NEW FORMS OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION: INVESTING IN CASE PORTFOLIOS AND FINANCING LAW FIRMS

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Abstract

Third-party funding in international arbitration has been widely discussed by academicians and practitioners alike. However, third-party funding is often reduced to single claim investments, mentioning new forms of third-party funding only briefly, if at all. One of these new funding structures is the so called 'portfolio investment', which allows funders to cross-collateralize their risks. In combination with law firms working on contingency fee basis, portfolio investments can be a game changer for the whole funding industry, as the effects of risk diversification are enhanced. This article is dedicated to these new funding structures and aims to provide an overview and understanding of the same. It also examines whether the new funding structures pose a need for regulation and discusses the possible future developments in relation to third-party funding.

I. Introduction

Third-party funding is a contemporary topic discussed by arbitration practitioners and scholars alike.[1] While the existing literature addresses the legal implications of third-party funding in commercial and investment arbitration, the broad variety of funding structures is often reduced to single case investments. There is, however, more to third-party funding. In recent years, new forms of funding have become increasingly popular amongst funders, law firms, and those who seek financial assistance in legal disputes. One of these new funding structures is the so-called *portfolio investment*. The driving force behind this development is the ever-growing demand for funding in arbitrations around the globe. The entry of new funders in the market fuels competition. Accordingly, the times where funders could cherry-pick and reject 90% or more[2] of funding requests may soon be over. With the increasing number of competitors in the market and clients who do not see themselves as petitioners any longer, established funders face a structural change that ultimately might force them to offer funding at lower rates.[3]

Funders that want to keep up their profit margin, despite a possible decline in prices for their product, must look for untapped market potential. One way to do so is to start financing claims

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The views expressed here are the personal views of the authors and do not reflect those of their law firm.

[1] *See generally* ICCA AND QMUL TASK FORCE ON THIRD-PARTY FUNDING, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018), *available at* https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html [*hereinafter* "ICCA-Queen Mary Third-Party Funding Report"]; LISA BENCH NIEUWVELD ET AL., THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2d ed. 2017) [*hereinafter* "Lisa Bench Nieuwveld et al."]; JONAS VON GOELER, THIRD-PARTY FUNDING AND IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE (2016) [*hereinafter* "Jonas von Goeler"]; INTERNATIONAL CHAMBER OF COMMERCE, *Third-Party Funding in International Arbitration*, (ICC Publication No. 752E, 2013) [*hereinafter* "ICC TPF in International Arbitration"].

[2] ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 25.

[3] *Id.*

which usually would not have been considered for funding before.[4] This could be, for example, low value claims, defendant-sided cases, and actions seeking declaratory relief or disclosure.[5] Smaller claims tend to have a worse benefit (of potential return) to loss (of investment) ratio than larger ones, rendering them unattractive from a funder's perspective. This is where portfolio funding comes into play. Compared to single case funding, the investment into a portfolio of cases reduces the risk of total loss of the investment from a funder's perspective. This is described as "*cross-collateralization*", meaning that the funder's return is dependent on the overall financial performance of the portfolio as opposed to the outcome of a particular claim.[6] As long as not all cases in the portfolio fail, there might be a chance of recovering at least part of the initial investment.

This article will, in particular, analyse portfolio investments in connection with law firms working on a contingency fee basis. The starting point of this is an analysis of what has been traditionally referred to as third-party funding and the downsides it implies (II.). Subsequently, the article will address two new forms of third-party funding, namely, portfolio investments and law firm portfolio financing, and present what their benefits are and whether there is a need for regulation (III.). The article will close with an outlook on future developments in the funding industry (IV.).

II. Traditional Form of Third-Party Funding: Single Case Investment

There are numerous definitions of third-party funding. The definitions usually consist of three parts, namely, (1) non-recourse financing[7] of a legal dispute (usually on the claimant's side) that is (2) provided by an entity, which has had no prior interest in the legal dispute (3) for a share of the recovered sum in case the party succeeds.[8] Those who undertake the task of defining third-party funding often struggle to do so due to the constant development of new funding models.[9]

From a funder's perspective, single case investments have several downsides. In case the supported party loses, the funder not only loses its expected profit, but also its investment. Even though funders usually scrutinize funding applications very carefully on their merits, there may still be cases where the assessment turns out to be wrong. In order to compensate for such a loss, a funder must have enough financial means at its disposal to continue investing in other cases. Relying solely on one case could prove to be careless. Thus, funders are in need for financial assets, entailing in a high entry barrier for new funders entering the market. This is why, from an outsider's perspective, the funding market often resembles a closed shop with only a handful of

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4 Tobey Butcher, *Is Arbitration Portfolio Financing Going to Grow in 2018?,* KLUWER ARB. BLOG (Feb. 2, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/02/02/arbitration-portfolio-financing-going-grow-2018/.

5 Matthew Denney, *Portfolio Finance May Minimize Litigation Funding Risks*, CHANCERY FINANCE (Feb. 20, 2018), *available at* http://chanceryfinance.com/2018/03/portfolio-finance-may-minimize-litigation-funding-risks/ [*hereinafter* "Denney"].

6 ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 38.

7 Non-recourse finance is a form of financing where the lender is only entitled to repayment from the profits of the project, not from other assets of the borrower.

8 *See* LISA BENCH NIEUWVELD ET AL., *supra* note 1, at 1; ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 18.

9 JONAS VON GOELER, *supra* note 1, at 61 *et seq*.; Christopher P. Bogart, *Third-Party Financing of International Arbitration*, 2017(2) EUR. ARB. REV. 315 (2017) [*hereinafter* "Bogart"]; *see also* Camille Fléchet, *Summary Report of the First Session Held on January 27, 2010*, *in* Maxi Scherer & Aren Goldsmith, *RDAI/IBLJ Round Table on Third Party Funding in International Arbitration in Europe*, TRANSN'L DISP. MGMT. (Mar. 12, 2012), *available at* https://www.transnational-dispute-management.com/news/20120312.pdf (where a discussion about the issue arose); *ICC TPF in International Arbitration, supra* note 1.

funders that really make an impact. Further, in single case investments, capital is usually tied up until enforcement of the award, i.e., until the proceeds from the arbitration are actually recovered.[10] Even though parties usually comply with arbitral awards, there might be cases where an unsuccessful party refuses to adhere to an award, making it necessary to initiate enforcement proceedings before the competent State courts. The unsuccessful party might even initiate proceedings to set the award aside. The need to enforce the award then results in further costs and delays. This tied up capital cannot be invested in other cases that might have a better return expectation.

