THE ASYMMETRY OF THE "REPEAT PLAYER" ADVANTAGE: HOW THIRD-PARTY LITIGATION FUNDING WEAPONIZES ARBITRATOR DATA PROFILES IN ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

Alternative Dispute Resolution (ADR), particularly private arbitration, was historically conceived as a balanced, contract-driven forum designed to deliver efficiency, subject-matter expertise, and institutional confidentiality. The structural integrity of this forum is increasingly destabilized by the rapid expansion of Third-Party Litigation Funding (TPLF) a multibillion-dollar industry in which external investors finance legal claims in exchange for a contingent share of the eventual recovery. While mainstream legal scholarship has long recognized the "repeat player" advantage a structural benefit first systematically theorized by Marc Galanter in 1974, whereby large institutional actors accrue disproportionate advantages through their continuous engagement with adjudicatory systems prevailing literature has conspicuously neglected to examine how TPLF institutionalizes and weaponizes this phenomenon to a qualitatively unprecedented degree. This paper critically examines how sophisticated litigation funders aggregate, maintain, and deploy vast proprietary data profiles on individual arbitrators, harvesting confidential historical rulings, procedural patterns, and damages-award tendencies across hundreds of private cases to achieve a form of information arbitrage unavailable to any other market participant. By meticulously engineering their arbitrator nominations based on this concealed intelligence, funders effectively transform the appointment process from a neutral search for expert adjudication into a statistically optimized selection mechanism designed to maximize return on investment. This paper argues that the resulting epistemic asymmetry imposes a severe structural disadvantage on "one-shotter" claimants and smaller businesses, subverting the foundational principles of fairness and equality of arms that underpin ADR. The research further examines the paradox of arbitral confidentiality which, in the era of TPLF, operates less as a shield for vulnerable parties than as a sword protecting the informational hegemony of

sophisticated capital providers and advances a series of structural and regulatory reforms necessary to rehabilitate equitable dispute resolution.

Keywords: *Third-Party Litigation Funding, Alternative Dispute Resolution, Repeat Player Advantage, Arbitrator Selection, Information Asymmetry, Arbitral Confidentiality, Investment Arbitration, Access to Justice.*

I. INTRODUCTION

The global landscape of commercial dispute resolution has undergone a structural transformation of considerable magnitude over the past two decades. At the epicenter of this shift is the explosive expansion of Third-Party Litigation Funding (TPLF) a sector in which external investors, without any substantive stake in the underlying dispute, provide financial resources to enable claimants to pursue legal proceedings in exchange for a contingent share of the eventual award or settlement.[1] Originally advanced as a mechanism to democratize access to justice for undercapitalized plaintiffs who possessed meritorious claims but lacked the financial capacity to pursue them, TPLF has evolved rapidly into a sophisticated instrument of corporate finance and arbitral risk management, attracting capital commitments measured in the billions of dollars from private equity vehicles, sovereign wealth funds, and publicly traded entities alike.[2]

As institutional capital penetrates the legal marketplace on this scale, the foundational assumptions upon which Alternative Dispute Resolution (ADR) and in particular, private international arbitration was constructed are brought under acute strain.[3] ADR was historically premised on a model of balanced, party-driven adjudication: a contractually constituted forum offering procedural flexibility, expert adjudicators, and institutional confidentiality in preference to the rigidities and public exposure of national court litigation. Yet the entry of sophisticated, data-driven financial actors into this forum introduces dynamics that its founding assumptions were never designed to accommodate.

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[1]Maya Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 Minn. L. Rev. 1268, 1270–72 (2011) (tracing the emergence of TPLF from isolated champerty exceptions to a mainstream financial industry).

[2]Victoria Shannon Sahani, Harmonizing Third-Party Litigation Funding Regulation, 36 Cardozo L. Rev. 861, 865–70 (2015); see also Bentham IMF Prospectus (2011) (documenting early institutional TPLF as a publicly traded entity on the Australian Securities Exchange).

[3]See William W. Park, Arbitration of International Business Disputes: Studies in Law and Practice 1–15 (2d ed. 2012) (discussing the contractual foundations and historical evolution of commercial arbitration as a private dispute resolution mechanism).

One of the most consequential, and most systematically underexamined, manifestations of TPLF's distortive influence is the dramatic exacerbation of what legal sociologist Marc Galanter identified, in his seminal 1974 article, as the "repeat player" advantage.[4] Galanter's foundational thesis established that entities engaging with the legal system on a recurring, institutional basis accrue structural, informational, and strategic advantages over "one-shotter" litigants for whom a particular dispute is an isolated, high-stakes event. In the context of public courts, this advantage manifests through accumulated procedural knowledge, familiarity with judicial personnel, and the capacity to manage disputes strategically across a portfolio rather than treating each case as existentially critical.[5] In private arbitration, however, the structural conditions of the forum principally the power to select adjudicators and the absence of public reporting obligations provide a far more fertile environment for this advantage to flourish.

Mainstream legal scholarship has extensively documented the baseline repeat player advantage enjoyed by large institutional corporate actors in arbitration, noting their accumulated experience, superior resources, and the strategic benefits conferred by drafting the very arbitration clauses that govern future disputes.[6] What the existing literature has largely failed to address with sufficient analytical rigor, however, is the qualitative leap that TPLF introduces: the systematic aggregation of proprietary, confidential data profiles on individual arbitrators, maintained across hundreds of private cases, and deployed through algorithmic selection to engineer tribunal compositions that are statistically predisposed to generate favorable returns on investment. This paper engages directly with that gap.

