THIRD PARTY FUNDING
IN DOMESTIC ARBITRATION:
CHAMPERTY OR SOCIAL UTILITY?

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I. INTRODUCTION

There are costs—sometimes substantial ones—attendant to any judicial or alternative dispute resolution process. How then can parties with meritorious claims, but shallow pockets, still utilize arbitration? One answer is third party funding.

Third party funding occurs when an individual or institutional lender agrees to pay a litigant’s legal costs and fees in exchange for a share of the judgment. Lawyers and their clients have engaged in one form of third party funding, the contingency fee, for over a century.¹ The prevalence of third party funding in domestic arbitration is uncertain. However, its pervasiveness in litigation² and international arbitration³ strongly suggests it will soon carry over to domestic arbitration (if it has not already).

Commentators disagree over whether third party funding should be decried as champerty or lauded as a social utility.⁴ Proponents argue that it increases access to justice, spreads the financial risks of arbitration, equalizes bargaining power of claimants and respondents, and

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¹ Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940, 47 DEPAUL L. REV. 231, 231 (1998).
³ Susanna Khouri & Kate Hurford, Third Party Funding in International Arbitration: Balancing Benefits and Risks, PLC MAG., July 2012, at 35.
⁴ See Susanna Khouri et al., Third Party Funding in International Commercial and Treaty Arbitration—A Panacea or a Plague?, 4 TRANSNAT’L DISP. MGMT. 1, 14 (2011) (“Third party funding is neither a panacea nor a plague but for suitable claims it can offer tangible commercial benefits to claimants and its evolution . . . should be positively nurtured, not constrained.”); Jason Lyon, Comment, Revolution in Progress: Third-Party Funding of American Litigation, 58 UCLA L. REV. 571, 579 (2010) (“A frequently cited criticism of third-party litigation lending, both in case law and in academic commentary, is that, on their faces, such agreements violate the common law doctrines of maintenance and champerty.”).
filters out meritless claims, and enables clients to benefit from the lender’s human capital. But critics maintain that third party funding constitutes champerty and leads to a host of ethical issues such as conflicts of interest, breaches of confidentiality, and the undercutting of client control over the claim.

This article contends that third party funding should be permitted in domestic arbitration. Part II discusses the origins and development of champerty, including its role in U.S. litigation and international arbitration. Part III lays out the benefits and detriments of allowing champertous contracts in domestic arbitration. Part IV argues that third party funding should be permitted in domestic arbitration because it advances public policy and will not give rise to the parade of ethical horribles suggested by critics. Part V concludes the article.

II. THE ORIGINS AND DEVELOPMENT OF CHAMPERTY

Champerty has been defined as “an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds.” Simply put, champerty is investing in someone’s lawsuit. While a finding of champerty does not affect substantive elements of a claim, it does render the financing contract unenforceable and exposes the lender to liability for the entire cost of the legal action.

This Part briefly traces the ancient origins of champerty and discusses its role in contemporary U.S. litigation and international arbitration.

A. Champerty in Greece, Rome, and England

Champerty can be traced back to ancient Greece and Rome. Intervention on behalf of a litigant who could not pursue legal action against a more powerful opponent was first permitted in Greece in the sixth century B.C. However, third party intervention escalated to the point of becoming a “striking and intolerable abuse” referred to as

5 See infra Part III.A.
6 See infra Part III.B.
7 BLACK’S LAW DICTIONARY 262 (9th ed. 2009).
“sycophancy,” a chargeable offense.\textsuperscript{10} In Rome, third party intervention was so common that it became a recognized profession, but courts limited its use by requiring the intervenor to have a personal connection to the litigant; otherwise, it was a tort.\textsuperscript{11}

In feudal times, English courts created the common law doctrine of champerty to discourage litigants from assigning meritless claims to wealthy and influential individuals—who were typically more successful in court—in exchange for an interest in a favorable judgment.\textsuperscript{12} English courts subjected “champertous maintainers” to criminal and tortious liability in an effort to protect the integrity of the justice system.\textsuperscript{13} Although the doctrine of champerty was traditionally aimed at civil litigation, English courts have recently applied it to arbitration as well.\textsuperscript{14} Today, some jurisdictions in England have abolished criminal and tortious liability for champerty, while others have significantly narrowed its scope of liability.\textsuperscript{15}

