOT ENOUGH: MANDATORY DISCLOSURE AND THIRD-PARTY FUNDING

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I. Introduction

While the rise of third-party funding agreements helped parties arbitrate their claims without harming their bottom lines, there is a high potential for unforeseen conflicts of interest to arise. The arbitral community is fairly small, with arbitrators having repeat appointments, counsel representing various parties, and funders pulling the purse strings.

This paper defines a conflict of interest within a third-party funding context and takes a look at why mandatory disclosure is important for the future of third-party funding and the arbitration community as a whole. It also analyzes the role states can play in supporting the legitimacy of arbitration through legislation. Of course, legislation is not necessarily the quickest method, but it is the most enforceable. The arbitral community should lean on the enforceability of hard law to require mandatory disclosure of the existence and identity of third-party funders. Requiring parties to disclose funding not only helps avoid conflicts of interest throughout an arbitration, but it can also lead to more enforceable awards and increase participation and trust in the system, while still maintaining the confidentiality of the process.

In this paper, I explain the mechanics of third-party funding and the types of funders who provide monetary support to claims. Second, I explain the types of conflicts that can arise when third party funding is involved in a dispute, and better define what a conflict of interest actually means within a third-party funding context. Finally, I argue

that requiring parties to disclose the name and existence of any funder throughout the course of an arbitration can help avoid conflicts throughout the process, lead to greater enforceability, and increase participation and trust in the arbitral process.

II. What is Third-Party Funding and Who Are These Funders?

This paper adopts the following definition and description of third-party funding loosely based off the definition provided in the Queen Mary Report: third-party funding is when a party (generally the claimant, but in a small number of cases, the respondent), an affiliate of the party, or the law firm representing that party funds a claim by receiving financial support from a third-party financial institution.[1] These arrangements either come in the form of equity or debt instruments, full or partial transfer of the claim, and risk avoidance instruments.[2] These are large loans that can cover legal fees, administrative costs, expert fees, or even the business operating expenses of the party.[3] A particular feature of these loans is that they are non-

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1 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 92 (April 2018) (The term "third-party funder" refers to any natural or legal person who is not a party to the dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party: (a) In order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and; (b) Such support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute).

2 Burcu Osmanoglu, *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, 32 J. Int'l Arb. 325, 329 (2015).

3 Yves Derains, *Foreword to Third-Party Funding in International Arbitration*, ICC Dossier No. 752E, 5 (2013).

recourse, meaning that if the claimant or respondent is unsuccessful, they do not have to repay the funder.[4]

The International Bar Association (IBA) 2014 Guidelines on Conflicts of Interest[5] defines third-party funding as "any person or entity that is contributing funds or material support to the prosecution or defense of the case and that has a direct economic interest in the award to be rendered in the arbitration."[6] This excludes other types of funding like bank loans, intra-group financing, and philanthropic financing from non-governmental organizations.[7]

Third-party funders can either specifically focus on third-party funding or use this type of financial instrument as a way to diversify their portfolios.[8] Generally these specialized firms are in countries with well-developed third-party funding industries and legal systems like Australia, Germany, the United Kingdom, and the United States.[9]

III. What is a Conflict of Interest?

The rise of third-party funding in arbitration and the small community of arbitrator-lawyers can create a perfect

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[4] Jennifer A. Trusz, Note, *Full Disclosure*? *Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J., 1649, 1653 (2013).

[5] Hereinafter the "IBA Guidelines".

[6] IBA Guidelines on Conflicts of Interest in International Arbitration, 13 (adopted Oct. 23, 2014) (updated Aug. 5, 2015) (citing Explanation of General Standard 6(b)).

[7] *Id*.

[8] Victoria Shannon Sahani, Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration* 3, 1-20 (2d ed. 2017), https://ssrn.com/abstract=3046300 (noting Chapter 1: Introduction to Third-Party Funding).

