NOTE

Helpful Industry or Officious Intermeddlers: Assessing U.S. Champerty Law Through the Lens of Third-Party Funding in International Dispute Resolution

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ABSTRACT

International commercial arbitration is experiencing a period of rapid growth as a means of dispute resolution. As arbitration can be an expensive process, there has also been a growth in the practice of third-party funding for arbitration. The old British common law doctrines of maintenance and champerty, which seek to prevent "officious intermeddlers" from gaining a stake in the lawsuits of others, stand as potential barriers to the wider proliferation of third-party dispute resolution funding. These old doctrines are alive and well in some nations but abolished in others, and confusion can result. Within the United States, there is similar variance across the several states. To avoid confusion and maximize efficiency in the realm of international trade, the United States should adopt unifying federal legislation that abolishes the doctrines of champerty and maintenance, establishes funding agreement disclosure guidelines, and standardizes U.S. law on third-party dispute resolution funding.

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Introduction

Few fields of dispute resolution have seen such rapid growth in the past fifty years as international commercial arbitration. The International Centre for the Settlement of Investment Disputes ("ICSID") was formed by the World Bank in 1965 to establish a neutral forum to resolve disputes "between States and nationals of other States."[1] From its inception until 1990—the first twenty-five years of its existence—ICSID

[1] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 246–47 (3d ed. 2017).

registered only twenty-six cases.[2] As trade began to globalize and international state investment became more common around the turn of the millennium, however, arbitration became an increasingly sought-after means of dispute resolution, and ICSID's dispute volume grew dramatically.[3] In fiscal year 2022 alone, ICSID administered 346 cases[4]—a striking increase over the rough average of one new case registered per year for the first quarter century of ICSID's operations.[5] The increase in volume has been meteoric.

Separately, in early 2000s England, a "revolution" was occurring in the world of civil litigation funding.[6] In 1967, England abolished the "[o]bsolete [c]rime[]" of champerty, an old English doctrine outlawing a third party from funding another's unrelated lawsuit with a possible recovery contingent upon the outcome of the suit.[7] In the years that followed, the United Kingdom became the prime location for a blossoming litigation-finance industry.[8] In 2007, Harbour Litigation Funding was formed in London, one of the first dedicated dispute resolution finance corporations, which today has a total combined claim value of $19 billion.[9] A culture emerged in which there existed "a recognition that England and Wales is the best place to litigate."[10] The former President of the U.K. Supreme Court recognized litigation funding as "the life-blood of the justice system" and instrumental in maintaining an "inclusive" society.[11]

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2 *Id.* at 247.

3 *See id.* at 246–47.

4 Int'l Ctr. for Settlement of Inv. Disps., Annual Report 24 (2022), https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf [https://perma.cc/4RL4-WXJK].

5 *See supra* note 2 and accompanying text.

6 Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DePaul L. Rev. 259, 259 (2002).

7 Criminal Law Act 1967, c. 58, § 13 (Eng. & Wales) (abolishing "any distinct offence under the common law in England and Wales of maintenance (including champerty . . .)"); *see also* Timothy Liang, *Champerty: Relic of a Bygone Era?*, 32 Sing. L. Rev. 181, 182 (2014).

8 *See* Lord Neuberger, President, U.K. Sup. Ct., Harbour Litigation Funding First Annual Lecture: From Barretry, Maintenance and Champerty to Litigation Funding ¶¶ 1–10 (May 8, 2013), https://www.supremecourt.uk/docs/speech-130508.pdf [https://perma.cc/H8NW-7NLA]; *A Brief History of Litigation Finance*, Practice, Sept.–Oct. 2019, available at https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/ [https://perma.cc/SBK5-DYU7].

9 *See Our History*, Harbour Litig. Funding, https://www.harbourlitigationfunding.com/about-us/history/ [https://perma.cc/7DL8-5WTA].

10 Owen Bowcott, *Litigation Funders Become Big Business, Enjoying Booming Market in UK*, The Guardian (May 25, 2012, 12:15 PM) (quoting Susan Dunn, Founder, Harbour Litigation Funding), https://www.theguardian.com/law/2012/may/25/litigation-funders-booming-market-uk [https://perma.cc/6RNA-VLTJ].

11 Lord Neuberger, *supra* note 8, at ¶¶ 52–53; *see also* Jonathan Barnett, Lucas Macedo & Jacob Henze, *Third-Party Funding Finds Its Place in the New ICC Rules*, Kluwer Arb. Blog (Jan. 5, 2021), http://arbitrationblog.kluwerarbitration.com/2021/01/05/

The boom in international dispute resolution via arbitration mirrors the increase in litigation funding in the United Kingdom and around the world. As arbitration and private dispute resolution became more common internationally and litigation funding became big business, views on the topic began to shift, and third-party involvement in legal disputes became more acceptable, at least in theoretical discussion.[12] This evolution in thinking toward more widespread tolerance of the practice resulted in a rapidly shifting area of law for a major part of the global economy.[13] The widespread adoption of such third-party funding arrangements for dispute resolution carries both risks and benefits, and not all nations are on the same legal playing field when it comes to this evolution, which, as this Note addresses, can lead to inequities, inefficiencies, and even potential legal liability for international lawyers.[14]

Third-party funding in international commercial arbitration works largely the same as third-party funding in litigation and has been experiencing a similar boom in the past few decades.[15] Because of the potential risks for conflicts of interest and the tainting of arbitral awards by concerns regarding arbitrators' connections to these third parties, arbitral rules increasingly require disclosure of funding arrangements well in advance of substantive hearings within the arbitration.[16] Giving arbitrators blanket authority to request funding agreement documents

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third-party-funding-finds-its-place-in-the-new-icc-rules/ [https://perma.cc/W9AN-3Q3B] (quoting Neuberger and discussing the increased global prominence of recognition and regulation of third-party funding).

12 *See, e.g.*, Zander, *supra* note 6, at 261–67 (discussing the shift over time in England toward acceptance of third-party funding in an evaluation of conditional fee arrangements); Barnett et al., *supra* note 11 (recognizing the increased volume of funding in international commercial arbitration as indicating that third-party funding is "[h]ere to [s]tay").

13 *See generally* Liang, *supra* note 7 (examining the shift in legal perspectives on champerty and maintenance in the U.K. from 1993 to 2014); Edouard Bertrand, *The Brave New World of Arbitration: Third-Party Funding*, 29 Swiss Arb. Ass'n Bull. 607 (2011) (exploring the potential economic and ethical implications of the "[b]rave [n]ew [w]orld" of third-party funding in arbitration); Prashant Krishan & Gaurav Tyagi, *New Trend in International Commercial Arbitration Third Party Funding*, 4 Int'l J.L. Mgmt. & Humans. 1671 (2021) (recognizing third-party funding as an important touchstone in discussions of international commercial arbitration due to its considerable recent uptick).

14 *See infra* Part III.

15 Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1658–62 (2013).

16 *See* Barnett et al., *supra* note 11 ("The overarching purpose of [mandated disclosure of funding arrangements in arbitral rules] is, again, to avoid conflicts of interest throughout the life of an arbitration, to ensure no arbitrator risks any such conflict . . . , and to ensure the enforceability of an award."); *see, e.g.*, Int'l Ctr. for Settlement of Inv. Disps., ICSID Arbitration Rules r. 14, *in* ICSID Convention, Regulations and Rules 88, 98 (2022), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf [https://perma.cc/7HBB-663V] ("The Tribunal may order disclosure of further information regarding the [third-party] funding agreement and the non-party providing funding . . . .").

themselves, however, poses alternative risks. Due to the sensitive nature of these agreements and the information within them, ordering their disclosure to the arbitral panel or to opposing parties risks giving undue access to privileged or other necessarily confidential information, which can create unfairness and partiality.[17] Some international arbitral institutions have begun slowly shifting provisions in their regulations to account for such funding arrangements, attempting to titrate disclosure requirements to a level that does not unfairly disadvantage either party or risk tainting awards while also not chilling the growing field of third-party arbitration funding.[18]

Within the United States, the landscape for dispute resolution funding in both litigation and arbitration is highly variable. Third-party funding is regulated entirely at the state level by state statutes, professional codes, and common law.[19] There is currently no federal legislation which addresses the legality of third-party dispute resolution funding.[20] Some U.S. states today expressly permit third-party litigation funding, although the scope of permissible practice varies;[21] others continue to outlaw champertous funding arrangements.[22] Some states maintain statutory prohibitions on champerty with carveouts for certain types of funding transactions.[23] Individuals or entities offering third-party funding services may strategically structure their funding agreements as loans rather than investments to tiptoe between differences among states' usury laws where they may not apply in commercial litigation

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17 Kirstin Dodge, Jonathan Barnett, Lucas Macedo, Patryk Kulig & Maria Victoria Gomez, *Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?*, Kluwer Arb. Blog (Jan. 31, 2022), http://arbitrationblog.kluwerarbitration.com/2022/01/31/can-third-party-funding-find-the-right-place-in-investment-arbitration-rules/ [https://perma.cc/8EX5-X84T].

