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The Hidden Influence of Third-Party Funding on Arbitrator Selection: Conflict, Strategy or Legitimate Commercial Interest?

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ABSTRACT

Third-party funding (TPF) in international arbitration has grown from a niche financing arrangement into a structural feature of the global dispute resolution landscape. While its commercial utility is well-documented, a comparatively underexplored dimension concerns its influence on arbitrator selection — the process by which parties nominate, challenge, or seek to disqualify arbitrators. This paper examines whether the participation of a third-party funder introduces conflicts of interest that compromise arbitral impartiality, or whether such concerns, though legitimate in appearance, ultimately reflect strategic behaviour dressed in the language of procedural fairness. Drawing on an analysis of institutional rules, investment arbitration jurisprudence, and scholarly discourse, the paper argues that the relationship between TPF and arbitrator selection occupies a grey zone between genuine conflict, tactical manoeuvre, and legitimate commercial interest. The paper finds that current disclosure regimes remain inadequate, that arbitral institutions have responded unevenly, and that no uniform global standard governs funder-arbitrator relationships. It concludes with reform proposals directed at arbitral institutions, domestic legislatures, and the international arbitration community, aimed at achieving systemic transparency without unduly burdening the commercial viability of TPF.

Keywords: Third-Party Funding; Arbitrator Selection; Conflict of Interest; Disclosure Obligations; International Arbitration; Arbitral Impartiality; IBA Guidelines; Investment Arbitration

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I. INTRODUCTION

International arbitration has long prided itself on procedural flexibility, party autonomy, and the capacity of disputing parties to select decision-makers best suited to resolve their disputes. This distinguishing feature — the right to participate in the constitution of the tribunal — forms a cornerstone of the arbitral legitimacy that draws sophisticated commercial actors to the forum in preference to national courts. Yet this very feature has become increasingly vulnerable to distortions introduced by the rise of third-party funding (TPF), a practice whereby an entity with no direct stake in the dispute finances a party's legal costs in exchange for a share of any eventual recovery.

The intersection of TPF and arbitrator selection raises questions that are at once procedural, ethical, and commercial. When a funder with an economic interest in the outcome has pre-existing relationships — financial, institutional, or social — with an arbitrator, can the neutrality of the tribunal be assured? Conversely, when arbitrator challenges are deployed not out of genuine concern for impartiality but as a dilatory tactic or a means of constituting a more favourable tribunal, does the mechanism of challenge itself become a tool of strategic manipulation?

This paper undertakes a balanced inquiry into these tensions. It does not proceed from the assumption that TPF is inherently problematic, nor does it dismiss concerns about funder influence as jurisprudential alarmism. Instead, it examines the available evidence — institutional rules, decided cases, and comparative regulatory frameworks — to identify where genuine gaps in the conflict-of-interest architecture exist and where procedural safeguards are being instrumentalised for strategic ends.

II. BACKGROUND OF THE STUDY

Third-party funding in international arbitration emerged as a formalised practice in Australia and the United Kingdom in the early 2000s, initially as a mechanism to enable access to justice for claimants who lacked resources to pursue meritorious

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claims.[1] Over the following two decades, the practice underwent a qualitative transformation: from an access-to-justice instrument to a sophisticated asset class, with dedicated litigation finance funds managing billions of dollars in deployed capital across international arbitration matters, particularly investor-state disputes and high-value commercial claims.[2]

Funders such as Burford Capital, Omni Bridgeway, and Litigation Capital Management now operate on a global scale, providing financing not only to individual claimants but to law firms and portfolios of cases.[3] The commercial logic of TPF rests on the non-recourse nature of the financing — the funder bears the risk of an adverse outcome — in exchange for a contractually agreed return on a successful recovery, typically calculated as a multiple of the funded amount or a percentage of the award.

Within this commercial structure, arbitrator selection assumes heightened significance for funders. Unlike a passive lender, a TPF provider has a direct financial stake in the outcome of the proceedings and, consequently, an interest in the composition of the tribunal. The arbitrator's approach to damages, liability, and procedural questions can materially affect the size — or existence — of any recovery. It would be commercially naïve to suppose that funders are entirely indifferent to who sits on the tribunal.