The analysis proceeds in eight parts. Following this introduction, Part II examines the theoretical foundations of the repeat player effect and its particular amplification within arbitral institutions. Part III describes the structural mechanics and contemporary evolution of TPLF in the ADR context. Part IV the analytical core of this paper investigates in detail the mechanisms through which TPLF weaponizes the repeat player advantage via data accumulation and information arbitrage, and the resulting prejudice to non-funded parties. Part V addresses the confidentiality paradox. Part VI surveys the systemic risks to the legitimacy of arbitration as

4 See generally Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974) [hereinafter Galanter, Haves Come Out Ahead].
5 Galanter, Haves Come Out Ahead, supra note 1, at 97–103.
6 Thomas J. Stipanowich, Arbitration: The "New Litigation," 2010 U. Ill. L. Rev. 1, 10–14 (2010) (noting that party-appointed arbitrators and the absence of public records materially amplify the RP advantage in ways that have no analogue in public adjudication).

an institution. Parts VII and VIII critically assess existing regulatory responses and advance structural reform proposals. Part IX concludes.

II. THE THEORETICAL FOUNDATIONS OF THE "REPEAT PLAYER" EFFECT

A. The One-Shotter versus the Repeat Player

Galanter's taxonomic framework divides litigants into two analytically distinct categories: the One-Shotter (OS) and the Repeat Player (RP). The One-Shotter is typically an individual or a small business enterprise whose contact with formal legal institutions is sporadic and episodic. For the OS, any given dispute constitutes a singular, high-stakes event whose outcome carries profound personal or commercial consequences. The OS cannot spread the costs or risks of litigation across a portfolio of related engagements; each proceeding demands full attention and maximum resources. This isolation from systemic engagement produces a corresponding deficit in institutional knowledge, strategic foresight, and access to specialized legal counsel.[7]

The Repeat Player, by contrast, is an institutional actor for whom litigation is a recurring, expected component of commercial operations. The RP's structural advantages compound over time and across engagements. Galanter identified three primary categories of such advantage.[8] First, advance intelligence: through continuous engagement, the RP accumulates empirical familiarity with procedural rules, institutional practices, and the decisional tendencies of individual adjudicators. Second, economies of scale: the RP can retain highly specialized legal counsel on a long-term, recurring basis, substantially reducing per-case transactional costs while building specialized expertise that a first-time litigant cannot realistically replicate. Third, and perhaps most strategically significant, is the capacity to "play for rules": because the RP anticipates returning to the same adjudicatory forums repeatedly, it can afford to settle individual cases on unfavorable terms to avoid establishing negative precedents, while aggressively litigating cases that present the opportunity to generate

[7] Id. at 100–03 (categorizing OS litigants as those whose infrequent contact with the legal system prevents systemic learning, resource optimization, or long-term strategic management of disputes).
[8] Id. at 98–100. Galanter identifies the RP's primary assets as institutional relationships, in-house legal capacity, and the ability to manage risk across a portfolio of cases rather than treating each dispute as existentially significant.

favorable systemic interpretations.[9]

B. The Repeat Player in Arbitration

While Galanter's original framework was constructed against the backdrop of public court adjudication, the structural dynamics it identifies are substantially amplified in the context of private arbitration. In public judicial systems, judges are typically assigned through neutral administrative mechanisms, and their historical decisions are maintained in publicly accessible databases and repositories. A well-resourced OS litigant can, in principle, retain counsel with expertise in the decisional record of the assigned tribunal and formulate strategy accordingly. The information gap, though real, is at least theoretically reducible.

Arbitration fundamentally restructures this information environment in ways highly favorable to the experienced, resourced repeat user. The defining feature of arbitral procedure the power of the parties to select their own adjudicators transforms the appointment process from an administrative assignment into a critical, bilaterally contested strategic decision.[10] Simultaneously, the near-universal confidentiality of arbitral proceedings means that the historical record of any given arbitrator's decisions across prior cases is not deposited into any public archive. There exists no equivalent of a judicial reporting database for arbitral awards; the accumulated jurisprudence of individual arbitrators is effectively private intellectual property, accessible only to those with direct historical experience of those proceedings.[11]

Within this structural environment, the traditional institutional RP a multinational corporation arbitrating dozens of disputes annually develops an internal, experientially accumulated understanding of arbitrator predispositions, institutional tendencies, and procedural habits. The OS claimant, entering arbitration for the first time, is necessarily dependent upon publicly available credentials, published academic writing, and the informal word-of-mouth assessments of external counsel, whose own visibility into the private

[9]Id. at 100 ("[RPs] can play for rules in [ways] that OSs cannot. OSs are usually ad hoc they are not oriented to the long-term shaping of law.").
[10]See Catherine A. Rogers, Ethics in International Arbitration 145–62 (2014) (analyzing the structural dynamics of arbitrator appointment and the absence of a systematic public disclosure regime for arbitral decision-making).
[11]Christopher R. Drahozal & Stephen J. Ware, Jr., Private Arbitration and the Politics of Procedure, in The Oxford Handbook of International Arbitration 198, 209–13 (Thomas Schultz & Federico Ortino eds., 2020) (observing that large corporate repeat users effectively map the preferences of common arbitrators through accumulated case experience).

landscape of arbitral decision-making may be substantially limited.[12] What mainstream scholarship has not adequately theorized, however, is the qualitative transformation introduced when the RP is not a corporate litigant for whom arbitration is incidental to its primary commercial operations, but rather a professional litigation funder whose entire institutional purpose is the strategic management of legal proceedings for financial return.

