

# Third party funding in international arbitration

## Balancing benefits and risks

Susanna Khouri and Kate Hurford of IMF (Australia) Ltd give an overview of third party funding in arbitration claims.

The last few years have seen increased interest in third-party funding for international commercial arbitration claims, both from parties that require funding to pursue substantial claims, and from funders themselves.

For claimants, the expense of pursuing high value complex arbitration claims, and the continuing uncertain economic conditions, make third-party funding an attractive or necessary option. Some claimants would not be able to bring their claims without some form of external financing, while others seek funding in order to share the financial risks of the arbitral process. For specialist commercial third-party funders, international arbitration offers a potential pool of high value awards with the benefits of enforcement under the New York Convention.

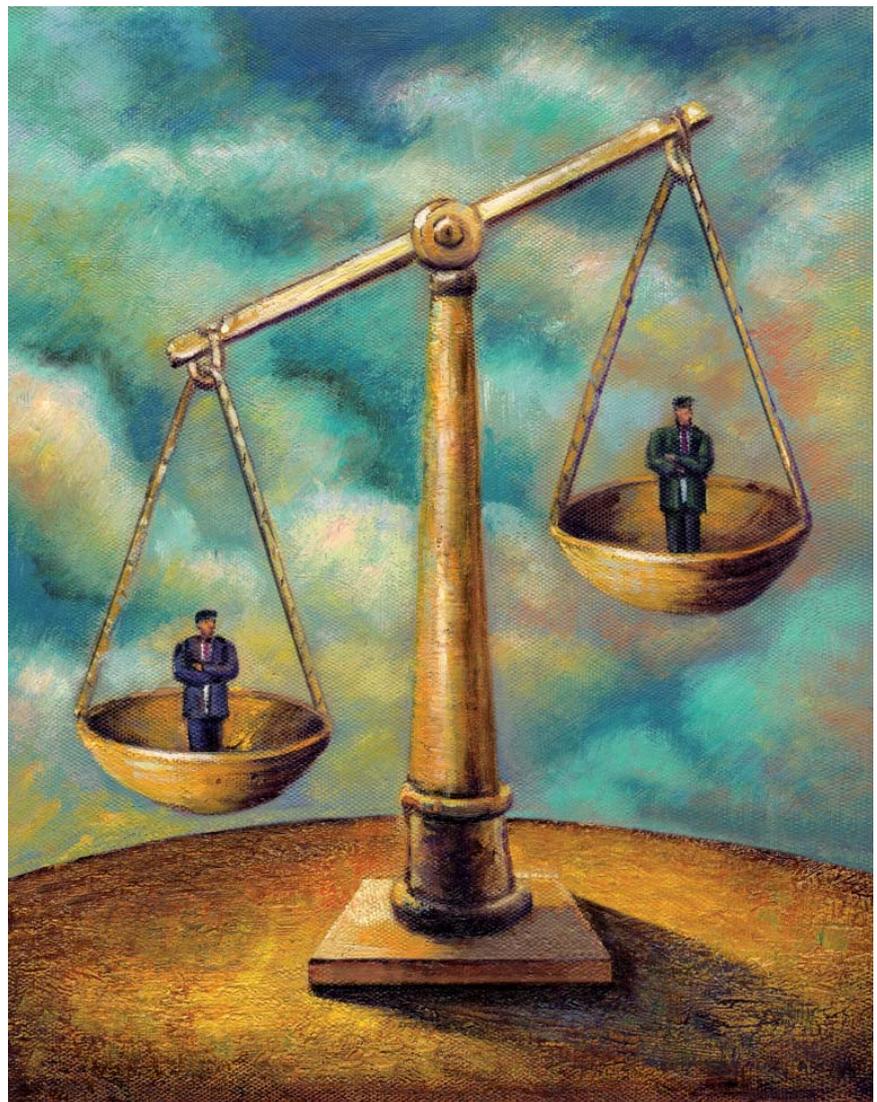


Illustration: Getty Images

The private, and often confidential, nature of arbitration means there is little empirical data to show the extent of third party funding in international arbitration. However, anecdotal evidence suggests it is on the rise, and this is expected to continue.

