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Third-Party Funding in Arbitration: A Game-Changer for Access to Justice and Dispute Resolution

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INTRODUCTION

Arbitration has long been favored as an effective alternative to traditional court litigation, providing parties with a more private, efficient, and flexible means to resolve disputes. However, the costs associated with arbitration can sometimes be a significant barrier, especially for parties with limited financial resources. In recent years, a solution has emerged: Third-Party Funding. Third-party funding has revolutionized the landscape of international arbitration by allowing parties to seek financial support from external investors or funders to cover arbitration costs and related expenses. This article explores the concept of third-party funding in arbitration, its impact on access to justice, the benefits, challenges, and ethical considerations associated with it.

UNDERSTANDING THIRD-PARTY FUNDING IN ARBITRATION

Third-Party Funding, also known as litigation funding or dispute financing, is a practice where an independent third party, typically an investor or specialized funding firm, agrees to finance all or part of the costs of a party's arbitration proceedings in exchange for a share of the award if the case is successful. This funding arrangement allows cash-strapped claimants to pursue their claims without bearing the entire financial burden of the arbitration process third-party funding is distinct from the traditional contingency fee arrangements, where lawyers finance the case in return for a portion of the recovery. In third-party funding, the funder does not control the case's strategy or decision-making; they only have a financial stake in its outcome. This model of financing has been particularly valuable in levelling the playing field between well-funded corporations and smaller businesses or individuals.

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BENEFITS OF THIRD-PARTY FUNDING

***1*. *Improved Access to Justice*:** third-party funding levels the playing field for parties with limited resources, making it possible for smaller companies and individuals to pursue meritorious claims that they might otherwise have been unable to afford. This increases access to justice and promotes fairness in the dispute resolution process.

***2. Risk Mitigation*:** Arbitration cases can be complex, lengthy, and costly affairs. Third-party funding transfers the financial risk from the claimant to the funder. If the case is unsuccessful, the funder typically bears the costs, sparing the claimant from the burden of paying expenses. Funders assume the risk of a negative outcome, encouraging meritorious claims to move forward without the fear of incurring substantial losses.

***3. Enhances Efficiency*:** By alleviating financial pressures, third-party funding allows claimants to focus on their case and avoid settlement pressures due to limited resources. This can lead to more informed decision-making and potentially more efficient settlement negotiations.

***4. Deterrence against Frivolous Claims*:** Funders typically conduct rigorous due diligence before investing in a case. Their financial interest aligns with the success of the claim, encouraging them to fund only meritorious and well-founded claims, and discouraging frivolous or weak cases.

CHALLENGES AND ETHICAL CONSIDERATIONS

1. Conflicts of Interest: Third-party funding introduces potential conflicts of interest between the funder, the funded party, and their legal representatives. To address this, many jurisdictions have introduced regulations requiring disclosure of funding arrangements.

***2. Confidentiality Concerns*:** third-party funding arrangements may involve sharing sensitive case information with the funder, potentially raising confidentiality concerns. Some parties may be reluctant to disclose confidential details to an external investor.

3. Potential for Increased Costs**:** While third-party funding can be a valuable resource, it may also lead to inflated costs if funders seek higher returns from successful cases, potentially affecting the overall arbitration process.

4. Security for Costs**:** Respondents may seek security for costs to protect against the risk of a funded claimant being unable to cover adverse costs orders. This could deter some claimants from pursuing valid claims.

CASE LAW DEMONSTRATING THE LEGITIMACY OF THIRD-PARTY FUNDING IN FOREIGN JURISDICTION

RSM Production Corporation v. Saint Lucia -

In the case of RSM Production Corporation v. Saint Lucia the International Centre for Settlement of Investment Disputes (ICSID) tribunal considered the question of whether third-party funding constituted an abuse of process and affected the tribunal's impartiality. The tribunal rejected these arguments and affirmed the legitimacy of third-party funding in international arbitration. It highlighted that third-party funding was not a novel concept and had been utilized in various forms, including insurance and contingency fee arrangements, without raising similar concerns. The tribunal emphasized that as long as there was transparency and no undue influence on the arbitration process, third-party funding was a legitimate practice.

Muhammet Cap & Sehil Inşaat Endustri ve Ticaret Ltd. v. Turkmenistan-

The case of Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. v. Turkmenistan showcased the positive impact of third-party funding on access to justice. The claimant, a small construction company, lacked the financial resources to pursue arbitration against the respondent state. With the assistance of a third-party funder, the claimant was able to proceed with the arbitration, leading to a successful settlement. The tribunal acknowledged the significance of third-party funding in ensuring that meritorious claims were not stifled due to financial constraints.

Lao Holdings N.V. v. Lao People's Democratic Republic-

The case of Lao Holdings N.V. v. Lao People's Democratic Republic provided an example of how third-party funding could affect the recoverability of costs. The tribunal ordered the respondent state to reimburse the claimant for its third-party funding costs. The tribunal reasoned that the claimant's decision to seek third-party funding was both reasonable and necessary due to its financial situation, and therefore, the associated costs should be considered as "other costs" recoverable under the applicable arbitration rules.

Hong Kong has dealt with TPFs in-depth, particularly in the decision of Cannonway Consultants Ltd. v. Kenworth Engineering Ltd. - wherein the doctrine of champerty was specifically nullified in arbitration proceedings. This is in furtherance of several measures taken by the legislation in Hong Kong to promote arbitration within the jurisdiction – a feature which will be revisited later in this article. Hong Kong has also defined TPF in the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, 2018, as being a) under a funding agreement; b) to a funded party; c) by a third party funder, and d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.

CONCLUSION

Third-Party Funding has emerged as a game-changer in the realm of arbitration, democratizing access to justice and improving the efficiency and fairness of dispute resolution. While the benefits of third-party funding are undeniable, it is essential to strike a balance that addresses potential challenges and ethical considerations. Transparency, regulation, and ethical guidelines are critical to ensure that third-party funding continues to serve as a valuable tool in enhancing access to justice while maintaining the integrity of the arbitration process. As the practice evolves, it will likely become an increasingly vital element in shaping the future of international dispute resolution.