

## Three's a crowd? Third-party arbitration funding

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Third-party arbitration funding can benefit both under-resourced growing businesses as well as established and profitable companies, allowing them to cover the legal costs of potentially complex proceedings. However, companies should be aware of its potential risks and downsides, such as concerns over confidentiality and privilege of sensitive information, the funder's self-interest in returning a profit on its investment and potential conflicts of interest between funders and arbitrators. A number of jurisdictions and arbitration institutions are considering introducing external regulation of third-party arbitration funding.

### **Is third-party arbitration funding common in your jurisdiction?**

Third-party funding is uncommon in Cyprus. Opinions vary on whether such activities are permissible in Cyprus since this issue has not yet been put before the courts. The Cyprus courts could adopt similar principles to those of English law in relation to this matter in order to allow third-party funding in litigation or alternative dispute resolution proceedings.<sup>(1)</sup> However, those who seek to adopt such a procedure must be careful since the Cyprus courts might be reluctant to allow it, as it seems that such an action might conflict with the equitable principle against champerty and maintenance. Third-party funding in Cyprus has not yet been regulated, thus it is impossible for a clear answer to be given on the matter.

### **What terms and conditions are generally associated with third-party arbitration funding in your jurisdiction? Does this type of funding usually include punitive measures in the event of an adverse outcome for the claimant company?**

In general, there are no terms and conditions associated with third-party arbitration funding in Cyprus. However, it could be argued that where the courts come across with such issues it is possible that they will look for guidance from English law. In the absence of any terms and conditions associated with third-party arbitration funding in Cyprus, there are no punitive measures in the event of an adverse outcome for the claimant company. Nonetheless, due to third-party arbitration funding, it might be easier for claimant companies to take advantage of the absence of punitive measures and promote claims for major amounts which, under normal circumstances, would not have been promoted.

### **Third-party arbitration funding can involve potential risks for claimant companies. What measures can be taken to avoid or minimise such risks?**

There are indeed potential risks arising from third-party arbitration funding, including:

- the risk of disclosing confidential or privileged material;
- the risk of the funder's improper influence over the proceedings;
- the risk that the funder might withdraw funding, leaving the party unable to continue the arbitration proceedings;
- the risk that the funder may have inadequate capital and thus be unable to bear the proceedings' overall costs; and
- the risk of a potential conflict of interest.

Nonetheless, there are a number of measures that can be taken in order to avoid or, at least,

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minimise these risks. First, the funded party's legal team should conduct due diligence on the potential funder. Further, an effective way to maintain the confidentiality of documents as well as privilege over them is to enter into a confidentiality or common interest agreement with the prospective funder. Finally, as mentioned above, the funder may have improper influence over the proceedings or withdraw funding, leaving the party unable to continue the arbitration. To avoid this risk, a funding agreement could be drafted, including relevant clauses to ensure that the funder does not have excessive control over the proceedings and will not unreasonably withdraw its funding.

### **How does third-party funding affect the confidentiality and privilege of sensitive material in arbitration proceedings?**

One of the reasons that parties choose arbitration proceedings is because arbitration is private and there is no public hearing, as in the case of litigation. Similarly, the documentation presented in an arbitration is not made available to third parties. Before deciding whether to participate in arbitration proceedings as a funder, a third party should weigh the merits of the claim and the likelihood of recovery. The funder will inspect the documents that accompany the claim and all aspects connected therewith. This could include:

- correspondence between the claimant and its legal team regarding the possibilities of success; and
- the disclosure of any relevant documents.

Therefore, the potential disclosure of documents concerning the claim may lead to confidentiality being waived. There are of course some measures that can be taken in order to avoid a waiver of confidentiality (eg, a confidentiality agreement), as explained in the third question above.

### **Given the significant legal and ethical issues associated with third-party arbitration funding, such as potential conflicts of interest and questions regarding impartiality, is external regulation needed in your jurisdiction?**

As explained above, third-party arbitration funding is uncommon in Cyprus and the courts might not allow it due to the principles of champerty and maintenance. However, if third-party funding is to be allowed in Cyprus in future, it will be important to support its development through regulation to avoid uncertainties and limit dangers regarding potential conflicts of interest and impartiality. The enactment of a clear, uniform and binding regulatory framework in the field of international arbitration will be of vital importance. A relevant regulation might provide, for example, for the disclosure of the funder's identity to the arbitrators and the non-funded party. Such a disclosure would be essential for the integrity and legitimacy of the arbitral system. Once third-party arbitration funding is allowed in Cyprus, the enactment of a relevant regulation for aspects of third-party funding will be essential to avoid the potential risks for the arbitral system.

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### **Endnotes**

(1) See *Jennifer Simpson (as assignee of Alan Catchpole) v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA 1149.

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