Simultaneously, the growth of TPF has produced what scholars have described as a "repeat player" problem within the international arbitration community.[4] A small and relatively interconnected community of arbitrators, funders, and arbitration practitioners means that pre-existing relationships — co-authorship, shared institutional affiliations, prior appointments, cross-investments — are not unusual. Whether such relationships rise to the level of disqualifying conflicts is a question that neither institutional rules nor arbitral jurisprudence has answered with consistency.

III. STATEMENT OF THE PROBLEM

The central problem this paper addresses is the absence of a coherent, internationally consistent framework governing the relationship between third-party funders and arbitrators in the context of arbitrator selection and challenge. This gap produces three distinct categories of difficulty.

First, there is the **disclosure problem.** Most arbitration rules require arbitrators to disclose circumstances that may give rise to doubts about their impartiality. However, these rules were drafted before the institutionalisation of TPF. They do not explicitly address whether an arbitrator must disclose prior or existing financial relationships with a funder, nor do they resolve whether a funder's identity must be disclosed to the tribunal at all. Without identity disclosure, an arbitrator who has received a retainer from the funder, served as an expert in a funder-backed matter, or sits on the funder's advisory board cannot make the disclosures that the conflict-of-interest architecture demands.[5]

Second, there is the **challenge problem.** Arbitrator challenges predicated on TPF-related conflicts have multiplied in investment arbitration. Some of these challenges appear to reflect genuine procedural concern; others appear designed to delay proceedings, secure the removal of an arbitrator whose track record is unfavourable to the challenging party, or destabilise a tribunal midway through proceedings. Arbitral institutions have handled these challenges with inconsistency, producing an unpredictable body of decisions that provides little guidance for future cases.[6]

Third, there is the **strategic selection problem.** If funders — possessing superior information about the track records, methodologies, and dispositional tendencies of arbitrators — are in a position to influence their clients' selection choices, the party-nomination system may no longer operate as it is designed to. The party with a funder effectively has access to a sophisticated, data-driven arbitrator intelligence function that the unfunded counterparty lacks, creating an informational asymmetry that may compromise the perceived equality of the parties.

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IV. RESEARCH QUESTIONS

This paper is guided by the following research questions:

1. In what ways does the participation of a third-party funder in international arbitration affect, directly or indirectly, the process of arbitrator selection and nomination?
2. What existing institutional and regulatory mechanisms govern potential conflicts of interest arising from funder-arbitrator relationships, and are they adequate?
3. Can arbitrator challenges predicated on TPF-related concerns be distinguished from strategic or dilatory challenges, and if so, how?
4. What reforms to disclosure requirements, challenge procedures, and institutional rules are necessary to address identified deficiencies?

V. RESEARCH OBJECTIVES

The objectives of this study are:

(i) To map the intersection between TPF and arbitrator selection across major arbitral institutions and jurisdictions;

(ii) To critically evaluate the adequacy of current disclosure standards in addressing TPF-related conflicts of interest;

(iii) To analyse how arbitral institutions have decided funder-related arbitrator challenge applications and to assess the consistency of that jurisprudence;

(iv) To distinguish genuine conflict-of-interest concerns from strategic invocations of the challenge mechanism; and

(v) To advance concrete, workable reform proposals calibrated to the distinct needs of commercial and investment arbitration.

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VI. SIGNIFICANCE OF THE STUDY

The significance of this inquiry extends across multiple dimensions. For practitioners, a clearer understanding of when TPF relationships generate disclosure obligations and challengeable conflicts is essential to advising clients on arbitrator selection and managing the risk of mid-arbitration challenges that can delay and inflate the cost of proceedings. For arbitral institutions, the study identifies systemic gaps in existing rules and proposes specific interventions.

For regulators and legislators — particularly in jurisdictions such as Singapore, Hong Kong, and India, which have recently enacted or are considering TPF legislation — the analysis provides a comparative framework for informed policymaking. More broadly, the study contributes to the structural legitimacy of international arbitration at a moment when the system faces growing scrutiny from within the practitioner community and from states that participate in investment arbitration as respondents.

A rigorous examination of the TPF-arbitrator selection interface is therefore not merely an academic exercise but a contribution to the institutional health of a system that adjudicates disputes worth hundreds of billions of dollars annually.