18 *See* Int'l Ctr. for Settlement of Inv. Disps., Working Paper No. 5: Proposals for Amendment of the ICSID Rules 278–79 (2021), https://icsid.worldbank.org/sites/default/files/documents/WP%205-Volume1-ENG-FINAL.pdf [https://perma.cc/G74D-9TA3] (evaluating different suggested amendments to ICSID's rules on funding disclosures in light of their administrability and fairness to funded and nonfunded parties).

19 Elizabeth Korchin, Eric Blinderman & Patrick Dempsey, *In Review: Third Party Litigation Funding in USA*, Lexology (Nov. 22, 2021), https://www.lexology.com/library/detail.aspx?g=66de1180-f371-4be9-8dfc-5739d826225a [https://perma.cc/7SK6-XGTA].

20 *See id.*

21 *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 98–99 (2011).

22 Delaware and Florida, jurisdictions with prominent corporate activity and industry, maintain prohibitions on champerty. *See* Steven K. Davidson, Michael J. Baratz, Molly Bruder Fox & Chris Paparella, *Litigation Funding Update—Abolishing Common Law Champerty*, Steptoe (July 7, 2020), https://www.steptoe.com/en/news-publications/litigation-funding-update-abolishing-common-law.html [https://perma.cc/XHN8-WMUW].

23 New York prohibits champerty by statute but exempts transactions "having an aggregate purchase price of at least five hundred thousand dollars." N.Y. Jud. Law § 489(2) (McKinney 2023); *see* Davidson et al., *supra* note 22.

transactions.[24] The confusion arising from jurisdictional contradictions indicates a need for change.

This Note argues that the problems arising from divergent laws governing dispute resolution funding in the United States should be solved by passing federal legislation that establishes a uniform stance on third-party funding arrangements. This unification would be achieved by finally abolishing the doctrines of champerty and maintenance, and standardizing disclosure and transparency requirements for funding agreements between parties and funding entities. Part I explores the history and origins of the doctrines of maintenance and champerty, how they have evolved over time, and the rise of international commercial arbitration and of third-party funding as a component of the industry. Part II considers the difficulties inherent in establishing disclosure requirements for third-party funding arrangements through the lens of international arbitration, namely in balancing the desire to detect conflicts of interest and ensure the validity of judgments against the risk of unduly prejudicing either party. Part III investigates the international clashes between national laws on the topic of third-party funding as well as domestic conflicts of law among the several states of the United States and the negative impacts of those conflicts on U.S. interests. Part IV concludes by presenting this Note's proposed solution: unifying federal legislation which abolishes champerty and regulates third-party dispute resolution funding in the United States.

I. The Convergent Historical Paths of Champerty and International Arbitration

To understand the modern state of dispute resolution funding in the international commercial sphere, one must trace back and understand the origins of champerty and the concerns which animated the doctrine at its inception. This historical context evidences the degree to which the world and the legal ecosystem have changed.[25] Legal dispute resolution occupies a different place in society today than it has in centuries past. Modern international arbitration favors freedom and flexibility, and there is space for third-party funding within the field so long as it is accounted for appropriately.[26]

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24 *See* Korchin et al., *supra* note 19.

25 *See infra* notes 33–37 and accompanying text.

26 *See generally* Moses, *supra* note 1, at 1, 269–70 (highlighting the flexibility of arbitration as a major strength in international commercial dispute resolution, and suggesting that—although concerns may arise, including potential conflicts of interest—third-party funding can support claims that otherwise may not be brought).

A. History and Origins of Maintenance, Champerty, and Litigation Funding

The unease with which courts and individuals have historically viewed the funding of legal disputes by third parties is encapsulated in the common law tort of champerty, which traces its origins back several centuries.[27] Black's Law Dictionary defines "champerty" as

> [a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif[ically], an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.[28]

In other words, champerty occurs when a third party with no personal stake in a lawsuit lends aid to one of the suit's parties in exchange for part of the payout if that party prevails in the suit.[29] Some conceive of champerty as "gambling" on lawsuits by third parties.[30] Champerty is a subspecies of maintenance,[31] an equally old English common law tort which refers more generally to the improper interference by an uninvolved party in the lawsuit of another, either financially or otherwise.[32]

The doctrines of champerty and maintenance originated in medieval England, where nobles and lords were very strong, and courts were comparatively weak.[33] The concept arose from a concern that feudal lords would manipulate their power and wealth to unduly influence the justice system, throwing their resources and influence behind otherwise weak claims in pursuit of outcomes which better suited their goals.[34] As English social structure evolved, courts became stronger and more independent from the ruling class, and the concerns originally animating the

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27 *See* Chiann Bao, *Third Party Funding in Singapore and Hong Kong: The Next Chapter*, 34 J. Int'l Arb. 387, 388 (2017).

28 *Champerty*, Black's Law Dictionary (11th ed. 2019).

29 *See* Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, 49 U.S.F. L. Rev. 237, 237–39 (2015).

30 *See, e.g.*, Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DePaul L. Rev. 453, 456–57 (2011); Langford, *supra* note 29.

31 Sebok, *supra* note 30, at 453.

32 *Maintenance*, Black's Law Dictionary (11th ed. 2019) ("Improper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation."). This Note focuses on champerty, but discussions involving litigation funding often mention both champerty and maintenance, occasionally using the terms interchangeably.

33 *See* Bao, *supra* note 27, at 388.

34 *See id.*

doctrines subsided.[35] England finally abolished criminal and civil liability for champerty in 1967, thereby legalizing dispute resolution funding arrangements that would have previously been barred under the doctrine.[36] The U.K. House of Lords has since described the doctrines of maintenance and champerty as "so old that their origins can no longer be traced" and "almost invisible."[37]

B. American Jurisprudence

The Supreme Court of the United States has only tangentially considered questions of maintenance and champerty, typically relying on the definition of maintenance from Blackstone's Commentaries: "officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."[38] Champerty, however, is the more directly applicable tort to describe modern third-party dispute resolution funding schemes,[39] and its definition is highly variable across jurisdictions.[40] At common law, as originally inherited from the British, both maintenance and champerty were torts; in the United States today, the legality of these activities varies by state.[41] Some U.S. states have passed statutes specifically addressing champerty,[42] some states rely on judge-made rules

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35 *See id.*

36 Criminal Law Act 1967, c. 58, §§ 13, 14 (Eng. & Wales); *see also* Bao, *supra* note 27, at 388.

37 Giles v. Thompson [1993] UKHL 2, [1994] 1 AC 142 [1] (appeal taken from Eng.).

38 4 William Blackstone, Commentaries *134; *see, e.g.*, *In re* Primus, 436 U.S. 412, 424 n.15 (1978); Sprint Commc'ns Co. v. APCC Servs., 554 U.S. 269, 306 n.3 (2008) (Roberts, C.J., dissenting). Many state courts have also used this definition in cases of external intermeddling in litigation, with minor grammatical changes as reflected in its republication in various legal treatises. *See, e.g.*, Locklear v. Oxendine, 65 S.E.2d 673, 676 (N.C. 1951) (quoting Blackstone's definition); Christie v. Sawyer, 44 N.H. 298, 300 (1862) (same); Andrews v. Thayer, 30 Wis. 228, 233 (1872) (same); Manning v. Sprague, 18 N.E. 673, 673 (Mass. 1888) (same); McKellips v. Mackintosh, 475 N.W.2d 926, 928 (S.D. 1991) (quoting 14 C.J.S. *Champerty and Maintenance* § 1 (1939)); State *ex rel.* Carr v. Cabana Terrace, Inc., 153 So. 2d 257, 259 (Miss. 1963) (quoting 10 Am. Jur. 2d *Champerty and Maintenance* § 3 (1962)); *In re* Ratner, 399 P.2d 865, 874 (Kan. 1965) (quoting 10 Am. Jur. 2d *Champerty and Maintenance* § 2 (1962)); Newkirk v. Cone, 18 Ill. 449, 453 (1857).

39 *See supra* note 29 and accompanying text.

40 *See, e.g.*, *infra* notes 47–51 and accompanying text.

41 *See* Sebok, *supra* note 21, at 98–99, 107; Steven Garber, Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns 17 (2010).