Recent developments in third party litigation funding in England and Wales have brought new and significant attention to the industry. In particular, in November 2011, the Association of Litigation Funders of England and Wales (ALF) was formed

and a self-regulated Code of Conduct for Litigation Funders was published (new Code of Conduct) (*see box "New Code of Conduct"*). Significant reforms have also been recently enacted that will expand funding options available to claimants and their lawyers in England: for example, the removal of restrictions on contingency fees that are scheduled to take effect in April 2013 (*see box "Alternative funding products"*).

These developments followed the recommendations made by Lord Justice Jackson in his final report on civil litigation costs and earlier judicial support of litigation funding as an important means of facilitating access to justice for impecunious claimants (*see "Access to justice" below*).

However, despite this growing acceptance and understanding of third party funding, many arbitration practitioners and parties with arbitration claims still know little about funding and may, possibly, be wary or suspicious of it (*see box "Historical concerns"*).

This article:

- Describes typical third party funding arrangements.
- Considers the benefits of third party funding for claimants in arbitration.
- Identifies some of the risks of third party funding and proposes ways to manage those risks.
- Summarises some of the other funding options available to claimants and their lawyers in England and Wales.

### THIRD PARTY FUNDING

Third party funding arrangements for high value claims do not conform to a template. Funding arrangements must be structured to suit the specific needs and interests of the parties, the dispute, and the laws governing the dispute and the arbitration. However, in general terms, third party funding involves a

## New Code of Conduct

The Code of Conduct for Litigation Funders (the Code) was facilitated by a working group of the Civil Justice Council that included representatives of the funding industry ([www.judiciary.gov.uk/NR/rdonlyres/75D4F49E-BDC6-40BC-B379-B5A1DA82BED9/0/CodeofConductforLitigationFundersNovember2011.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/75D4F49E-BDC6-40BC-B379-B5A1DA82BED9/0/CodeofConductforLitigationFundersNovember2011.pdf)).

The Code sets out standards of practice and behaviour to be observed by members of the Association of Litigation Funders of England and Wales (ALF). The ALF regulates compliance with the Code by its members.

The Code includes requirements in relation to:

**Control of the litigation.** For example, the funder must:

- Take reasonable steps to ensure that the litigant has received independent advice on the terms of the funding agreement.
- Not take any steps that cause or are likely to cause the litigant's solicitor or barrister to act in breach of their professional duties.
- Not seek to influence the litigant's solicitor or barrister to cede control or conduct of the dispute to the funder.

**Capital adequacy.** The funder must maintain at all times adequate financial resources to meet its funding liabilities for a minimum period of three years.

**Termination of the funding agreement and settlement of the dispute.** The Code sets out the circumstances in which the funder may withdraw from a case. It also provides that if there is a dispute about settlement or termination of the agreement, a binding opinion must be obtained from a QC.

commercial funder agreeing to pay some or all of the claimant's legal fees and expenses in return for reimbursement of the funder's direct outlays, and a share of any sum recovered from the resolution of the claim.

### Agreeing the fee

Typically, third party funders seek a share of the recovery in the range of 15% to 50% (the median figure is around a third), depending on the costs and risks involved in funding the dispute. The funder's fee may also increase over time to reflect additional costs and risk being incurred. In addition, the funder may agree to bear any adverse costs liability and provide security for the defendant's or respondent's costs, or agree that adverse costs risks will be covered by insurance or will remain the responsibility of the claimant.

Funding is also provided on the basis of a success fee calculated on a multiple of the amount the funder invests. As the funder's investment and risk increases, so does the size of the funder's fee. Some funding agreements calculate the funder's fee by reference to the lesser (or greater) of a multiple of the funder's investment and a percentage of the successful outcome.

