

Third-party funding – how useful is it in practice?

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Introduction

Most high-profile disputes to which an arbitration clause applies involve excessive costs. However, the parties involved do not always have the resources to match these expenses (eg, in disputes between global enterprises and users or small businesses). As such, under-resourced parties require practical solutions to enable them to pursue proceedings which a lack of financing would otherwise prevent. One relatively new and controversial solution is third-party funding, where arbitration is paid for by a third party which is unrelated to the dispute itself but has an interest (eg, economic or political) in the arbitration, either because of the success fee agreed or the precedent that the arbitration may set (this is more common in commercial affairs).

It is not just under-resourced parties that can utilise this kind of financial funding. For parties that are adequately resourced, third-party funding can offer a more convenient financing structure, allowing capital which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings. This means that all of the parties involved in arbitration can take advantage of this aid.

Concerns

However, there are concerns surrounding third-party funding and there is a level of risk involved. For example, arbitration carries a risk of unmeritorious claims, so this kind of funding could increase the number of unmeritorious claims that have more of a political background than legal standing. However, others believe the opposite, arguing that because their return is dependent on the success of the case, funders will have no desire to take on weak, unmeritorious cases. So, third-party funding could act as a filter that prevents such actions.

However, the main concern with regard to third-party arbitration funding is that it may result in undisclosed conflicts of interest. This can occur, for example, where there is a prior relationship between the funder and the party or law firm involved in the proceedings or between the funder and the arbitrator. Such conflicts can result in costly satellite disputes, including challenges to the arbitrator's appointment and applications for disclosure of funding arrangements. Parties seeking third-party funding should consider whether they should disclose the arrangement (and, if so, how and when). The applicable law and rules of the arbitration will play a determinative role here. This is why the analysis of key administrative arbitration entities (eg, the International Chamber of Commerce) on this controversial topic draws on debates between leading international arbitrators and practitioners and major third-party funding corporations. This will allow them to set the highest standard of integrity for the process and improve parties' trust in arbitration as the best dispute resolution option.

Comment

Third-party funding is a useful way for most parties to access arbitration and front the associated costs, enabling them to pursue proceedings which a lack of financing would otherwise prevent. However, the funding process must be subject to specific rules which guarantee that the arbitration is not affected by any factor (eg, a conflict of interest) that could lead the procedure to be annulled before the courts, as the courts must recognise the arbitration award and execute it accordingly.

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