Also, there are drawbacks to single case funding from a party's perspective. This is because funders will usually only consider high volume cases with high chances of success for funding.[11] Smaller claims that might be existential to smaller companies, such as start-ups, might not even be considered for funding.[12] In fact, due to the high standards that need to be met for obtaining support, one can question whether the often-claimed existential need for funding is a reality in the majority of cases.

Furthermore, as indicated in the definition above, single case investment is often understood as single *claim* investment, meaning that traditionally the vast majority of funded parties are claimants.[13] As *Kantor* puts it, "*respondent-side risk protection products are unchartered waters for international arbitration*".[14] One major problem with funding defendants in single case scenarios is that a defendant does not receive a return from the case which could serve as the basis for the funder's interest. Instead, should the defence be successful, the defendant would have to pay the profit out of its own pocket. This constellation resembles special forms of insurances, namely, before-the-event ["**BTE**"] (and after-the-event ["**ATE**"] insurances. Depending on the specific agreement, both forms of insurance will cover the liability of an adverse cost order or even all costs associated with bringing or defending a claim.[15] It should be noted, however, that BTE or ATE insurances require the defendant to pay the policy premium and allow the defendant(s) to mitigate the cost risk of the arbitration only.[16] Hence, if the defendant fails, it would usually still have to bring up the awarded sum on its own. It has been reported that providers of ATE insurance may provide insurance on the basis of a conditional premium fee, i.e., the premium will

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10 JONAS VON GOELER, *supra* note 1, at 31.

11 This is because the return of the funder depends on the actual recovery of the proceeds from the arbitration by the funded party, see Jonas VON GOELER, *supra* note 1, at 84 *et seq*.

12 Caroline Dos Santos, *Third-party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?*, 35 ASA BULL. 918, 921 (2017) [*hereinafter* "Caroline Dos Santos"].

13 *See* ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 20.

14 *See* Mark Kantor, *Risk Management Tools for Respondents – Here Be Dragons*, *in* THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 57 (Bernardo Cremades & Antonias Dimolitsa eds. 2013) [*hereinafter* "Kantor"]; *but see* RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Final Award (Mar. 13, 2009); Philip Morris Brands Sàrl, Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration (Feb. 19, 2010) (where funding was provided by third entities not seeking a direct monetary profit from the outcome of the case); *for further information see,* ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 23 *et seq*.

15 *See* ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 33 *et seq*.; Trinidad Alonso, *Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue Of Regulation*, KLUWER ARB. BLOG (Aug. 31, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/08/31/third-party-fundings-older-sibling-legal-costs-insurance-issue-regulation/.

16 *Id.*

only be due in case the supported party succeeds with its claim or defence.[17] This considerably blurs the lines between ATE insurance and third-party funding.

III. New Forms of Third-Party Funding

In light of the downsides of traditional single case investments, a large number of parties involved in legal disputes do not resort to third-party funding as a means of financing litigation or arbitration. In order to address this untapped market potential, funders developed new funding models. *Bogart* provides several examples. These are:[18]

- funding of case portfolios, provided either to the client or a law firm;
- funding other business activities rather than the underlying claim, with high-value claims used as collateral;[19]
- discounted payment on an uncollected award;[20] and
- funding provided to cover premiums of insurance policies on an award not being enforced or a worse-than-expected outcome in defence cases.

A. Portfolio Investment

Out of these new funding options, portfolio funding, in the authors' opinion, is probably the one with the most potential. The underlying idea here is that a funder does not invest in a single case, but rather invests in a portfolio of cases that have been bundled by externals, such as large corporate entities or insolvency administrators, who could be potential funding clients with many proceedings.[21] As per the report of a major third-party funder, portfolio financing is clearly on the rise.[22]

B. Law Firm Portfolio Financing

Interestingly, even law firms now serve as potential funding clients for portfolio investments.[23] A recent example of this is the investment of USD 67 million by a major third-party funder into the portfolio of a US law firm.[24] This so-called law firm portfolio financing requires a law firm that has several clients with cases that have a good chance of succeeding. The law firm then provides its legal services, at least in part, on a contingency fee basis.[25] In order to reduce the risk caused by the fact that the law firm does not receive an income through hourly fees and might, in a

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[17] ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 35.

[18] Bogart, *supra* note 9, at 319.

[19] This means that the funding provided is spent on activities such as keeping up the day-to-day business.

[20] This means that the funder assumes the collection risk by buying the award at a price lower than the awarded sum.

[21] ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 38.

[22] *2018 Interim Report,* BURFORD CAPITAL (2018), *available at* http://www.burfordcapital.com/wp-content/uploads/2018/07/BUR-30307-Interim-Report-2018-web.pdf (according to the report, portfolio finance made up the biggest portion of balance sheet commitments (USD 131.8 million = 39 % of total) and investment funds commitments (USD 73.6 million = 36 % of total) during the first half of 2018. Those numbers grew from 25 % and 24 % respectively in the first half of 2017).

[23] *Case Study: Broadening Fee Arrangement Options for Clients with Plaintiff-Side Portfolio Financing*, IMF BENTHAM, *available at* https://www.benthamimf.com/funding/case-studies/case-study/broadening-fee-arrangement-options-for-clients-with-plaintiff-side-portfolio-financing; *Case Study: Extending Deep Defense-side Discounts with Hybrid Portfolio Funding*, IMF BENTHAM, *available at* https://www.benthamimf.com/funding/case-studies/case-study/extending-deep-defense-side-discounts-with-hybrid-portfolio-funding.

