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Third-Party Funding and its Impacts on Modern Commercial Mediation

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Introduction

Third-party funding or the process of providing financial support from a funder – be it banks, hedge funds, or other financial entities that provide funding for profit – to a party to a dispute with the aim of facilitating a dispute resolution proceeding is now more widely available and accepted than before. This practice has significantly taken off in the fields of international commercial and investment treaty arbitration. A number of states have amended their national legislation on arbitration to allow for and regulate third-party funding. Several arbitral institutions have also developed institutional rules governing third-party funding.

While not as widespread as in arbitration, third-party funders have also been involved in international commercial mediation. In 2021, the Singapore International Dispute Resolution Academy ("SIDRA") conducted an international survey to understand how businesses and lawyers make decisions regarding the resolution of cross-border commercial and investment treaty disputes. Views of non-user stakeholders such as neutrals, academics, and institutional providers were not represented in this survey. The respondents were asked about their use of third-party funding in international commercial arbitration. The results indicated that 17% of External Counsels (defined as dispute resolution lawyers and corporate lawyers) have used third-party funding in arbitration, while none of the Client Users (who consist of corporate executives and in-house counsel) have used it.[1] Users of international

[1] The Singapore International Dispute Resolution Academy, *SIDRA International Dispute Resolution Survey: 2022 Final Report* (Singapore Management University, 2022) at 28, online (pdf): <sidra.smu.edu.sg> [perma.cc/9BAF-LC2X] [SIDRA Final Report 2022].

commercial mediation were similarly asked about their use of third-party funding. Interestingly, more Client Users have used third-party funding in mediation than arbitration; 20% of Client Users reported they had used it in mediation, compared to 8% of External Counsels.[2] While the number of respondents who actually used third-party funding in international commercial mediation is relatively small, there is clearly a growing awareness of what it is and how it can be utilized by parties.

Parties who engage in litigation or arbitration procedures, while being funded by third parties, may also opt to suspend the litigation or arbitration in order to negotiate an agreement through mediation. Mediation may also be utilized while litigation or arbitration is on-going. These hybrid or mixed mode mechanisms, where two or more dispute resolution processes are combined to reach a final solution, may also be affected by third-party funding.

This article seeks to explore the implications of third-party funding in commercial mediation. To begin, it explains the concept of third-party funding, its uses, and its existing governing rules and regulations (Part II). Part III is a discussion on the implications and effects of third-party funding on mediation. Specifically, Part III will cover (1) the possible reasons parties may have to resort to third-party funding in commercial mediation; (2) the issues related to transparency, conflict of interest, and disclosure; (3) the discussion on confidentiality and privilege; and finally, (4) an analysis of changing power dynamics and clear funding agreements. Part IV includes a brief discussion on hybrid dispute resolution mechanisms and how third-party funding may also affect hybrid mechanisms involving mediation, such as arbitration-mediation-arbitration or mediation-arbitration.

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[2] *Ibid* at 42.

I. What is third-party funding?

Third-party funding in international commercial and investment arbitration has been widely debated. Debates on third-party funding in arbitration have led to policy changes and the publication of several studies. In 2018, the International Council for Commercial Arbitration and the Queen Mary College of the University of London released their joint report on third-party funding in international arbitration ("ICCA-Queen Mary Report"). According to the report:

> The term "third-party funding" refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,
>
> a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
>
> b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[3]

The report further identifies a "third-party funder" as

> [a]ny natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

[3] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration, 2018) at 50, online (pdf): <cdn.arbitration-icca.org> [perma.cc/CK3Q-7QX5] [ICCA-Queen Mary Report].

> a) in order to provide material support or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
>
> b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[4]

At its core, third-party funding is the process of bringing in a stranger to a lawsuit to finance the proceeding in exchange for a share of the settlement, arbitral award, or judgment. Funders can be banks, hedge funds, insurance companies, or other entities that provide funding for profit.[5] More recent instruments, such as the EU-Canada Comprehensive Economic and Trade Agreement and the International Centre for Settlement of Investment Disputes (ICSID) 2022 Arbitration Rules, have now also included donations or grants used to finance the proceedings fully or partially in the form of third-party funding.[6]

Typically, third-party funding agreements are non-recourse;[7] funders profit and receive a percentage of the settlement, award, or judgment if the claim is successful. Should the claim fail, funded parties generally do not need to reimburse the third-party funder.[8]

The relationship between the funder and the litigant or claimant is primarily defined by the contract between them. The funding agreement dictates the role the funder plays in managing the case and allocating the

[4] *Ibid.*

[5] Victoria Shannon Sahani, "Judging Third-Party Funding" (2016) 63:2 UCLA L Rev 388 at 392.

[6] *Comprehensive Economic and Trade Agreement* (CETA), Canada and the European Union, 30 October 2016 at Chapter 8, Section A, art 8.1 (provisional application 21 September 2017).

[7] Ina C Popova & Katherine R Seifert, "Gatekeeping, Lawmaking, and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration" in K Fach Gómez, ed, *Private Actors in International Law, European Yearbook of International Economic Law* (Switzerland: Springer Nature, 2021) 133 at 136.