[9] *Id*., at 3.

storm of conflict of interest issues between the parties and the arbitrator. For example, if a party appointed arbitrator has had extensive dealings with a funder or has a financial stake in the funder's business dealings, this could negate the neutrality of the tribunal as one of the arbitrators is predisposed to favor a funded party. Or at least, set the tribunal's decision up for an impartiality challenge. Unfortunately, trying to asses a "conflict of interest" and whether that conflict could impact the tribunal's decision-making abilities is a difficult process because there is no one universal definition. Neither institution rules nor state legislation truly define when conflicts arise, and under what circumstances. Instead, they suggest guidelines, possible situations to look out for, and what type of test to apply when analyzing conflicts issues. This is helpful but offers about as much clarity as a partially fogged mirror.

Taking into account the difficulty of truly figuring out whether a conflict of interest strongly influences an arbitrator's impartial decision-making capabilities (for better or worse, individuals in society cannot read minds), I propose the following standard based off institutional guidelines, existing case law regarding arbitrator impartiality challenges, and national legislation:

> **A conflict of interest arises when there is a direct and dependent relationship between the funder and the arbitrator where the outcome of the case *significantly* affects: (1) the financial performance, profitability, or share price of the funder, or (2) the arbitrator's personal financial interests.**

This definition of a conflict of interest within a third-party funding context will not only be used as a reference point for the rest of the paper but should be adopted as the standard when analyzing third party funding conflicts. This

is because it is just narrowly tailored enough to apply to the nuanced relationship between funders and tribunals, but it also sets itself up for application in existing litmus tests used by institutions and states.

Arbitral and other legal institutions (like the IBA), while great in many ways, have largely refrained from adopting one uniform definition of a conflict of interest. Instead, they just generally support the idea of an objective test. UNCITRAL for instance, in trying to define what an impartial and independent arbitrator can mean, explains that "impartiality" is a subjective test, regarding the arbitrator's state of mind, whereas "independence" is an objective test that looks to the arbitrator's relationships with the parties or funders.[10] This is why the IBA Guidelines also adopt a reasonableness test. The IBA Guidelines explain standards for what constitutes a reasonable doubt regarding an arbitrator's potential for bias and a possible test for disqualification. General Standard 2(c) states:

> "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the

[10] *See*, *e.g.*, Blackaby Nigel et al., *Redfern and Hunter on International Arbitration* ¶ 4.77, 1028 (6th ed. 2015); Fouchard, *Gaillard, Goldman on International Commercial Arbitration*, ¶ 1028 (Emmanuel Gaillard & John Savage eds., 1999); Amelie Abt, Arbitration in Germany: The Model Law Practice § 1036 at 25, (Karl-Heinz Bockstiegel, Stefan Kroll, Patricia Nacimiento eds., 2d. ed. 2015) (for German arbitration law); 50 para. 7; Judgement of 10 June 2004, *Bargues Agro Industrie SA v. Young Pecan Cie*,, XXX YB Comm. Arb. 499, 503 (Paris Cour d'appel) (2005) (for French arbitration law); Judgement of 27 June 2012, *X. v. Y. Inc., Swiss Federal Tribunal*, 4A_54/2012 ¶ 2.2.1. (for Swiss arbitration law).

> case as presented by the parties in reaching his or her decision."[11]

General Standard 3(a) outlines a test for disqualification, but only when testing for the *appearance* or likelihood of bias. It uses an objective standard with a high threshold to prove.[12] Fortunately, in an effort to prove *some* sort of more substantial guidance on what could be a conflict of interest, the IBA has created red, orange, and green lists with red meaning a high likelihood of bias, orange meaning a medium likelihood of bias, and green meaning a low likelihood of bias. Generally, the list equates a higher likelihood of bias with: (1) the closeness of a relationship between an arbitrator, the party, an affiliate of the party, or the law firm (2) financial interest in the outcome of the claim; and (3) the length of the relationship between the arbitrator and the party, an affiliate of the party, or the law firm.