42 *See, e.g.*, Miss. Code Ann. § 73-3-57 (2023) (making "[c]hamperty and maintenance unlawful"); Ga. Code Ann. § 13-8-2(a)(5) (2023) ("Contracts deemed contrary to public policy include . . . [c]ontracts of maintenance or champerty.").

emerging from the evolving common law,[43] and some states have left the question largely unanswered.[44]

Among the roughly half of U.S. states that maintain champerty prohibitions, the rationales for doing so vary.[45] Some state courts cite potential risks, such as a flood of litigation or tainting the attorney-client relationship.[46] Some state courts use definitions that outright describe champerty as "unlawful,"[47] while others describe it merely as an "agreement"[48] or "bargain"[49] without attaching a judgment as to the lawfulness of the activity. Some states' definitions contemplate a third party who takes on the supported claim entirely at his own cost and risk,[50] while

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43 *See, e.g.*, Wilson v. Harris, 688 So. 2d 265, 269–70 (Ala. Civ. App. 1996) (looking to other states' courts' nonbinding decisions on champerty to inform a decision on a champertous arrangement absent state statutory guidance); Johnson v. Wright, 682 N.W.2d 671, 676–80 (Minn. Ct. App. 2004) (acknowledging that "[c]ase law in Minnesota concerning champerty and maintenance is neither abundant nor recent," and discussing general common law principles and definitions as well as considering common law approaches to champerty and maintenance in other U.S. jurisdictions).

44 *See* Sebok, *supra* note 21, at 100 n.167.

45 *See id.* at 98–107.

46 *See, e.g.*, Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

> The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Id.

47 WFIC, LLC v. La Barre, 148 A.3d 812, 818 (Pa. Super. Ct. 2016) ("Champerty may be defined as the *unlawful* maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of the litigation." (emphasis added) (quoting *In re* Frazier's Est., 75 Pa. D. & C. 577, 594 (Orphans' Ct. 1951))).

48 Mut. of Omaha Bank v. Kassebaum, 814 N.W.2d 731, 735–36 (Neb. 2012) ("Champerty consists of an *agreement* whereby a person without interest in another's suit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation." (emphasis added) (quoting Andersen v. Ganz, 572 N.W.2d 414, 418 (Neb. Ct. App. 1997))).

49 Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000) ("Champerty is defined as a *bargain* by a person with a plaintiff or a defendant for a portion of the matter involved in a suit in the event of a successful termination of the action, which the person undertakes to maintain or carry on at his own expense." (emphasis added)).

50 DaimlerChrysler Corp. v. Kirkhart, 561 S.E.2d 276, 283 (N.C. Ct. App. 2002) ("'Champerty' is a form of maintenance whereby a stranger makes a 'bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to *carry on the party's suit at his own expense*.'" (emphasis added) (quoting Smith v. Hartsell, 63 S.E. 172, 174 (N.C. 1908))).

others only require that the funder supply some unspecified quantum of aid in exchange for a portion of the winnings if the claim is successful.[51]

A lawyer evaluating a proposed funding arrangement must ascertain the legality of champerty in that jurisdiction in order to determine whether the arrangement is permissible. Whether an arbitral award is enforced within a jurisdiction can hinge upon whether it is deemed contrary to that jurisdiction's public policy,[52] and absent unifying federal legislation, each state's unique amalgamation of champerty-related caselaw and statutes becomes emblematic of that state's public policy on the topic. Lawyers involved in arbitrations considering third-party funding therefore must attempt to ascertain this potentially confusing policy in states where they may need to seek enforcement of an award.

There is one form of fee arrangement similar to champerty with which many U.S. lawyers should be familiar: the contingency fee. When a lawyer takes a client on a contingency fee basis, the lawyer agrees to represent or provide legal services in pursuit of a judgment or settlement in exchange for a percentage of the client's ultimate recovery if the client's suit is successful.[53] Historically, many jurisdictions found contingency fee agreements to be champertous in that they represent an offer of services to help a litigant pursue their claim in exchange for a part of any potential judgment proceeds.[54] However, U.S. courts have long held that contingency fees are not champertous.[55] Contingency fees are very common in the United States today;[56] the American Bar Association Model Rules of Professional Conduct provide specifically for the use of contingency fees in approved applications in the attorney-client relationship.[57]

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51 Maslowski v. Prospect Funding Partners, 944 N.W.2d 235, 237 (Minn. 2020) ("Champerty is 'an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who *supports or helps enforce the claim*.'" (emphasis added) (quoting *Champerty*, Black's Law Dictionary (11th ed. 2019))).

52 *See infra* note 131 and accompanying text.

53 *See* Arthur L. Kraut, Note, *Contingent Fee: Champerty or Champion?*, 21 Clev. St. L. Rev. 15, 15 (1972).

54 *See* Adrian F. Twomey & M. Litt, *Competition, Compassion, and Champerty: The Contingent Fee in Profile*, 4 Irish Student L. Rev. 1, 7 (1994); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 Chi.-Kent L. Rev. 625, 626–27 (1995); *see, e.g.*, Key v. Vattier, 1 Ohio 132, 133 (1823) (finding an attorney-client agreement by which the attorney's only compensation would be part of the property in dispute if his client won to be illegal and void as champertous).

55 *See* Kraut, *supra* note 53, at 21; Williams v. City of Philadelphia, 57 A. 578, 579 (Pa. 1904) ("Contingent fees are not illegal. . . . [T]he law has long been settled that contracts for such fees are lawful and enforceable by the courts, and something more than the mere contingency of the compensation is necessary to make them champertous.").

56 *See* Painter, *supra* note 54, at 626 nn.3–9 and accompanying text.

57 Model Rules of Pro. Conduct r. 1.5(c) (Am. Bar Ass'n 2020) ("A fee may be contingent on the outcome of the matter for which the service is rendered . . . . A contingent fee agreement

As a form of litigation funding which once was illegal as champertous but now is widely accepted, contingency fee arrangements can serve as a helpful reference point in considering the place of third-party dispute resolution funding in the twenty-first century American legal system. Contingency fee arrangements and third-party funding both have the potential to grant indigent litigants access to the justice system they might not have had otherwise, but they retain critics due to their potential negative moral implications.[58]

C. Arbitration as a Means of International Commercial Dispute Resolution

Arbitration is a private system of dispute resolution by which parties are able to settle a legal dispute without necessarily involving the judicial courts of any nation.[59] Because the decisions of arbitral tribunals lack governmental force, parties must consent to give them power; this is most commonly achieved by including a binding arbitration clause in the parties' commercial contract.[60] In the absence of such a clause, parties can mutually consent to submit a dispute to arbitration by a "submission agreement."[61]

Arbitrators are not judges or other governmental actors—in fact, they need not even be lawyers—but rather private citizens appointed by the parties involved in the dispute.[62] Rather than following typical civil procedural requirements as to which jurisdiction's law should be applied, arbitrators make decisions based on which law or laws the parties have designated to govern their contract.[63] For example, if an arbitration clause says that any dispute arising in an automotive manufacturing transaction is to be decided by applying German substantive automotive manufacturing law, the arbitrators must use that law—even if none of the arbitrators, neither of the parties, nor the seat of the arbitration itself has any connection to Germany or German law.

International commercial arbitrations can be facilitated by a preexisting administering institution or can be conducted ad hoc, in which the

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shall be in a writing signed by the client and shall state the method by which the fee is to be determined . . . .").

58 Kraut, *supra* note 53, at 16 ("The claim is made that the attorney, by reason of the contingent fee contract, is changed from a knight in shining armor, protecting his client's case, into an *ambulance chaser* and *shyster*, protecting only his fee."); *id.* at 26 ("Litigation in these areas [of major public policy issues, such as workers' rights and discrimination] is initiated primarily by individuals and groups too poor to pay a fixed fee. The contingent fee system has allowed persons, who otherwise could not afford a lawsuit, to assert their claims and have their day in court . . . .").

59 Moses, *supra* note 1, at 1.

60 *See id.* at 1–2.

61 *Id.* at 20.

62 *Id.* at 2.

63 *See id.* at 63.

arbitral tribunal is "[f]ormed for [the] particular purpose" of resolving a specific dispute by the parties themselves.[64] In an ad hoc arbitration, the parties are responsible for handling the many administrative steps in operating an arbitration and either create or choose rules to govern their procedure.[65] In institutional arbitration, the parties hand over responsibility for much of the administration to the arbitral institution and operate their arbitration pursuant to that institution's procedures and protocols.[66] Most arbitral institutions maintain and utilize their own sets of arbitral rules, which provide specific regulations for issues including arbitrator appointments, discovery and disclosure, time limits on proceedings, how to challenge an arbitrator, raising questions of bias or conflicts of interest, and the form and structure of awards.[67] Rules can vary across regions as different institutions adopt new ideas but generally shift along similar lines over time to reflect commonly agreed-upon best practices in the field.[68]

Given the private nature of arbitration, one might wonder, What happens if a party fails to comply with a decision—for example, by refusing to pay what it owes? Even though arbitration is administered separately from court systems, international agreements and domestic laws permit court enforcement of valid arbitral awards with the strength of a legal judgment.[69] To this end, an important international agreement in the field is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention.[70] The domestic courts of all state parties to the Convention—which currently number 172, including the United

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64 *Ad Hoc*, Black's Law Dictionary (11th ed. 2019); *see also Arbitration*, Black's Law Dictionary (11th ed. 2019) (defining "ad hoc arbitration" as "1. Arbitration of only one issue. 2. An arbitration that does not involve an arbitration provider or institution to administer the proceeding").