The amounts payable to a funder depend on the successful resolution of the claim, including any recovery by the claimant following a settlement of the claim. If the claim fails, the funder receives nothing, but typically remains liable for any fees due to the claimant's lawyer, together with any adverse costs which it has agreed to pay and which have been incurred during the term of the funding agreement.

## Funder's decision

A funder's decision to fund a claim is an investment decision. When considering whether to do so, the funder will carefully assess various factors which bear on the financial risks it is being asked to assume.

The process of seeking third party funding varies from case to case and from funder to funder, but usually a claimant or a claimant's lawyer approaches the funder. Claimants and their lawyers may also be introduced to a funder by an intermediary or broker.

If the claim meets the funder's threshold criteria (usually as to claim size, the nature of the claim, and the respondent's capacity to pay), the funder will undertake extensive due diligence in relation to the claim (*see "Due diligence" below*).

The actual decision to fund a claim is often made by a credit or investment committee within the funder. If the funder agrees to fund, then a funding agreement is negotiated and entered into between the funder and the claimant. In some cases, the funder may structure the funding to allocate risk to other parties, such as lawyers acting on a contingency or part-contingency basis (in jurisdictions that allow such arrangements), other funders or insurers. In those circumstances, there may be additional parties to the funding agreement or ancillary agreements with other parties linked to a principal funding agreement.

## Due diligence

Some funders will conduct due diligence on a potential claim by retaining external counsel at the client's or the funder's expense. Some funders conduct due diligence predominantly "in-house", relying on the skills and experience of its investment staff.

A funder will carefully and thoroughly analyse and assess all aspects of the claim which bear on the financial risks it is being asked to assume or to share. These factors include: the prospects of success of the claim; possible coun-

## Alternative funding products

Some of the alternative funding products available to claimants in international arbitrations located, or with their seat, in England include:

### Contingency fees or damages-based agreements

Contingency fees (which are a percentage of the amount of a client's recovery) are prohibited in England, other than in employment tribunal proceedings. However, following the government's adoption of a recommendation made in Lord Justice Jackson's report on civil litigation costs, this prohibition will soon be removed and contingency fees, or "damages-based agreements" as they are known, will be permitted in all litigation in England and Wales from April 2013 (*Part II, Legal Aid, Sentencing and Punishment of Offenders Act 2012*) (2012 Act) ([www.practical-law.com/2-519-6312](http://www.practical-law.com/2-519-6312)).

### Conditional fee agreements

Conditional fee agreements (CFAs) are a form of contingency fee agreement which had been permitted and had become a common form of funding for claimants in civil litigation in England. A CFA is an agreement between the law firm and the client which provides that the legal fees and expenses, or any part of them, will be paid only in certain circumstances, usually only if the client is successful in the proceedings. In those circumstances, the lawyer is paid his usual charge-out rate plus an uplift or "success fee". Currently, the success fee is recoverable from the losing party in proceedings in England. However, this will cease from April 2013 and any success fee will be paid by the CFA-funded party (this is a further feature of the Jackson reforms that has been adopted by the government in the 2012 Act). This will make CFAs a less attractive funding option for claimants, and will likely increase opportunities for third party funders.

Although it does not appear to be widespread, some English solicitors act under CFAs in arbitrations.

### After the event insurance

After the event (ATE) insurance is a type of legal expenses insurance taken out after a dispute has arisen to protect the insured claimant against the risk of having to pay the respondent's and/or the claimant's own legal fees and expenses if the claimant loses. ATE insurance is commonly obtained in relation to international arbitration proceedings.

ATE policies vary but will often include cover for some or all of the claimant's disbursements, such as expert's fees, and may also include the arbitrator's fees. On occasion, ATE policies extend to include cover for the claimant's own legal fees. Usually, the ATE insurance is taken out in conjunction with a CFA (which protects the claimant's liability for its own legal fees).