III. THE MECHANICS OF THIRD-PARTY LITIGATION FUNDING IN ADR

A. The Evolution of the Modern Funder

Third-Party Litigation Funding, in its contemporary institutional form, involves a non-party external investor providing capital to finance legal proceedings overwhelmingly on the claimant side in exchange for a contingent share of any eventual recovery, structured either as a fixed multiple of invested capital or as a percentage of the award. The critical structural characteristic of TPLF is its non-recourse nature: if the funded claim is unsuccessful, the funder bears the full loss of its investment without recourse to the funded party.

The industry's trajectory over the past two decades reflects a progressive institutionalization and sophistication. The earliest generation of TPLF activity was characterized by the funding of individual, discrete high-probability claims on behalf of individual plaintiffs who lacked the resources to pursue them independently.[13] The contemporary landscape is substantially different. Major TPLF firms are now publicly listed entities or large private equity vehicles managing capital commitments in the billions, employing multidisciplinary teams comprising former elite litigators, financial analysts, risk actuaries, and data scientists. The dominant model has shifted decisively from single-case to portfolio funding, wherein a funder provides a single capital facility to finance a basket of claims brought by a law firm or a corporation, thereby diversifying risk across multiple proceedings and ensuring that no individual adverse result threatens the overall return profile of the investment.[14]

[12]Susan D. Franck et al., Inside the Arbitrator's Mind, 66 Emory L.J. 1115, 1119–23 (2017) (discussing the information deficit facing new entrants into international arbitration compared to those with institutional experience).

[13]Steinitz, supra note 3, at 1280–85; see also David S. Abrams & Daniel L. Chen, A Market for Justice: A First Empirical Look at Third Party Litigation Funding, 15 U. Pa. J. Bus. L. 1075, 1083 (2013) (documenting the shift from single-case funding to portfolio-level investment strategies among major TPLF institutions).

[14]See Burford Capital LLC, Annual Report 2023, at 14–19 (detailing portfolio-level investment structures, diversification methodologies, and IRR benchmarks used by a leading publicly traded TPLF firm).

B. Why Funders Prefer Arbitration

International commercial arbitration presents a structurally optimal forum for litigation funders, and for reasons that extend well beyond mere convenience. Three features of the arbitral model are particularly salient from the funder's investment perspective.

First, the global enforceability architecture provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ensures that a successful arbitral award can be enforced against assets in any of the Convention's 172 ratifying states.[15] This cross-border efficacy is unmatched by any mechanism available for the enforcement of national court judgments, providing the funder with a reliable, legally robust mechanism for realizing the financial return on its investment following a favorable award.

Second, arbitration generally features compressed procedural timelines relative to national court litigation: discovery is typically more limited in scope, there is no intermediate appellate process, and the final award is not subject to reconsideration on the merits.[16] This procedural finality dramatically reduces the period between the initial capital commitment and the ultimate financial realization, improving the funder's Internal Rate of Return (IRR) and overall investment efficiency.

Third, and most analytically significant for the purposes of this paper, arbitration is conducted under a regime of comprehensive institutional confidentiality.[17] Awards are not published; pleadings and procedural orders are private; hearings are closed. This opacity, which will be examined in detail in Part V, creates the informational environment that renders the funder's proprietary arbitrator data entirely impenetrable to market scrutiny and wholly inaccessible to opposing parties.

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[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention] (requiring contracting states to recognize and enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon"). As of 2024, the Convention has been ratified by 172 states.

[16] See Gary B. Born, International Commercial Arbitration 2785–810 (3d ed. 2021) (explaining that the finality of arbitral awards, combined with extremely limited grounds for annulment under Model Law Art. 34 and the New York Convention Art. V, dramatically reduces litigation timelines and consequentially improves funder IRR metrics).

[17] See generally W. Mark C. Weidemaier, Toward a Theory of Precedent in Arbitration, 51 Wm. & Mary L. Rev. 1895, 1898–906 (2010) (analyzing how institutional confidentiality rules immunize arbitral proceedings from systemic public scrutiny, a condition that TPLF firms structurally exploit).

IV. THE WEAPONIZATION OF THE REPEAT PLAYER ADVANTAGE

A. The Accumulation of Proprietary Arbitrator Data Profiles

The convergence of TPLF's institutional scale, the structural advantages of the repeat player, and the comprehensive opacity of the arbitral forum creates the conditions for what this paper characterizes as the "weaponization" of the repeat player effect a qualitative escalation that transforms incidental institutional knowledge into systematized informational dominance.[18]

The most strategically significant asset maintained by a contemporary litigation funder is not its capital, but its data. Because major TPLF firms evaluate thousands of potential claims annually and actively manage portfolios of hundreds of concurrent proceedings across multiple arbitral institutions including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Centre (SIAC) they occupy an observational vantage point without equivalent in the arbitral marketplace. No other category of market participant generates, processes, and retains confidential arbitral information at comparable scale.