65 *See* Moses, *supra* note 1, at 10. The United Nations Commission on International Trade Law ("UNCITRAL") maintains and distributes Arbitration Rules and a Model Law, which are frequently used in ad hoc arbitrations. *See* U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, Annex 1, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008); U.N. Comm'n on Int'l Trade L., Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/65/17, at 79–98 (2010).

66 *See* Moses, *supra* note 1, at 10–13. Some of the most prominent arbitral institutions today include the ICC International Court of Arbitration, the American Arbitration Association's International Centre for Dispute Resolution, the London Court of International Arbitration, the Hong Kong International Arbitration Center, and the Singapore International Arbitration Centre.

67 *See, e.g.*, *Arbitration Rules*, Int'l Chamber of Com. (Jan. 1, 2021), https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ [https://perma.cc/VXK2-WKB9]; The London Ct. of Int'l Arb., Arbitration Rules (2020).

68 *See* Moses, *supra* note 1, at 10–13; Barnett et al., *supra* note 11.

69 *See* Moses, *supra* note 1, at 1–3.

70 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

States[71]—must undertake to enforce valid arbitration awards rendered in any other member state.[72] The Convention provides a list of grounds on which parties may seek to prevent enforcement of awards, which includes incapacity of the parties; improper composition or procedure of the arbitral tribunal; an arbitrator acting in excess of the authority granted by the parties; lack of notice or fairness in the proceedings; invalidity of an agreement under the chosen law or the law of the seat nation; or a competent authority of the chosen legal jurisdiction or the seat nation setting aside a pending award.[73] Because most nations' laws provide that an arbitrator conflict of interest is grounds for challenging an arbitral award—including the United States[74]—the discovery of such a conflict can seriously impair a victorious party's ability to seek enforcement of that award later.[75]

D. The Recent Rise of Third-Party Funding in International Commercial Arbitration

In the ever-growing world of commercial arbitration as a means of international dispute resolution, third-party funding continues to gain a more solid foothold in the field.[76] Arbitration can be a very expensive process, especially in larger disputes requiring a tribunal of more than one arbitrator and disputes involving expert or technical input or extensive document requests.[77] Parties facing a binding arbitration agreement that are unable to cover their portion of arbitration costs can turn to third-party funding as a potential solution.[78]

Although hard data is elusive due to the private and confidential nature of international commercial arbitration,[79] scholars have noted signs of an increased volume of international commercial arbitrations

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71 U.N. Comm'n on Int'l Trade L., *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [https://perma.cc/3HR6-78XK]. The United States ratified the New York Convention on September 30, 1970. *Id.*; *see also* U.S. Federal Arbitration Act, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–08).

72 New York Convention, *supra* note 70, 21 U.S.T. at 2519, 330 U.N.T.S. at 38.

73 *Id.* at 21 U.S.T. at 2520, 330 U.N.T.S. at 40–42. *See* Moses, *supra* note 1, at 231–38. There is also a public policy challenge available under the Convention. *See infra* note 131 and accompanying text.

74 9 U.S.C. § 10(a)(2) (allowing U.S. courts to vacate arbitral awards "where there was evident partiality or corruption in the arbitrators").

75 *See* Dalal Alhouti & Georgia Fullarton, *Conflicts of Interest in International Commercial Arbitration*, Charles Russell Speechlys (Aug. 4, 2023), https://www.charlesrussellspeechlys.com/en/insights/expert-insights/dispute-resolution/2023/conflicts-of-interest-in-international-commercial-arbitration/ [https://perma.cc/43R3-95TM].

76 Barnett et al., *supra* note 11.

77 *See* Moses, *supra* note 1, at 56–57, 164–65.

78 *See id.* at 269–70.

79 Trusz, *supra* note 15, at 1651.

involving third-party funding, including an increase in such funding in domestic litigation.[80] Domestic legislation in nations representing major hubs of international commerce has begun to evolve to accommodate funding relationships in international commercial disputes previously viewed as illegally champertous.[81] This evolution has led to a shift in large-scale institutional commercial arbitration toward an acceptance of third-party funding.[82] Today, there are numerous large, profitable corporations built primarily around providing funding to parties in litigation and arbitration.[83] These entities may voluntarily join industry self-regulating organizations, such as the Association of Litigation Funders of England and Wales, but at present, no country has established an official binding regulatory system for such enterprises.[84]

Proponents of third-party funding in international commercial arbitration highlight its potential to promote more widespread access to justice by enabling impecunious individuals to explore the possibility of bringing a claim which they would otherwise lack the means to pursue.[85] Simply by applying for funding, prospective claimants receive

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80 *See id.*; Sarah E. Moseley, Note, *Disclosing Third-Party Funding in International Investment Arbitration*, 97 Tex. L. Rev. 1181, 1181, 1186–92 (2019) (comparing the relative merits of third-party funders of funding arbitrations versus litigations, since most arbitration funders are also litigation funders).

81 For example, Hong Kong amended its laws in 2017 to define terms related to third-party funding, establish codes of practice, and exempt such funding agreements from penalties in the arbitration context, while maintaining the tort of champerty. Arbitration and Mediation Legislation (Third Party Funding) (Amendment), No. 6, (2017) 2 O.H.K., §§ 98E–98O. The same year, Singapore abolished the torts of maintenance and champerty entirely. Civil Law Act, (Cap 43, 2017 Rev Ed) § 5A (Sing.). For further discussion on these changes, see Bao, *supra* note 27, at 387–89 and Varun Mansinghka, *Third-Party Funding in International Commercial Arbitration and Its Impact on Independence of Arbitrators: An Indian Perspective*, 13 Asian Int'l Arb. J. 97, 99–104 (2017) (reviewing updates in United Kingdom, Singapore, Hong Kong, and India).

82 *See Third Party Funding in Arbitration—More Commonly Used*, Stockholm Chamber of Com. Arb. Inst. (Dec. 20, 2021), https://sccarbitrationinstitute.se/en/news-events/news/third-party-funding-arbitration-more-commonly-used [https://perma.cc/CUS3-88B3].

83 Most of these firms were formed in the late 2000s. *See A Brief History of Litigation Finance*, *supra* note 8. Some major players include Omni Bridgeway, headquartered in Australia; Baker Street Funding, in New York; and Woodsford Group and Burford Capital, both based in the U.K. *Arbitration Financing*, Omni Bridgeway, https://omnibridgeway.com/litigation-funding/arbitration-financing [https://perma.cc/S5GA-CS54]; *International Arbitration Financing*, Baker St. Funding, https://bakerstreetfunding.com/litigation-financing/international-arbitration [https://perma.cc/N4UA-KGWJ]; *Litigation Funding*, Woodsford Grp. Ltd., https://woodsford.com/us/litigation-funding [https://perma.cc/AV5Y-YHF5]; *Disputes We Finance*, Burford Cap. LLC, https://www.burfordcapital.com/what-we-do/disputes-we-finance [https://perma.cc/7WKL-F6A4].

84 Jean Kalicki, *Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2)*, Kluwer Arb. Blog (Mar. 13, 2012), http://arbitrationblog.kluwerarbitration.com/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/ [https://perma.cc/BLT8-Y4DT].

85 *See* Trusz, *supra* note 15, at 1656–57.

a helpful assessment of the merits of their case through the rigorous scrutiny that funding entities apply to a potential case before electing to establish an agreement.[86] If the claim is selected and an agreement is created, claimants can gain the funder's assistance in selecting counsel, among other resources.[87]

II. Challenges in Balancing Disclosure Requirements for Third-Party Funding Agreements in International Commercial Arbitration

While the emergence of third-party funding into mainstream international commercial arbitration carries a number of potential benefits, it poses risks as well, perhaps most notably regarding conflicts of interest and disclosure.[88] Conflicts with third-party funders can threaten the impartiality of an arbitral tribunal and the validity of the ensuing award.[89] The risk of such conflicts increases if members of the tribunal are initially unaware of a funder's involvement.[90]

A. The Risks of Inadequate Disclosure: Conflicts of Interest and Tainted Arbitral Awards

In arbitration, as in any legal process, conflicts of interest can arise where a practitioner's personal interests clash with her legal duties.[91] If two corporations bring a case in a U.S. court and the assigned judge owns a financial stake in one of the party corporations, the judge would be expected to recuse herself or otherwise acknowledge the inherent conflict as a barrier to her adjudication of that suit.[92] Under International Bar Association ("IBA") guidelines, the same is expected of arbitrators.[93] Rules from most major arbitral institutions provide that

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86 *See id.* at 1657; *see, e.g.*, John Lazar, *Adding Value Beyond Capital: During Case Review*, Burford Cap. LLC (Oct. 12, 2019), https://www.burfordcapital.com/insights-news-events/insights-research/adding-value-beyond-capital-during-case-review/ [https://perma.cc/9ZPN-YVCQ].