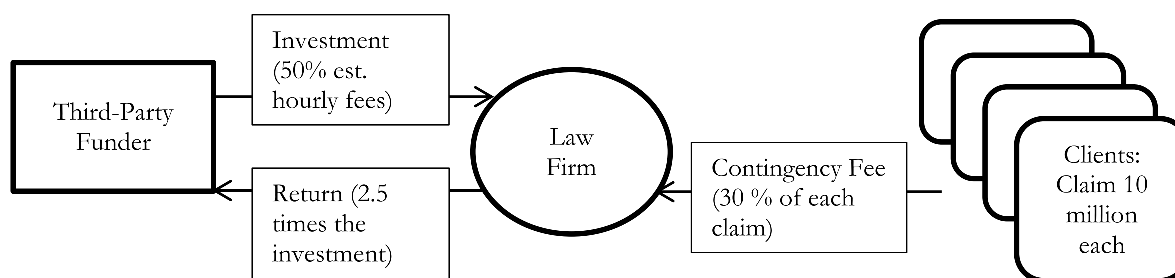
[24] *Longford Capital Closes Its Largest Law Firm Portfolio Investment*, LONGFORD CAPITAL (Aug. 27, 2018), *available at* http://www.longfordcapital.com/media/law-firm-portfolio-investment-august-27-2018.

[25] ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 38 *et seq.*; David R. Glickman, *Embracing Third-Party Litigation Finance*, 43(3) FLA. ST. U. L. REV. 1043, 1050 *et seq.* (2016) [*hereinafter* "Glickman"].

worst-case scenario, not collect any contingency fees, the law firm approaches a third-party funder who is willing to invest in its portfolio.[26] This allows law firms to expand their contingency fee business while ensuring continuous cash flow and minimizing collection risk.[27] This is in contrast to the traditional form of third-party funding, wherein the client only has a contractual relationship with the law firm and not with the funder. The contractual relationships are linear and not triangular as it is the case in traditional funding constellations where the client enters into a contract with its law firm and with the third-party funder.[28]

Financing law firms which provide their services on a contingency fee basis is not a brand-new idea. Commentators already addressed this financing structure when it gained popularity amongst United States ["**U.S.**"] based law firms that specialize in plaintiff-sided personal injury and tort cases.[29] Lawyers dealing with plaintiff personal injury and tort cases usually provide their services on a contingency fee basis.[30] In order to provide law firms with a way to dispose of their contingency fee risks, a '*lawyer lending*' industry has developed with funders providing non-recourse financing for a share in the proceeds of the claim.[31]

Nonetheless, this form of funding can be utilized in international arbitration as well. Imagine a scenario where a law firm has four different clients that hold claims amounting to USD 10 million each.[32] The law firm would like to agree on a contingency fee of 30% of the returns of each claim with the clients, i.e., USD 3 million per case and USD 12 million in total. This is because the clients are either unable or unwilling to spend their own capital on legal fees. However, the law firm's internal policy is to take only a certain amount of cases on contingency in order to maintain a stable cash flow. Taking all four claims on contingency would exceed this limit. That's why the law firm is looking to collateralize half of the contingency risk and for a way to stabilize its cash flow. Predicting the hourly legal fees in each case to amount to USD 1 million, totalling USD 4 million for all four cases, it thus needs USD 2 million. Here the funder comes into play, by providing the law firm with the amount needed in return for 2.5 times the investment.



26 *Id.*

27 David R. Glickman, *supra* note 25, at 1050 *et seq*.

28 Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 415 (2017) [*hereinafter* "Sahani"].

29 Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISC. 110 (2013) [*hereinafter* "Engstrom"]; Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. INT'L COMP. L. 93, 129 *et seq*. (2013).

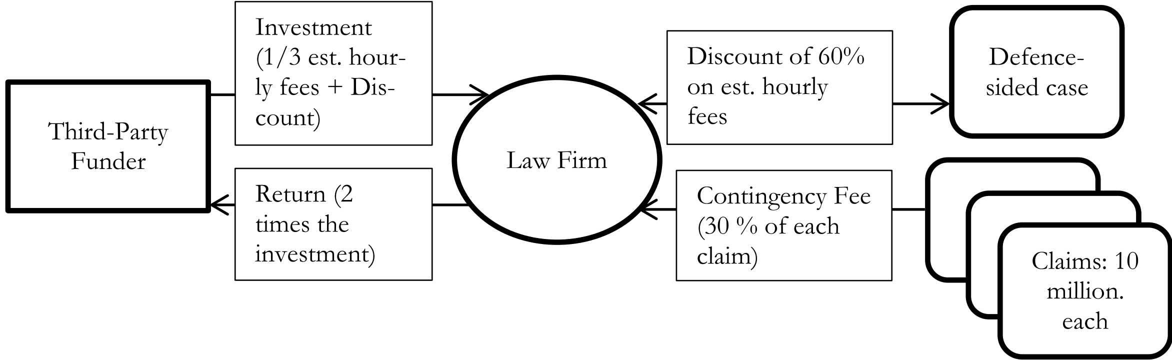
30 Engstrom, *supra* note 29.

31 *Id.*

32 *Case Study: Extending Deep Defense-side Discounts with Hybrid Portfolio Funding*, IMF BENTHAM, *available at* https://www.benthamimf.com/funding/case-studies/case-study/extending-deep-defense-side-discounts-with-hybrid-portfolio-funding.

In an ideal constellation, all four claims would succeed. The law firm would receive a total of USD 12 million in contingency fees of which it has to pay USD 5 million (2.5* USD 2 million) to the funder. If the firm had taken the cases on an hourly basis, it would have only made USD 4 million instead of USD 7 million. Even if all cases fail, the law firm still has the USD 2 million provided to it by the funder. Simultaneously, the clients would not face any legal fees.[33]

Law firm portfolios may also contain defendant-sided cases, as long as there are enough plaintiff-sided cases to cover the monetary interests of the law firm and the funder.[34] This '*hybrid*' portfolio allows law firms to consider serving a defendant on a discounted hourly or fixed rate.[35] Imagine, for example, a law firm with a regular client who holds three claims and has to defend a fourth case. The value of each claim is USD 10 million. Because the client is not willing or able to pay the legal fees of approximately USD 1 million per case (totalling USD 4 million), the law firm and the client agree on contingency fees of 30 % for the three plaintiff-sided cases, and on a discount of 60% in the defence-sided case. In order to dispose of its risk and stabilize its cash flow, the law firm approaches an investor who is willing to provide USD 1.6 million for a return of twice its investment in order to cover the discount of 60% for the defendant-sided case and 1/3 of the cost risk for the remaining claimant-sided cases.



In a best-case scenario, the law firm receives USD 6.2 million, instead of USD 4 million it would have received had it taken all cases on hourly rates. The funder gets USD 3.2 million and the client USD 21 million. Even if all cases fail, the law firm would still have USD 2 million (USD 1.6 million + USD 400.000) to cover for the USD 4 million in hypothetical hourly fees. The client would only face legal fees in the amount of USD 400.000.