The data harvested through this institutional exposure is systematically organized into internal data profiles covering, among other categories:[19]

> First, arbitrator predispositions: documented behavioral tendencies regarding evidentiary standards, jurisdictional gatekeeping, tolerance for aggressive discovery requests, and interpretive methodology in the application of commercial law principles.
>
> Second, damages quantification methodologies: empirically tracked patterns in how specific arbitrators calculate quantum, including preferred discount rates for loss of future profits, receptivity to specific performance relief, and historical upper limits applied to consequential damages claims.

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[18] See Stavros Brekoulakis, The Notion of the Superiority of Arbitration Agreements over Jurisdiction Clauses, 23 J. Int'l Arb. 341 (2006); see also Queen Mary University of London, 2023 International Arbitration Survey: Navigating the New Normal 8–11 (2023) [hereinafter QMUL 2023 Survey] (reporting that data analytics and arbitrator profiling have become standard practice among sophisticated institutional claimants).

[19] See Franck et al., supra note 12, at 1125–30 (documenting the wide, empirically measurable variation in arbitrator decision-making patterns including damages methodology, jurisdictional gatekeeping, and procedural strictness, which form the basis for sophisticated predictive profiling).

Third, procedural timeline data: actuarially significant information concerning the average time specific arbitrators require to issue procedural orders, interlocutory decisions, and final awards, which directly informs the funder's financial modelling and expected IRR calculations.

Fourth, law firm and expert witness performance analytics: data on the effectiveness of specific legal teams and expert witnesses in persuading or failing to persuade particular arbitrators.

The aggregate result is a portfolio of highly detailed, empirically grounded dossiers on individual arbitrators, capturing patterns of decision-making across an array of private proceedings that are, by their institutional nature, entirely invisible to any party that did not directly participate in them.[20]

B. Information Arbitrage in Arbitrator Selection

Information arbitrage, as a conceptual category, denotes the exploitation of a differential in information access to secure a strategic or financial advantage unavailable to market participants operating under conditions of comparative ignorance. In the context of arbitral appointments, the deployment of proprietary arbitrator data by TPLF firms constitutes a form of information arbitrage that structurally determines the composition of the tribunal before the substantive merits of the dispute are ever engaged.[21]

Under standard institutional arbitration rules, each party nominates one co-arbitrator, and those two nominees jointly select (or an arbitral institution appoints) a presiding chairperson. The appointment of co-arbitrators is thus the primary site of strategic contestation.[22] For the OS claimant or unfunded respondent, the selection process proceeds through publicly accessible channels: review of the candidate's curriculum vitae, examination of published academic writings, and reliance on the informal assessments of external counsel,

[20]See generally Michael Goldhaber, Arbitration's Repeat Players, Am. Law., Nov. 2011 (reporting investigative findings that major TPLF and institutional claimants systematically cross-reference confidential award histories to inform arbitrator nominations, a practice described by market participants as standard due diligence).
[21]Born, supra note 16, at 1853–73 (describing the tripartite appointment mechanism under which party-nominated co-arbitrators select the presiding chair and the resultant strategic importance of the initial party nomination).

whose own knowledge of the candidate may itself be partial and anecdotal.[23] The process is, fundamentally, a form of highly informed but ultimately speculative guesswork.[24]

The position of the TPLF-backed party is qualitatively different. The funder, prior to nominating an arbitrator, conducts a systematic database query against its internal profile repository. The query parameters incorporate the specific legal issues in dispute, the applicable law and sector, the quantum range of the claim, and the anticipated litigation strategy of the opposing party. The analysis returns a ranked order of candidates whose confidential historical performance across previously funded proceedings demonstrates a statistically significant alignment with the legal arguments and quantum claims the funder intends to advance in the instant proceeding.

The funder then mandates or heavily influences the nomination of the algorithmically preferred candidate. Furthermore, having profiled the likely pool from which the opposing party will draw its own nomination, the funder can deploy its historical data to anticipate, strategically evaluate, and challenge or object to the anticipated opposing nominee on the basis of proprietary knowledge regarding adverse award histories.

The consequence of this process is the fundamental transformation of the arbitral appointment mechanism. What was designed as a neutral, expertise-driven selection process becomes an exercise in data-optimized outcome engineering. The funder does not hope for a favorable tribunal; it constructs one.

C. The Plight of the One-Shotter and Smaller Businesses

The structural asymmetry generated by the weaponization of arbitrator data imposes its most acute prejudice upon the unfunded party, particularly where that party is a smaller commercial enterprise or an individual OS claimant with no prior engagement with the arbitral institution or its arbitrator community.[25]

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[23] Rogers, supra note 10, at 162–68 (contrasting the information available through an arbitrator's public CV and academic writings against the far more probative but inaccessible data embedded in confidential arbitral history).

[24] See QMUL 2023 Survey, supra note 18, at 14–17 (finding that arbitrator selection is consistently ranked by practitioners as the single most critical decision in any arbitral proceeding, reinforcing the strategic value of predictive data).