VII. LITERATURE REVIEW

A. Third-Party Funding: General Framework

The literature on TPF in international arbitration has grown substantially since the early 2010s, with initial scholarship focused primarily on access-to-justice justifications and ethical concerns.[7] The foundational contributions of Maya Steinitz[8] and Judith Resnik[9] examined TPF through the lens of procedural fairness and the commercialisation of litigation. Steinitz, in particular, argued that the transformation of claims into tradeable assets fundamentally altered incentive structures, raising questions about who truly controls the conduct of a case and in whose interests decisions are made.

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B. Conflict of Interest in Arbitration

The scholarship on arbitral conflicts of interest predates the TPF debate and is anchored in the foundational work on arbitral impartiality and independence. The IBA Guidelines on Conflicts of Interest in International Arbitration[10] — first published in 2004 and revised in 2014 — provide the most widely referenced soft-law framework. As Bernardo Cremades and David Arias have noted,[11] the Guidelines were not designed with the TPF relationship in mind, and their categories of waivable and non-waivable conflicts do not map cleanly onto the funder-arbitrator dynamic.

C. TPF and Disclosure

William Park's scholarship on arbitral disclosure obligations[12] argued that disclosure serves two functions: it enables the parties to make informed decisions about whether to waive a potential conflict, and it ensures the integrity of the process by creating a verifiable record. The problem with TPF is that it introduces a conflict with an entity whose identity may itself be confidential, making disclosure structurally incomplete. More recent contributions by Rachael Kent[13] and Catherine Rogers[14] have directly addressed the TPF-disclosure nexus. Rogers' work on the systemic dimensions of the "repeat player" problem is particularly germane, arguing that opacity surrounding funder-arbitrator relationships is not merely a bilateral problem but a systemic failure.

D. Arbitrator Challenges in Practice

Empirical analysis of arbitrator challenges by Bernd Ehle and Monica Alberti[15] reveals that the rate of successful challenges remains low across all major institutions. Their data suggest that institutions apply a high threshold for disqualification, typically requiring demonstrable evidence of actual bias rather than mere appearance of conflict. This conservative approach has been criticised as inadequate in the TPF context, where the conflict may be structural — embedded in a financial relationship — rather than attitudinal.

E. Strategic Use of Challenges

Jan Paulsson's influential writing on arbitral legitimacy[16] touches on the pathological uses of party-nomination rights, while Gary Born's comprehensive treatise[17] addresses the challenge mechanism in institutional context. Neither, however, directly addresses the extent to which TPF-related challenges may be pretextual — a gap this paper seeks to address.

F. Institutional and Regulatory Responses

The SIAC Practice Note on TPF,[18] the ICC's disclosure framework, and the ICSID Rule amendments of 2022[19] represent the most significant institutional responses to date. The ICSID amendments introduced an explicit obligation to disclose the existence and identity of TPF providers, representing a notable advance. However, these rules apply only to ICSID proceedings and have not been replicated universally, leaving large portions of the global arbitration market without a mandatory disclosure standard.

VIII. RESEARCH METHODOLOGY

This paper employs a doctrinal-comparative methodology. The primary sources analysed include: the rules of major arbitral institutions (ICC, SIAC, LCIA, ICSID, UNCITRAL); the IBA Guidelines on Conflicts of Interest; national legislative instruments governing TPF in Singapore, Hong Kong, England, and Australia; and published arbitrator challenge decisions from ICSID and ICC proceedings.

Secondary sources include peer-reviewed journal articles, book chapters, institutional reports, and practitioner commentary published between 2004 and 2024. The analysis proceeds by identifying the legal framework applicable to each dimension of the problem, examining how that framework has been applied in practice, and evaluating whether the outcomes are consistent with the stated objectives of the system.

The paper does not purport to be empirically exhaustive. Challenge decisions in commercial arbitration are rarely published, and data on funder-arbitrator

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relationships are inherently difficult to obtain given the confidentiality that surrounds both TPF agreements and arbitral proceedings. The analysis accordingly relies on the available published record, supplemented by reasoned inference from institutional design and commercial incentives.

IX. CRITICAL ANALYSIS

A. The Structural Conflict Problem

The most significant conflict-of-interest concern in the TPF-arbitrator relationship is structural rather than attitudinal. An arbitrator who has previously been appointed in proceedings funded by a particular funder, who has received a speaking engagement fee sponsored by the funder, or who sits on the funder's advisory board has a financial relationship with an entity that has a direct economic stake in the award. This is qualitatively different from the conventional arbitrator-party conflict, because the funder's interest runs not to the identity of the prevailing party but to the quantum of the recovery.