The red list is separated into two categories: non-waivable and waivable situations. Non-waivable situations include: the arbitrator being a manager, director, or member of the supervisory board, having a controlling influence on one of the parties or an affiliate, having a "significant financial or personal interest in the outcome," or regularly advising the party and its affiliate, of which they derive "significant financial income." "Waivable" offenses include situations where the arbitrator has relationship to the dispute (whether through prior involvement or given legal advice on the dispute to a party or affiliate), they have a direct or indirect interest in the dispute, or there is a current and slightly substantial relationship to one of the

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11 IBA Guidelines on Conflicts of Interest in International Arbitration, 13 (adopted Oct. 23. 2014) (updated Aug. 5, 2015) (citing General Standard 2(c)).

12 *See id*. (citing General Standard 3(a)).

parties, or its affiliates. The orange list is similar to the waivable red list offenses, but only takes into account small services or relationships within the past three years. Green includes situations where the arbitrator has previously expressed legal opinions, currently renders services for one of the parties, or has contacts (rather than a relationship) with another arbitrator or with counsel for one of the parties.

Recently, the ICC released a "guidance note" regarding arbitrator conflicts of interest. [13] According to the President of the ICC's International Court of Arbitration, Alexis Mourré, the note is aimed at "ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts."[14] It does not address third-party funding specifically, but defines one potential conflict of interest as having a "business relationship." Thus, it can inferred that an arbitrator having a business relationship with an affiliate or a personal interest of any nature can include a significant financial interest in the outcome of the case could have a potential conflict of interest.

Fortunately, there are some ICSID cases that shed light

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[13] Burcu Osmanoglu, *Third- Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, 32 J. Int'l Arb. 325, 348 (2015) ("According to unconfirmed information, the ICC is considering including third-party in funding in its arbitration rules.") (while it is generally frowned upon to base an argument off of rumors in an academic research paper, it looks like the rumors published in this article came to fruition as evidenced by the ICC's guidance note released in 2018 advising parties on potential conflicts arising from the use of third-party funding).

[14] International Court of Arbitration, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration* (2019), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf. (Quoting Alexis Mourre).

on how tribunals have attempted to define conflicts of interest regarding third party funding. For the most part, these cases have used an objective test to evaluate based on a "reasonable evaluation of the evidence by a third-party."[15] The subjective belief of the requesting party is not enough to satisfy the requirements of the convention.[16]

For instance, an arbitrator simply being in a leadership position as a funder is not enough to merit a successful claim of arbitrator bias. In *Suez Vivendi v. Argentina*,[17] Argentina challenged the Claimant's arbitrator appointment because it believed that her position as a board member of UBS was enough to violate the neutrality requirement. The council applied an objective standard – stating that the subjective belief of the requesting party is not enough to satisfy the requirements of the convention. And that as a result of the relationship between an arbitrator and a funder, a manifest lack of independence and impartiality of judgment must be demonstrated to a reasonable person. They looked at the following elements to determine whether a reasonable person would think that the challenged arbitrator could be biased: (1) proximity of the connection between the challenged arbitrator and the party; (2) intensity and frequency of the interactions between the challenged arbitrator and the party; (3) dependence of the challenged arbitrator on the party; (4) materiality of the benefits accruing to the challenged arbitrator as a result of the alleged connection.

Applying this four-prong test to analyze the proximity and type of relationship between the arbitrator and the

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[15] *Suez, Sociedad General De Aguas De Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina Republic*, ICSID Case No. ARB/03/199 (Investment disputes).

[16] *Id*.

[17] *Id*.

funder, the tribunal concluded that simply holding an advisory position on a large multi-national bank is not enough to disqualify an arbitrator. It is not about the type of relationship, but the closeness and influence the funder and arbitrator might exercise over the other. The tribunal ruled that "any connection between Prof. Kaufmann and the Claimants is remote and certainly not direct" because her directorship at UBS was merely supervisory and had no involvement in the day-to-day management of the corporation. Regarding element (2), there was no interaction at all between Prof. Kaufmann and the Claimants because of her UBS directorship. Regarding element (3), the tribunal said, "Prof. Kaufmann derives no benefits or advantages from and is in no way dependent on the Claimants as a result of the alleged connection." Further, "UBS shareholdings in Claimant are not material to UBS financial performance, profitability, or share price and in no way affect the compensation that Professor Kaufmann earns as a director of UBS." As a result, Prof. Kaufmann's directorship did not create a manifest lack of independence and impartiality of judgment. Even multiple appointments are not enough to give a reasonable third-party an appearance of bias. There must be a relationship of dependence.[18] This decision further illustrates that the relationship between funders and arbitrators can be complex and nuanced. Mandatory disclosure of the existence of any type of funder can help prevent challenges from being raised after the tribunal's decision has been made, because it requires the parties to continuously do a conflicts-check. However, creating an institutional