B. Champerty, Contingency Fees, and Third Party Funding in U.S. Litigation

Although the United States inherited common law champerty from England, early American courts did not agree as to what constituted a violation of the doctrine. Some courts held that any agreement based on the proceeds of a lawsuit was champertous, whereas others required that the lawsuit must have been financed at the sole expense of the lawyer.\textsuperscript{16} And some states never formally recognized champerty while others regulated it entirely by statute.\textsuperscript{17}

\textsuperscript{10} Id.
\textsuperscript{11} \textit{Id.} at 52.
\textsuperscript{12} Jern-Fei Ng, \textit{The Role of the Doctrines of Champerty and Maintenance in Arbitration}, 76 ARB. 208, 209 (2010).
\textsuperscript{15} Khouri & Hurford, \textit{supra} note 3, at 39.
\textsuperscript{17} \textit{Id.}
By the mid-nineteenth century, a majority of states had rejected or relaxed the English rule, and eventually every state permitted champerty in the form of a contingency fee. Common contingency fee arrangements stipulate that the lawyer receives a predetermined share of any favorable judgment but receives nothing if the client loses. Courts allow these arrangements because “[i]n the United States the open court door policy has had a preeminent place, and the contingency legal fee has been viewed as the poor and middle income person’s ticket to justice.”

While the contingency fee has been legal in the United States for over a century, the funding of litigation by a disinterested third party lender is a relatively nascent phenomenon. Major lenders include financial institutions, insurance companies, hedge funds, wealthy individuals, and specialized litigation financing corporations. State courts have generally taken a laissez-faire approach to this type of third party funding, leaving its regulation to state legislatures.

Nevertheless, in some jurisdictions the doctrine of champerty precludes third party funding altogether. Ohio is one such jurisdiction. In Rancman v. Interim Settlement Funding Corp., the Supreme Court of Ohio held that procuring financial support from an institutional lender in exchange for a portion of the judgment constitutes champerty and voids the financing contract. The court emphasized that “a lawsuit is not an investment vehicle” and “[a]n intermeddler is not permitted to

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18 For a survey of the status of champerty in different states, see Susan Lorde Martin, Financing Plaintiffs’ Lawsuits: An Increasingly Popular (and Legal) Business, 33 U. Mich. J.L. Ref. 57, 72 (1999) (“In the United States . . . the most notable exception [to the champerty prohibition] is the contingency fee system. A lawyer’s agreement to handle a case in exchange for a percentage of the damages recovered, if any, is clearly champertous. Nevertheless, all states recognize such agreements.”); see also Craig Miles & Sarah Zagata Vasani, Case Notes on Third-Party Funding, 3 Global Arb. Rev. 35, 37 (2008).


20 Martin, supra note 18, at 72.

21 Andreas Frischknecht & Vera Schmidt, Privilege and Confidentiality in Third Party Funder Due Diligence, 8 Transnat’l Disp. Mgmt. 3 (2011).


23 John Beisner et al., U.S. Chamber Institute for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States 3 (2009); Lyon, supra note 4, at 584 (concluding that the legality of third party funding remains uncertain in many states).

24 789 N.E.2d 217, 221 (Ohio 2003).
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gorge upon the fruits of litigation.”

The Ohio Rules of Professional Conduct also stand as a barrier to some financing contracts.

Although third party funding is disfavored in some jurisdictions, its use in litigation is steadily growing.

The total value of third party investments in U.S. lawsuits at any given time is estimated to exceed $1 billion. In fact, the United States is home to the largest institutional financier of litigation and arbitration in the world, which recently reported a twenty-five percent increase in annual profits to $42.5 million.

C. Champerty and Third Party Funding in International Arbitration

Foreign jurisdictions have generally treated contingency fees and other third party funding arrangements as champertous. For example, in Otech Pakistan Ltd. v. Clough Engineering Ltd., the Singapore Court of Appeal held that the “purity of justice and the interests of vulnerable litigants are as important in [arbitral] proceedings as they are in litigation. Thus the natural inference is that champerty is as applicable in the one as it is in the other.” Yet there is some indication this position is changing in certain jurisdictions.