In some jurisdictions, for example in England, Wales and in the district of Colombia in the U.S., it might even be possible for the funder and the law firm to partner in the form of an alternative

[33] Under the so called *American Rule*, fee shifting is prohibited. That is why each party carries its own legal costs and does not have to fear an adverse cost order.

[34] *Case Study: Extending Deep Defense-side Discounts with Hybrid Portfolio Funding*, IMF BENTHAM, *available at* https://www.benthamimf.com/funding/case-studies/case-study/extending-deep-defense-side-discounts-with-hybrid-portfolio-funding; *see also* Tobey Butcher, *Is Arbitration Portfolio Financing Going to Grow in 2018*, KLUWER ARB. BLOG (Feb. 2, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/02/02/arbitration-portfolio-financing-going-grow-2018/.

[35] *Case Study: Extending Deep Defense-side Discounts with Hybrid Portfolio Funding*, IMF BENTHAM, *available at* https://www.benthamimf.com/funding/case-studies/case-study/extending-deep-defense-side-discounts-with-hybrid-portfolio-funding.

business structure ["**ABS**"].[36] In an ABS, law firms may benefit even more from the financial assets and the expertise a third-party funder can offer.[37] Outside those jurisdictions, however, such business enterprises may be prohibited.[38]

C. Advantages

These new forms of funding have several benefits for clients, funders and law firms, which shall be discussed below.

i. Advantages for Clients

The key benefit of portfolio funding is that it can be offered at a much lower price than traditional single claim investment funding. While the latter is usually offered for 2.5-3 times the investment, or up to 30% of the claim, portfolio financers advertise their product at much lower rates.[39] This reduction of funding costs is made possible by the above-mentioned cross-collateralization, which allows diversification and mitigation of risks. Also, with regard to the client's balance sheet, portfolio funding has the same advantages as conventional single case funding when it is structured in a way to directly support a portfolio held by one client.[40] Outsourcing of financial risks related to arbitration by obtaining outside funding allows companies to clear the related costs from their balances and generate a positive cash flow.[41] This means that because the capital is not tied up in arbitrations, the companies may invest in new projects instead of having to spend money on failed ones.[42]

Moreover, defendant-sided portfolio funding is a good alternative to ATE insurances for multiple reasons. First, outside the United Kingdom ["**U.K.**"] litigation practice, ATE insurance is not as readily available, although this might change as the ATE insurance market is growing in Asia, Europe and the U.S.[43] Second, such insurance policies may not be available for all types of litigation/arbitration.[44] Even where special litigation or arbitration insurance policies are available,

36 Sahani, *supra* note 28, at 434 *et seq.*; Victoria Shannon Sahani, *Blurred Lines between Third-Party Funders and Law Firms*, KLUWER ARB. BLOG (Nov. 3, 2016), *available at* http://arbitrationblog.kluwerarbitration.com/2016/11/03/blurred-lines-between-third-party-funders-and-law-firms/; (similar business structures may also be permissible in Australia in the form of a so called "Incorporated Legal Practice"); *see Legal Profession Act 2006* (ACT) pt. 2.6 (Austl.); *Legal Profession Act* 2004 (NSW) pt. 2.6 (Austl.); *Legal Practitioners Act 2006* (NT) pt. 2.6 (Austl.); *Legal Profession Act 2004* (Vic) pt. 2.7 (Austl.); *Legal Practice Act 2003* (WA) (Austl.); *Legal Profession Act 2007* (Qld) pt. 2.7 (Austl.); *Legal Profession Act 2007* (Tas) pt. 2.5 (Austl.); *Legal Practitioners Act 1981* (SA) sch. 1 (Austl.).

37 Sahani, *supra* note 28, at 463.

38 *See, e.g.,* MODEL RULES OF PROF'L CONDUCT r. 5.4 (2018) (AM. BAR ASS'N) (U.S.); *see also Bundesrechtsanwaltsordnung* [BRAO] [Federal Lawyers' Code], § 59a, *translation available at* https://www.gesetze-im-internet.de/brao/__59a.html (Ger.) (which allows multidisciplinary partnerships only under specific circumstances); *see also* Jakob Weberstaedt, *English Alternative Business Structures and the European single market*, 21(1) INT'L J. LEGAL PROF. 103 *et seq.* (2014).

39 Denney, *supra* note 5 ("Spreading the risk and cross-collateralizing the investment allows for the key element of a portfolio - the reduction in cost to the client. As mentioned above, traditional terms are three times or 300 percent of damages. Under a portfolio, a client might be offered terms starting as low as 0.25 times. That is offering a client terms of 25 percent as opposed to 300 to 500 percent").

40 *See* ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 20 (for the use of third-party funding because of its benefits to the balance-sheet).

41 JONAS VON GOELER, *supra* note 1, at 83 *et seq.*; Joanna M Shepherd and Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L. J. 919, 944 *et seq.* (2015).

42 *Id.*

43 ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 35.

44 Jonathan T. Molot, *A Market in Litigation Risk*, 76(1) U. CHI. L. REV. 367, 377 (2009); Emily Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83(4) U. CHI. L. REV. 2299, 2318 (2016).

they usually require the payment of a premium.[45] By paying the premium, a part of the cost risk is realized. Therefore, the defendant has no option to discard the entire cost related risk. On the other hand, in a portfolio investment scenario, with law firms working at discounted hourly rates, the costs for defendants might be lower than the premium for an insurance policy.