[18] *Universal Compression v. Venezuela*, ICSID Case No. ARB/10/9 ("Prof. Stern indicates that she has been appointed multiple times by various law firms, but that a relationship of dependence, which could endanger her independence or impartiality, does not exist here or elsewhere.").

guideline is not enough – the arbitral community must look at national legislation as well.

While institutional guidelines and arbitral decisions are important to look at to understand general trends and interpretations of guidelines, it is still important to note that they are not legally binding as national legislation. National legislation of the "big" arbitral seats (United States, United Kingdom, France, Switzerland, Hong Kong, and Singapore),[19] also outlines tests for impartiality. The Federal Arbitration Act requires parties to establish "evident partiality" to succeed in challenging an award.[20] However, there is no set standard regarding "evident partiality."[21] England and Wales do not have a statutory definition regarding arbitrator impartiality, but have developed a test through case law calling for the arbitrator to use a "state of mind which is free from any influences extraneous to the merits which is capable of dispassionate inquiry and an objective judgment, and which is not turned aside by any motivation to favour one side as against the other."[22] Case law goes on to establish an objective test stating "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[23]

France also adopts a reasonableness test which aims to review *any* circumstance that may influence an arbitrator's

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[19] Aceris Law LLC, *The Seat of Arbitration in International Commercial Arbitration* (Aug. 11, 2017), https://www.acerislaw.com/seat-arbitration-international-commercial-arbitration.

[20] Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1947).

[21] *Id*.

[22] *See Roylance v. The General Medical Council* PC ([1999] 3 WLR 541).

[23] *See Porter v. Magill, HL* ([2002] 2 AC 357); see also *A & Ors v B & Anor* [2011] EWHC 2345 (Comm).

judgment and create in the minds of the parties' reasonable doubts as to his impartiality or independence. For example, in *Creighton v. Qatar*, the court stated: "it is incumbent upon the judge of the lawfulness of the arbitral award to assess the independence and impartiality of the arbitrator, by pointing out any circumstance of such a nature as to alter his/her judgment and create a reasonable doubt in the eyes of the parties on these qualities, which pertain to the very essence of arbitral function."[24]

Hong Kong is similar to England and Wales since there is no statutory definition of independence or impartiality, but it has developed a test for independence and impartiality through case law. As defined by the courts, impartiality requires a state of mind to be free from any influences "extraneous to the merits of the particular case, which is capable of dispassionate inquiry and an objective judgment, and which is not turned aside by any motivation to favor one side as against the other."[25]

Once again, case law replaces a statute in Singapore regarding a test for impartiality. First, it establishes three forms of bias: actual bias, imputed bias, or apparent bias.[26] Actual bias will clearly disqualify an arbitrator from sitting on a tribunal. Imputed bias arises when an arbitrator acts (or appears to act) in their own interest.[27] In this case, if it is proven that the arbitrator has even a pecuniary or proprietary interest in the case, disqualification is automatic

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[24] *Creighton Limited v. Minister of Finance of Qatar and Minister of Municipal Affairs and Agriculture of Qatar*, Case No 98-19068 (Official Case No) (2000) 207 Bulletin civil I, 135 (Other Reference) ILDC 772 (FR 2000) (OUP reference).
[25] *Supra* note 23.
[26] *PT Central Investindo v Franciscus Wongso and others and another matter,* [2014] 4 SLR 978.
[27] *Id*.