[8] Khong Cheng-Yee et al, "Third-Party Funding and COVID-19" in Maxi Scherer et al, eds, *International Arbitration and the COVID-19 Revolution* (Kluwer Law International, 2020) 179 at 181.

responsibilities between or among them.[9] Funding agreements vary. It can be a financial agreement where the funder provides financial assistance to a claimant in return for a share of any potential proceeds, without the funder agreeing to pay for adverse cost orders. It can also be used as a risk management tool, where the funder shares the financial burden of the funded party when it loses its case.[10] For instance, it can be an arrangement that centers on insuring against the risk of adverse costs orders and even the orders to pay the costs of the opposing party.[11]

Historically, third-party funding was prohibited because most courts believed that allowing a stranger to finance the claim of another in exchange for a share in any possible return could be unethical and "would subvert the integrity of the justice system."[12] It was conceived as harmful to both litigants and the justice system as a whole.[13]

Critics of third-party funders in litigation and arbitration argue that they encourage filing numerous meritless claims when litigants or claimants no longer have to shell out their own financial resources to support and defend their claims.[14] This situation occurs because financial risk is alleviated for the parties involved, and the claimants may be more inclined to pursue their claims even if they do not have a strong case. It may even stretch small meritorious claims into inflated frivolous ones.[15]

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[9] Elayne E Greenberg, "Hey, Big Spender: Ethical Guidelines for Dispute Resolution Professionals when Parties are Backed by Third-Party Funders" (2019) 51:1 Ariz St LJ 131 at 137 [Greenberg, "Ethical Guidelines"].
[10] Khushboo Hashu Shahdadpuri, "Third-Party Funding in International Arbitration: Regulating The Treacherous Trajectory" (2016) 12:2 Asian Intl Arbitration J 77 at 79.
[11] Caroline Kenny, "A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia" (2021) 87:2 Intl J Arbitration, Mediation & Dispute Management170 at 171.
[12] Greenberg, "Ethical Guidelines", *supra* note 9 at 135.
[13] *Ibid.*
[14] Michael E Leiter et al, *A New Threat: The National Security Risk of Third Party Litigation Funding* (Washington, DC: U.S. Chamber of Commerce Institute for Legal Reform, 2022) at 1, online (pdf): <instituteforlegalreform.com> [perma.cc/2G79-T6HM]; Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns* (Santa Monica: RAND Corporation, 2010) at 32, online (pdf): <rand.org> [perma.cc/9BJ5-EYJT]; *Third Party Financing: Ethical & Legal Ramifications in Collective Actions* (Washington, DC: U.S. Chamber Institute for Legal Reform, 2009) at 10–11, online (pdf): <instituteforlegalreform.com> [perma.cc/PD5G-5XKE].
[15] Richard E Walck, "A Quantum Expert's Perspective on Third-Party Funding" in K Fach Gómez, ed, *Private Actors in International Law, European Yearbook of International Economic Law* (Cham: Springer Nature Switzerland AG, 2021) 123 at 128.

Nevertheless, the proponents of third-party funding insist that "[n]o one is going to invest in a frivolous lawsuit because any money thus invested will be lost."[16] Funders conduct their own due diligence and assessment of the merits of the case and the likelihood of success.[17] Some funders even have their own internal rules and only support certain types of disputes, such as climate change-related disputes in litigation or arbitration.

It has been observed that one of the factors that third-party funders consider in arbitration before agreeing to any funding agreement is whether the realistic anticipated recovery is at least ten times the amount of the funding request.[18] As such, arbitration funders usually reject a case because of concerns over the quantum of the claim, as well as a low likelihood of recovery that does not justify the amount of money needed to finance an entire proceeding.[19] It has been argued that third-party funding may even create incentives for pursuing meritorious claims.[20] As third-party funders can only turn a profit if the funded cases succeed, they may even "serve a gatekeeping function … by filtering out, rather than facilitating, frivolous claims."[21]

Third-party funding is now going through a period of unprecedented growth,[22] with funders realizing the potential of financing litigation and arbitration as a fast-growing and largely unregulated investment that does not depend on financial markets, stock prices, or company valuations.[23] Several dedicated international dispute resolution funding firms across

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[16] Susan Lorde Martin, "The Litigation Financing Industry: The Wild West of Finance Should be Tamed Not Outlawed" (2004) 10:1 Fordham J Corp & Fin L 55 at 77.
[17] Walck, *supra* note 15 at 127.
[18] *Ibid*.
[19] ICCA-Queen Mary Report, *supra* note 3 at 25.
[20] Popova & Seifert, *supra* note 7 at 136.
[21] *Ibid* at 135.
[22] Nadja Alexander, "Ten Trends in International Mediation" (2019) 31 Sing Ac LJ 405 at 443 (special issue) [Alexander, "Trends in International Mediation"].
[23] Sahani, *supra* note 5 at 396; ICCA-Queen Mary Report, *supra* note 3 at 20; Chan Leng Sun, "Third-Party Funding – Taking stock" (November 2018), online: <lawgazette.com.sg> [perma.cc/A7EK-B56R].

several jurisdictions have cropped up in recent years. Many have accepted third-party funding as an economic necessity to fund international commercial arbitration,[24] as well as investment arbitration.[25]

Over time, attitudes towards third-party funding have changed, with courts seeing it as a tool that offers litigants, who might not otherwise afford it, access to justice.[26] It has enabled litigants, especially large companies, to keep litigation costs off their balance sheets or to use their financial resources on other business priorities, instead of funding a claim before a court or tribunal.[27] In 2016, the U.K. Court of Appeal described third-party funding as a "feature of modern litigation"[28] and "an accepted and judicially sanctioned activity perceived to be in the public interest."[29] However, the practice is still considered controversial because of the potential influence that third-party funders may hold over the funded party and how the proceedings are actually conducted, possible conflict of interest, and the lack of transparency as to the existence of a third-party funder and a funding agreement.[30] Some have claimed that third-party funding is simply a "misappropriation of access to justice rhetoric by global speculative finance"[31] that encourages meritless claims. These issues have not gone unnoticed, with courts and lawmakers crafting new rules to address the issues caused by third-party funding to ensure the integrity of the legal system.