Further, third-party funders may profit from agreeing to carry the liability risk of having to bring up the claimed sum in defence cases when the portfolio contains enough 'good' claims to cover a possible liability, and the risk of the client being held liable appears to be relatively low. Such "*litigation buyout insurance*"[46] would allow defendants to hedge against adverse outcomes and fill the void for defendant-sided funding and risk management options. While ATE and BTE insurances might help defendants to minimize the cost risk related to arbitrations, the risk of liability in a given case remains the same. As *Molot* points out, insurance companies struggle with providing liability insurance for defence cases because such liability insurance would cover a highly individualized, heterogeneous risk rather than a homogeneous risk.[47]

Turning to law firm portfolio financing, there might be no real difference to contingency fee agreements from a client's perspective. However, the provided funding might enable a law firm to enter into contingency fee agreements in the first place, or allow the firm to take more cases on contingency, ultimately making such agreements more readily available.[48] In particular, for smaller claims, defence cases, claims for declaratory relief and investigation, law firm portfolio financing might open a way to obtain funding, considering that those claims usually do not qualify for third-party funding or contingency fee agreements.[49] By bundling those cases in a portfolio with sufficient 'good' claims, it is now possible for a client to outsource at least a part of its own cost risk related to the arbitration.[50] For clients who face financial difficulties and would otherwise not be able to pursue a case, this might even improve their access to justice.

ii. *Advantages for Funders*

The main beneficiaries are probably the funders and law firms. The advantages available to them are discussed below.

a. *Portfolio Investment: a Tool to Diversify Risk*

First and foremost, investing in portfolios enables investors to diversify risks that threaten the return on their investment. By spreading their investment over a portfolio of cases, funders are able to cross-collateralize the risk of losing their investment. As long as not all cases in the portfolio fail, there might be a chance of recovering at least part of the initial investment. This allows funders to offer their service at a much lower rate than in conventional funding scenarios, thereby opening access to a broad spectrum of potential new clients. Traditionally, funders refused many applications for funding.[51] With the new funding mechanisms and the option to

45 This might be different with the newly reported forms of conditional premium fees for litigation/arbitration insurance policies mentioned above.

46 *See*, Kantor, *supra* note 14, at 57.

47 Jonathan T. Molot, *supra* note 44, at 381 *et seq*.

48 Tobey Butcher, *supra* note 4; *see also With Akin Gump hire, Buford Capital launches ABS law firm*, BURFORD CAPITAL, *available at* http://www.burfordcapital.com/newsroom/burford-capital-launches-abs-law-firm-burford-law-akin-gump-hire/.

49 Denney, *supra* note 5.

50 Tobey Butcher, *supra* note 4.

51 ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 25; *see also* Part I.

bundle less promising and 'good' cases in a portfolio, this attitude may change.

Also, third-party funders do not have to scrutinize each and every case as carefully as when deciding on whether to provide funding for a single case or not. Instead, they have to do a thorough due diligence only for the cases securing the investment.[52] This means that the other cases in the portfolio must only be assessed regarding their impact on the total portfolio in a worst-case scenario, and the likelihood of such a worst-case scenario happening.[53] Hence, the new funding structures allow funders to do less in-house legal work as compared to when funders offer only single case funding. This has major savings potential as regards to staff and financial resources.

The reduction of in-house costs lowers the entry barrier of necessary starting capital, and consequently paves the way for smaller funders to participate in the funding industry. While this may result in an increase in competition for the established funders, it may lead to a corresponding increase in innovation. This is because it is likely to change the former *status quo*, as per which a small group of third-party funders were in a position to determine the direction in which the funding industry developed, as well as the terms and conditions on which the funding was provided.

b. Advantages of Law Firm Portfolio Financing

By cooperating with a law firm, funders can enhance the cost reducing effect of portfolio funding even more. For a funder, it might then be possible to scale down its internal legal costs to an absolute minimum. Possibly, a funder could even trust the assessment of the outside law firm so much that it abandons the idea of in-house legal advisors altogether. This is interesting for third-party funders who lack expertise in certain legal fields, which they want to access with their product, without having to hire new legal advisors. Imagine, for example, a third-party funder who has only funded litigations and now wants to fund arbitrations as well. Further, the law firm and the funder together share the risk. This means that both entities equally reduce their own risk exposure in the event of a negative outcome. Hence, there are two stages of risk collateralization. First, the risk is spread across the case portfolio. Second, the risk is split between the funder and the law firm. The financing of law firm portfolio, therefore, is an especially robust example of litigation and arbitration financing.[54] Also, building a strategic and trusted relationship with a third-party funder might help the law firm to set itself apart from competitors.[55]

iii. Law Firm Portfolio Financing: a Solution to Procedural Problems of Third-Party Funding in Arbitration?

Portfolio financing also provides a solution for much debated legal problems associated with third-party funding in arbitrations. Within the course of the discussion about the need for regulation, commentators and practitioners are discussing: (a) whether the involvement of a funder should be disclosed, (b) cost-related problems, especially adverse cost orders against funders and their impact on security for cost orders, and (c) the issues of champerty and

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52 Denney, *supra* note 5.

53 *Id.*; *see also*, Caroline Dos Santos, *supra* note 12, at 928.

54 Bogart, *supra* note 9, at 319.

55 *See Understanding the potential benefits of portfolio litigation funding for law firms*, GLOBAL LEGAL POST (Aug. 31, 2017), *available at* http://www.globallegalpost.com/big-stories/understanding-the-potential-benefits-of-portfolio-litigation-funding-for-law-firms-46991192/.

maintenance.

a. Disclosure

As the ICCA-QMUL Task Force on Third-Party Funding suggested, a party and/or its representative should, on their own initiative, disclose the involvement of a third-party funder.[56] This is based mainly on the concern that the involvement of a funder might lead to conflicts of interest for the arbitrators.[57] The IBA Guidelines on Conflicts of Interest, 2014) state in General Standard 6(b) that a party that is a legal entity shall disclose any other legal or natural person that has a direct economic interest in or has to indemnify the party for the award being rendered in the arbitration. The term 'third-party funder' is defined in the Explanation to General Standard 6(b) as:

> "*any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*"

Since one of the main features of this definition is the direct economic interest in the arbitral award being rendered, portfolio funding and law firm financing might not be considered to fall under the scope of this definition.[58] The economic interest of the funder is spread across the portfolio, and not a single arbitration.[59] Nevertheless, it could be argued that the potential of conflicting interests from an arbitrator's perspective still remains the same as in traditional third-party funding constellations.[60]

In our opinion, this might be true for funding into a portfolio held directly by the party. However, it does not hold true for a possible party's obligation to disclose any third-party funder involved when the funding is structured as a law firm portfolio funding. Given the structure of law firm portfolio financing, the fact that the law firm received funding from a third-party funder might not even be known by the party. There is no contractual relationship between the funder and the party. Instead, the party might only be aware that its case is part of a portfolio for which its law firm obtained outside funding. Under these circumstances, the only entity able to disclose specifics on the involvement of a funder is the party's law firm. But why should the law firm need to disclose its internal business relationship to an outside funder? How can the fact that a party's law firm received funding on a portfolio possibly raise issues of conflicts of interest for arbitrators with regards to that party? There is no reason why the arbitrator should prefer the party whose representatives received portfolio funding. Hence, there is no reason why a party or its representative should disclose the involvement of a third-party funder in the law firm's portfolio. Thus, portfolio financing may call for a different approach with regards to the issue of disclosure.

b. Adverse Cost Orders and Security for Costs

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[56] ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 81 (as for power of tribunals to order disclosure, some new arbitration rules already introduced specific provisions, *see, e.g.,* Arbitration Rules of the Singapore International Arbitration Centre (SIAC) 2016, art. 24 (l)).

