

International
Arbitration Focus Team:



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Third Party Funding (“TPF”): a useful tool to know in International Arbitration

TPF is the funding of arbitration by a litigation funder on a non-recourse basis – i.e., the funder gets paid only if the client wins; otherwise, the client does not incur any cost.

On 15 May 2018, BonelliErede held a seminar on TPF in international arbitration, which featured the leaders of four major funding companies.

The seminar was attended by corporate counsel and colleagues from other law firms, and focused on how third-party funding can be – and is – used in arbitration. In particular, the discussion with Alain Grec (LA FRANÇAISE) and Yasmin Mohammad (VANNIN) centered on the key aspects of funding agreements and the types of cases that are frequently funded, while Mick Smith (CALUNIUS) and Wieger Wielinga (OMNI BRIDGEWAY) discussed issues such as conflicts of interest and transparency relating to funding.

We wish to highlight three main points emerged from the discussion:

1) MASSIVE AMOUNT OF CAPITAL AVAILABLE

Following the 2008-09 financial crisis, funds and financial institutions realized that litigation and arbitration could be a potential new market, and therefore opted to invest heavily in litigation financing. Funding companies do not have liquidity problems, but instead find it difficult to identify appropriate cases to finance. In order for a party in arbitration to receive funding, it must go through a detailed due diligence process, where the jurisdiction, merits and quantum of the case are assessed. Quantum, in particular, is relevant: funders tend to adopt a conservative approach when weighing whether damages are probable and not speculative, and whether the counterparty is sufficiently solvent to pay a potential future award.

2) HEAVILY NEGOTIATED FUNDING AGREEMENTS

After the due diligence phase is concluded, the negotiation of the funding agreement becomes central. The contractual relationship between the funder and the client must be defined in detail in order to avoid future misunderstandings. For example, the funder and the client need to agree on how potential settlement offers will be handled.

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3) DISCLOSURE STILL HIGHLY CONTROVERSIAL

The issue of disclosure of third-party funding continues to provoke a highly charged discussion. While the funders agreed that if an arbitral tribunal calls for disclosure of the identity of the funder, its identity should of course be disclosed, they were uncomfortable with disclosure of the funding agreement, which contains the financing terms and strategies for different scenarios. The funders also commented on problems of definition: pursuant to the IBA Guidelines on Conflicts of Interest in International Arbitration, disclosure of funding relationships could also entail disclosure of a client's banking arrangements, if a bank were to have a direct interest in the final arbitral award.

CONCLUSION

Parties in arbitration need to know the players in a growing industry where a high amount of capital circulates. Our seminar brought to light the **significance of TPF in international arbitration and the variety of approaches being taken by some of the leading funders**. While Italian companies have not been as active in use of third party funders as companies in the US, the UK, and elsewhere in Europe, we expect this to change in the near future, with the need for continued examination of best practices to advance the process.