Hong Kong and Singapore, both leading international arbitration seats in Asia,[32] reformed their international arbitration law in 2017 to

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[24] *Excalibur Ventures v Texas Keystone*, [2016] EWCA Civ 1144 [*Excalibur Ventures*].
[25] "Third Party Funding in International Arbitration" (15 June 2022), online: <ashurst.com> [perma.cc/A638-FPDV].
[26] *Arkin v Borchard Lines Ltd*, [2005] EWCA Civ 655; Walck, *supra* note 15 at 124.
[27] Sahani, *supra* note 5 at 396; ICCA-Queen Mary Report, *supra* note 3 at 20.
[28] *Excalibur Ventures*, *supra* note 24 at para 1.
[29] *Ibid* at para 31.
[30] Alexander, "Trends in International Mediation", *supra* note 22 at 443.
[31] Tara Santosuosso & Randall Scarlett, "Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance" (2019) 60 Boston College L Rev I.-8 (supplement).
[32] In its 2021 international dispute resolution survey, SIDRA asked respondents about their most commonly used international commercial arbitration seats. Singapore ranked as the most commonly used seat at 73%, followed by London (72%) and Hong Kong (37%). See SIDRA Final Report 2022, *supra* note 1 at 16.

allow for third-party funding. Hong Kong and Singapore are considered to be among the first jurisdictions to regulate third-party funding through legislation.[33]

In 2018, the Hong Kong Secretary of Justice issued the Code of Practice for Third Party Funding of Arbitration, which contains practices and standards that third-party funders are expected to comply with.[34] Some of the obligations funders should be mindful of include maintaining access to HK$20 million of capital[35] and indicating, in a clear manner, in the funding agreement that the third-party funder will not seek to influence the funded party, or the funded party's legal representative, and the party will not relinquish control of the arbitration proceeding to the third-party funder.[36]

Hong Kong's Part 10A of Cap. 609 (Arbitration Ordinance), which discusses third-party funding in arbitration, came into force in 2019. The Arbitration Ordinance defines third-party funding as "the provision of arbitration funding for an arbitration under a funding agreement to a funded party by a third party funder and in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement."[37] Accordingly, third-party funding of both domestic and international arbitrations is permitted by the Ordinance.

Amendments to Singapore's *Civil Law Act* (Cap. 43), which is relevant to third-party funding, came into force in 2017. Section 5B provides that contracts under which a qualifying third-party funder provides funds to any party for the purposes of funding dispute resolution

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[33] Can Eken, "A detailed comparison of third-party funding regulations in Hong Kong and Singapore" (2021) Asia 29:1 Asia Pac L Rev 25 at 28.

[34] Government of Hong Kong Special Administrative Region, Press Release, G.N. 9048, "Code of Practice for Third Party Funding issued" (7 December 2018), online: <info.gov.hk> [perma.cc/X4UV-NYCJ].

[35] Hong Kong, *Arbitration Ordinance (Chapter 609), Schedule, Code of Practice for Third Party Funding of Arbitration*, s 2.5.

[36] *Ibid*, s 2.9.

[37] *Ibid*, s 98G.

proceedings are “not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.”[38] Third-party funders in Singapore must also comply with the *Civil Law (Third-Party Funding) Regulations 2017*, which requires third-party funders to have a paid-up share capital of not less than S$5 million or equivalent amount in foreign currency or not less than S$5 million or equivalent amount in foreign currency in managed assets.[39]

While Hong Kong and Singapore have legislated regulations that third-party funders must strictly follow, other jurisdictions, such as the United Kingdom and Australia, prefer to have “little regulation” over this matter.[40]

In the United Kingdom, third-party funding agreements are legal and enforceable so long as such agreements do not wantonly and officiously intermeddle with the disputes of others.[41] In England and Wales, self-regulation of third-party funding is preferred.[42] In 2018, the Association of Litigation Funders of England and Wales published its own Code of Conduct for Litigation Funders (ALF Code of Conduct). The ALF Code of Conduct[43] sets out the standards of practice and behavior expected of all its members.[44]

Australia has been described as a “pro-funding” jurisdiction, where third-party funders are allowed to operate with little regulation.[45]

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[38] Singapore, No. 2, *Civil Law (Amendment) Act 2017*, s 5B.

[39] Singapore, No. S. 68, *Civil Law (Third-Party Funding) Regulations 2017*, s 4.

[40] Kenny, *supra* note 11 at 170.

[41] *Giles v Thompson*, [1993] UKHL 2.

[42] Kenny, *supra* note 11 at 175.

[43] *Code of Conduct for Litigation Funders* (London: Association of Litigation Funders of England and Wales, 2018), online: <associationoflitigationfunders.com> [perma.cc/TLS8-PRFK] [*ALF Code of Conduct*].

[44] But changes may be on the horizon for the U.K. third-party funding legal regime. In July 2023, the U.K. Supreme Court ruled in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* that litigation funding agreements, which permit funders to receive a percentage of the damages awarded to a funded party, are considered a form of damages-based agreements. Consequently, these litigation funding agreements are unenforceable unless they comply with Section 58AA of the Courts and Legal Services Act 1990. This decision is expected to have a significant impact on the U.K. litigation funding industry. See *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others*, [2023] UKSC 28.

[45] Kenny, *supra* note 11 at 176.

However, Australia has recently required third-party funders to hold an Australian Financial Services License and comply with the managed investment scheme, which allows a group of investors to contribute funds that are then pooled together for investment purposes to generate a financial return, for any class action[46] in order for funders to operate in a transparent and accountable manner.[47]

Arbitral institutions, such as the ICSID, the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC), have also embraced third-party funding by providing for rules on third-party funding in commercial and investment arbitration. ICSID requires parties to file a written notice disclosing the name and address of third-party funders with the ICSID Secretary-General upon registration of the request for arbitration or immediately upon concluding a third-party funding arrangement after registration.[48] The 2018 HKIAC Administered Arbitration Rules provides that if a funding agreement is made, the funded party must inform all other parties, the arbitral tribunal, and the HKIAC about the funding agreement and the third-party funder's identity.[49] Under the SIAC Investment Rules 2017, arbitral tribunals have the power to order the disclosure of the existence of a party's third-party funding agreement, the identity of the third-party funder, the details of the third-party funder's interest in the outcome of the proceedings, and/or the third-party funder's commitment to undertake adverse costs liability.[50]

The immediate reaction and focus on third-party funding have been centred on litigation and arbitration. However, changes in institutional

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[46] *Corporations Act 2001 (*Austl), 2001/50, s 9; *Corporations Amendment (Litigation Funding) Regulations 2020 (Cth)* (Commonwealth), 2020, (Austl).