[57] ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 98.

[58] *Id.* at 91.

[59] *Id.*

[60] *Id.*

Another much debated question is whether an arbitral tribunal can order a third-party funder to pay an adverse cost order.[61] Case law from the U.K.[62] and the U.S.[63] suggests that an arbitral tribunal might have the power to do so. Where the funding agreement does not specify this power, it is argued that tribunals lack the jurisdiction to order the funder to pay adverse costs.[64] This should hold true where the third-party funder has not provided funding to the party directly, but has provided the same to the party's law firm. Those who argue in favour of adverse cost orders against third-party funders in international arbitrations usually claim that the funder agreed to share the cost risk by entering into the contract with the party.[65] However, in the case of law firm portfolio financing, there is no contractual relationship between a party and a funder that could serve as a basis for this line of argumentation. The funder does not agree to share the cost risk of the party; he merely agrees to share the contingency risk of the law firm. In such a scenario, the already questionable proposition to allow arbitral tribunals to issue adverse cost orders against third-party funders becomes even more objectionable.

Furthermore, law firm portfolio financing might be a solution to the question of whether the funding arrangement has any implications on the decision on an application for security for costs. In many jurisdictions, arbitral tribunals have the power to order a party to provide security for costs.[66] Where arbitration laws and institutional rules do not specify this *expressis verbis*, the majority opinion in the international arbitration community is that tribunals may rely on their competence to order such interim measures.[67] The general view, however, is that arbitral tribunals may only issue a security for costs order when specific circumstances of the case justify it.[68] One scenario that justifies a security for costs order is the sudden deterioration of the financial situation of one of the parties, potentially resulting in an unenforceable adverse cost order.[69] It could be argued that the involvement of a third-party funder justifies a security for costs order against the supported party.[70]

Given the trend of companies to dispose of their cost risk and maintain their cash flow by using third-party funding, this view is not persuasive. Even if one follows that opinion, the line of argumentation cannot be upheld in the case of law firm portfolio financing. As there is no contract between party and funder, the involvement of the funder does not leave any room for

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61 *See generally* Stavros L. Brekoulakis & Jonas Von Goeler, *It's All About The Money: The Impact Of Third-Party Funding On Costs Awards And Security For Costs In International Arbitration*, AUSTRIAN Y.B. INT'L ARB. 3, 8 *et seq.* (2017) [*hereinafter* "Brekoulakis"]; ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 160 *et seq.*

62 *See* Excalibur Ventures LLC v. Texas Keystone Inc. & Ors. *&* Texas Keystone Inc. & Ors. v. Psari Holdings Ltd. & Ors., [2016] EWCA Civ. 1144 (AC) (appeal taken from QB) [*hereinafter* "Excalibur 2016"]; Excalibur Ventures LLC v. Texas Keystone Inc. & Ors. (Rev 2) [2014] EWHC 3436 (Comm.) [*hereinafter* "Excalibur 2014"]; Arkin v. Borchard Lines Ltd. & Ors., [2005] EWCA (Civ.) 655 (appeal taken from QB) [*hereinafter* "Arkin"].

63 *See* Abu-Ghazaleh v. Chaul, 36 So. 3d 691 (2009) (U.S.).

64 Brekoulakis, *supra* note 61, at 8 *et seq.*

65 *See* Excalibur 2016, *supra* note 62; Excalibur 2014, *supra* note 62.

66 NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 317 (6th ed. 2015) [*hereinafter* "Nigel Blackaby et al."].

67 *Id.*; *see* Guaracachi America, Inc. and Rurelec plc v Plurinational State of Bolivia, Case No. 2011-17, Procedural Order No. 14, ¶ 6 (Perm. Ct. Arb., Mar. 11, 2013); REDFERN AND HUNTER, *supra* note 66, at 317.

68 NIGEL BLACKABY ET AL, *supra* note 66, at 317.

69 *See* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 650 *et seq.* (2012).

70 *See* RSM Prod. Corp. v. St. Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2014) (where the respondent State argued that the involvement of a third-party funder called for a security for costs order against the claimant. However, the particular circumstances were such that the claimant had a history of not adhering to adverse cost awards); *see also* Christine Sim, *Security for Costs in Investor–State Arbitration*, 33 ARB. INT'L 427, 438 *et seq.* (2017); *see generally* NIGEL BLACKABY ET AL, *supra* note 66, at 317 *et seq.*

speculations regarding the financial situation of the party. Instead, the party only benefits from the funding indirectly through the contingency fee agreement. So long as entering into contingency fee agreements itself is not seen as indicating impecuniosity of the party, law firm portfolio financing constellations do not allow such a conclusion. Hence, the involvement of a third-party funder in law firm portfolio financing scenarios cannot be taken as a basis for ordering a security for costs order against the party benefiting indirectly from the funding through a contingency fee agreement.

c. Doctrine of Champerty and Maintenance

Even though it can be said that third-party funding is broadly accepted in common law jurisdictions,[71] there remain legal uncertainties in some jurisdictions about whether the traditional funding structure conflicts with the doctrine of champerty and maintenance. Under the common law doctrine of champerty and maintenance, it is prohibited for third parties with no legitimate interest in the legal dispute to provide funding in litigations and arbitrations in exchange for proceeds from the supported case.[72] For example, the Supreme Court of Ireland has held that third-party funding does, in fact, violate this doctrine.[73] This position was also followed in Singapore and Hong Kong until both jurisdictions enacted their respective legislations to exclude third-party funding from the doctrine of champerty and maintenance for international arbitration.[74]

In a law firm portfolio financing situation, there is no risk of violating the doctrine of champerty and maintenance as the funding is structured in a manner so as to provide indirect funding for disputes by way of contingency fees. Thus, there is no direct financial support extended by the third party in such cases. Consequently, there is no room for assuming that this constellation should be contrary to the doctrine of champerty and maintenance. This is all the more relevant as the funder does not invest in a single claim but a portfolio of cases. There is a possibility that the portfolio might contain defence-sided cases with no return for either the law firm or the funder. Nevertheless, law firm portfolio financing may be subject to special legislation on contingency fee agreements in some jurisdictions.[75]

iv. Interim Conclusion

The rise of law firm portfolio financing in international arbitration brings benefits for all parties involved. Clients benefit by obtaining funding for cases which possibly would not have been considered for funding in a single case scenario, and also from a decline in prices for third-party

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71 *See* Valentina Frignati, *Ethical Implications of Third-party Funding in International Arbitration*, 32 ARB. INT'L 505 (2016) [*hereinafter* "Frignati"].