This subtlety matters. An arbitrator may harbour no prejudice toward either party yet be susceptible — even unconsciously — to tendencies that serve the funder's economic interest, such as a disposition toward expansive damages awards or a reluctance to make adverse costs orders that would reduce net recoveries. The conflict, in other words, is not about allegiance but about incentive alignment.[20] The IBA Guidelines' traffic light system — classifying conflicts as "Red List" (non-waivable), "Orange List" (waivable), or "Green List" (generally acceptable) — does not comprehend this incentive-alignment dimension, as it addresses the arbitrator's relationship with the parties and their counsel, not with a financially interested third party whose identity may be entirely unknown to the tribunal.

B. Disclosure: The Identity Problem

A foundational precondition of any conflict disclosure is that the arbitrator knows who the funder is. If funders are not required to disclose their involvement to the tribunal, arbitrators cannot perform the conflicts check that the IBA Guidelines and institutional rules require of them. This produces a structural incoherence: the conflict-of-interest regime demands disclosure, but the TPF regime — where it exists — is often silent on mandatory disclosure to the tribunal.

The ICSID Rule 14, as amended in 2022, addresses this by requiring parties to disclose the name and address of any TPF provider. This is a commendable step. However, it remains isolated: neither the ICC Rules nor the LCIA Rules impose equivalent obligations.[21] Even where disclosure obligations exist, their scope is contested. Does "disclosure" require the arbitrator to proactively search their records for any prior relationship with the named funder, or is it sufficient to disclose only relationships of which they are presently aware? Given the volume of appointments that senior arbitrators carry, the former standard is practically demanding; the latter may be inadequate to serve the purpose for which disclosure obligations exist.

C. Challenge Jurisprudence: Patterns and Inconsistencies

Analysis of published arbitrator challenge decisions in investment arbitration reveals two broad patterns. First, challenges based on TPF-related conflicts are treated sceptically by arbitral institutions, which apply the "justifiable doubts" standard articulated in Article 12 of the UNCITRAL Model Law without always confronting the specific structural issues that funder relationships create. Second, the analysis of these decisions does not reveal a principled distinction between the evidentiary threshold applied to TPF-related conflicts and that applied to more conventional conflicts, suggesting that institutions are mapping an old standard onto a new problem without adequate analytical recalibration.

The 2012 challenge decision in Oxus Gold v. Republic of Uzbekistan[22] illustrated the difficulty: the challenge was dismissed, but the reasoning offered limited guidance on how funder-arbitrator financial relationships should be categorised. The decision

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neither endorsed the view that such relationships presumptively generate disqualifying conflicts nor articulated a test for when they would. This analytical gap persists across subsequent institutional decisions, producing a body of precedent that is voluminous but not coherent.

D. Strategic Challenges: Distinguishing the Genuine from the Tactical

Not all TPF-related challenges are made in good faith. The mechanics of the challenge mechanism — triggering a suspension or delay in proceedings, requiring the institution to constitute a separate committee, and consuming significant resources of all parties — make it an attractive tactical weapon regardless of the substantive merits of the underlying concern.

Indicators of strategic challenge behaviour include: the timing of the challenge (raised after an unfavourable procedural ruling rather than immediately upon learning of the funder relationship); the absence of any specific evidence of actual conflict beyond the bare existence of a prior relationship; and the pattern of the challenging party across prior proceedings (serial challengers with a track record of pre-emptive applications).

However, distinguishing strategic from genuine challenges requires institutional capacity that most arbitral institutions presently lack. Without a standing committee with expertise in TPF arrangements and access to information about funder-arbitrator relationships — which are rarely publicly documented — institutions are poorly placed to make this determination reliably. The result is that even abusive challenges receive the full procedural treatment that genuine challenges merit, rewarding tactical behaviour.

E. Informational Asymmetry in Selection

The sophisticated data resources available to commercial litigation funders — including systematic databases of arbitral awards, arbitrator track records on specific legal issues, and analytical tools that profile individual arbitrators' methodological tendencies — create a meaningful informational asymmetry between funded and unfunded parties in the selection process. A funded claimant effectively has access to an arbitrator intelligence function of a quality unavailable to an unfunded counterparty.