In England, the ATE premium is currently recoverable from the losing party in litigation as part of the costs awarded. However, this will also cease from April 2013 under the 2012 Act. Consequently, the ATE market is expected to change dramatically. These changes may involve ATE insurers moving to assist third party funders and/or solicitors using damages-based agreements to underwrite their risks.

terclaims; the terms of the arbitration agreement or treaty; the arbitral institution and composition of the tribunal (if it has been appointed); the seat of

the arbitration; the substantive law of the dispute; the quantum of the claim in comparison with the likely costs and risks of pursuing the claim; and

the risks associated with enforcing and obtaining payment under an award (including, for international commercial arbitrations, the question of whether the respondent has assets of sufficient value in a state which is a signatory to the New York Convention).

### Wider market

This article focuses on the more common and established approaches to third party funding for claimants. However, as the industry grows, new products are emerging, including funding for respondents and funding groups of claims on a portfolio or aggregated basis.

### THE BENEFITS

Some of the benefits which make third party funding an attractive option for claimants are described below.

#### Access to justice

The importance of third party funding in facilitating access to justice is widely accepted in many jurisdictions and has received strong judicial support in England and Wales. Parties with meritorious arbitration claims, but with limited financial resources, or a desire to manage scarce resources, can use third party funding to enable those claims to be successfully pursued.

The following examples relate to access to the civil courts, but there is no reason why the same principles should not apply to arbitration.

The rise of third party funding has coincided with the drastic decline in public funding for civil claims in England. The Court of Appeal decision in *Arkin v Borchard Lines Ltd* is considered a turning point in the recognition by the English courts that third party funding could offer access to justice ([2005] EWCA Civ 655). The court referred to commercial funders “who provide help to those seeking access to justice which they could not otherwise afford” (paragraph 38). The court also held that a professional funder who finances part of the costs of litigation in a manner which facilitates access to justice should be potentially liable for the opposing

party’s costs but only “to the extent of funding provided” (paragraphs 40-41).

After a year-long review of the costs of civil litigation in England and Wales, Jackson LJ gave significant support to third party funding of litigation, which he viewed as promoting access to justice. He stated “it was better for [a claimant] to recover a substantial part of his damages than nothing at all” (*Review of Civil Litigation Costs: Final Report, January 2010*) (see *Exclusively online article “Jackson report: reform-ist but not too radical”*, [www.practical-law.com/6-501-2349](http://www.practical-law.com/6-501-2349)).

In Australia, third party funding has been available for over a decade and has provided persuasive examples for the English courts. The seminal decision is the High Court of Australia’s judgment in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* in which Justice Kirby referred to “the importance of access to justice, as a fundamental human right which ought to be readily available to all...” ([2006] HCA 41, paragraph 145).

#### Risk management and financial support

Third party funding provides not only the financial resources with which to pursue a claim, but also opportunities to manage financial risks associated with the pursuit of a claim through arbitration. If a claimant transfers some or all of those risks to the funder, the claimant may be able to achieve a successful recovery without having to pay legal fees and other costs as the claim progresses, or having to obtain or allocate funds to deal with the consequences should the claim fail (depending on the arrangements agreed with the funder).

The legal and expert fees and other costs associated with pursuing claims in international arbitration can be substantial, often running into many millions of dollars per dispute. A commensurate amount will also usually have been spent by the respondent. In many arbitrations, there is the risk that, if the claim fails, the claimant will be liable for not only its own legal fees and expenses, but also for the respondent’s

costs (where the “loser pays” principle applies to the arbitration).

Consequently, controlling the costs of arbitration is an issue of increasing concern within the arbitration community. The ability to spread and share these risks with a third party may be attractive, even to clients with strong businesses and cash flows.

### Experience

Many 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.