87 *See* Trusz, *supra* note 15, at 1657.

88 *See id.*

89 *See* Moseley, *supra* note 80, at 1193.

90 *See id.* (explaining that even if an arbitrator cannot be biased if they are not aware of a conflict, disclosing conflicts avoids issues with the enforceability of an award later because it is not reliable to expect that conflicts will not be exposed later on); Moses, *supra* note 1, at 270 (noting that a conflict of interest cannot be avoided if it is not disclosed).

91 *See Conflict of Interest*, Black's Law Dictionary (11th ed. 2019) ("A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.").

92 *See* Model Code of Jud. Conduct r. 2.11 (Am. Bar Ass'n 2020) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . . .").

93 *See* Int'l Bar Ass'n, IBA Guidelines on Conflicts of Interest in International Arbitration 5 (2014).

the "impartiality" and "independence" of an arbitrator are extremely important to the overall sanctity of an arbitration, as well as the validity of its resulting award, and any indication to the contrary is grounds for removing that arbitrator from the tribunal.[94] Since arbitrators are private citizens appointed to individual disputes and not full-time public servants like judges, the risks for conflicts can be even higher in arbitration than in litigation.[95]

The presence of third-party funding agreements in commercial arbitration further complicates potential conflicts of interest due to the possibility of connections between the funder and members of the arbitral tribunal.[96] An arbitrator with a financial connection to a funder of one of the parties to the arbitration would pose a major risk of bias and partiality toward the funded party, as an arbitrator who stood to financially gain from the success of one party would surely struggle to be entirely neutral in her decision making. In apparent recognition of this risk, the 2014 IBA Guidelines expanded "parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party" to include "relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding."[97]

Unlike judges in courts of governmental authority, however, arbitrators are only empowered to make orders and demands of parties to the extent that the rules governing that arbitration allow.[98] While arbitrators can typically request production of documents directly related to the legal matter at issue from either party, documents pertaining to a party's private finances may fall beyond their reach.[99]

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94 *See, e.g.*, Int'l Chamber of Com., *supra* note 67, arts. 11, 14 (requiring that arbitrators be independent and impartial to all parties in the arbitration and providing for procedures for challenging the appointment of an arbitrator on an alleged lack of independence and impartiality); U.N. Comm'n on Int'l Trade L., *supra* note 65, arts. 11–13 (requiring proactive disclosure by appointed arbitrators of "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence" and providing grounds for removal of an arbitrator for violation thereof).

95 *See* Moses, *supra* note 1, at 141–47 (explaining potential conflicts of interest risks for arbitrators). For example, arbitrators who come from private practice may be more likely to have connections to large firms and multinational corporations, making it more difficult to fully check for all possible conflicts than a career judge whose personal life and holdings are more regularly scrutinized. *See id.*

96 *See* Moseley, *supra* note 80, at 1189–90.

97 Int'l Bar Ass'n, *supra* note 93, at 16.

98 *See supra* note 63 and accompanying text.

99 *See generally* Pelin Baysal & Bilge Kağan Çevik, *Document Production in International Arbitration: The Good or the Evil?*, Kluwer Arb. Blog (Dec. 9, 2018), https://arbitrationblog.kluwerarbitration.com/2018/12/09/document-production-in-international-arbitration-the-good-or-the-evil/ [https://perma.cc/M5W5-L9L5] (discussing a case where a party submitted financial expert reports to the arbitrators but not all the documents those experts reviewed, and a court ultimately nullified the award).

Recent changes to the guiding rules of various international arbitral institutions acknowledge the existence and potential impacts of third-party funding on arbitral proceedings and take steps toward regulating disclosure in such funding arrangements.[100] These rules generally require parties receiving funding to disclose the presence and identity of the funder as soon as the funding agreement is established in order to give the tribunal and opposing party adequate warning of the potential for conflict.[101] In ad hoc international commercial arbitrations in which the arbitral agreement is the primary controlling document, parties are free to establish their own guidelines for whether to permit third-party funding and, if so, what the disclosure requirements will be.[102] If the losing party does not pay, however, and court enforcement is sought, an award resulting from an ad hoc arbitration using third-party funding may still be vulnerable to later issues, potentially from an undiscovered conflict of interest or a public policy conflict with the laws of the jurisdiction where enforcement is sought.[103]

Scholars' opinions vary on how much parties must disclose to ensure thorough conflicts checks and fair dealings.[104] Some urge diligence about early disclosure of third-party funding to detect potential conflicts of interest given the risk of an arbitral award being invalidated on conflict grounds.[105] Others warn that because of the inherent sensitivity and strategic value of information present in most third-party funding agreements, disclosure requirements unfairly disadvantage the funded party by granting undue access to tactical aspects of their case.[106] For unifying legislation to adequately address the risks associated with

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100 *See, e.g.*, *Admin. Res. 18/2016: Recommendations Regarding the Existence of Third-Party Funding in Arbitrations Administered by CAM-CCBC*, Ctr. for Arb. & Mediation Chamber Com. Braz.-Can. (July 20, 2016), https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/ [https://perma.cc/C4UD-MAMK]; China Int'l Econ. & Trade Arb. Comm'n, International Investment Arbitration Rules art. 48 (2024); H.K. Int'l Arb. Ctr., Administered Arbitration Rules art. 44 (2018).

101 *See, e.g*, China Int'l Econ. & Trade Arb. Comm'n, *supra* note 100, art. 48; H.K. Int'l Arb. Ctr., *supra* note 100, art. 44.

102 *See* Moses, *supra* note 1, at 10.

103 *See supra* notes 70–75 and accompanying text; *infra* note 131 and accompanying text. For an overview of fourteen major commercial jurisdictions' legal stances on third-party funding, see *Jurisdiction Guide to Third Party Funding in International Arbitration*, Pinsent Masons (May 7, 2021, 12:37 PM), https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration [https://perma.cc/38KX-WFN9].

104 *Compare* Barnett et al., *supra* note 11 ("Disclosure and transparency seek to avoid conflicts of interest between an arbitral tribunal and the parties (or any related parties, including funders), thereby ensuring the enforceability of an award."), *with* Dodge et al., *supra* note 17 ("[D]isclosure of details of the funding agreement provides an unfair advantage to the non-funded party, creating an unbalanced position that arbitrators and arbitral institutions should avoid.").

105 *See* Barnett et al., *supra* note 11.

106 *See* Dodge et al., *supra* note 17.

third-party dispute resolution funding, it must carefully titrate the appropriate balance of disclosure to detect conflicts of interest without exposing overly sensitive confidential information.

The primary consequence threatened by conflicts stemming from inadequate disclosure of third-party funding agreements is the potential to taint, and ultimately weaken the enforceability of, the arbitral award.[107] If, after a final award has been rendered, it is discovered that an arbitrator's impartiality was undermined, that is typically grounds for nullifying or setting aside the award.[108] In international arbitration, awards are granted at the location where the arbitration takes place, which is often a neutral forum.[109] To collect their payment, prevailing parties generally must bring that award to the jurisdiction where the losing party's assets are based.[110] If the losing party is less than fully compliant in handing over what is owed, collecting the judgment may require enforcing the award with the strength of a judgment from that nation's courts[111]—which can only be accomplished if the sanctity and enforceability of an award have been maintained.

Once an arbitral tribunal has rendered its award and finished its duties, it becomes *functus officio*[112] and loses all of its legal power.[113] After this point, tribunals are generally only capable of reconvening within a limited time period to clarify or correct ministerial errors.[114] Once that period has passed, generally only a court-ordered remand may compel further duties by the tribunal and cannot require a substantively changed ruling.[115] Arbitral awards are therefore quite final

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107 *See* Alexander J. Bělohlávek, *Procedural Irregularities and Arbitrator Misconduct During Proceedings*, *in* The Cambridge Handbook of Judicial Control of Arbitral Awards 54, 62 (Larry A. DiMatteo et al. eds., 2021).