This asymmetry does not necessarily produce biased outcomes — an arbitrator selected on the basis of superior research is not thereby partial. But it raises questions about the procedural equality that underpins the legitimacy of the arbitral process. If one party's selection is data-driven and the other's is intuitive or experience-based, the party-nomination system may no longer operate on the equal footing its design assumes. Whether this asymmetry constitutes a structural problem requiring institutional correction, or simply reflects the advantages that well-resourced parties have always enjoyed, is a question the literature has not yet resolved.

X. SUGGESTIONS AND RECOMMENDATIONS

A. Universal Disclosure of Funder Identity

All major arbitral institutions should adopt rules requiring mandatory disclosure of the identity of any third-party funder to the arbitral tribunal at the earliest stage of proceedings. This reform — already implemented by ICSID — should be extended to the ICC, LCIA, SIAC, and UNCITRAL frameworks. Disclosure should include not only the name of the funder but also a summary of the funding arrangement sufficient to enable the tribunal to assess potential conflicts. Confidentiality of the commercial terms of the funding agreement can be preserved while still enabling adequate conflicts assessment.

B. Enhanced Arbitrator Self-Disclosure Obligations

Institutional rules and the IBA Guidelines should be amended to require arbitrators explicitly to check for and disclose any financial relationship — past or present — with any identified funder. This should include prior appointments in funder-backed matters, advisory roles, board memberships, and receipt of speaking fees or other remuneration. A standardised disclosure questionnaire tailored to TPF relationships would assist arbitrators in making systematic and consistent checks across the full range of their professional activities.

C. Revised IBA Guidelines

The IBA Guidelines Working Group should undertake a targeted revision to introduce a specific category addressing funder-arbitrator relationships. At minimum, the revised Guidelines should clarify whether an existing advisory relationship between an arbitrator and a TPF provider falls within the non-waivable Red List or the waivable-subject-to-disclosure Orange List, and should address the treatment of prior appointments in funder-backed cases. The current silence of the Guidelines on this point is an anomaly that has persisted for too long given the pace of TPF's growth.

D. Institutional Capacity for Challenge Assessment

Arbitral institutions should develop specialised capacity for assessing TPF-related challenges. This might include a dedicated panel or standing committee with expertise in commercial finance and arbitration ethics, and access to a curated record of funder-arbitrator relationships built from disclosed information across proceedings. The assessment process should also incorporate indicators of strategic challenge behaviour, enabling institutions to impose costs sanctions or expedited rejection procedures in cases of manifestly abusive applications.

E. Legislative Frameworks for TPF Regulation

In jurisdictions where TPF operates without bespoke legislation, lawmakers should consider enacting regulatory frameworks that require funders to maintain and disclose records of their arbitrator relationships as a condition of operating in the market. Singapore's Civil Law (Amendment) Act 2017 and the Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 provide

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useful legislative precedents, though neither addresses the arbitrator-relationship dimension with the specificity that the identified problems demand.

XI. CONCLUSION

The relationship between third-party funding and arbitrator selection is neither inherently corrupt nor inherently benign. It is a domain of structural complexity in which the legitimate commercial interests of funders, the procedural rights of parties, and the integrity of the arbitral process exist in a tension that current institutional frameworks are inadequately equipped to manage.

This paper has argued that three distinct problems require attention: the disclosure gap created by funder anonymity; the inconsistency of challenge jurisprudence in applying established conflict standards to a novel structural situation; and the informational asymmetry that sophisticated funders introduce into the arbitrator selection process. Each problem is tractable; none requires a wholesale rejection of TPF as a practice.

The reform agenda proposed — universal identity disclosure, enhanced arbitrator self-disclosure obligations, revised IBA Guidelines, institutional challenge capacity, and legislative frameworks — is calibrated to address identified deficiencies without unduly burdening a practice that serves the legitimate function of enabling meritorious claims to be pursued. The objective is not to drive funders from the arbitral arena but to integrate their presence into the conflict-of-interest architecture in a manner that preserves the impartiality and legitimacy on which the entire enterprise of international arbitration depends.

As TPF continues to grow — in volume, in sophistication, and in the diversity of the claims it funds — the pressure on these frameworks will only intensify. The international arbitration community would be well advised to act with deliberate foresight rather than to wait for a high-profile legitimacy crisis to compel reform.

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