An experienced funder will be able to assist the lawyer and claimant in the due diligence or investigations phase and during the course of the arbitration; for example, the funder can help choose counsel, experts and arbitrators, if they have not been retained or appointed before funding has been agreed.

In most cases, a claimant will already have engaged a lawyer to assist it with its claim. Usually, the funder will agree to the retainer of the claimant’s lawyer. Occasionally, the claimant identifies that its lawyer does not have the skills and experience to conduct the arbitration and seeks assistance from the funder to locate a more suitable lawyer.

At all times, the lawyer acting for the claimant remains the claimant’s lawyer and owes duties and responsibilities solely to the claimant. The claimant’s lawyer will usually be asked to provide regular reports to enable the funder to monitor the claim’s progress and to ensure compliance with the claimant’s obligations under the funding agreement (particularly once there has been a recovery).

In appropriate cases, and depending on the jurisdiction, the funder is also able

to assist in strategic and tactical decisions during the arbitration. The nature and scope of the funder's role, including the extent to which the funder can influence how the claim is managed on a day-to-day basis, depends principally on the contractual arrangements between the funder and claimant. However, the funder's level of involvement also depends on the application of the relevant rules regarding maintenance and champerty to the particular funding agreement and the arbitration, and on any relevant regulatory regime with oversight of the funder (*see box "Historical concerns", and "Regulation of funders" below*).

## THE RISKS

There are inevitably risks associated with third party funding in international arbitrations. Many of these stem from the significant costs of the arbitration process and the large amounts at issue. These risks need to be fully understood by claimants and their lawyers, so that claimants can make properly informed and considered decisions about whether to use third party funding.

The principal risks are described below, together with ways in which many of these risks are often, or can be, addressed.

### Unfair terms

By providing funding, funders may gain a degree of economic power in the relationship with the funded claimant and in relation to the outcome of the dispute. Equally, funders have much at stake and must rely on the continuing co-operation and goodwill of the claimant and the competence and dedication of the lawyers to achieve the parties' mutual goals.

There is a concern that a funder could take advantage of its economic power by insisting on unfair terms in a funding agreement, using its economic position to renegotiate terms to the detriment of the claimant at a mature stage of the dispute resolution process, or to achieve a resolution of the claim which may not be consistent with the client's best interests. Rights of termination

## Historical concerns

The historical concerns about third party funding stemmed from the ancient prohibition against strangers funding litigation under the common law doctrines of maintenance and champerty:

- Maintenance is the improper support of litigation in which the supporter has no legitimate concern, without just cause or excuse. Maintenance can occur where a third party funds litigation, though assignments of causes of action may also "savour of maintenance".
- Champerty is a type of maintenance. It occurs when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the action or suit.

The rules against maintenance and champerty are based on the public interest in protecting the purity of justice.

There was a perception that third party funding encouraged frivolous claims and could corrupt the dispute resolution process by the participation of a party that was unconnected with the merits of the dispute, was not an officer of the court, and whose only motive was profit.

However, these concerns are now widely considered to be out of date and misplaced. Many jurisdictions, including England and Wales, have abolished the criminal and tortious consequences of maintenance and champerty and, even where they remain as torts, their scope has significantly narrowed.

A more supportive and flexible approach to the third party funding industry is emerging in many countries. Judicial attitudes have relaxed, or are relaxing, and policymakers in many countries are also expressing support for the continued development of the industry. This was demonstrated recently in England by Parliament's rejection of statutory regulation of funders in favour of self-regulation (*see "Regulation of funders" in the main text*).

could be used by a funder to exert unfair pressure on a claimant.

In practice, this tends not to arise as the interests of the claimant and the funder are closely aligned. However, the authors of the new Code of Conduct have chosen to include a provision that a funder's right to terminate may only be exercised in certain circumstances (*see box "New Code of Conduct"*).