108 *See, e.g.*, 9 U.S.C. § 10(a) ("[A U.S. court] may make an order vacating the award . . . where there was evident partiality or corruption in the arbitrators . . . ."); New York Convention, *supra* note 70, art. V, ¶ 1 (allowing national courts of state parties to the Convention to refuse recognition and enforcement of a foreign arbitral award if a party demonstrates that the composition of the arbitral tribunal or procedure "was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place").

109 Moses, *supra* note 1, at 51–52. Many international commercial arbitrations occur in locations where large arbitral institutions have been set up, typically in places known as centers for international commerce such as London, Hong Kong, and Singapore. *See id.* at 12–14.

110 *See id.* at 226–27.

111 *See supra* notes 70–75 and accompanying text.

112 *Functus officio* is Latin for "having performed his or her office," and is used in legal contexts to mean "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *Functus Officio*, Black's Law Dictionary (11th ed. 2019).

113 Moses, *supra* note 1, at 202–03.

114 *Id.* at 213–14.

115 *See id.* at 214–15; *see also* T. Co. Metals LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342–43 (2d Cir. 2010) (holding that a *functus officio* arbitral panel may reconvene after an award

once rendered, so a prevailing party has few options for redress if a potential conflict that renders the award unenforceable is discovered after the award is signed.[116]

If the presence of a third-party funder is not discovered until after an arbitral tribunal has become *functus officio*, foreign courts may find a conflict of interest that prevents them from enforcing the tribunal's judgment.[117] Unlike court judgments, which can be enforced in their respective nations without secondary consideration, private international commercial arbitrations do not automatically carry the force of law;[118] the independence and impartiality of an arbitral tribunal are key to ensuring the legitimacy of the arbitral process and the ultimate enforceability of the award.[119] It is therefore important that participants in arbitration receiving aid or funding from uninvolved third parties initially disclose at least the presence of the funder so that the arbitral panel can make necessary adjustments to the composition of the tribunal.

B. The Risks of Too Much Disclosure: Unfair Tactical Advantages and Jurisdictional Futility

The 2022 amendments to the ICSID Rules allow arbitrators to not only require parties to disclose the presence and identity of potential funders but also to disclose the funding agreement itself.[120] Some foresee negative consequences of the amendments arising from a disclosure scope that is now too broad.[121] Because funding agreements are made to specifically fit each potential recipient's needs based on their financial situation and the nature of their case, they can contain potentially sensitive

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has been rendered to correct clerical mistakes or mathematical errors, and may only reconvene to reinterpret the record or modify any more substantive conclusion if the parties have agreed to grant the arbitrator further authority).

116 *See* Moses, *supra* note 1, at 216–24.

117 *See* Rachel Howie & Geoff Moysa, *Financing Disputes: Third-Party Funding in Litigation and Arbitration*, 57 Alta. L. Rev. 465, 492–96 (2019) (discussing how delayed or absent disclosure of the presence of a third-party funder can constitute a conflict of interest, causing enforcement issues for the resulting award); *see also* Ridhima Sharma, *Third Party Funding in International Commercial Arbitration*, 12 Nat'l U. Advanced Legal Stud. L.J. 61, 70–71 (2018) (examining Singaporean arbitration law, which requires third-party funders to follow disclosure regulations or otherwise waive their ability to enforce their rights).

118 *See* Moses, *supra* note 1, at 1–3.

119 *See* Howie & Moysa, *supra* note 117, at 492–96.

120 Int'l Ctr. for Settlement of Inv. Disps., *supra* note 16, at r. 14(4) ("The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3)."). These amendments mark the fourth time the Rules have been updated and represent the most extensive changes to date. *ICSID Rules and Regulations Amendment*, Int'l Ctr. for Settlement of Inv. Disps. (July 1, 2022), https://icsid.worldbank.org/resources/rules-amendments [https://perma.cc/92DH-97WP].

121 *See, e.g.*, Dodge et al., *supra* note 17.

information, such as frank—and potentially damaging—internal assessments of the merits of the case or confidential communications.[122] Requiring a party to share the contents of such an agreement with the arbitral tribunal and the opposing party therefore presents a large privacy risk for funders and funded parties.[123] The information may bear so specifically on questions related to the merits of the dispute that the risks of bias or strategic unfairness persist even if disclosure is limited to only the arbitrators.[124] Because funding agreements typically arise only after lengthy negotiations between the litigant and the funder regarding the perceived merits of the case, an agreement document containing these assessments may irrevocably alter the ability of the arbitrator to consider the merits without bias.[125]

Rules that extend as far as these amendments also raise potential procedural and administrability concerns across jurisdictions. Because commercial arbitration is a private method of law, its provisions for confidentiality and disclosure must always bow to legal requirements coming from sources of law carrying governmental authority.[126] Prior to the adoption of the amendments, ICSID recognized in its Working Papers that information regarding a funding agreement may be entitled to protection from disclosure in certain jurisdictions as confidential business information, under attorney-client privilege, or "otherwise confidential."[127] In cases where binding state law in the seat of the arbitration prevents the disclosure of certain items or, conversely, requires access to documents meant to be kept secret, arbitral rules would have to defer to the relevant state law, creating potential jurisdictional inequities and unfairness in their application.[128] In an international dispute

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122 *See id.*

123 *See id.*; Int'l Ctr. for Settlement of Inv. Disps., *supra* note 18, at 279.

124 Dodge et al., *supra* note 17 ("The danger that a funding agreement will inappropriately impact an arbitrator's assessment of a case means that even *in camera* review of funding agreements should not be required absent compelling circumstances.").

125 *See id.*

126 *See* Moses, *supra* note 1, at 57–58 ("Even if the parties agree on confidentiality provisions, these provisions may be overridden if there is a court challenge."); *see also* Am. Arb. Ass'n, Drafting Dispute Resolution Clauses: A Practical Guide 32 (2013), https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf [https://perma.cc/57ME-RGNT] ("*Except as may be required by law*, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties." (emphasis added)).

127 Int'l Ctr. for Settlement of Inv. Disps., *supra* note 18, at 279.

128 *See* Moses, *supra* note 1, at 57–58. For example, communications between an in-house counsel and her employer or client are protected by the doctrine of attorney-client privilege in the United States, but they are *not* protected by its E.U. analog, "legal professional privilege." *See* Jacques-Philippe Gunther, William H. Rooney, Christina Hummer & Rebecca N. Zimmer, *Beware: Legal Privilege Rules Differ Between the U.S. and the EU*, Willkie Farr & Gallagher (June 19, 2008), https://www.willkie.com/-/media/files/publications/2008/06/

resolution system like commercial arbitration, drafters of arbitral rules must be careful not to infringe upon the national laws of countries where they hope to operate in order to keep the playing field as fair and equal as possible.

III. Conflicts of Law Regarding Champerty and Dispute Resolution Funding

In addition to conflicts of law associated with disclosure, varying definitions and legalities associated with champerty and dispute resolution funding can give rise to complex situations where lawyers and funders become unsure of whether their arrangements are permissible. The varying treatment of champerty in national laws can potentially result in situations where a lawyer's relationship with a client is normal and acceptable in the client's home country but illegal in the lawyer's home country.[129] A parallel scenario persists among U.S. states given the inconsistency of domestic champerty laws.[130] These problems can be mitigated by the unification of law and understanding on these topics.

A. Variations in Champerty Laws and the Effect on Commerce and Dispute Resolution

Nations whose laws retain older definitions of champerty that conflict with modern understandings of third-party funding create potential complications for all parties to commercial disputes involving a party from that nation. The New York Convention provides that the national courts of a country where enforcement of a foreign arbitral award is sought may refuse enforcement of that award when it is "contrary to the public policy of that country."[131] The presence of a third-party funder in an arbitration would present precisely this type of public policy obstacle to enforcing that arbitration's award in a jurisdiction where champerty was illegal.[132] These "holdout" nations thus present roadblocks even

beware--legal-privilege-rules-differ-between-the__/files/legalprivilegerulesdifferbetweenusandeupdf/fileattachment/legalprivilegerulesdifferbetweenusandeu.pdf [https://perma.cc/Q3SX-FEU4].

129 *See infra* Section III.A.

130 *See infra* Section III.B.