[47] Authority of the Assistant Treasurer, Commonwealth (Austl), *Explanatory Statement, Corporations Amendment (Litigation Funding) Regulations 2020*, Commonwealth Numbered Regulations - Explanatory Statements, F2020L00942 (2020), online: <classic.austlii.edu.au> [perma.cc/4KHQ-C8TE].

[48] International Centre for Settlement of Investment Disputes, *Arbitration Rules*, 2022, r 14.

[49] Hong Kong International Arbitration Centre, *2018 Administered Arbitration Rules*, 1 November 2018, art 44.

[50] Singapore International Arbitration Centre, *Investment Rules*, 1 January 2017, art 24 (l).

rules, regulations, and legislation have also furnished the ground for the emergence of third-party funding in international mediation.[51]

II. How does third-party funding affect mediation and mediators?

As highlighted in the article's introduction, the SIDRA Survey Final Report 2022 indicated that third-party funding was used in mediation by 11% of all respondents, by 20% of Client Users, and by 8% of External Counsels. 72% of all respondents mentioned that they did not use third-party funding in international commercial mediation but understood its application and function. Conversely, only 17% of all respondents did not hear about third-party funding in international commercial mediation and/or did not understand its application or function.[52]

This data shows that third-party funding in mediation has been utilized and that a considerable number of users understand what it is and how it works. Accordingly, parties, mediators, and stakeholders need to take necessary steps to safeguard the integrity of the mediation process and consider the benefits that third-party funders bring to mediation.[53]

2.1 - Utilizing third-party funding in mediation

Parties to mediation may enter into a third-party funding agreement for similar reasons as those who seek funding in international arbitration and litigation. It promotes access to justice and allows parties with limited financial resources to afford the costs of mediation. It can also speed up the mediation process by removing the parties' need to secure funding from their own resources. Parties can also opt to seek third-party funding in mediation for business risk management reasons or to fund other priority business interests instead.

[51] Alexander, "Trends in International Mediation", *supra* note 22 at 446.
[52] See Section I above.
[53] Greenberg, "Ethical Guidelines", *supra* note 9 at 152.

Funders may also be interested in investing their financial resources in mediation as any possible settlement agreement reached through mediation provides them a more certain and immediate return, compared to the unpredictable nature of litigation or arbitration.[54] Therefore, funders could minimize risks through mediation as prolonged litigation or arbitration can be costly.[55]

The Singapore government has recognized the benefits that third-party funding brings to mediation. In 2021, it permitted third-party funding in mediation in a variety of proceedings, including the ones related to domestic arbitration, court proceedings arising from or connected with domestic arbitration proceedings, proceedings commenced in the Singapore International Commercial Court (SICC) as long as those proceedings remain in the SICC, and appeal proceedings arising from any of these decisions of the SICC. In explaining this recognition, the Singapore Ministry of Law acknowledged that there may be a rise in disputes and companies facing the risk of insolvency because of the COVID-19 pandemic. Financial constraints may cause litigants to forgo pursuing valid legal rights. Therefore, allowing third-party funding in more categories of legal proceedings in Singapore, including selecting mediation, would give additional funding options to litigants to enable them to pursue meritorious claims.[56]

Reservations about third-party funding in international arbitration and litigation also applies to mediation. It may similarly encourage meritless mediation claims. Questions on transparency as to the existence of a third-party funder and the agreement itself, as well as conflict of interest and confidentiality issues can also arise. Party autonomy may be

[54] Geoff Sharp & Bill Marsh, "A New Seat at the Mediation Table? The Impact of Third-Party Funding on the Mediation Process (Part 2)" (1 April 2017), online (blog): <mediationblog.kluwerarbitration.com> [perma.cc/4W3D-K76E].
[55] *Ibid.*
[56] Singapore Ministry of Law, Press Release, "Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore" (21 June 2021), online: <mlaw.gov.sg> [perma.cc/8L5C-2B32].

affected in mediation, as funders might control the process. However, considering the nuances between mediation, arbitration, and litigation, it is important to view third-party funding in mediation through a different lens.[57] In mediation, it is the parties themselves that create a solution to their dispute. No persons or panels – judges, arbitrators, or arbitral tribunals – can decide the outcome of the dispute for the parties. It is thus crucial to ask what role third-party funders should play in the mediation and what influence they should have on the negotiation strategy, the power dynamic, and the settlement itself.[58]

2.2 - Dealing with transparency, conflict of interest, and disclosure

Mediation is a process where parties discuss their dispute directly with one another and negotiate a mutually agreeable solution with the help of a mediator, a neutral third party. Mediators are entrusted with "work[ing] with the parties, evaluating, facilitating and moving along the discussion about the matter in dispute and how best to resolve the conflict."[59] In order to create a settlement agreement that works for all parties, the mediation process must enable parties to communicate freely, explore interests and issues, generate options, and consider alternatives.

Mediation requires transparency from the parties in order to find the best possible outcome to resolve the dispute.[60] Disclosure of third-party funding is necessary to foster trust among parties in the mediation.[61] At the very least, funded parties must inform the mediator and other parties in mediation the (1) identity of the funders or (2) the existence of a funding agreement. Such disclosure can lead to better transparency and

[57] Alexander, "Trends in International Mediation", *supra* note 22 at 446.
[58] *Ibid.*
[59] Susan D Franck, "Using Investor-State Mediation Rules to Promote Conflict Management" (2014) 29:1 ICSID Rev 66 at 71.
[60] Andrea Maia, "Transparency is a Necessary Requirement to Find the Way for the Best Agreement" (25 October 2012), online (blog): <mediationblog.kluwerarbitration.com> [perma.cc/QE26-5FY3].
[61] Elayne Greenberg, "Please Ask, Please Tell: Disclosing Third-Party Funding in Mediation" (11 June 2021) at 141, online: <papers.ssrn.com> [perma.cc/D2ED-RFXG] [Greenberg, "Disclosing Third-Party Funding in Mediation"].