In general, funding a claim in the expectation of earning a return is an expensive, risky and protracted undertaking. A claim may take years to resolve. The funder will have outlaid very substantial sums in legal fees and other costs during that time, and may also have incurred a significant exposure to adverse

costs. It is imperative, from both the funder's and claimant's points of view, that the funding agreement is clear and well drafted and that each party has access to appropriate legal advice. (These aims are also set out in the new Code of Conduct.)

The claimant's lawyer should be an important check and balance on the funder and is obliged to ensure the proper protection of his client's interests. The lawyer will be regulated by his professional organisation, and, for arbitrations held or seated in England, the new Code of Conduct arguably applies and includes provisions that aim to make clear the lawyer's role and professional duties to his client (*see box "New Code of Conduct"*).

Given the costs and risks involved, it is in the funder's interests to act with a high level of professionalism towards the claimants that it funds and to enter into funding agreements that are likely to be seen as fair and reasonable, having regard to all the circumstances of the funding and the risks attendant in the arbitration.

In the context of international arbitration claims, many clients of funders are themselves sophisticated commercial parties that may have decided to obtain funding for their claim in order to manage appropriately the risks of pursuing the claim. Such clients expect and demand professionalism from a funder, and usually have access to sophisticated and well-resourced legal advisers. In addition, there is growing competition among third party funders. These factors offer a large measure of protection against any unfair or uncommercial terms which a funder may propose.

#### **Funder's financial resources**

The funder's agreement to pay the claimant's legal costs and any adverse costs orders could turn out to be illusory if the funder lacks adequate capital or insurance to meet its obligations.

It is important that the funder's assets and capital structure are properly understood by a claimant and its advisers, and that the claimant is comfortable with the funder's ability to meet all liabilities that may arise under the funding agreement. Claimants should therefore thoroughly investigate the funder's capital position and the transparency of its business structure before entering into a funding agreement. They should also, as a matter of course, check the funder's track record, and the experience and competence of its staff.

Due to the costs associated with international arbitration proceedings, third party funding of these claims is extremely capital intensive. Funders provide funding through a range of structures, including:

- Public companies with traded share capital which are required to dis-

close their financial position (for example, IMF (Australia) Ltd (a company listed on the Australian Securities Exchange) and Burford Capital Limited and Juridica Investments Limited (which are both listed on the London Stock Exchange's AIM market)).

- Private companies such as Woodford Litigation Funding Ltd in England.
- Private funds (including hedge funds) with the expressed intention of investing in high value legal claims, such as Harbour Litigation Funding Ltd, Calunius Capital and Vannin Capital.

#### **Conflicts of interest**

Potential conflicts of interest are another source of concern to critics of third party funding. One issue of particular concern is that the claimant's lawyer may be unduly influenced by the funder (as the funder pays the bills) and may favour the funder's interests over the claimant's interests. Lawyers need to assess carefully any relationship they may have with a funder and ensure that all necessary disclosures are made to a client to enable the client to make an informed decision on the question of funding and its risks and benefits.

This issue can emerge sharply in the context of settlement negotiations, particularly in circumstances where the funder and client may disagree over whether or not to settle a claim. Where the lawyer has been chosen by the funder, and not the claimant, or where the funder offers the prospect of repeat business for the lawyer, some commentators consider that the lawyer may be persuaded to advise the claimant to accept the settlement, even where the settlement may not be in the claimant's best interests.

The identification and management of conflicts of interest should be a subject for discussion between the funder, the claimant and the claimant's lawyer and should be addressed in the funding agreement. The agreement should

expressly recognise that the lawyer who has the conduct of the claim owes his full professional and fiduciary duties to the claimant. The agreement may also provide that, in the event of a conflict of interest between the claimant and the funder, the lawyer may continue to act solely for the claimant, even if the funder's interests are adversely affected by him doing so. This standard should be observed whether the lawyer is retained by the funder or by the claimant.