131 New York Convention, *supra* note 70, art. V(2)(b).

132 *See* Moses, *supra* note 1, at 219–20. *See generally* Hussein Haeri, Clàudia Baró Huelmo & Giacomo Gasparotti, *Third-Party Funding in International Arbitration*, Glob. Arb. Rev. (Dec. 30, 2022), https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration [https://perma.cc/GG4H-FMUM] (discussing how third-party funding can be found contrary to public policy in common law and civil law jurisdictions). For example, punitive damages may be granted in arbitration under U.S. law but may not in many civil law jurisdictions; if one took such an arbitral award granting punitive damages rendered in the U.S. and sought its enforcement in one of those foreign jurisdictions, it

when they are not the seat of the arbitration but merely the location where awarded assets are sought.[133]

Nations like Mexico and Serbia, whose laws fail to speak directly to the legality of champerty and third-party funding, create situations where counsel entering into disputes involving a party from that nation must seek out alternative indicators of that nation's public policy to predict whether the presence of third-party funding will render an award unenforceable.[134] Other jurisdictions maintain legal prohibitions on champerty but rely on judge-made rules or narrow statutory amendments carving out specific allowances for certain types of third-party litigation and arbitration funding, such as Hong Kong and New Zealand.[135] Ireland, among the fiercer holdouts, maintains legal prohibitions on champerty and maintenance for any potential funder who lacks a personal stake in the dispute, meaning no uninvolved large for-profit funding entity may lend funding to a party in an Irish legal dispute.[136] In an increasingly globalized world of open international commerce, variations in the legality of third-party dispute resolution funding present obstacles to reliability and chill commercial transactions with entities from certain nations compared with others.

B. Negative Effects on U.S. Interests Resulting from Conflicts in Legal Treatment of Champerty and Funding Relationships

The hazardous landscape of champerty laws in the United States presents great obstacles to foreign lawyers and firms looking to partner with U.S. enterprises and may push businesses to look elsewhere for

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would likely be refused by that jurisdiction's courts as contrary to public policy. Moses, *supra* note 1, at 209–10.

133 *See, e.g.*, Moses, *supra* note 1, at 243–44 (describing how a Chinese court declined to enforce an arbitral award for monies owed to a heavy metal band because their music was deemed "against 'national sentiments,' and accordingly, contrary to the social and political interests [of China]").

134 *See* Paloma Castro, *In Review: Third Party Litigation Funding in Mexico*, Lexology (Dec. 8, 2022), https://www.lexology.com/library/detail.aspx?g=eced1332-2c5b-46e0-ac26-abc0714caa6c [https://perma.cc/W66V-YSCN]; Sima Živulović, *Admissibility of Third-Party Funding in Arbitration Proceedings in Serbia: A Search for a Definitive Answer*, Kluwer Arb. Blog (Aug. 8, 2022), http://arbitrationblog.kluwerarbitration.com/2022/08/08/admissibility-of-third-party-funding-in-arbitration-proceedings-in-serbia-a-search-for-a-definitive-answer/ [https://perma.cc/73TB-2HZT].

135 *See* Irene Lee Wing Yun, *In Review: Third Party Litigation Funding in Hong Kong*, Lexology, https://www.lexology.com/library/detail.aspx?g=a1afe95b-0aed-432e-842b-3383d6d5a872 [https://perma.cc/6LTA-HHP5]; Jason Geisker & Simon Gibbs, *In Review: Third Party Litigation Funding in New Zealand*, Lexology (Dec. 8, 2022), https://www.lexology.com/library/detail.aspx?g=24bc9642-572d-4950-b2c0-0df19367503d [https://perma.cc/X686-WZHE].

136 *See* Colin Monaghan, *Dispute Resolution Update: Third Party Litigation Funding in Ireland*, Mason Hayes & Curran (Feb. 24, 2021), https://www.mhc.ie/latest/insights/dispute-resolution-update-third-party-litigation-funding-in-ireland [https://perma.cc/JTB4-FUUV].

their international commercial needs. Imagine a lawyer representing a U.K. businessperson in arbitration for a dispute with a U.S. corporation that is incorporated in New Jersey, maintains its principal place of business in New York, and keeps the majority of its assets in California. How should that lawyer advise her client if the client seeks to secure funding from a U.K. dispute-resolution-funding firm? Will the funder need to be disclosed at the outset? Will the presence of the funder render the award unenforceable depending on where the client may need to seek enforcement to obtain the assets?

Under the present system, it is essentially impossible for the lawyer to give coherent advice to her client. In 2021, the U.S. District Court for the District of New Jersey adopted new local rules requiring proactive disclosure by parties of any third-party funding arrangement within thirty days of filing.[137] Conversely, since 2019, several federal district courts in California have held that parties are *not* entitled to discovery of information regarding an opposing party's funding arrangement with a third party.[138] New York has codified champerty and so bars funding arrangements by statute, but maintains statutory carveouts for transactions above a value threshold, manifesting a likely public policy opposition to arbitral awards touched by third-party funding—except in certain circumstances.[139]

Perhaps not surprisingly, in light of this confusion, the United States has lagged compared with the United Kingdom, which has led the way into the modern era of third-party funding for litigation and arbitration.[140] From its formal abolishment of the doctrines of champerty and maintenance in the Criminal Law Act 1967[141] to its emerging culture of widespread acceptance of funding, the United Kingdom has driven the industry forward and seen payoffs: a boom in its litigation finance

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137 *See* D.N.J. Civ. R. 7.1.1 (requiring parties to disclose "information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance").

138 *See* MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-CV-03657-SI, 2019 WL 118595, at *1–2 (N.D. Cal. Jan. 7, 2019) (order denying discovery), *aff'd*, 10 F.4th 1358 (Fed. Cir. 2021); Kenneth Harmon, *California's Evolving Views on Disclosure of Litigation Funding*, LexShares (Oct. 4, 2021), https://www.lexshares.com/resources/california-litigation-funding-disclosure [https://perma.cc/93DL-WZG6] ("In contrast [to the New Jersey Rule], state and federal courts in other states have generally leaned in the opposite direction, rejecting attempts to discover litigation funding-related documents on relevance grounds or in recognition of work-product protections."). However, two California district courts have "local rules requiring disclosure of non-parties with a financial interest in the case at the inception of civil litigation." Harmon, *supra* note 138.

139 *See supra* note 23 and accompanying text.

140 *See* Trusz, *supra* note 15, at 1661.

141 Criminal Law Act 1967, c. 58 (Eng. & Wales).

sector.[142] The United Kingdom is projected to remain at the helm of the litigation funding market for the foreseeable future.[143]

On the international stage, nations are expected to put forth a sole organ which can speak on behalf of that nation with a single voice and allow it to be treated as a unified entity.[144] For federalized nations, this sole organ comes from the central federal government;[145] in the United States's case, the executive branch usually occupies that role.[146] However, without unifying law in the United States on the question of third-party dispute resolution funding, the external perception of the United States's legal stance becomes an amalgamation of state laws.[147]

The Framers foresaw the commercial problems that would arise from divergent laws among the several states and accordingly granted Congress the all-important Commerce Clause power to regulate commerce with other countries and between the states.[148] The Supreme Court has long held that Congress's ability to legislate to control interstate commerce is singular, striking down state laws which step into that regulatory sphere.[149] The Court has found state laws violated the exclusive purview of Congress even where no federal law yet existed,

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142 *See supra* notes 6–10 and accompanying text.

143 *EU and UK Market Are Set to Capture 15.8% of Global Litigation Funding, Poised for Strongest Growth Worldwide*, Litig. Fin. J. (Oct. 18, 2022), https://litigationfinancejournal.com/eu-and-uk-market-are-set-to-capture-15-8-of-global-litigation-funding-poised-for-strongest-growth-worldwide/ [https://perma.cc/4LLF-HNQ3] ("The United Kingdom is set to be the biggest single market contributor [in the next five years], with annual investment potential reaching USD 1bn.").

144 *See* Montevideo Convention on the Rights and Duties of States art.2, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 ("The federal state shall constitute a sole person in the eyes of international law."). The Montevideo Convention is widely accepted as codifying customary international law on statehood and thus applying beyond its signatories to all subjects of international law. *See* Timothy Meyer, *Codifying Custom*, 160 U. Pa. L. Rev. 995, 1036 (2012); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 Colum. J. Transnat'l L. 403, 413–16 (1999).

145 *See* Edward L. Rubin, *The Role of Federalism in International Law*, 40 B.C. Int'l & Compar. L. Rev. 195, 204 (2017) ("[A]llowing one nation to deal with subsidiary units of another on the basis of the fact that the subsidiary possesses a decision-making role would in effect dissolve the nation-state as the unit of international relations . . . .").

146 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) (establishing the president of the United States as the "sole organ" of the nation's federal government in the field of international relations).

147 *See* Korchin et al., *supra* note 19 (presenting an overview of the myriad legal factors and potentially applicable rules in the United States that a foreign lawyer must consider when approaching third-party funding).