In Arkin v. Borchard

25 Id. Notably, five years after Rancman, the Ohio legislature adopted a bill permitting and regulating “non-recourse civil litigation advances.” See Mark M. Bello, Lawsuit Funding—New Legislation in Ohio, OHIO TRIAL, Summer 2009, at 29.


27 BEISNER ET AL., supra note 23, at 3 (“The recent growth of third-party litigation financing in the United States results from a number of factors, including rising litigation costs, the lack of capital in the traditional lending market to fund litigation, . . . and professional-responsibility rules that prohibit attorneys from paying their client’s living expenses while litigation is pending.”); see also Jonathan D. Glater, Investing in Lawsuits for a Share of the Awards, N.Y. TIMES (June 2, 2009), http://www.nytimes.com/2009/06/03/business/03litigate.html?_r=0.


30 Martin, supra note 18, at 72 n.128 (citing cases and articles in support of the proposition that France, Portugal, the Bahamas, Germany, Italy, Hong Kong, Nevis, and Mexico do not allow contingency fee arrangements).

31 [2006] 3 SLR [34].
Lines Ltd., the England and Wales Court of Appeal noted that third party funding is consistent with public interest insofar as it increases access to justice, and that “pure funders” should not normally be held liable for costs under fee-shifting rules.32

In the United States, a recent high-profile case involving international arbitration has swung the momentum further in favor of third party funding. The case involved a financing contract between Juridica Investments and S&T Oil, which stipulated that Juridica would finance part of S&T’s arbitration against the Government of Romania in return for a percentage of the judgment.33 S&T ultimately abandoned its case, prompting Juridica to file its own arbitration claim against S&T with the London Court of International Arbitration (LCIA) seeking damages pursuant to the financing contract.34 The U.S. District Court for the Southern District of Texas denied S&T’s application for a temporary restraining order enjoining the LCIA arbitration, holding that S&T could not meet its burden under Federal Rule of Civil Procedure 65.35 As demonstrated by S&T Oil and Arkin, courts are increasingly countenancing third party funding in international arbitration—and the use of such arrangements continues to grow.36

III. THE BENEFITS AND DETRIMENTS OF THIRD PARTY FUNDING

There is much debate surrounding the benefits and detriments of allowing a disinterested lender to finance a legal claim. Proponents of third party funding assert that it increases access to justice, spreads financial risk, equalizes bargaining power, filters out meritless claims, and provides access to the lender’s human capital. But critics maintain that third party funding violates public policy and gives rise

32 [2005] EWCA (Civ.) 655, [38] (Eng.).
34 Id.
35 Id. at *6.
36 See Maya Steinitz & Joseph Matthews, Contingent Fees and Third Party Funding in Investment Arbitration Disputes, 4 TRANSNAT’L DISP. MGMT. 1 (2011) (“Today, the use of contingent fee retainer agreements and/or third party funding arrangements in the world of international arbitration . . . is growing quickly.”); Jennifer A. Trusz, Note, Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration, 101 GEO. L.J. 1649, 1651 (2013) (“Although there is no hard data about the use of third-party funding in international commercial arbitration, due to the typical confidentiality of proceedings, there are several indications that its use is increasing.”).
to ethical issues such as conflicts of interest, breaches of confidentiality, and the undercutting of client control over the claim. This Part lays out both sides of the argument.

A. Benefits of Third Party Funding

Access to justice. Third party funding increases access to justice for parties with meritorious claims but shallow pockets. One recent study concluded that the high upfront costs of arbitration have a deterrent effect and often prevent claimants from filing claims. An arbitrator’s costs may be especially prohibitive for a party pursuing claims against a larger, more powerful opponent. Financing contracts remedy this problem by diverting legal costs and fees to a third party, thereby enabling claimants with limited financial resources to pursue their claims. Alternatively, third party funding “permit[s] defendants with sound defenses to avoid surrendering to a better-financed plaintiff’s pressure to enter into an early (one-sided) settlement agreement.” Facilitating access to justice furthers public policy and is one reason U.S. courts routinely uphold contingency fee agreements in litigation.