without needing to establish whether there is a likelihood or suspicion of bias.[28] Finally, apparent bias is established through a reasonableness test involving a two-step inquiry.[29] First, the applicant has to establish the factual circumstances suggesting the possibility of a biased tribunal.[30] Second, the court examines whether a "hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it."[31]

Pursuant to section 9 of Switzerland's Arbitration Act an arbitrator shall be impartial.[32] The circumstances establishing possible partiality are outlined in the rest of the section – bearing strong resemblance to the guidelines outlined by the IBA regarding conflicts of interest.[33] The test is also objective, and the subjective impression of the parties is not decisive.[34]

Defining a conflict of interest as: "…a direct and dependent relationship between the funder and the arbitrator where the outcome of the case *significantly* affects: (1) the financial performance, profitability, or share price of the funder, or (2) the arbitrator's personal financial interests,"[35] reflects this trend towards adopting an objective test regarding impartiality. Further, it takes into

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28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*.
32 Swiss Rules of International Arbitration, Ch. 2, Art. 9 (2012).
33 *See* Supreme Court Decision 4A_458/2009 of 10 June 2010, ASA Bull 3/2010, p. 520; *see also* Supreme Court Decision 4A_506/2007of 20 March 2008, ASA Bull 3/2008, p. 565.
34 Supreme Court Decision 4A_260/2017 of 27 March 2003, ATF 129 III 445, ASA Bull 3/2003, p. 601.
35 Refer to previous discussion regarding non-waivable situations.

account the fact that arbitrators do not live on the moon.[36] They are real people, who form relationships with their colleagues and have a variety of financial interests. Thus, it is important to take into consideration the specific type of relationship that exists between the funder and the arbitrator when determining a conflict of interest.

IV. Mandatory Disclosure

A. Helps Avoid Conflicts of Interest Throughout an Arbitration

By requiring parties to simply disclose the existence of third-party funding and the name of the funder at the start of the arbitration (or within a timely manner if a party secures third-party funding during the arbitration), arbitrators can make better decisions in determining their own propensity for bias, ensuring that awards are more enforceable, and increasing trust and participation in the arbitral system.

ICSID is already addressing this issue by proposing mandatory disclosure in its new proposed rules amendment.[37] It imposes a new obligation on the parties to disclose "whether they have third-party funding, the source of the funding, and to keep disclosure of such information

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[36] *Suez v. Vivendia*, ICSID Case No. ARB/03/19, 18 Decision on Disqualification. ("Arbitrators are not disembodied spirits swelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions.")

[37] ICSID Secretariat, *Proposals for Amendment of the UCSID Rules – Synopsis, International Centre for Settlement of Investment Disputes* (August 2, 2018), https://icsid.worldbank.org/en/amendments/Documents/Homepage/Amendments-Vol_1_Synopsis_EN,FR,SP.pdf.

current through the proceeding."[38] The LCIA addresses this as well, establishing an ongoing duty to disclose information about their independence to the ICC,[39] or the LCIA registrar.[40] Other groups, like the Queen Mary Task Force are in favor of this idea. In fact, in the Queen Mary Report, it states that "There was nearly universal agreement that disclosure of the identity of a funder is necessary for an arbitrator to undertake analysis of potential conflicts of interest."[41] At least one funder has acknowledged (perhaps reluctantly) that disclosing the funding relationship can be helpful in limited circumstances.[42]

Reconciling the possibility of conflicts of interest arising from third-party funding could involve this four-part solution: (1) the inclusion of arbitrator relationships with third-party funding institutions to be relevant in determining an arbitrator's independence and impartiality;

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[38] *Id*. ("AR 21 ((AF)AR 32) imposes a new obligation on the parties to disclose whether they have third-party funding, the source of the funding, and to keep such disclosure of information current through the proceeding. They are not required to disclose the funding agreement or its contents for this purpose. The name of an involved funder will be provided to the arbitrators prior to appointment to avoid inadvertent conflicts of interest, and the Arbitrator Declaration requires confirmation that there is no conflict with the named funder.")

[39] IBA Guidelines General Standard, *supra* note 11, art. 11(2) ("Before appointment or confirmation, a prospective arbitrator shall . . . disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.").