148 U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .").

149 This has come to be known as the "Negative Commerce Clause" or "Dormant Commerce Clause" doctrine. *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 576–77 (1886) (striking down an Illinois state statute which regulated interstate commercial and passenger trains); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 678 (1981) (invoking the dormant

reflecting a preference for a uniform federal standard over a patchwork of state laws.[150]

Today, there is a similar need for a uniform national standard on third-party dispute resolution funding, and Congress should use its power to unify American law on the topic. Without such a unification, the landscape of U.S. law on champerty and third-party dispute resolution funding is a mess of changes, amendments, carveouts, and often direct contradictions.

IV. A Potential Solution: Unification of U.S. Federal Law on Champerty and Third-Party Funding in Litigation and Arbitration

The United States has the power to solve these conflicts of laws and disclosure disagreements and help protect U.S. trade interests. Congress should pass unifying legislation which abolishes the torts of maintenance and champerty and standardizes disclosure requirements for third-party dispute resolution funding. Such an act would homogenize the American legal landscape for litigation funding and clarify U.S. public policy on the matter, signaling to the international community that U.S. courts would not resist enforcing arbitral awards where funding was used and ensuring equitable dispute resolution when transacting with U.S. entities.

Congress has made attempts in the past to address third-party dispute resolution funding but has fallen short of adequate solutions to the several problems currently facing the United States. The latest proposed legislation was the Litigation Funding Transparency Act,[151] which was introduced most recently in 2021.[152] The Act had been introduced twice before, in 2018[153] and in 2019,[154] and failed to pass both times;[155] the 2021 attempt was referred to subcommittee in October of 2021, where it

commerce clause in invalidating an Iowa state law which burdened interstate commerce in its inconsistency with other states' regulations and federal interests).

150 *See, e.g.*, S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 783 (1945) (striking down an Arizona statute regulating train cars on interstate railways for conflicting with Congress's Commerce Clause power even absent any extant applicable federal law due to the belief that a uniform federal standard would better solve the issue).

151 H.R. 2025, 117th Cong. (2021).

152 *Id*.

153 S. 2815, 115th Cong. (2018).

154 S. 471, 116th Cong. (2019).

155 *See* Stephanie Spangler & Dai Wai Chin Feman, *How Courts Are Shaping Disclosure of 3rd-Party MDL Funding*, Law360 (Apr. 16, 2020, 5:39 PM), https://www.law360.com/articles/1264346/how-courts-are-shaping-disclosure-of-3rd-party-mdl-funding [https://perma.cc/7WJM-BCLM].

failed to receive a vote before the congressional term ended.[156] The proposed bill set disclosure mandates and schedules in third-party funding arrangements, but only for class actions and multidistrict litigation.[157] The bill did not mention champerty at all.[158] A broader act of federal legislation, accounting for transparency in litigation funding but also formally abolishing champerty, would serve to eliminate the remaining nagging issues regarding conflicting state public policy on champerty and the resulting doubt around judgments and awards sought to be enforced in those jurisdictions.

Congress can look to the language of the U.K.'s Criminal Law Act 1967 as a guide to clearly and unequivocally eliminate the outdated common law doctrines of champerty and maintenance.[159] The act should distinctly abolish the "obsolete crimes" of maintenance and champerty and specify that there shall be no tort liability of any kind under U.S. law for conduct identifiable as maintenance or champerty under the common law.[160] Congress is able to regulate the interstate dispute resolution funding industry through its Commerce Clause power, and the drafters should specify that this new federal law would be supreme and thus override the existing patchwork of variable U.S. state law on the topic.[161]

In addition to squarely abolishing champerty and maintenance, this proposed unifying federal legislation should take a more balanced, fully formed approach to disclosure requirements for funding arrangements. Regarding funding agreement documents, the Litigation Funding Transparency Act of 2021 commanded that parties produce to the court "any agreement creating the contingent right [to receive payment from the litigant's receipt of monetary relief in the suit]."[162] However, as this Note has illustrated, requiring the disclosure of an entire funding agreement can lead to serious issues, including granting undue access

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156 *See All Actions: H.R.2025—117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/2025/all-actions?q=%7B%22search%22%3A%22hr2025 [https://perma.cc/95ST-3KEV] ("10/19/2021 Referred to the Subcommittee on Courts, Intellectual Property, and the Internet."); *H.R. 2025 (117th): Litigation Funding Transparency Act of 2021*, GOVTRACK.US, https://www.govtrack.us/congress/bills/117/hr2025 [https://perma.cc/63NG-XE6Z] ("Status: Died in a previous Congress.").

157 H.R. 2025, 117th Cong. (2021).

158 *See id.*

159 Criminal Law Act 1967, c. 58 (Eng. & Wales) ("An Act . . . to do away (within or without England and Wales) with certain obsolete crimes together with the torts of maintenance and champerty . . . .").

160 *See id.* §§ 13–14.

161 *See supra* notes 149–151 and accompanying text; *see also* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

162 *See* H.R. 2025 § 2–3.

to privileged information and irreparably biasing factfinders.[163] Instead, the proposed unifying legislation should contain a full description of what information should be present in the signed agreement that is disclosed to the court and what information should be kept protected and confidential.

As a guiding principle, what is disclosed to the court should be enough information to know who is involved and has a stake in the dispute, and anything that might implicate conflicts of interest, but nothing that includes privileged information. The legislation should define "funding agreement" to include the identity of the funding entity as well as any parent, subsidiary, or partner entities attached to that funder that would stand to gain from a successful outcome in the funded case. This way, all parties can be sure that there are no connections through which the factfinder might be financially motivated to have the case come out a certain way or any other avenue by which a funder might exert undue influence over the proceedings.[164] However, the legislation should clarify that any information which is privileged under U.S. law—or, in cases involving foreign parties, privileged under the national law of the foreign party's home country—must not be included in the funding agreement.[165] The agreement should also be required to exclude any information pertaining to the funder's or the funded parties' assessments of the merits of the case to avoid any potential bias or prejudice in the adjudication of the case.[166] By striking this balance, the legislation can ensure that arbitrators and courts have enough information upfront to ward off conflicts of interest and maintain the integrity of the proceedings without disadvantaging either party in a dispute.

Whether or not this specific legislative proposal is adopted, the field of third-party dispute resolution funding demands closer regulatory scrutiny overall. Last year, Sysco Corporation, a multinational restaurant supply firm, used litigation funding from Burford Capital to bring antitrust suits against certain pork and poultry producers, but Sysco ended up suing Burford for improperly intervening in the lawsuit and blocking attempted settlements that Burford believed were too low.[167] The parties eventually settled and dropped their claims.[168]

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163 *See supra* Section II.B.

164 *See supra* Section II.A.

165 *See supra* Section II.B.

166 *See supra* Section II.B.

167 *In re* Pork Antitrust Litig., No. 18-CV-1776, 2024 WL 511890, at *2–4 (D. Minn. Feb. 9, 2024) (order denying substitution of parties); *see* Mike Leonard & Justin Wise, *Sysco Accuses Burford Capital of Meddling in Antitrust Deals (1)*, Bloomberg L. (Mar. 9, 2023, 5:11PM), https://news.bloomberglaw.com/business-and-practice/sysco-accuses-burford-capital-of-meddling-in-antitrust-deals [https://perma.cc/DDG7-QRDQ].

168 *See* Emily R. Siegel, *Burford and Sysco End Legal Dispute Over Antitrust Claims*, Bloomberg L. (June 28, 2023, 7:15 PM), https://news.bloomberglaw.com/business-and-practice/burford-and-sysco-end-legal-dispute-over-antitrust-claims [https://perma.cc/8GJC-RT9X].

Although never decided on the merits, these alleged actions taken by a funding entity represent a starkly negative example of the type of intermeddling by third parties that the law seeks to prevent. This kind of improper behavior further reinforces the need for unifying legislation and more detailed oversight in this field to both protect litigants and arbitral parties and stabilize the legal footing of the industry.

Conclusion

Arbitration as a means of international commercial dispute resolution is a rapidly growing field, and third-party funding appears to be establishing itself as a permanent component. The increasingly outdated doctrines of champerty and maintenance present obstacles to progress, and the United States should abolish these doctrines in its national law to avoid falling behind. Through unifying federal legislation that abolishes these doctrines and directly regulates third-party dispute resolution funding, the United States can ensure that it remains a valuable center for global trade and commerce into the next century.

That said, there remain valid criticisms regarding the practice of third-party dispute resolution funding and questions for which there do not yet exist satisfying answers. Policymakers and practitioners should remain vigilant of the possible negative side effects of the funding industry and keep a watchful eye for warning signs, such as a rise in frivolous litigation or evidence of abuses of power and wealth. The unification of champerty law proposed by this Note, however, represents a measured and necessary first step toward modernizing U.S. law, avoiding oppressive conflicts of law issues, and creating a more efficient international framework for dispute resolution, which will help the United States take a stronger position in the global industry of dispute-resolution funding.