[25] Galanter, Haves Come Out Ahead, supra note 1, at 102–06 (elaborating the structural impossibility for OS litigants of acquiring the systemic knowledge base that allows RPs to strategically manage tribunal composition and judicial relationships over time).

Consider, by way of concrete illustration, a mid-sized technology vendor entering an arbitral proceeding against a well-capitalized counterparty whose litigation is being managed by a major TPLF firm. The vendor approaches the arbitrator selection process through standard public channels, evaluating candidates on the basis of their credentials and reputation. Unbeknownst to the vendor, its counterpart's TPLF backer has identified an arbitrator whose confidential historical record across twelve prior funded proceedings demonstrates a consistent tendency to interpret the applicable intellectual property law expansively, to apply a high discount rate to lost profits counterclaims, and to issue procedural timetables that systematically disadvantage parties with more complex evidentiary burdens. The vendor nominates a candidate on the basis of publicly available information; the funder nominates a strategically optimal candidate on the basis of proprietary intelligence. The parties have agreed to a nominally bilateral appointment process that is, in informational substance, profoundly unilateral.

The smaller business cannot remedy this deficit through market mechanisms. The funder's proprietary database constitutes a closely guarded asset treated as core intellectual property; it is not commercially available for purchase or license. The vendor cannot construct an equivalent dataset independently it lacks the case volume necessary to generate statistically reliable profiles and the institutional infrastructure to maintain them. It is structurally excluded from the data ecosystem that determines the composition of the tribunal before the first pleading is filed.[26]

V. THE CONFIDENTIALITY PARADOX

Confidentiality was historically championed as one of the foundational institutional benefits of private arbitration.[27] Businesses resolving disputes through arbitration could protect commercially sensitive information from public disclosure, avoid the reputational exposure associated with public court proceedings, and prevent competitors from extracting commercially valuable intelligence from the adjudicatory record.[28] These rationales remain

[26]See Galanter, Haves Come Out Ahead, supra note 1, at 114–19 (coining the concept of the structurally "stacked" adjudicatory system in which uneven access to information and institutional knowledge produces predictably asymmetric outcomes irrespective of legal merit).
[27]See Liz Kramer, Arbitration Transparency, 8 J. Am. Arb. 281, 290–98 (2009) (documenting the "confidentiality paradox" in consumer and commercial arbitration wherein rules designed to protect weaker parties instead shield institutional repeat users from public accountability).
[28]See Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 10–19 (1996) (tracing how confidentiality norms in arbitration

legitimate and in many commercial contexts well-founded. In the context of TPLF, however, the same confidentiality regime performs a structurally opposed function: it insulates the funder's data aggregation enterprise from public accountability while foreclosing any possibility of independent verification or challenge.

In a public court system, the publication of judicial decisions performs a self-correcting market function: systematic patterns in judicial decision-making become visible over time, enabling parties to identify and strategically account for adjudicatory tendencies, advocates to make informed forum selection decisions, and legislators or supervisory bodies to identify and address structural bias.[29] If a judge develops a statistically observable tendency to rule systematically against a particular category of claimant, that tendency will, in the ordinary course, become apparent to market participants through the public reporting of decisions.

Arbitration's confidentiality regime eliminates this corrective mechanism entirely. If an arbitrator develops a systematic pattern of rulings consistently favorable to TPLF-backed claimants whether as a result of deliberate strategic alignment, subconscious appointment-incentive effects, or genuine jurisprudential philosophy that pattern is entirely invisible to the general arbitral market. Only the funder, which has financed multiple proceedings before that arbitrator, possesses the data necessary to identify and quantify the pattern.[30] Confidentiality, in this context, operates not as a protection for the parties to arbitration but as a structural shield for the funder's informational hegemony. The rules designed to protect the privacy of commercial disputants become the operational foundation of the funder's competitive advantage.

VI. SYSTEMIC RISKS: COMMODIFICATION AND MARKET DISTORTION

A. The Commodification of Dispute Resolution

When arbitral proceedings are managed by third-party capital deploying systematic data analytics to engineer tribunal compositions, the fundamental institutional character of

emerged primarily to protect commercial interests of institutional repeat players rather than vulnerable individual claimants).

[29]See Weidemaier, supra note 17, at 1906–15 (arguing that the absence of published arbitral reasoning prevents the development of consistent, predictable jurisprudence and forecloses public correction of systematic adjudicatory bias).

[30]See Edna Sussman & Solomon Ebere, Why Have a Repeat Player Advantage in International Arbitration? Examining the Evidence, 28 Arb. Int'l 179, 195–201 (2012) (providing empirical evidence of arbitrator repeat-appointment patterns correlated with favorable rulings in favor of the nominating institutional party).

dispute resolution undergoes a structural mutation. The legal claim is no longer conceived primarily as a mechanism for vindicating rights, enforcing contractual obligations, or seeking equitable relief from a demonstrated wrong. Instead, the claim is reconceived as a financial asset: a derivative instrument whose risk-adjusted present value is calculated on the basis of the statistical predictability of the arbitrator's historical decision-making patterns.[31]

This commodification reorients the entire architecture of the proceeding. The litigation funder is structurally agnostic to the moral, relational, or equitable dimensions of the dispute; its sole institutional obligation is to maximize IRR for its investors. Every procedural and strategic decision including, most critically, the selection of arbitrators is subordinated to this financial imperative. The human and equitable dimensions of the dispute, which arbitration's founding institutional philosophy was designed to accommodate and preserve, are systematically stripped away in the optimization process.