accountability, making third-party funding in mediation more reputable. Some commentators assert that third-party funding disclosure in mediation will enable parties to give "meaningful informed consent" to proceed with mediation and agree to any settlement agreement.[62] This disclosure is "essential to promoting the candor, understanding, and problem-solving that are hallmarks of mediation conflict discourse."[63]

Disclosure is also necessary to avoid conflict of interest. Mediators are expected to be neutral, independent, and impartial.[64] They also have a continuing obligation to disclose to the disputing parties information that may affect their independence and impartiality.[65] The existence of a third-party funder may be a fact or circumstance that affects a mediator's ability to be impartial or independent. Avoiding conflict of interest is in the best interest of all parties and ensures the legitimacy of the entire process and the parties' settlement agreement. Thus, parties must disclose the existence of third-party funding before the commencement of the mediation or even after the mediation process has commenced, but soon after a funding agreement has been concluded, in order for mediators to comply with their respective code of conduct and to safeguard the concluded settlement agreement as "procedurally and substantively fair and just."[66]

There are divergent opinions as to what should be disclosed. Third-party funders are concerned that disclosure would lead to making public their proprietary information, such as their method of determining

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[62] *Ibid* at 146.
[63] *Ibid* at 145.
[64] *Code of Professional Conduct for SIMI Mediators* (Singapore: Singapore International Mediation Institute, 2017) at para 4, online: www.simi.org.sg [perma.cc/BQT8-6NUV] [*Code of Professional Conduct for SIMI Mediators*]; *Code of Professional Conduct*, (Amsterdam: International Mediation Institute, 2017) at para 3, online: <imimediation.org> [perma.cc/L4UT-WZ7L] [*Amsterdam Code of Professional Conduct*]; *Model Standards of Conduct for Mediators*, (Chicago: American Bar Association, 2005) at standard II, online: <americanbar.org> [perma.cc/SV75-DYTZ] [*Model Standards of Conduct for Mediators*].
[65] *Code of Professional Conduct for SIMI Mediators, supra* note 64 at para 3.2; *Amsterdam Code of Professional Conduct*, *supra* note 64 at para 3; *Model Standards of Conduct for Mediators*, *supra* note 64 at para 3.
[66] Greenberg, "Ethical Guidelines", *supra* note 9 at 152.

whether a case should be funded.[67] But some third-party funders do not object to the disclosure of the identity of the funder and that a funding agreement has been concluded, and they are actually in favour of disclosure.[68]

In Singapore, litigation and arbitration practitioners are required to disclose to the court or tribunal and every other party to the proceedings (1) the existence of any third-party funding contracts underlying a proceeding, and (2) the identity and address of the third-party funder involved in the funding process.[69] This disclosure should be made at the date of the commencement of the proceedings if the funding agreement is entered into before the commencement of the proceedings, or as soon as it is entered into force after the proceedings have commenced.[70] Singapore has not legislated that the funding agreement itself must be disclosed. Hong Kong has a similar regime. Under its Arbitration and Mediation Legislation (Arbitration Ordinance of 2017), when a funding agreement is made, the name of the third-party funder must be disclosed to the involved parties. There is currently an initiative in Hong Kong to require funded parties to a mediation to disclose details of the funding agreement *only* if it is required by the funding agreement, ordered by the mediator or mediation body in a mediation, or as otherwise required by law.[71]

Disclosing the existence of a funding agreement and the funder's identity, or even the mere possibility of obtaining a funding agreement, might change the negotiation dynamic between the disputing parties. In one instance, the disclosure of the existence of a funding agreement was

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[67] *Ibid* at 137, 157.
[68] Sahani, *supra* note 5 at 447; Greenberg, "Disclosing Third-Party Funding in Mediation", *supra* note 61 at 149.
[69] Singapore, *Legal Profession (Professional Conduct) Rules 2015*, r 49A.
[70] *Ibid* at r 49B.
[71] Hong Kong Department of Justice, *Proposed Code of Practice for Third Party Funding of Mediation*(Hong Kong: Department of Justice, 2021) at para 2.11, online: <doj.gov.hk> [perma.cc/X5SC-MUGM] [*Proposed Code of Practice for Third Party Funding of Mediation*].

the triggering point for the non-funded party to take the claim seriously.[72] Disclosure can encourage early settlement; the existence of a third-party funder can send a message to a non-funded counterparty that the claim has merit.[73] Having a third-party funder may also "level the playing field in terms of resources" between a funded claimant and the other party involved in the dispute.[74] A funded claimant has more "staying power", which will, in turn, cause the non-funded party to change the amount for which they are willing to settle for when negotiating the settlement agreement.[75] But it might also discourage early settlement when a non-funded party is less inclined to settle if they believe third-party funders are unconscionable entities seeking to profit from the disputes of others.[76] It is also possible that a funded party makes negotiations difficult by expecting a greater monetary amount being offered during a settlement negotiation, just because a funder has invested in their case.[77] Lastly, funders expect a specific rate of return. As such, funded parties may have an unreasonable expectation regarding the settlement amount because they want to make sure that the funder receives a share of the settlement outcome.[78]

2.3 - Maintaining confidentiality and privilege

Before accepting any case, third-party funders examine the facts of a particular claim, the legal rights involved, and the odds of successfully pursuing the case. To do so, prospective funded parties will have to share information and documents with these funders. This information sharing raises questions about confidentiality. Are the information and documents

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[72] Greenberg, "Disclosing Third-Party Funding in Mediation", *supra* note 61 at 152.
[73] Kenny, *supra* note 11 at 186; Greenberg, "Ethical Guidelines", *supra* note 9 at 149–150; Sharp & Marsh, *supra* note 54.
[74] Barbara A Reeves, "How third-party funders change the chemistry of settlements" (2017) Advocate: J Consumer Attorneys Associations of Southern California (August issue), online: <jamsadr.com> [perma.cc/JZ5S-E9NM].
[75] *Ibid.*
[76] Greenberg, "Ethical Guidelines", *supra* note 9 at 161.
[77] Reeves, *supra* note 74.
[78] *Ibid.*

shared with the third-party funder still confidential? Are they covered by legal professional privilege rules, such as attorney-client privilege? Does the mere act of sharing waive the attorney-client privilege?