Risk allocation. Third party funding provides a way to share the financial risks associated with arbitration. A party faced with footing the entire bill of arbitration may be compelled to drop the claim due to the high degree of risk. Repeat players—such as employers and corporations—typically have a higher risk tolerance, and “[w]hen differing risk tolerances are combined with differing resource levels, . . . an unequal playing field results, and the goal of fair and even-handed arbitral justice is often thwarted by cost, process and risk.” However, contracts with lenders may be structured to

37 PUBLIC CITIZEN, The Costs of Arbitration, http://www.citizen.org/publications/publicationredirect.cfm?ID=7173 (last visited May 13, 2015) (“Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that forum costs . . . can be up to five thousand percent higher in arbitration than in court litigation.”).
39 Cremades, Jr., supra note 13, at 34.
40 Khouri & Hurford, supra note 3, at 35; Trusz, supra note 36, at 1657.
allocate risk among various parties, including lawyers acting on a contingency basis and others seeking to invest in the claim.\textsuperscript{42} Moreover, lenders have experience assessing risks and are better equipped to manage them than most parties.\textsuperscript{43}

\textit{Bargaining power.} Third party funding equalizes bargaining power of claimants and respondents, which increases settlement leverage for the funded party.\textsuperscript{44} Equalization of bargaining power can facilitate settlement because “financially stronger parties who would otherwise have tried to take advantage of their financial strength would be more amenable to engaging in settlement negotiations with the weaker (but funded) party at an earlier stage of the dispute.”\textsuperscript{45} And lenders often structure financing contracts to favor early settlement.\textsuperscript{46}

\textit{Meritorious claims.} Lenders act as gatekeepers by filtering out meritless claims. Prior to investing, lenders usually perform exhaustive due diligence on all aspects of the claim affecting the likelihood of a successful resolution.\textsuperscript{47} This includes the terms of the arbitration agreement, substantive law governing the dispute, possible counterclaims, risks associated with obtaining payment of an award, and the arbitrator and arbitral institution.\textsuperscript{48} Lenders base their investment decision largely on the due diligence analysis, and typically finance only those claims that are likely to succeed.\textsuperscript{49} For instance, in choose between a certain outcome and an uncertain outcome, their choice will be affected by their risk preferences. And where one party is a repeat player and the other is a one-time participant, they will have very different risk tolerances—the one-time, risk-averse participant will be more fearful of proceeding to trial, more eager to settle, and in a weaker bargaining position.”).

\textsuperscript{42} Khouri & Hurford, supra note 3, at 38.

\textsuperscript{43} Maya Steinitz, \textit{Whose Claim Is This Anyway? Third-Party Litigation Funding}, 95 MINN. L. REV. 1268, 1313 (2011) (“[C]ontingency lawyers (and funders) make decisions across a portfolio of cases—trading off a small gain in one case for a larger gain in another case achieved with the same time-investment and reputational costs.”).

\textsuperscript{44} van Boom, supra note 14, at 49.

\textsuperscript{45} Cremades, Jr., supra note 13, at 34.

\textsuperscript{46} Id.

\textsuperscript{47} Frischknecht & Schmidt, supra note 21, at 2 (“A prudent funder will base its investment decision on a comprehensive assessment of the strengths and weaknesses of the claimant’s position. That assessment will often require access to documents and other evidence as well as candid discussions with counsel.”).

\textsuperscript{48} Id.

\textsuperscript{49} Lyon, supra note 4, at 594 (“[T]rue frivolous claims because the ratio of risk to potential return in those cases is so lopsided.”).
early 2010, Juridica Investments financed only twenty-three of the nearly 400 claims it reviewed.50

*Human capital.* Clients can benefit from the human capital of lenders. It has been observed that:

> [m]any firms offering third party funding are run by highly experienced former dispute resolution lawyers who are focused on the timely, efficient and successful resolution of funded claims for the maximum achievable value. With a broad range of specialist skills and experience, and consistent with its own commercial objectives, a funder can add real value to the successful pursuit of arbitration claims.51