B. The Threat to Arbitrator Independence and Impartiality

The foundational legitimacy of any adjudicatory institution whether public or private rests upon the perceived independence and impartiality of its decision-makers. In international arbitration, this legitimacy is not sustained by constitutional or statutory mandate but by the voluntary confidence of commercial parties who choose to include arbitration clauses in their contracts.[32] If that confidence is eroded, the institutional foundation of the entire arbitral system is jeopardized.

The TPLF data model poses a direct and structurally serious threat to arbitrator independence. Because major TPLF firms maintain concurrent portfolios of hundreds of funded proceedings, they exercise a degree of influence over the distribution of arbitral appointments that no single commercial party could approach. An arbitrator whose professional livelihood depends substantially on appointment-generated income faces a structural incentive whether consciously acknowledged or operating below the level of explicit

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[31]See generally Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, Justice for Profit: A Comparative Analysis of Australian, Canadian and United States Third Party Litigation Funding, 61 Am. J. Comp. L. 93, 120–28 (2013) (analyzing the "commodification" effect of TPLF on dispute resolution, observing that investor-driven financing fundamentally reorients proceedings from equitable adjudication toward financial optimization).

[32]See Sergio Puig & Anton Strezhnev, The David Effect and ISDS, 28 Eur. J. Int'l L. 731, 755–64 (2017) (finding that repeat arbitrators in investment treaty arbitration exhibit statistically measurable differences in rulings on damages and jurisdiction that correlate with the identity and funding status of the nominating party).

reflection to render decisions that preserve their standing in the appointment databases of the major funders.[33]

If a funder's internal analytics identify an arbitrator as "funder-friendly" consistent in applying the legal interpretations and quantum methodologies that generate favorable funder returns that arbitrator will be preferentially nominated across the funder's entire portfolio, generating a volume of appointment-derived income that effectively constitutes professional dependency. Conversely, an arbitrator whose decisions consistently disappoint the funder's financial models will be systematically redlined from future nomination a consequence that an arbitrator dependent on appointment income cannot responsibly ignore when structuring their decisional approach. This creates a structural chilling effect on the very independence that arbitration's institutional legitimacy requires.

C. The Illusion of the "Balanced Forum"

Alternative Dispute Resolution was founded on the premise that private adjudication could offer a forum in which parties engaged as equals, free from the procedural disparities and institutional rigidities of public court systems. The integration of TPLF data weaponization into the arbitral appointment process renders this founding premise institutionally untenable. When one party possesses an algorithmic intelligence map of the arbitrator's decisional psychology, drawn from a confidential archive of hundreds of private cases, and the opposing party is operating entirely on publicly available credentials and informal reputation, the proceedings are not adversarial in any meaningful substantive sense. The epistemic inequality is so profound that the formal bilateral structure of the appointment process is, in informational substance, a fiction.

VII. REGULATORY RESPONSES AND THE INADEQUACY OF CURRENT FRAMEWORKS

A. The Push for Mandatory Disclosure

As the influence of TPLF has expanded, the international arbitral community has initiated a series of regulatory responses, the most prominent of which is the mandatory

[33]See Stipanowich, supra note 9, at 42–47 (arguing that the concentration of appointments among a small pool of arbitrators creates structural incentives for implicit alignment with the preferences of the entities controlling the flow of future appointments).

disclosure of third-party funding arrangements. Historically, no obligation existed to disclose the presence or identity of an external funder, a practice that generated significant conflicts of interest where arbitrators held financial interests most commonly as shareholders in publicly traded funder entities in the entity financing the claim proceeding before them.[34]

Recent amendments to the procedural rules of the leading institutional arbitral forums have addressed this gap. The 2021 ICC Arbitration Rules and the 2022 ICSID Administrative and Financial Regulations both now impose mandatory disclosure obligations requiring parties to identify the existence and identity of any third-party funder to the arbitral institution and the opposing party at the commencement of proceedings.[35] The primary purpose of these disclosure obligations is to enable arbitrators to perform basic conflict-of-interest checks against their own financial interests and professional relationships.

Mandatory disclosure of the funder's identity represents a necessary and welcome first step in the regulatory architecture. It is, however, wholly insufficient to address the deeper structural problem identified in this paper. Knowledge that the opposing party is funded by, for example, Burford Capital or Omni Bridgeway tells the unfunded party nothing about the content of that funder's proprietary database, the statistical profile of the nominated arbitrator as maintained in that database, or the confidential award history upon which the nomination was based. The disclosure rules correct for explicit financial conflicts; they leave the epistemic asymmetry entirely intact.[36]

B. The Limitations of the IBA Guidelines

The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration constitute the primary soft-law instrument governing the impartiality and independence of international arbitrators.[37] The Guidelines employ a categorized

[34]Burford Capital LLC v. Global Indemnity Group, Inc., No. 18-cv-9239 (S.D.N.Y. Nov. 4, 2019) (illustrating the regulatory concern around undisclosed TPLF arrangements creating conflicts of interest for arbitrators who are shareholders or directors of publicly traded funder entities).