[40] London Court of International Arbitration, LCIA Arbitration Rules art 5.3 (2014).

[41] The ICCA Reports, s*upra* note 1, at 98.

[42] Lisa Bench Nieuwveld, *To Disclose or to not Disclose-That is the Question,* Kluwer Arb. Blog (Apr. 17, 2012), http://arbitrationblog.kluwerarbitration.com/2012/04/17/to-disclose-or-to-not-disclose-that-is-the-question/.

(2) parties to disclose to the institution that it is receiving third-party funding; (3) a confidential and automatic conflicts check done by the institution if it receives notice from a party that it is receiving funding; and (4) that the arbitral tribunal shall be prohibited from considering the existence of a third-party funding relationship when determining costs or security for costs.[43] However, simply proposing a four-part conflicts check guideline does not go far enough in establishing the teeth necessary to increase the enforceability of awards. Countries should pass legislation requiring arbitral parties to disclose the existence of funding, because the hard law support of arbitration is what makes the system work.

B. Leads to More Enforceable Awards

By ensuring that all bases were covered in determining bias, it reduces the chances of a successful challenge to the tribunal's decision. If a court sees that the arbitrator and the parties went through proper steps to make sure that all potential conflicts of interest were disclosed to the arbitrator, then it decreases the chances that a challenge will be successful.

The arbitration community also needs the backing of national legislation to add legitimacy and enforceability to these disclosure rules. Further, any case law arising out of potential mandatory disclosure legislation can provide an additional source of guidance to tribunals. Currently no national legislation about mandatory disclosure in the context of third-party funding exists.[44] While arbitration

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[43] Trusz, s*upra* note 4, at 1673.

[44] *See* Aren Goldsmith and Lorenzo Melchionda, *The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction*, Kluwer Arb. Blog (March 14, 2016), http://arbitrationblog.kluwerarbitration.com/2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding-a-step-in-the-

exists as a way to balance the unwillingness for parties to resolve disputes in domestic courts,[45] it only works because states recognize it as a legitimate dispute resolution tool[46] and enforce arbitral judgments.[47] If arbitral judgments were largely unenforceable, the entire system would collapse. As such, the arbitration community should embrace this relationship with domestic law and lean on it to lend ensure its longevity.

Looking at the most popular seats for arbitration: the United Kingdom, France, Switzerland, Sweden, Singapore, and Hong Kong,[48] it is clear that national law recognizes the need for a check to arbitrator bias.[49] By taking an additional step to ensure that arbitrators are fully informed of any potential conflict of interest, states promote neutrality in the system and ensure that unnecessary

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[45] Erin A. O'Hara and Larry E. Ribstein, *The Law Market*, Oxford University Press (2009), at 85 ("[A]rbitration as a mechanism for enabling the parties either to defensively avoid undesirable law or to affirmatively choose the law that will govern the parties' relationship.").

[46] New York Arbitration Convention, http://www.newyorkconvention.org/countries (at least 138 countries have signed the New York Arbitration Convention, which greatly limits the ways in which a contracting state can issue an award and refuse enforceability. This was signed on June 10, 1958 at the Convention on the Recognition and Enforcement of Arbitral Awards), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention]. Article II of the New York Convention also provides for the enforcement of agreements to arbitrate.

[47] O'Hara & Ribstein, *supra* note 46, at 95. (stating that arbitration awards may be more enforceable than court judgments rendered by courts outside the US).

[48] Federal Arbitration Act, s*upra* note 21.

[49] Kluwer Arbitration, www.kluwerarbitration.com (last accessed December 20, 2018) (Impartiality data gathered using the Kluwer Arbitration Database).

challenges to awards are prevented from being brought forward.