Lenders can be of assistance throughout the course of the arbitration by advising on experts and arbitrators, opining on strategic decisions, and even helping the client retain a new lawyer if it becomes apparent their current one lacks the skill or experience to successfully arbitrate the claim.52

**B. Detriments of Third Party Funding**

*Champerty.* The doctrine of champerty is far from obsolete53 and third party funding is precisely the sort of activity it is meant to discourage. “The root problem with third-party litigation financing is that it introduces a stranger to the attorney-client relationship whose sole interest is a financial one.”54 Some states have relaxed or abolished the doctrine,55 but others continue to enforce it in cases

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51 Khouri & Hurford, *supra* note 3, at 38.

52 *Id.*


involving third party funding. For instance, in *Resolution Settlement Corp. v. Curry*, a litigant signed a contract with an institutional lender requiring her to pay the greater of twenty-five percent or $1.2 million of a favorable judgment. When the litigant prevailed in court but refused to honor the contract, the lender sued. The U.S. District Court for the District of Nevada ruled against the lender, citing several Nevada Supreme Court decisions applying the doctrine of champerty.

*Other policy concerns.* Third party funding opens the floodgates for meritless claims because funded parties assume little or no financial risk, and thus are not discouraged from pursuing such claims. Similarly, lenders are not always discouraged from funding meritless claims. If the potential recovery is sufficiently large, “the lawsuit will be an attractive investment, even if the likelihood of actually achieving that recovery is small.” Third party funding also unjustly raises the floor on settlement negotiations while inflating the legal bill for opponents who lack financing. It may even raise costs for the client as well. Because clients will often have little or no leverage when negotiating the terms of the financing contract with lenders, they must be willing to give up substantial portions of an award to secure financing.

*Conflicts of interest.* Third party funding can also lead to a host of ethical issues, perhaps the most conspicuous of which is conflicts of interest. Lenders must obtain information to assess the viability of a claim, which can be problematic for lawyers who owe a duty of loyalty to their clients. Lawyers may wrongly place loyalty with lenders rather than clients, particularly in settlement negotiations.

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57 *Id.* at 3–5.
59 Cremades, Jr., *supra* note 13, at 36.
60 Beisner, *supra* note 29 (“An investor boosted by third-party funding is also likely to bring more experts and witnesses to the dispute, driving up the legal costs of the respondent state.”); Cremades, Jr., *supra* note 13, at 36 (“[A] claimant will not settle for any amount offered by the defendant that is less than the aggregate of the principal amount advanced by the funder and the current interest accrued.”).
where clients and lenders disagree over the terms of the settlement. Conflicts of interest may also exist between lenders and arbitrators “due to multiple appointments indirectly made by the same third-party funder, a relationship between the funder and the arbitrator’s law firm, or shares held by the arbitrator in a third-party funding corporation.”

Confidentiality. Another ethical issue surrounding third party funding in arbitration is the breach of client confidentiality. Confidentiality is a fundamental right in the lawyer-client relationship and is becoming increasingly important in arbitration, but it is threatened whenever a disinterested third party is introduced to the lawyer-client relationship. This is particularly true when lenders conduct invasive due diligence—which almost always includes confidential information—before determining whether or not to invest. Furthermore, attorney-client privilege generally does not protect “communications made in the presence of third parties who are objectively not necessary to informed attorney-client contact.”

Control over claims. Third party funding has a tendency to undercut client control over the claim. Party autonomy is one of the cornerstones of arbitration, but lenders may seek to usurp control and influence strategic decisions in order to protect their investments. Client control might likewise be jeopardized by confidentiality or conflict of interest issues, and some clients may even be compelled to entirely delegate claims to the lender via an agency relationship.

IV. THE SOCIAL UTILITY OF THIRD PARTY FUNDING

The S&T Oil and Arkin decisions demonstrate that courts in the United States and abroad are warming to the idea of third party funding in arbitration. Indeed, the utility of third party funding is

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64 Khouri & Hurford, supra note 3, at 40.
65 Trusz, supra note 36, at 1665.
66 Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not, 56 U. MIAMI L. REV. 949, 962 (2002) (“[C]onfidentiality agreements are increasingly common in arbitration and the question of how much of the arbitration will remain totally confidential has become an issue, both of ethics and substantive law.”).
68 Ng, supra note 12, at 10.
70 Trusz, supra note 36, at 1654–55.
reflected in its pervasiveness in U.S. litigation and international arbitration. This Part contends that courts and legislatures should permit third party funding in domestic arbitration, and asserts that the arguments against it are overstated and inaccurate in light of current public policy and ethical safeguards.