72 *Id.*

73 *See* Persona Digital Telephone Ltd. and Sigma Wireless Networks Ltd v. The Minister for Public Enterprise & Ors, [2017] IESC 27 (Ir.); *see also* Maintenance and Embracery Act 1634 (Ir.), *available at* http://www.irishstatutebook.ie/eli/1634/act/15/enacted/en/print.html.

74 *See* Singapore Civil Law (Amendment) Act, No. 2 of 2017, §§ 5A and 5B (2); Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, (2017), rr. 98K-98M.

75 *See, e.g., Legal Profession Act 2006* (ACT) § 285 (Austl.); *Legal Profession Act 2004* (NSW) § 325(1)(b) (Austl.); *Legal Profession Act* (NT) § 320(1) (Austl.); *Legal Profession Act 2007* (Qld) § 325 (Austl.); *Legal Profession Act 2007* (TAS) § 309(1) (Austl.); *Legal Profession Act 2004* (Vic) § 3.4.29(1) (Austl.); *Legal Profession Act 2008* (WA) § 285(1) (Austl.); *see also* Bar Council of India Rules, pt. VI, ch. II, § II, r. 20; Bundesrechtsanwaltsordnung [BRAO] [Federal Lawyers' Code], § 49b(2), *translation available at* https://www.gesetze-im-internet.de/brao/__59a.html (Ger.) read in conjunction with Rechtsanwaltsvergütungsgesetz [RVG] [Lawyers' Compensation Act], § 4a (Ger.) (allowing contingency fee agreements only under exceptional circumstances); s*ee* Part III.D.(i).

funding. Funders benefit by cross-collateralizing and minimizing the risk of total loss. Furthermore, by entering into a close business relationship with law firms, they might be able to reduce in-house legal costs and thereby maximize their profit margin. Law firms benefit by entering into more contingency fee arrangements with clients and sharing their contingency risk with the funder. Additionally, law firm portfolio financing might be a solution to the procedural problems of disclosure, adverse cost orders against funders, security for costs orders, and the compatibility problem with the doctrine of champerty and maintenance.

D. Potential Need for Regulation?

Even though these new forms of third-party funding have many advantages, they also cause new problems that might make it necessary to implement specific regulation. In this part we will address: (i.) the existing regulation which might pose obstacles to law firm portfolio financing, (ii.) the rules on capital adequacy for funders, and (iii.) the rules on potential conflicts of interest arising from the cooperation between the funder and the law firm.

i. Existing Regulation

Since law firm portfolio financing relies on the law firm to provide its services to a party on a contingency fee basis, national legislation regarding such arrangements must be considered. For example, in Germany, success fee arrangements are generally prohibited under Section 49b (2) of the *Bundesrechtsanwaltsordnung* [“**BRAO**”] and only permissible under exceptional circumstances according to Section 4a of the *Rechtsanwaltsvergütungsgesetz* [“**RVG**”].[76] The exception in Section 4a of the RVG was introduced after the Federal Constitutional Court of Germany held that the former total ban of success fee agreements violated constitutional law, as long as it did not leave room for the possibility of success fee agreements where parties would otherwise refrain from perusing their rights.[77]

In jurisdictions where success fee agreements are prohibited, shared risk agreements, also referred to as risk alignment,[78] could be an option allowing law firms and funders to work together. One manner in which such agreements work is:[79] first, the law firm estimates its hourly fees for the mandate that is supposed to be funded. Then the funder agrees to carry those costs for the client. The fee estimate serves as a fee cap in the relationship between client and law firm. If the law firm is able to keep its actual hourly fees under the estimate, the funder pays, for example, 50% of the difference between estimated and actual hourly fees. In simple words, the law firm essentially receives a ‘bonus’ for its efficient work on the case.

Furthermore, the law firm portfolio financing agreement must be drafted carefully in order to ensure compliance with rules of professional conduct for lawyers concerning fee-sharing with non-lawyers.[80] A violation of such rules could arise when the return for the funder is taken directly out of an award or settlement.[81] Hence, the basis for calculating the funder’s interest should be independent from the specific award or settlement sum in the supported cases. As

76 *See* RÜDIGER BRÜGGEMANN ET AL., BUNDESRECHTSANWALTSORDNUNG: BRAO KOMMENTAR § 49b, ¶ 14 *et seq.* (9th ed. 2016).
77 BVerfG, 2 BvR 1390/12, Sept. 12, 2006, at 117, 163 *et seq.* (Ger.).
78 ICCA-QUEEN MARY THIRD-PARTY FUNDING REPORT, *supra* note 1, at 27 *et seq.*
79 The authors obtained the information presented hereafter in a meeting with a German third-party funder.
80 *See, e.g.,* MODEL RULES OF PROF’L CONDUCT r. 5.4 (2018) (AM. BAR ASS’N) (U.S.); Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE), r. 3.6.
81 Matthew Bogdan, *The Decision-making Process of Funders, Attorneys, and Claimholders*, 103 GEO L.J. 197, 207 (2014).

shown in the examples above, this is possible and should not cause problems in practice as the return usually depends on the performance of the whole portfolio and not on one specific case.

ii. *Rules on Capital Adequacy*

Where portfolio investments and law firm portfolio financing is permissible, this could lead to an increase in the number of third-party funders due to the lowered financial entry barrier. This, in turn, might bring back the old debate on capital adequacy, i.e., the debate on how much capital a funder must have readily available at a given point. In fact, it has been reported that some of the third-party funders in the U.K. discussed whether or not to introduce capital adequacy regulation.[82] The fear was that "*less trustworthy elements would enter the market absent regulation*".[83] This reasoning might hold especially true today, where the lowered financial entry barrier may incentivize undercapitalized funders to enter the market. This would possibly be devastating to parties, law firms, and the funding market as a whole, as it might be grist to the mill for those who claim that third-party funding is nothing but a casino game, a gamble on the outcome of cases in order to make profit.[84] The consequence could be that the newly developed trust of the international arbitration community in the integrity of the third-party funding industry would be damaged.