C. Increases Participation and Trust in the System

Despite its imperfection, arbitration exists because the global community at large recognizes its importance. In an age where transactions are global, arbitration's greatest strength is its neutrality.[50] The reassurance of a "neutral, reliable, and effective dispute resolution mechanism"[51] increases the trust needed to promote investment and cross-border transactions. National legislation requiring parties to disclose the existence of third-party funding to an arbitrator reassures parties that the tribunal has considered all potential conflicts of interest. It reinforces the trust parties have placed, for decades, on the neutrality of arbitration. To emphasize this point even further, it is helpful to analyze the criticisms of mandatory disclosure.

Some argue that mandatory disclosure of third-party funding would replace independent analysis of case-by-case thinking on the relationships between arbitrators and funders,[52] that it would lead to split conflicts standards,[53] and that no one would be willing to enforce or participate in a mandatory disclosure regime – ultimately resulting in

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[50] Jan Paulsson, *International Arbitration is Not Arbitration*, 2 Stockholm Int'l Arb.n Rev. 1, 2 (2008) ("In international arbitration, all of these elements of evaluation fade into relative insignificance when contrasted with a criterion that is dominant here although it is, by definition, irrelevant in the national context. This alone tells you that international arbitration is not arbitration. That unique criterion is neutrality.").

[51] O'Hara & Ribstein, *supra* note 46, at 97.

[52] Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure 291 (Kluwer Law International, 2016).

[53] *Id*., at 283-84.

lower participation.[54]

Mandatory disclosure would not discourage relationships between arbitrators and funders.[55] Instead, requiring parties to disclose the existence of third-party funding would encourage arbitrators, legislators, judges, and parties to constantly evaluate relationships in the context of third-party funding. Further, striving for a degree of perceived legal certainty in complex cases regarding an extremely subjective topic is what the law does. A great example of this are the impartiality tests set forth by England[56], France[57], Hong Kong[58], Singapore,[59] Switzerland,[60] and the United States.[61] These tests set forth a legal certainty (the type of test to measure impartiality and independence) to make sense of a complex and fact-specific topic. Further, national law *requiring* parties, rather than just encouraging them through institutional peer pressure, to disclose the existence of funding, additionally encourages them to reflect on third-party funding relationships. And it still gives tribunals and courts the

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[54] *Id*., at 288.
[55] *Id*., at 291 ("[S]triving for a degree of perceived legal certainty in evaluating conflicts of interest . . . would replace independent case by case thinking on relationships involving third-party funders in a complex world of business and finance.").
[56] *See Roylance v. The General Medical Council PC* ([1999] 3 WLR 541.
[57] *Creighton Limited v. Minister of Finance of Qatar and Minister of Municipal Affairs and Agriculture of Qatar*, Case No 98-19068 (Official Case No) (2000) 207 Bulletin civil I, 135 (Other Reference) ILDC 772 (FR 2000) (OUP reference).
[58] *Roylance*, s*upra* note 23.
[59] *PT Central Investindo v Franciscus Wongso* and others and another matter [2014] 3 SGHC 190.
[60] Federal Supreme Court of 10 June 2010, ASA Bull 3/2010, 520 and of 20 March 2008, ASA Bull 3/2008, 565.
[61] Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1947).

freedom to consider each case on its merits – which is one of the reasons why parties choose arbitration over domestic court systems.

There is also the argument that it would lead to the coexistence of different disclosure regimes creating a lack of clarity and split conflicts standards.[62] This lack of clarity would dissuade parties from participating in systems requiring mandatory disclosure because the unknown consequences of obtaining third-party funding would dissuade investors, parties, and arbitrators from engaging in arbitration.[63] National legislation requiring mandatory disclosure actually removes this "perceived" lack of clarity because of the myriad of case law parties can use as guidance when analyzing possible third-party conflicts of interest.