It is important to note that attorney-client privilege is an evidentiary principle that is usually available in common law jurisdictions. It is meant to encourage frank conversations between attorneys and their clients regarding ongoing or contemplated litigation or arbitration so that attorneys can give their clients proper legal advice.[79] Hence, only clients and lawyers can claim this privilege.[80]

Confidentiality "ensures the integrity of the process and protects the interests of all mediation participants."[81] It can cover documents and communications that may not be relevant in an arbitration or litigation.[82] The ICCA-Queen Mary Report tackled this issue and its applicability in international commercial arbitration. The report provides that arbitral tribunals should not conclude that this privilege is waived "solely because [information] was provided by parties or their counsel to a third-party funder for the purpose of obtaining funding or supporting the funding relationship."[83] In *Miller UK Ltd v Catterpillar, Inc,*[84] a United States federal district court ruled that the attorney-client privilege was waived when the party involved in the dispute provided the materials to a prospective funder because the litigant and the prospective funder did not have a common legal interest in the case.[85] However, the court further ruled that the materials were still privileged and protected under the work-product doctrine, a type of legal professional privilege that "establishes a

[79] Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2009) at 271 [Alexander, *International and Comparative Mediation*]. See also *Upjohn Co v United States*, 449 US 383 (1991).
[80] Alexander, *International and Comparative Mediation*, *supra* note 79 at 272.
[81] *Ibid* at 245.
[82] *Ibid*.
[83] ICCA-Queen Mary Report, *supra* note 3 at 17, 189.
[84] 17 F Supp 3d 711 (ND Ill 2014) [*Miller*].
[85] *Ibid* at 733–734.

zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary."[86] The court clarified that such documents do not necessarily cease to be protected by the attorney-client privilege because they may have been used for obtaining litigation financing. Specifically, the court reasoned:

> [w]hile disclosure of a document to a third party waives attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance, the same is not necessarily true of documents protected by the work product doctrine. This disparity in treatment flows from the very different goals the privileges are designed to effectuate. The attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys. In contrast, the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation.
>
> Because the work-product doctrine serves to protect an attorney's work product from falling into the hands of an adversary, a disclosure to a third party does not automatically waive work-product protection. A waiver occurs "when the protected communications are disclosed in a manner that 'substantially increase[s] the opportunity for potential adversaries to obtain the information.'"[87]

[86] *Ibid* at 734.
[87] *Ibid* at 736.

Funders may require parties to share information about their claims that might be privileged and confidential, with the aim of determining whether or not to provide funding for a commercial mediation case. Hence, the privileged nature of the information should not be waived merely because it was used to obtain financing. Depending on the jurisdiction, the privilege can fall under the attorney-client privilege or the work-product doctrine.

Nevertheless, the question that remains to be answered is whether the information that a third-party funder has received or accessed *over the course* of mediation can also be protected. The disputing parties involved in mediation, as well as their respective legal representatives, are obliged to keep discussed materials during the mediation process confidential[88] and without prejudice – it generally cannot be later used in a court, arbitral tribunal, or other dispute resolution body.[89] This characteristic is meant to encourage parties to speak freely with one another and with the mediator to achieve an optimal settlement agreement. As third-party funders are not the actual disputants in the case, this confidentiality requirement might not apply to them. They may learn trade secrets and other confidential information that would enable them to advance their other financial interests. Thus, if the financial arrangement between the funded party and the third-party funder requires the funded party to share information and consult the third-party funder as the case progresses, it may be prudent to have the third-party funder sign a confidentiality agreement to protect the confidentiality of the mediation process.[90]

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[88] Bruce Pardy & Charles Pou, "Confidentiality" in Ellen Waldman, ed, *Mediation Ethics: Cases and Commentaries* (Hoboken: Jossey-Bass, 2011) 227 at 227–228.
[89] *Ibid* at 229.
[90] Greenberg, "Ethical Guidelines", *supra* note 9 at 156.

2.4 - Managing changing power dynamics and clear funding agreements

A crucial issue that needs to be addressed is the exact role the third-party funder plays in mediation. Do third-party funders provide input regarding the selection of the party's counsel? Should third-party funders have a say in the negotiation strategy and the final settlement stage? What happens when the third-party funder and the funded party, or the party's legal counsel, have a disagreement over the strategy or settlement?

Critics of third-party funding in mediation are very cautious and concerned about whether funders will eventually progress from funding to controlling a case.[91] Some have argued that granting third-party funders excessive control would simply make the funded parties "a proxy for the funder's interests."[92] They also question whether third-party funders should attend the mediation session, and what role they have to play in the actual room.[93] Are they silent observers, active participants, or agents of reality?[94]

These concerns need to be addressed, especially in mediation where parties are supposed to have the ultimate decision-making power. Several jurisdictions are aware of this issue and have stipulated some basic ground rules. For example, in 2021, the Hong Kong Department of Justice launched a two-month public consultation regarding its draft Code of Practice for Third-Party Funding of Mediation.[95] The draft code contains practices and standards for third-party funders in mediation.[96] Article 2.9 of the draft code specifically stipulates:

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[91] Sharp & Marsh, *supra* note 54.
[92] ICCA-Queen Mary Report, *supra* note 3 at 194; Elizabeth Chan, "Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration" (2015) 26:2 Am Rev Intl Arb 281 at 308.
[93] Alexander, "Trends in International Mediation", *supra* note 22 at 446.
[94] Sharp & Marsh, *supra* note 54.
[95] Government of Hong Kong Special Administrative Region, Press Release, "Public consultation on proposed code of practice for third party funding of mediation starts today" (16 August 2021), online: <info.gov.hk> [perma.cc/5P5R-9QU3].
[96] *Ibid.*

The funding agreement shall set out clearly:

(1) that the third party funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the mediation to the third party funder except to the extent permitted by law;

(2) that the third party funder will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties; and

(3) that the third party funder will not seek to influence the mediator and/or mediation service provider involved.[97]

Singapore does not have a similar explicit law detailing the obligations of a third party funder under the funding agreement. But there is a general obligation for legal practitioners to assist in the administration of justice and to act honourably in the interests of the administration of justice.[98] As such, this applies to legal practitioners who work in the third-party funding industry.