A. Third Party Funding Is Consistent with Public Policy

Champerty in the form of third party funding is consistent with public policy, which has no doubt evolved since feudal times when lords intermeddled in the lawsuits of peasants. As one commentator has argued:

It is unlikely that any of [the traditional policy justifications] would apply to a third-party litigation financier voluntarily sought out by a plaintiff in need of assistance to foster an already-existing, valid claim. This is all the more true when the litigant is a corporate entity receiving impartial and expert legal counsel. Indeed, in an age when liberalized pleading has resulted not only in greater access to courts but in greater costs in prosecuting claims because of expensive pretrial discovery, third-party funding could be considered a public service.71

Dramatic shifts in the economic and legal landscape over time has caused some to call for the elimination of common law champerty altogether.72

Public policy does not favor a ban on third party funding in domestic arbitration. To the contrary, third party funding advances public policy by expanding access to arbitration for parties with meritorious claims but limited resources. It can also make the arbitration process more efficient and fair by filtering out meritless claims, equalizing bargaining power and settlement leverage, offsetting the financial risks of arbitration, and providing access to the valuable human capital of lenders.73

71 Lyon, supra note 4, at 589.
72 Cremades, Jr., supra note 13, at 39 (“Domestically, the first step would seem to be to abandon, at least to some extent, the doctrines of maintenance and champerty.”); Lyon, supra note 4, at 589–90 (“[T]he doctrines of maintenance and champerty are not only obsolete, they appear to run counter to our public policy goals. They no longer provide a valid justification for prohibiting third-party litigation funding.”).
73 See supra Part III.A.
B. Third Party Funding Is Not Inherently Unethical

Concerns over the ethical implications of third party funding are not unfounded. However, to the extent ethical issues arise, safeguards exist to address those issues. For instance, conflicts of interest are governed by the overarching principle that lawyers owe ethical obligations solely to their clients and not to third parties.\(^{74}\) Any tendency lawyers may have to favor lenders’ interests over clients’ is kept in check by ethics rules—including disciplinary sanctions\(^{75}\) and malpractice liability\(^{76}\)—and the terms of the financing contract.\(^{77}\) The ethics rules of most states preclude lawyers from accepting compensation from a third party in any situation where there is “interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”\(^{78}\) Moreover, financing contracts can expressly provide that “in the event of a conflict of interest between the claimant and funder, the lawyer may continue to act solely for the claimant, even if the funder’s interests are adversely affected.”\(^{79}\)

Conflicts of interest that may arise between lenders and arbitrators can be neutralized by disclosure requirements.\(^{80}\) Under ABA arbitration rules, arbitrators must “disclose any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence.”\(^{81}\)

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\(^{74}\) See, e.g., Model Code of Prof’l Conduct R. 1.7(a)(2) (providing that a conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”) (emphasis added).

\(^{75}\) In Ohio, for example, the Supreme Court can impose four types of discipline for ethical violations: (1) public reprimand; (2) suspension from practice for up to two years; (3) indefinite suspension from practice; or (4) permanent disbarment. Ohio St. Bar Ass’n, Lawyer Ethics and Discipline, https://www.ohiobar.org/ForPublic/Resources/LawFactsPamphlets/Pages/LawFactsPamphlet-9.aspx (last updated Jan. 10, 2012).

\(^{76}\) See Jeffrey M. Smith & Ronald E. Mallem, Preventing Legal Malpractice § 1.8 (2d ed. 1996) (“Ethical rules may be a basis for discipline, have been argued to provide an alleged independent basis of tort liability, may prescribe a standard of conduct, or may codify accepted principles of civil liability . . . . Malpractice liability is the common result of disregarding of these responsibilities.”).

