

Third Party Funding and International Arbitration – Top 10 questions and their answers

Top 10 Questions asked by Corporate Counsel considering Third Party Funding for a dispute – and their answers!

Third Party Funding is where a commercial funder agrees to cover some or all of the legal fees and expenses incurred by a party (usually a claimant) in relation to a dispute. In return, if the party is successful in the dispute, the funder will receive a return on its investment, usually a share of the sums recovered (often calculated as either, or a combination of, a multiple of its investment or a percentage of the amount recovered), plus, as a priority, repayment of the amount paid out. Third Party Funding is becoming of increasing interest to businesses as a source of capital to finance and offset the risk of disputes they are involved in. In this flash briefing, prepared in conjunction with Ruth Stackpool-Moore of litigation funder Omni Bridgeway, we answer 10 of the most frequently asked questions corporate counsel have about Third Party Funding.¹

1. Why consider Third Party Funding?

Third Party Funding allows businesses to pursue legal claims without diverting liquidity to cover the legal fees and associated costs of a dispute. Third Party Funding can help clients whose assets are the subject of the dispute (e.g. where money has been misappropriated) or who would otherwise not necessarily have the available cash to pursue their claim, as well as clients who wish to reduce the ongoing impact of a dispute on their business activities or balance sheet.

2. Is Third Party Funding available to both claimants and respondents?

Yes, in the right circumstances Third Party Funding can be available to both claimants and respondents. Respondents may have a counterclaim that will return value. A party may also have a portfolio of cases (in some of which they are the claimant and in others the respondent) and look to finance them all in one package with a funder. A Respondent seeking funding on a stand-alone basis may also be able to secure it, if it is able to reach agreement with the funder on a mutually acceptable definition of success, allowing the funder's return to be based on agreed quantifiable measures, typically secured against collateral such as company assets or a parent guarantee.

3. How do funders determine whether to fund a case?

There are a number of factors that a funder will consider when deciding whether to fund a case. The key factors include: (1) the merits of the claim and prospects of success; (2) the economics of the case, i.e. how proportionate the estimated costs of the case (or the part of them to be funded) are when compared to the size of the recoveries that could reasonably be expected; and (3) prospects of enforcement and obtaining payment if an award is made in the client's favour. Ultimately, like its client, the funder will be looking to ensure that there are realistic prospects of the claim being successful and generating a financial recovery sufficient to cover the funder's commission and a meaningful return to the client.

¹ The answers in this document reflect the approach taken by Omni Bridgeway and industry best practice. Due diligence should be conducted on any specific funder in respect of their approach to the same.

4. What is “success” and how is it determined?

A key feature of any Third Party Funding agreement is the concept of “success”. What equates to “success” will be unique to each dispute, depending on the overall factual matrix. It is ultimately for the client and the funder to reach a mutual agreement as to what will be a successful outcome of any particular dispute and this should be clearly stated in the funding agreement.

5. What level of involvement can a party expect from a funder in the day-to-day management of their case and any settlement negotiations?

The Third Party Funding agreement will set out the level of involvement the funder may have in key decisions in the case, the requirements for the funded party to keep the funder informed and what input the funder will have in the management of the case. Although not uniformly the case, it is important in some jurisdictions for the funded party itself to retain control and conduct of the case. With regard to settlement, as a minimum this will typically include keeping the funder updated about any ongoing negotiations and the amounts and conditions under discussion. Whilst funders are usually involved in settlement discussions, directly or indirectly, the degree of involvement varies depending on the type of case and expectations of the funded party and should be clearly set out in the funding agreement.

6. Can a funder prevent settlement?

Whilst a funder may not have the power to veto a settlement agreement, there may be a circuit breaker mechanism built into the Third Party Funding agreement under which the funder and the client agree to be bound by the opinion of an independent counsel if there is any difference in opinion as to the reasonableness of a settlement offer. In practice, that provision is rarely used, since the funder not only aims to align its interests with the client’s in terms of the structure and financial interests of the Third Party Funding agreement from the outset, but also communicates regularly with the client in the hope of avoiding such differences in opinion as the case progresses.

7. Do funders attend hearings?

This will depend on the funder, the case, and the subject matter of the hearing in question. A funder may for example wish to attend specific parts of the hearing or hearings relating to specific issues which are most relevant to their financial interests (e.g. a funder may attend a hearing of an application for security for costs).

8. In what circumstances would a funder terminate funding?

Third Party Funding agreements normally provide for a very limited set of circumstances in which a funder may terminate funding. Generally these may include (1) if the merits of the case substantially deteriorate e.g. if new evidence comes to light which completely undermines the case; (2) if the prospects of any meaningful recovery disappear e.g. the counterparty becomes insolvent; and (3) if there has been a material breach of the funding agreement or misrepresentation during the due diligence phase. However, even in circumstances where there is a decline in the prospects of success, the funder will usually look to work with the client to find a way to resolve the dispute as favourably as possible for all parties.

9. Are communications between the client and a funder or prospective funder privileged and / or confidential?

The availability and type of privilege applicable to communications with funders depends on the law of the relevant jurisdiction(s) involved. A Non-Disclosure Agreement should be entered into with the funder before any confidential or sensitive information is exchanged, to assist in protecting any information disclosed to the funder.

10. When does the Third Party Funding Agreement end?

As the funder is only entitled to a return on its investment once money or assets capable of liquidation are recovered, the Third Party Funding agreement will remain in place whilst the award is enforced, notwithstanding the end of the arbitration proceedings. Funders are often actively involved in the enforcement process, given their vested interest in ensuring value is recovered.

The CMS International Arbitration Group would like to thank Amy Wen Wei and Stephanie Woods, Senior Associates in the Hong Kong and London offices respectively for their assistance in preparing this publication and Ruth Stackpool-Moore from Omni Bridgeway for her time in answering these questions. Omni Bridgeway offers dispute finance from case inception through to post-judgment enforcement and recovery on a worldwide basis. Ruth is an Investment Manager based in the Singapore office of Omni Bridgeway and can be contacted on rstackpoolmoore@omnibridgeway.com.

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