Third-party funding in international arbitration

BY VICTORIA SHANNON SAHANI

Third-party funding, also known as litigation funding, is a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award, or judgment rendered against that party, or both. Third-party funding is a growing phenomenon that is becoming more mainstream in both the litigation and the international arbitration communities. The leading jurisdictions worldwide — in terms of volume and sophistication of third-party funding arrangements — are Australia, the U.K., the U.S. and Germany. In the past, third-party funding was a smaller niche market, but in recent years, the demand for third-party funding services in these and other jurisdictions has grown exponentially, due to innovative third-party funding products that resemble corporate finance or venture capital deals.

For funders and other investors, international arbitration is a particularly attractive area of investment because of the high values of the claims, the speed of the proceedings, the potential for greatly reduced evidentiary costs, the greater predictability of the outcome than in litigation, the industry expertise of the decision-makers, and the high enforceability of arbitration awards. With respect to enforceability, there are currently 157 jurisdictions worldwide in which a party can enforce an award through the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"), which is the main vehicle for enforcing arbitral awards worldwide. In addition, more funders are financing claimants in investor-state arbitration under bilateral or multilateral investment treaties and free-trade agreements against sovereign governments, which has lead to several influential rulings by arbitral tribunals and at least three new investment treaties that contain provisions requiring disclosure of third-party funding.

There are many different types of clients for third-party funding, such as corporations, law firms, individuals, and sovereign states. Funding is most readily available for the plaintiff or claimant side of the case, but some funders are willing to support the defense side. The client will be asked to provide extensive information about the case, which may be confidential or privileged under applicable law, to the potential funder so that it may assess the claim. If the funder approves of the client's case, the client would then negotiate a detailed funding agreement with the funder. The funding agreement is typically a network of contracts that may contain provisions addressing nondisclosure, confidentiality, the method of calculating the funder's fee, a cap on attorney fees and costs paid by the funder, whether the funder would pay an adverse costs award if the funded party loses under the "loser pays" rule of cost allocation (or if the arbitrator or judge orders the funded party to pay the attorney fees of another party), and under what (rare) circumstances the funder may terminate or withdraw from the funding arrangement before the end of the case, as well as many other provisions.

Increasingly, funders are engaging

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Q&A

Question from
DAVID WILLINGHAM
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When do you begin the process of a successful mediation in a complex matter? Do you contact the parties in advance after receipt of the mediation briefs to gather intelligence, collect thoughts, answer questions, etc.?

I schedule pre-mediation conference calls to ask questions and get an idea of party and counsel dynamics. Ideally this takes place after the briefs have been submitted, but I find it helpful even if the briefs have not yet been filed.

HON. GAIL A. ANDLER, (RET.)
JAMS

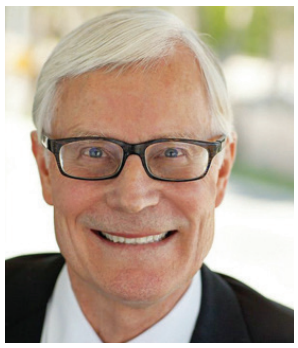
in portfolio financing of law firms, whereby the third-party funder's investment is based on predicted returns from multiple cases in which the law firm represents its clients. Funders have also entered into joint ventures or ownership interests involving their underlying clients, including ownership of law firms in the U.K. and possibly Washington D.C. These newer phenomena are still too rare to assess their impact. Third-party funding of class action litigation or arbitration is not yet prevalent in the U.S. for a variety of reasons beyond the scope of this article.

A two-thirds majority of states in the U.S. allow third-party funding, at least to some degree. Third-party funding of small-scale consumer disputes has been prevalent since the early 2000s and is now regulated in a strong minority of states due to concerns about predatory lending and consumer protection. Large-scale funding of commercial disputes is treated very differently, however, and exceptions or exemptions to the laws that now protect consumer clients are usually carved out for large commercial disputes. Since the U.S. is an arbitration-friendly jurisdiction, third-party funding of international arbitration is typically upheld and enforced by U.S. courts in commercial international arbitration cases that do not involve ordinary consumers as parties.

In addition, third-party funding may affect the applicability of evidentiary privileges or an attorney's conduct under the attorney ethical rules relating to confidentiality, evidentiary privileges, professional independence, conflicts of interest, fee-splitting with non-attorneys, the client-lawyer relationship, and settlement. In 2012, the ABA Commission on Ethics 20/20 issued an informational report on "alternative litigation finance" detailing how attorneys should handle their professional ethical obligations when third-party funding is involved in their clients' cases.