National legislation also helps to sidestep the resistance some parties have towards the idea that institutions, themselves, should address this issue. James Clanchy, the former registrar and deputy director of the LCIA, when asked whether arbitral institutions should shoulder the burden of clearing potential conflicts of interest between arbitrators and third-party funders, was very much against the idea.[64] He argued that it would be a terrible idea, that it would place an unrealistic burden on the institution, and that it would lead funders and clients to avoid the rules of the institution.[65] National legislation mitigates this unrealistic burden by placing the enforcement mechanism in the hands of the state. This allows arbitral institutions to

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[62] Goeler, *supra* note 53, at 284.
[63] *Id*.
[64] *TheJudgeVideo*, IA event - Full video, Youtube (July 25, 2013), https://www.youtube.com/watch?v=cwZQvgE1tvQ&feature=youtu.be&t=3740.
[65] *Id*.

lean on state enforcement methods to require disclosure. Further, simply requiring parties to answer a yes or no question, then providing only the name of a funder does not add any more of a burden on the parties than checking a box.

Of course, some parties might seek to avoid mandatory disclosure rules and encourage states to adopt a "race to the bottom" – where disclosure is not required, and the rules are scarce. However, it is unclear what benefit a party would gain from refusing disclosure. Mandatory disclosure still protects the confidentiality of the funding agreement.

Being unwilling to disclose funding, in the hope that if they lose they could "discover" a conflict of interest between an arbitrator and funder would be a terrible idea. Considering that existing institutional and national standards for demonstrating the objective appearance of bias are so high, it is extremely unlikely that a potential challenge would pass muster. Furthermore, more regulation does not necessarily result in a marked decrease of participation.[66] In fact, in high value situations, it makes sense that parties would default to rules requiring mandatory disclosure because it increases their chance for a more enforceable award and reassures parties that a significant element in determining the existence of a conflict of interest is taken care of. Further, mandatory disclosure still protects the confidentiality of the funding agreements by prohibiting disclosure of the terms of the agreement. Further, courts have been reluctant to look at funding agreements unless the agreement itself is under scrutiny.[67] While requiring parties to give up the name of

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[66] IBA Guidelines on Conflicts of Interest in International Arbitration, *supra* note 5.

[67] Press Release, Oxus Gold PLC, *Litigation Funding* (March 1, 2012) (Oxus issued a press release disclosing recourse to third-party funding

the funder, it still keeps the terms of the relationship confidential, reassuring funders that tribunals will not take the name of a funder into its decisions for regarding security for costs or fee shifting.[68] This incentivizes third-party funders to be more comfortable with parties disclosing the name of the funder, and can in fact, encourage parties to arbitrate in those jurisdictions because the confidential nature of their agreement can be kept intact. [69]

V. Conclusion: Third-party Funding is Here to Stay

Issues arising from third-party funding should not be ignored, not just because of the ethical implications, but also because of the sheer amount of money involved. With judgments reaching in the billions of dollars,[70] more money

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and revealed details of the funding agreement); *Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order, 3 ICSID 1, 1 (June 12, 2015) (The tribunal ordered the claimant to disclose the identity of the funder. It also ordered disclosure of the 'nature' of the funding arrangement, including the funder's rate of return if the claimant is successful in its claims)

[68] *See 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 7ICSID (July 11, 2011); *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, 48 ICSID (Apr. 28, 2011); *Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, 691 ICSID (Mar. 3, 2010).

[69] Trusz, *supra* note 4, at 1652.

[70] As an example, the UNCITRAL decided three awards (referred to as *Yukos v. The Russian Federation*) in 2014 ordering Russia to pay USD $50 billion. The awards are as follows: *Hulley Enterprises Limited (Cyprus) v. The Russian Federation,*PCA Case No. AA 226, Final Award (July 18, 2014).; *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* PCA Case No. AA 227, Final Award, (July 18, 2014. ; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation,* PCA Case No. AA 228, Final Award (July 18, 2014).

means more complications and more problems.[71] Especially when looking at investor-state arbitration, and particularly cases where the state has lost, taxpayers end up shouldering the burden of the judgment. As such, states have a legitimate interest in making sure that procedures are in place that can limit the possibility of unmeritorious claims being dragged out. Further, the support states can lend to the entire institution of arbitration goes beyond just enforcing judgments, it can help provide binding stop gap measures that increase (to a useful extent) transparency and neutrality in a fairly closed a confidential system.

[71] The Notorious B.I.G., *Mo Money Mo Problems,* Life After Death (Bad Boy Records 1997).