As discussed earlier, third-party funding in dispute resolution in the U.K. is largely self-regulated and the ALF prescribes certain standards of practice.[99] The ALF Code of Conduct provides that funders (1) should not take any steps that would cause or would likely cause the funded party's legal representative to act in breach of their professional duties and (2) should not seek to influence the funded party's legal representative to cede control or conduct of the dispute to the third-party funder.[100] It is worth mentioning that this Code of Conduct allows parties to include a provision concerning the third-party funder's ability to express their input in the

[97] *Proposed Code of Practice for Third Party Funding of Mediation*, *supra* note 71 at para 2.9.

[98] Jeffrey Pinsler, *Legal Profession (Professional Conduct) Rules 2015: A Commentary*, 2nd ed (Singapore: Academy Publishing, 2022), s 9(1).

[99] Kenny, *supra* note 11 at 175.

[100] *ALF Code of Conduct*, *supra* note 43, at r 11.1.

settlement decision.[101] Some third-party funders in the U.K. have expressed that they do not seek to control every aspect of the case.[102] They maintain that ultimate control over the strategy and the decision to enter into a settlement remains with the funded parties and their legal representatives.[103] However, these third-party funders reserve the right to provide their opinion on the matter, especially since these funders position themselves as rational decision-makers who have experience in settlement to craft a realistic settlement.[104]

Rules and regulations on whether third-party funders can influence mediation and settlement can be put in place in the funding agreement. However, ultimately, the parties themselves must decide what role a third-party funder plays in mediation. Day-to-day case management and strategic decision-making can be determined by the funded party and third-party funder in their funding agreement.[105] This agreement must "clearly and unequivocally reflect the intentions of the parties with respect to the scope of involvement or control on all such issues and the procedures, rights, and duties that apply when an unresolved dispute over management and strategy arises."[106] Funding agreements must also include provisions on how potential outcomes will be shared between the funder and funded party "in a way that avoids providing incentives for sub-optimal behaviour."[107] Therefore, the funding agreement must address the needs of the parties at the early stage of the proceeding and have provisions on how to identify and resolve potential issues.[108]

[101] *Ibid*.
[102] Sharp & Marsh, *supra* note 54.
[103] *Ibid.*
[104] *Ibid*; see also Greenberg, "Disclosing Third-Party Funding in Mediation", *supra* note 61 at 151.
[105] ICCA-Queen Mary Report, *supra* note 3 at 193.
[106] *Ibid.*
[107] Walck, *supra* note 15 at 129.
[108] *Ibid.*

2.5 - Having preconceived notions about third-party funding

Mediators are expected to conduct mediation in an impartial manner and avoid doing anything that gives the appearance of partiality.[109] They "should not act with partiality or prejudice based on any participant's personal characteristics, background, values, and beliefs, or performance at a mediation, or another reason."[110] Nevertheless, mediators are still human beings who may have opinions about the efficacy of third-party funding. Unlike judges or arbitrators, mediators do not decide disputes. They facilitate the negotiation and settlement process and leave the outcome of the dispute to the parties. In this context, mediators are subject to a broader range of complexities where conscious or unconscious bias about third-party funders can occur, when, for example, they have a positive opinion on the involvement of a third-party funder, which can lead them to act in favor of the funded parties.[111] Mediators might believe the funded party's claim has merit simply because an outside person/entity has invested its own resources in preparing the case,[112] a possibility that affects their ethical obligation to remain impartial.

With the increasing availability of third-party funding, some commentators have suggested that mediators should undergo professional training to obtain the necessary skills needed to deal with cases that involve third-party funders.[113] These training programs can include modules on how third-party funding works, what ethical issues mediators will face when they encounter a funded party, and how to manage cognitive biases toward third-party funders.[114]

Some commentators believe that there is a value-added benefit that third-party funding brings to the mediation process. It has been suggested

[109] *Model Standards of Conduct for Mediators*, *supra* note 64 at Standard II (B).
[110] *Ibid* at Standard II (B)(1).
[111] Greenberg, "Ethical Guidelines", *supra* note 9 at 159.
[112] *Ibid.*
[113] *Ibid* at 157–158.
[114] *Ibid* at 158.

that third-party funders should disclose the financial arrangement to help mediators move the negotiation process along.[115] If a mediator is aware of the economic considerations underlying the relationship between the funded party and the funder, the settlement reference point can be understood more easily. Knowing the third-party funder's objective assessment of the case may also help the mediator to understand the relevant issues more properly and incorporate them into the negotiation process.[116]

III. How does third-party funding affect hybrid dispute resolution mechanisms?

Another aspect of dispute settlement that third-party funding can affect concerns hybrid or mixed methods of dispute resolution, which are significantly on the rise. Hybrid dispute resolution consists of two or more of the following dispute resolution processes: arbitration, mediation, neutral evaluation, or litigation. Some of the popular hybrid mechanisms are mediation-arbitration (Med-Arb), arbitration-mediation (Arb-Med), and arbitration-mediation-arbitration (Arb-Med-Arb).[117]

There has been a considerable number of commercial parties who are willing to include hybrid mechanisms into their dispute resolution clauses. For example, in the 2022 SIDRA International Dispute Resolution Survey, 71% of the respondents with prior exposure to hybrid dispute resolution mechanisms indicated that hybrid dispute resolution clauses found in their contracts were the primary factor influencing their adoption of such mechanisms.[118] As a matter of comparison, this statistic is higher than the 2020 SIDRA Survey where 61% of the respondents