The funding agreement should specify a means to resolve any conflict over whether or not to settle the claim. It may provide that any irreconcilable difference over settlement must be referred to nominated counsel for a binding expert opinion on whether the settlement is a reasonable one, or the agreement may include some other form of dispute resolution clause to address this situation. A properly drafted funding agreement should recognise and clearly address these issues (see *box "New Code of Conduct"*).

In many jurisdictions, lawyers' obligations under their professional conduct rules also assist by prohibiting a lawyer from acting if there is a conflict of interest (for example, see *chapter 3 of the English Solicitors Regulation Authority Code of Conduct 2011, www.sra.org.uk/solicitors/handbook/code/content.page*).

Another potential, or perceived, conflict of interest could arise between a funder and one of the arbitrators appointed to arbitrate a dispute (for example, where the arbitrator is a partner of a law firm with which the funder has a relationship). Disclosure of such a connection could cause particular difficulties where the funding has been kept confidential until the arbitration process is well under way. However, this conflict can be avoided by the funder undertaking the appropriate conflict checks in relation to all the relevant participants in the arbitration before agreeing to fund, and by arbitrators making full disclosure in accordance with the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.

The types of potential conflicts of interest described above are not new. They may arise in circumstances where a lawyer acts for both an insurer and the insured, or where the lawyer himself is conducting a claim on a contingency basis (common in the US and soon to be permitted in England) (see box “Alternative funding products”).

### Confidentiality and privilege issues

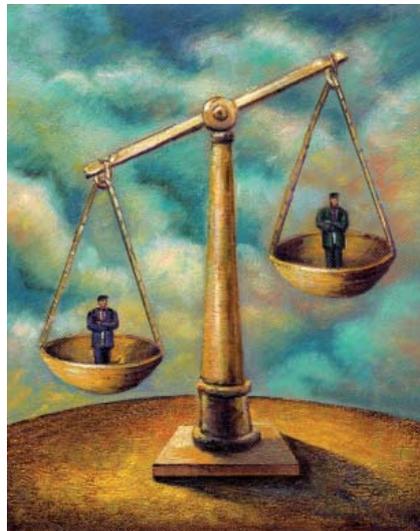
To ensure that the funder can perform due diligence, it is important for it to have complete access to all information held by the claimant or the claimant’s lawyer which might be relevant to the claim and the funder’s decision to provide funding (see “Due diligence” above). However, the lawyer’s duty of confidentiality to the client seeking funding could be compromised by providing information about the claim to the funder. Normally, a confidentiality agreement is entered into between the funder and the claimant at the outset, or confidentiality provisions are contained in the funding agreement.

However, depending on the jurisdiction, contractual provisions as to confidentiality may not prevent a respondent from seeking to gain access to documents in the funder’s possession, if they are relevant to the matters in issue. For example, there are possible risks that:

- Legal privilege in documents prepared by the claimant’s lawyer, or for the purpose of the dispute, will be waived when otherwise privileged communications are given to the funder.
- Communications between the funder and the funded claimant and/or claimant’s lawyer about the claim will not be protected by privilege in jurisdictions which do not recognise a common interest form of privilege (that is, where information, evidence or legal advice is shared between parties who hold a “community of interest”).

These limitations may stifle third party funding in the affected jurisdictions and may ultimately require definitive court

authority or legislative intervention if the full benefits of third party funding are to be made available in those jurisdictions. However, this is less of a risk in England where the case law on common interest privilege continues to grow.



Proper analysis of the arbitration agreement is also required. Some arbitration agreements incorporate, expressly or by reference, particular confidentiality terms (both as to disclosure of information between the parties and as to the conduct of the arbitration).

Depending on the amount and type of information which a funder may wish to have disclosed to it during the conduct of a claim, and the applicable laws, these issues will likely require ongoing attention and management until such time as the claim is resolved.