\(^{77}\) See Khouri & Hurford, supra note 3, at 40.


\(^{79}\) Khouri & Hurford, supra note 3, at 40.

\(^{80}\) See van Boom, supra note 14, at 14–17; see generally Eric de Brabandere & Julia Lepeltak, Third-Party Funding in International Investment Arbitration, 27 ICSID Rev. 379 (2012) (arguing that investment arbitration is becoming increasingly more transparent due to disclosure requirements).

\(^{81}\) Am. Bar Ass’n, Commercial Arbitration Rules and Mediation Procedures R-17(a) (2013).
Similarly, under the Revised Uniform Arbitration Act (RUAA), arbitrators must disclose any known facts that a reasonable person would consider to affect impartiality, including financial or personal interests and relationships with any party to the arbitration.

Confidentiality issues arising from third party funding are likewise resolvable. Confidentiality agreements are increasingly common in arbitration and can be extended to lenders. It is true that due diligence sometimes requires access to confidential information to fully assess the merits of a claim, and clients who provide such information to lenders may indeed waive attorney-client privilege. However, the lawyer must obtain the client’s informed consent before releasing information to a third party, and communications with lenders may still be protected by the work product rule provided they were made in anticipation of litigation. Additionally, the RUAA gives arbitrators discretion to issue a protective order to prevent disclosure of privileged or confidential information.

Finally, critics overstate the extent to which undercutting client control is an issue. The common law allows parties to give up control over legal claims by contract in various contexts, and in third party funding, the financing contract dictates the lender’s level of control. Providing lenders with some degree of control is not necessarily problematic because “the funder’s expertise in a certain kind of claim might yield more proven strategies and better-informed

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84 Menkel-Meadow, supra note 66, at 962.
85 Grace M. Giesel, Alternative Litigation Finance and the Work-Product Doctrine, 47 Wake Forest L. Rev. 1083, 1140 (2012) (concluding that sharing confidential information with lenders should be protected under the work product rule provided the lender signs a binding nondisclosure agreement pertaining to the shared information).
86 See Beisner et al., supra note 23, at 8 n.23.
87 Andrew Hananel & David Staubitz, The Ethics of Law Loans in the Post-Rancman Era, 17 Geo. J. Legal Ethics 795, 807 (2004) (noting that under ABA Model Rules 1.6 and 2.3, the lawyer must obtain consent from the client before a lender can evaluate any information).
88 Fed. R. Civ. P. 26(b)(3); see Lyon, supra note 4, at 605.
90 See Sebok, supra note 69, at 53.
91 Id. at 2.
decision-making than the lay plaintiff’s.” In most cases, lenders have no need to usurp control from the client because their interests are aligned. And lenders are unlikely to demand control after having already performed due diligence on the merits of the claim and track record of the lawyer.

V. CONCLUSION

As the cost of litigation and arbitration in the United States continues to rise, more and more litigants are seeking out lenders to pay their legal costs and fees in exchange for a share of the judgment. Third party funding should be permitted in domestic arbitration because it increases access to justice and promotes fairness in the arbitral process by equalizing resources and bargaining power. In short, the notion of lenders as champertors is outdated and inaccurate in light of current public policy and ethical considerations.

To be sure, there are legitimate concerns over the ethical implications of third party funding. But many of the safeguards that have been applied to contingency fees for the last century—such as the doctrine of unconscionability and ethics rules precluding unreasonable fees—can be applied to financing contracts with a third party lender. The use of such contracts in U.S. litigation and international arbitration is a testament to the efficacy of existing safeguards.

Still, the successful integration of third party funding in domestic arbitration will require vigilance. Lawyers should be cognizant of the potential ethical dilemmas so they can negotiate financing contracts that will benefit their clients and allow them to fulfill their professional responsibilities. Lawmakers and ethics organizations should stand ready to amend applicable rules or more tightly regulate lending if new developments render existing safeguards ineffective. Careful attention to these issues will ensure legal professionals maximize the benefits and minimize the detriments of third party funding in domestic arbitration.

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92 Lyon, supra note 4, at 602.
93 Khouri & Hurford, supra note 3, at 39.
94 Lyon, supra note 4, at 603.