Overview

According to the International Council for Commercial Arbitration, Third-Party funding is the involvement of an entity with no prior interest in the legal dispute, providing financial assistance to one of the parties, usually the claimant, on a non-recourse basis in the case of an unsuccessful claim. The emergence of third-party funding can be accredited to the upsurge in the practice of international arbitration, with the users demanding innovative ways to finance arbitral matters.

The scope of international commercial arbitration has rapidly diversified in the last decade, demonstrated not only in disputes among commercial parties, but also in those between states and commercial parties and in state to state disputes. However, even with the modernization of international arbitration and third party funding, many questions remain unanswered with regard to potential arbitrator conflict of interest, confidentiality, privilege and costs issues.

The varied opinion on the subject has a convergence on the fact that it is an undeniable reality. A recent study by the Financial Times has revealed that the third party funding of disputes in both litigation and arbitration exceeds $10 billion and the figure is expected to increase.

The increase in use of third-party funding exacts an urgent need to balance the increasing business need for innovative approaches to the financing of arbitration while protecting the integrity of the arbitral process and the ultimate enforceability of the awards.

In addition to this, Professors Lisa Bench and Victoria Shannon Sahani expressly point out the correlation between third-party funding and arbitration and its role in improving access to justice. Arbitration plays a major role in improving access to justice and hence the focus on the third party funding should be given a keener look.

The key participants in this process are claimants, the funders, lawyers and potentially, the fund-brokers. The funding may be sought to cover legal fees, out of pocket costs such as expert fees, arbitral institution fees, discovery related fees, or costs associated with subsequent enforcement actions or appeals and may be structured around a single claim or a portfolio of claims.

The Claimants

Funding allows the claimant to grow its business or reduce risk of loss while pursuing a claim in a manner that poses no cash flow burden. Claimants are the vast majority recipients of this aid as most claimants utilize resources in their quest to recover or win against the defendant or respondents that may be more powerful entities. The funds enable the claimants, in instances when corporations are involved, to turn there in house legal teams from a cost department to a profit-making part of the company.
This in turn supplements the cost-efficiency advantage arbitration has over other means of dispute settlement. The claimants can pursue their action without fear of inadequate resources. This has the result of enhancing access to justice as there is more control with regard to capital-output in the pursuit of remedies.

**Lawyers and Law-firms**

Lawyers and law-firms play a multi-faceted role with regard to third party funding. They may play the role of the financier as well as that of the receiving party. In the case of receiving, the firm would approach the funders directly in order to seek financing options for its own risk free exposure and enhance its ability to offer alternative billing offerings relative to its competitors. In the financing part, a law-firm may effectively act as the provider of dispute finance for example in provision of contingency fees.

**Respondents**

The funding of respondents is rare. The financing of respondents poses challenges with respect to remuneration of the funder for its capital provision in the event of a successful defence, while avoiding any potential moral hazards created by the existence of the funding.

The rare situations in which the financing occurs involve situations where the funder has an independent financial or non-financial interest in the outcome. For instance, in RSM Production Corporation v Grenade, the respondent state was funded by a third party that had a competing interest in the oil exploration rights that would have been awarded to the claimant if it prevailed.

**Areas of Concern with regard to Third-party funding**

**Confidentiality/Privilege**

The privacy and confidentiality of the process is one of the key foundations of arbitration. Parties seeking third party funding in some instances can be required to share certain sensitive and confidential information with the funders. Certain basic steps such as the entering into Non-disclosure agreements should be taken by parties in order to ensure the protection of pivotal information, which if leaked, could upset the entire arbitral process.

**Conflict of Interest**

The funder’s participation in the case raises the obvious question of conflict of interest. However, in most cases, the issues are addressed fairly and effectively due to the presence of a funding agreement that is well detailed, defining the specific roles of the participants. For instance, the claimant and the funder enter into an arrangement under which the funder provides the claimant with capital in order to finance the legal fees and costs associated with the arbitration. In this case, the lawyer only owes a duty to the claimant and not to the third party.

**Conclusion**

Albeit the varied opinion on the role of Third party funding and its role in international commercial arbitration, there is a unanimous agreement among scholars that Third party funding is an undeniable reality and it is set to develop further. The problems associated with it with regard to confidentiality and conflict of interest has to be granted a keener look in a bid to streamline the practice.

The sanctity and trust in the arbitral process can only be assured if only arbitration’s inherent characteristics such as confidentiality, cost-efficiency and party-control are protected without fail.