### Disclosure of funding and costs

As between a funder and its client, the question of disclosure of the funding agreement to third parties is primarily a matter for agreement between them. However, a broader question arises as to whether a claimant is obliged to notify the participation of a funder to a respondent and/or an arbitral tribunal.

There appear to be no relevant rules of the leading arbitral institutions requiring a party to disclose whether it is being funded. Nevertheless, this information may become known by the respondent during the arbitration. The claimant may voluntarily disclose that it is being

funded, or the respondent may become aware of the funding, in any event, either during the due diligence phase, during the course of the arbitration or in any settlement negotiations. Does this situation give rise to any additional costs or other risks for the funded claimant in international arbitration?

An International Centre for Settlement of Investment Disputes (ICSID) ad hoc committee dismissed an argument that the successful party should not be awarded costs in respect of its legal fees, on the basis that those legal fees had allegedly been met by an undisclosed third party (*RSM Production Corporation v Granada* (ICSID Case No ARB/05/14), paragraph 68). The committee concurred with an earlier ICSID tribunal which stated that it knew “of no principle why any ... third-party financing arrangement should be taken into consideration in determining the amount of recovery” of the costs incurred in the arbitration (*Ioannis Kardassopoulos and Ron Fuchs v Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), paragraph 691).

A question arises as to whether a failure to disclose the funder’s participation in an arbitration is a breach of the procedural good faith implied as a part of an agreement to arbitrate. As there are a range of strategic and tactical considerations which may bear on whether a claimant chooses to disclose the participation of a third party funder and circumstances may evolve in the course of an arbitration which may merit the disclosure of a funding arrangement, there is no clear and easy answer to this question.

At a recent roundtable in London on third party funding, participants, including funders, arbitrators and external counsel, expressed a range of views (see “Global Arbitration Review”, Volume 7, Issue 1). Some felt that a tribunal should be aware of a funding arrangement when deciding applications for adverse costs and security for costs or if a conflicts issue arises. However, other participants felt that disclosure distracts attention from the substantive

issues before the tribunal and “leads to satellite arguments that are expensive and detrimental to the proceedings”.

It is possible that, at some point, the arbitral institutions or other bodies with influence on how arbitrations are conducted may decide it is necessary to address this issue. Of course, if the involvement of a funder for a claimant in an arbitration is required to be disclosed, there is no reason why potential or actual sources of funding for the respondent should not equally be disclosed, including funding provided by insurers and other external sources.

### Regulation of funders

International arbitrations can be anchored to different legal systems. The law of the seat may be different to the law governing the dispute. There is no overarching global or other regulatory regime that oversees third party funders in international arbitration. Therefore, a regulatory analysis of third party funding in international arbitration requires an analysis of regulatory regimes in the jurisdictions involved.

External controls that may apply to the conduct of third party funders include laws or regulations that apply by virtue of the place of incorporation of the funder (for example, if the funder is listed on a securities exchange) and/or the place at which it enters into the funding arrangements. In some jurisdictions, the funding arrangements may be financial products regulated by legislation.

The limited ability to regulate the conduct of funders in an international context may cause practical problems in arbitration, given that arbitral tribunals generally do not have powers to make

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binding orders against third parties. As stated above, as there are also no specific rules of the arbitral institutions requiring a party to disclose if it is being funded, arbitrators may not be aware of the funder's participation.

Third party funders who join the ALF voluntarily agree to abide by the new Code of Conduct (*see box "New Code of Conduct"*). For those members located in England and Wales, or funding arbitrations with a seat in England and Wales, the new Code arguably applies. The Code refers to “litigation or arbitration” in paragraph 2, although there is still some doubt if it applies only to do-

mestic arbitration or extends to international arbitration as well. In any event, it is likely to be influential in setting the standards expected of funders where there is some connection with England.

This self-regulation has been criticised by some as being insufficiently stringent. However, calls for statutory regulation of funders in the UK were rejected for reasons including that stricter regulation would risk stifling a “nascent” but growing industry.

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