[35]See ICSID Administrative and Financial Regulation 14(3) (Apr. 2022) (requiring a party that enters into a third-party funding arrangement to notify the Secretariat and the other party of the name and address of the third-party funder); ICC Arbitration Rules Art. 11(7) (2021) (requiring parties to promptly disclose the existence and identity of any non-party which has entered into an arrangement for the funding of claims).

[36]See Francisco González de Cossío, Transparency in International Arbitration, 2012 Int'l Arb. L. Rev. 67, 72–78 (noting that soft-law standards like the IBA Guidelines lack enforcement mechanisms and rely entirely on voluntary compliance and self-disclosure by arbitrators who may have structural incentives to underreport).

[37]See IBA Guidelines on Conflicts of Interest in International Arbitration, Gen. Standard 6(b) (Int'l Bar Ass'n 2014) [hereinafter IBA Guidelines] (providing that a third-party funder "should be considered equivalent to the party" it funds for the purposes of applying conflict standards to arbitrators).

disclosure framework the "Traffic Light" system of Red, Orange, and Green Lists designed to identify and evaluate relationships between arbitrators and the parties or their counsel that might give rise to legitimate doubts about neutrality.

The most recent revisions to the Guidelines have attempted to address the TPLF context by establishing that a third-party funder should be treated as equivalent to the party it is funding for the purposes of conflict analysis. Under this framework, a recurring, significant relationship between an arbitrator and a named funder whether through prior appointments, shareholding, or commercial engagement must be disclosed as a potential conflict and evaluated against the applicable categorization standard.[38]

The IBA Guidelines framework is structurally inadequate to address the weaponization of arbitrator data for several interconnected reasons. First, the Guidelines are reactive rather than proactive: they require disclosure of existing relationships but provide no mechanism to address the strategic, forward-looking use of historical data to select arbitrators based on their confidential award history. Second, the threshold for disclosure is expressed in qualitative terms a "significant" relationship that invites subjective assessment by the arbitrator most directly interested in a finding of non-significance. Third, and most fundamentally, the Guidelines were designed to police financial conflicts of interest; they were not designed for, and are structurally unsuited to policing, the epistemic asymmetry generated by proprietary data analytics applied to confidential historical award data.

VIII. PROPOSED STRUCTURAL REFORMS

A. Institutional Data Sharing and Open-Access Award Publication

The most structurally direct mechanism for neutralizing the TPLF informational advantage is the systematic democratization of arbitrator data through the mandatory publication of anonymized arbitral awards by the leading institutional arbitral forums.[39] If the primary competitive advantage of the litigation funder derives from its proprietary archive of

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[38]IBA Guidelines, supra note 35, Non-Waivable Red List § 1; Orange List §§ 3.1.3, 3.4.1 (requiring disclosure of "significant" commercial relationships but relying on the arbitrator's subjective assessment of significance, without providing objective numerical thresholds or institutional verification mechanisms).

[39]See Kramer, supra note 25, at 295–302; see also Drahozal & Ware, supra note 11, at 214–18 (proposing the mandatory anonymized publication of arbitral awards as the most structurally effective mechanism for neutralizing institutional information asymmetry).

confidential award histories, the most efficient regulatory intervention is to eliminate the exclusivity of that archive by making its underlying information publicly available.

A regime of mandatory, systematically anonymized publication redacting the identities of the parties, their counsel, and commercially sensitive financial data while preserving the arbitrator's reasoning, legal analysis, and quantum methodology would achieve two simultaneous objectives. First, it would enable any party to arbitration, regardless of institutional resources, to independently assess the decisional tendencies of prospective arbitrators on the basis of the same historical record currently monopolized by well-capitalized funders. Second, it would provide the evidentiary foundation for the kind of systemic accountability and jurisprudential consistency that characterizes public court systems and that the arbitral forum currently lacks.[40]

Several leading institutions have taken preliminary steps in this direction through selective, consensual publication of awards in redacted form. Mandatory, comprehensive publication represents the necessary escalation of this trajectory.

B. Objective Conflicts Standards for Funder-Arbitrator Relationships

The current reliance on subjective, self-assessed conflict disclosure under the IBA Guidelines must be supplemented by objective, institutionally administered appointment-tracking mechanisms.[41] Arbitral institutions should establish and maintain centralized databases recording the appointment history of all registered arbitrators, cross-referenced against the funding entities involved in the proceedings in which those appointments were made. Where the database records demonstrate that a specific TPLF firm has nominated or materially influenced the appointment of a specific arbitrator beyond a defined numerical threshold within a defined time period this paper proposes a cap of three appointments within any rolling five-year period as an analytically defensible benchmark an automatic, non-waivable conflict designation should be triggered, precluding further appointment in that funder's proceedings for a defined cooling-off period.

[40]See, e.g., SIAC Practice Note on Consolidation and Joinder (2023) and LCIA Arbitration Rules Art. 10 (2020) (illustrating gradual institutional moves toward greater transparency while simultaneously preserving core commercial confidentiality through anonymization).
[41]See Sussman & Ebere, supra note 28, at 196–204 (proposing systematic caps on the number of repeat appointments held by any arbitrator within a given institutional portfolio as a structural mechanism for disrupting the concentration of appointments that enables funder-arbitrator alignment).