[115] *Ibid*; see also Greenberg, "Disclosing Third-Party Funding in Mediation", *supra* note 61 at 148.
[116] *Ibid*; Reeves, *supra* note 74.
[117] SIDRA Final Report 2022, *supra* note 1 at 58.
[118] *Ibid.*

identified contractual obligation as the most influential factor.[119] Notably, even though hybrid mechanisms are not included in contracts, parties can still decide to take advantage of these mechanisms even after the commencement of the dispute to access an impartial and speedy process that preserves the business relationship of the disputing parties and minimizes indirect costs to client business.[120]

Settlement is fairly common in arbitration and litigation.[121] However, in hybrid procedures such as Arb-Med-Arb, parties are able to benefit from the key features of mediation and arbitration at the same time. They can retain party autonomy and take control of the outcome of the dispute, with the help of a mediator who facilitates the negotiation process. Parties can also benefit from the certainty of arbitration because they can formalise their settlement agreement as an arbitral consent award, which can be enforced in over 160 countries under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the New York Convention. Arbitration and mediation institutions have also responded to the rise of hybrid dispute resolution by developing specific rules governing the process and acknowledged that there is a market for these combined mechanisms. The SIAC has an existing Arb-Med-Arb protocol with the Singapore International Mediation Centre (SIMC).[122] The SIMC recently launched a Litigation-Mediation-Litigation (LML) Framework with the Singapore International Commercial Court.[123]

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[119] *Ibid*; see also SIDRA Singapore Management University, *SIDRA International Dispute Resolution Survey: 2020 Final Report* (Singapore: SIDRA, 2020) at 71, online: <sidra.smu.edu.sg> [perma.cc/82VD-J5KV].

[120] SIDRA Final Report 2022, *supra* note 1 at 59.

[121] Teck Kian Desmond Chng, "The SIAC-SIMC Arb-Med-Arb Protocol: Enforcing International Commercial Mediated Settlement Agreements (MSAs) through the New York Convention" in Joel Lee & Marcus Tao Shien, eds, *Contemporary Issues in Mediation*, vol 1 (Singapore: Singapore International Mediation Institute & World Scientific, 2016) 85 at 89; Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 J Empirical Leg Studies 459 at 515.

[122] For more information on the SIAC-SIMC Arb-Med-Arb protocol see Singapore International Mediation Centre, "Arb-Med-Arb" (last visited 14 February 2023), online: <simc.com.sg> [perma.cc/3HAT-APXR].

[123] For more information on the SICC-SIMC LML protocol see Singapore International Commercial Court, "Litigation-Mediation-Litigation Framework" (17 Nov 2023), online: <sicc.gov.sg> [perma.cc/V5JQ-NB2X].

Third-party funding can also significantly impact hybrid mechanisms. As previously stated, there are currently certain rules governing third-party funding in litigation and arbitration, as separate and isolated dispute resolution mechanisms. The inquiry to be answered is what would happen if arbitration or litigation is combined with mediation. Would the third-party funding rules designed for arbitration or litigation extend to the mediation portion of the hybrid mechanism?

Conflict of interest, disclosure, and privilege, as well as the evolving roles of the funded party and the funder, are also becoming concerns for hybrid dispute resolution mechanism. At a minimum, mandatory disclosure of the existence of funding and the identity of the funder should be extended to hybrid dispute resolution mechanisms. Doing so would ensure that the judge or arbitrator and mediator involved in the process can comply with their respective conflict of interest obligations, aiding in their ability to remain independent and impartial. Clear funding agreements must also be carefully crafted to delineate what role the funder should play in litigation or arbitration and mediation. It should include details as to who has control over the strategy and negotiations in the entire hybrid process, as well as information on dealing with potential disagreements between the funder and the funded party. As this is an emerging area, it is important to pay attention to trends and conduct further research to determine the impact of third-party funding in hybrid dispute resolution mechanisms.

Conclusion

More and more users of international commercial dispute resolution are becoming aware of third-party funding, what it is for, and how it functions. There now exist several mandatory and voluntary regulations governing third-party funding, especially in litigation and arbitration.

Compared to litigation and arbitration funding, there is little data and anecdotal information about third-party funding in mediation. However, some mediation practitioners believe that third-party funding alters the dynamics of the parties involved in the dispute,[124] and it "radically changes" parties' consideration of risk.[125] Typically, in non-recourse funding agreements, funded parties, who lose the case, need not reimburse the third-party funder for any of the amounts that the funder has paid. Should they win the case, the funded party will receive a share of the proceeds, and the funder gets the rest. As interests and risk tolerance are completely different in third-party funding, funded parties tend to be more confident coming into mediation and may have different financial expectations with respect to the amount being offered by the counterparty in order to settle.[126] Parties, and even mediators themselves, may also have preconceived notions and biases about third-party funding. They may think it is a tool that provides access to justice or something that proves to be counterproductive. Such considerations and attitudes may change the negotiation process and how a mediator should facilitate it.

Thus, it is important to view third-party funding in commercial mediation through a different lens. Ethical considerations need to be carefully examined, such as who controls the mediation and possible conflict of interest. There now appears to be some consensus that disclosure of the existence of a funding agreement and the third-party funder's identity is required to ensure that mediation and any resulting settlement agreement remain fair and just. Third-party funding should not erode confidentiality, a key aspect of mediation. Confidentiality in mediation ensures that parties are given an opportunity to speak freely about their interest and encourages creative dispute settlement processes. It may then be prudent to consider that parties do not automatically waive

[124] Reeves, *supra* note 74.
[125] Sharp & Marsh, *supra* note 54.
[126] *Ibid.*

privilege over confidential documents when they share these with funders they seek to engage. Disputants interested in obtaining funding need to carefully consider the risks and benefits before entering into any funding agreement. They must also ensure that their funding agreements clearly delineate the rights and responsibilities of the funder and the funded party, detail who has influence over decision-making (including settlement negotiations), and how disagreements over management and strategy should be resolved.

While third-party funding in mediation continues to develop, it is important for both mediators and disputing parties to engage in conversation and training on third-party funding. As third-party funding seems to be gradually becoming a feature of modern commercial mediation, affirmative steps must be taken by policymakers, users of commercial mediation, institutional providers, and even third-party funders themselves to ensure the integrity of mediation.