To counter this, it is advisable to introduce legislation addressing the capitalization of third-party funders. Singapore is the first country to have passed legislation on the subject in the form of the Civil Law (Third-Party Funding) Regulations, 2017.[85] According to Section 4(1)(b), a third-party funder must have a paid-up share capital of no less than SGD 5 million or the equivalent amount in foreign currency, or no less than SGD 5 million or the equivalent amount in foreign currency in managed assets. Another example of rules on capital adequacy can be found in the Code of Conduct of the Association of Litigation Funders of England and Wales.[86] The code requires each member to maintain adequate capital to cover funding liabilities for a minimum of 36 months, and have access to at least GBP 5 million.[87] However, the reach of these rules is limited to the 18 members of the Association of Litigation Funders.[88]

iii. *Potential Conflicts Regarding the Cooperation with Law Firms*

As clear cut as the structure of law firm financing may be, and as different from ABS law firm portfolio financing may seem, there remains the possibility that in practice the borders blur. Where, for example, a small law firm bundles the vast majority of its cases into a portfolio in

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82 CHRISTOPHER HODGES ET AL., LITIGATION FUNDING: STATUS AND ISSUES 80 *et seq.* (2012), *available at* https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf; s*ee also* JONAS VON GOELER, *supra* note 1, at 112.

83 *Id.* at 80.

84 William Alden, *Looking to Make Profit on Lawsuits, Firms Invest in Them*, N.Y. TIMES (Apr. 30, 2012), *available at* https://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-lawsuits-firms-invest-in-them/; PIA EBERHARDT AND CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM 57 *et seq.* (Helen Burley ed., 2012).

85 Furthermore, the Government of Hong Kong recently published its Draft Code of Practice for Third Party Funding in Arbitration and Mediation, which stipulates rules on capital adequacy for third-party funders in § 2.5, *available at* https://www.gov.hk/en/residents/government/publication/consultation/docs/2018/tpfcode.pdf.

86 *See* Code of Conduct of the Association for Litigation Funders 2011, § 9.4 (Eng.)

87 *Id.*; *see also* Matthew Secomb & Philip Tan, *Third Party Funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation*, 18 ASIAN DISP. REV. 182, 185 (2016).

88 *See* ALF Membership Directory, ASSOCIATION OF LITIGATION FUNDERS, *available at* http://associationoflitigationfunders.com/membership/membership-directory/.

order to obtain funding, the economic bond between funder and law firm may resemble the financial structures of an ABS, thereby putting the agreement at risk of being contrary to specific legislation. The consequence of this delimitation problem is legal uncertainty as to the legality of the business relationship for everyone involved. Solutions to this could be restrictions on the number of cases law firms can take on contingency, or limitations on the (total) amount of outside investments of funders into law firms. This could prevent an economic dependency between law firm and funder.

Another issue is the possibility of rising conflicts of interest for law firms. As the parties' representatives, they have to make sure that they act in the best interest of the client. While in a classic funding scenario, the economic dependency of law firms from the funder was limited to a specific occasion, the economics change drastically with funding the law firm directly. In a law firm portfolio financing scenario, economic dependency of law firms on the funder can lead to a situation where the law firm finds itself '*serving two lords*', i.e., the funder and the party.[89] This would put the law firm into a delicate situation. This could be counterbalanced by implementing specific rules on the involvement of a funder in a law firm's case portfolio.

IV. Conclusion and Outlook

As reports of third-party funders suggest, portfolio funding has superseded classic single case investments.[90] Due to the benefits of portfolio funding, this trend will continue in the future. Recent developments show that there are new funders entering the market who promote this type of funding.[91] From a client's perspective, this development is welcome since funding becomes obtainable at lower prices and for cases that were ineligible for single case funding before. Further, law firms might profit from the new form of law firm portfolio funding, because it enables them to take more cases on contingency and to maximize their profit. Law firm portfolio financing might also be a solution to several procedural problems resulting from the traditional single case investment structures, namely, the questions of disclosure, adverse cost orders, security for costs orders, and possible conflicts with the doctrine of champerty and maintenance. However, with the lowered financial entry barrier, new funders entering the market could pose new problems, especially with regards to capital adequacy rules and involvement in law firm portfolios. Those new challenges might make it necessary to pass new regulation specifically addressing the new funding structures.

Even though there are many benefits to portfolio and law firm portfolio funding, single case funding will probably not vanish from the funding market altogether. In particular, high-volume cases, such as investment arbitrations, are usually not suitable to be bundled up in a portfolio, neither in the hands of a possible claimant nor at the law firm. This is due to the high complexity of those cases. Furthermore, because of the extremely high amounts involved in these disputes, the benefit to loss ratio from the funder's perspective might be attractive enough for the risk of total loss to be worth taking, even in a single case scenario. At the same time, many law firms

89 *See* Frignati, *supra* note 71, at 510; Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 607 (2010).

90 *2018 Interim Report,* BURFORD CAPITAL, *available at* http://www.burfordcapital.com/wp-content/uploads/2018/07/BUR-30307-Interim-Report-2018-web.pdf; *see also Part III.B.*

91 *See, e.g.,* Chancery Capital Advisors LLP incorporated on Mar. 30, 2017; for further information *see also* COMPANIES HOUSE, *available at* https://beta.companieshouse.gov.uk/company/OC416667; CHANCERY FINANCE, *available at* http://chanceryfinance.com/.

might not be willing to take those high volume cases on the basis of contingency fee agreements, which rules out a possible law firm portfolio financing structure. Another factor worth considering in this context is that usually only well-capitalized and established funders are approached by parties and law firms to provide funding in investment arbitrations. Hence, there is not as much competition, which is the driving force behind the new developments of portfolio funding structures.

It has been said many times that third-party funding is here to stay. In light of the findings in this article, we are inclined to add: especially in the form of portfolio and law firm financing!