A global Task Force on Third-Party Funding in International Arbitration was constituted in 2013 to study the impact of third-party funding in international arbitration and produce a useful Report. The Task Force is jointly organized by the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London School of Law (Queen Mary). The Task Force is finalizing a Report addressing key issues in third-party funding in international arbitration, including defining third-party funding, suggesting best practices for those involved in third-party funding arrangements, avoiding and managing conflicts of interest that may arise, protecting the client's confidential information and evidence under the attorney-client privilege or similar doctrines based on local law, and advising arbitral tribunals and institutions on how to approach allocating costs when a third-party funder is involved in the case. The Task Force will present its finalized, published Report at the ICCA Biennial Congress in Sydney, Australia on April 15-18, 2018.

The newly published second edition of "Third-Party Funding in International Arbitration" (Wolters Kluwer: 2017), co-authored by this article's author, addresses the issues discussed in this article in greater detail, examines the laws on third-party funding in over 60 countries, examines how third-party funding is being incorporated into arbitral rules and investment treaties, and provides a reliable resource for users and potential users who may wish to tap into and make use of this distinctive funding tool.



Robert H. Fairbank, Esq.

PHILLIPS ADR, FAIRBANK ADR

Nationwide

Bob Fairbank conducts mediations of complex high-stakes disputes both independently (through his own practice, Fairbank ADR) and in affiliation with the Hon. Layn Phillips, as a member of the Phillips ADR Distinguished Panel of Neutrals. Bob's mediation experience includes disputes covering diverse legal areas, such as:

- Securities Class Actions
- Shareholder Derivative Actions
- Going Private Transactions
- Patent Infringement
- Patent Royalty Disputes and Renegotiation of Patent Royalty Agreements
- Trade Secret Misappropriation
- Antitrust Class Actions
- Consumer Class Actions
- Breach of Contract
- Accounting Malpractice
- Legal Malpractice
- Negligent Misrepresentation
- Breach of Fiduciary Duty

Fairbank ADR is the successor to Fairbank & Vincent, a business litigation firm that Bob co-founded in 1996 after beginning his career as an associate and partner of Gibson, Dunn & Crutcher (1977-96).

Bob obtained extensive and diverse experience in major civil litigation over 36 years. Bob successfully represented prominent corporate and individual (Director and Officer) defendants in a variety of civil disputes, and served as co-counsel for plaintiffs in major class actions. In addition, from 2002 to 2009, Bob served as an independent consultant for the plaintiff, Regents of the University of California, in the Enron, Worldcom, AOL Time Warner, and Dynegy federal securities cases, as part of a team co-headed by the Hon. J. Lawrence Irving.

Bob also has developed sophisticated knowledge of the leading civil and criminal corporate fraud cases, government investigations, and regulatory developments as an adjunct professor at the USC Gould School of Law (2004-present) and the Stanford Law and Business Schools (2007).

Bob received his A.B. from Stanford University, his M.L.S. from the University of California, Berkeley, and his J.D. from New York University, where he served on the Law Review. He is also a Los Angeles Super Lawyer (2005-2017).

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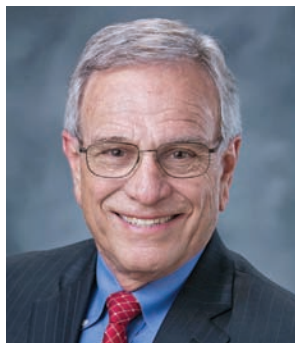

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Family Law

Theodore J. "Ted" Fogliani, Esq. joins JAMS following a 43-year career as a highly regarded and respected family law attorney/mediator. Mr. Fogliani incorporated mediation into his litigation practice in 1978 and has continued to develop his mediation/arbitration skills through ongoing coursework and specialized training. Mr. Fogliani also practiced in the areas of civil, business and real estate matters from 1974 to 1985 in addition to his family law cases, which provided him with a diversified background in his work as a family litigator/mediator. During his long career, Mr. Fogliani handled and resolved a broad spectrum of complex, difficult and unique family law matters along with many simple and routine cases. All of this extensive experience and training as a litigator/mediator will now be focused on providing mediation/arbitration/referee services for JAMS. Mr. Fogliani believes it is important to resolve disputes as expeditiously as is reasonably and prudently possible. He understands that change is inevitable and can often serve as a positive force in our lives. As a mediator/arbitrator, Mr. Fogliani believes the key to successful outcomes in family-centered disputes is to consider the family history and interpersonal dynamics in the dispute resolution process to allow the participants to craft their own framework for settlement. He believes his role is to listen carefully to each participant to gain an appreciation of why they have been unable to reach a resolution; to carefully read, review and digest the written records, reports, prepared statements, etc. with a view to understanding the content and source of this information. Further, to ask pertinent and probing questions to ascertain what truly is in play in the family or partners' relationships and develop, over a reasonable period of time, equitable and workable solutions to all issues presented to him.

As an Arbitrator/Referee, Mr. Fogliani brings over 40 years of trial experience to JAMS. Mr. Fogliani has participated in over 1500 hearings and trials in Los Angeles, Orange, Ventura, San Bernardino, Riverside, and San Diego Counties. He has also participated in extensive substantive family law review courses and trial skills training during his entire career.

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