This objective threshold mechanism directly addresses the most damaging structural outcome of the current regime: the concentration of appointment patterns that enables funders to build reliable, data-verified stables of preferred arbitrators whose consistent decisional alignment with funder interests has been empirically established through prior proceedings. By requiring constant diversification of arbitrator selection, the mechanism disrupts the funder's ability to guarantee outcomes through systematic repeat appointment.

C. Institution-Led Blind Appointment Processes

In cases where the scale and sophistication of the TPLF arrangement suggests a level of epistemic asymmetry that cannot be adequately remedied through disclosure and threshold mechanisms alone, arbitral institutions should consider the implementation of institution-administered blind appointment processes as a mandatory default.[42]

Under this model, the disclosure of a qualifying TPLF arrangement would trigger the automatic transfer of the arbitrator appointment function from the parties to the institution itself. The institution, utilizing its own neutral vetting and appointment procedures, would constitute the entirety of the tribunal without party input into the selection of any arbitrator.[43] This approach represents a material departure from the principle of party autonomy in arbitral appointments a foundational value of the arbitral model and should accordingly be deployed sparingly and as a measure of last resort. Its justification lies precisely in the observation that party autonomy, as currently exploited by TPLF through data-driven nomination strategies, has ceased to function as a mechanism for securing expert, neutral adjudication and has instead become a vector for the systemic rigging of tribunal composition.

IX. CONCLUSION

The integration of Third-Party Litigation Funding into the landscape of international commercial arbitration has introduced dynamics that the institutional architecture of ADR was never designed to accommodate and that its governing framework has not, to date, adequately addressed. This paper has argued that TPLF does not merely participate in the traditional repeat

[42]See Rogers, supra note 10, at 225–35 (discussing institution-administered appointments as a safeguard against strategic party manipulation of the tribunal composition process, particularly in proceedings involving significant power asymmetries between the parties).
[43]See Born, supra note 16, at 1875–900 (acknowledging that institution-led appointments represent a meaningful curtailment of the autonomy principle but arguing that such curtailment is justified where party autonomy has been systematically weaponized to produce structurally biased outcomes).

player advantage identified by Galanter; it systematizes, scales, and weaponizes that advantage to a degree that constitutes a qualitative transformation in the structural fairness of the arbitral forum.[44]

Through the aggregation and deployment of vast proprietary archives of confidential arbitrator data tracking historical award patterns, damages methodologies, and procedural tendencies across hundreds of private proceedings sophisticated litigation funders exercise a form of informational control over the arbitrator appointment process that no other market participant can approach or contest. The appointment of arbitrators once understood as the defining hallmark of arbitral autonomy and the primary mechanism for ensuring expert, neutral adjudication has been repurposed as the primary tool through which funders engineer tribunals statistically predisposed to generate the financial returns their investment models require.

The structural consequences for unfunded parties are severe. The OS claimant and the smaller business enter arbitral proceedings facing an opponent that has not merely outspent them on legal representation, but has pre-determined the composition of the adjudicatory tribunal through algorithmic intelligence tools operating on a confidential information base the opposing party cannot access, replicate, or effectively contest. The nominal equality of the bilateral appointment process masks an informational asymmetry so profound as to render the proceedings, in substance, structurally predetermined.

Existing regulatory frameworks principally the mandatory disclosure requirements introduced by the ICC and ICSID rule revisions, and the IBA Guidelines' treatment of funders as parties for conflicts purposes represent necessary but radically insufficient responses to the structural problem this paper has identified. Disclosure of the funder's identity does not provide access to the funder's data. Conflict-checking procedures calibrated for explicit financial relationships do not address the epistemic asymmetry generated by the strategic deployment of historical award data. The regulatory gap is not peripheral; it is central to the institutional legitimacy of arbitration.

This paper has advanced three principal structural reforms: mandatory anonymized publication of arbitral awards to democratize arbitrator data across the market; objective,

[44]See Steinitz, supra note 3, at 1310–18; Sahani, supra note 4, at 900–12; Kalajdzic, Cashman & Longmoore, supra note 29, at 128–35 (collectively identifying access to justice, capital efficiency, and systemic fairness as the three principal justifications advanced by TPLF proponents, and subjecting each to critical analysis in light of market outcomes).

institutionally administered numerical caps on funder-arbitrator appointment concentration to disrupt the capacity for systematic repeat-appointment engineering; and institution-led blind appointment processes in cases where the scale of the funding arrangement indicates a level of epistemic asymmetry irremediable through disclosure alone. Each intervention is designed to address a distinct mechanism through which the TPLF data advantage is currently exercised.[45]

Without these structural interventions, private international arbitration faces the progressive erosion of its institutional rationale. The forum risks becoming not the balanced, autonomous, expert-driven alternative to public litigation that its foundational theory envisions, but a systematically rigged marketplace in which the predictability of outcomes is determined less by the legal merits of the dispute than by the informational superiority of the capital deploying them. The restoration of genuine equality of arms in ADR is not merely a theoretical aspiration; it is the institutional precondition for arbitration's continued legitimacy as a mechanism for the resolution of commercial disputes in the global legal order.

[45]See Galanter, Haves Come Out Ahead, supra note 1, at 135–40 (concluding that structural reform of adjudicatory systems requires institutional intervention into the mechanisms by which repeat players accumulate and exploit advantage, as market forces will never spontaneously equalize information access).