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ARTICLE

Third Party Funding in Arbitration

Third party funding (TPF) is an arrangement whereby a party (the funder), which typically has no prior interest in a dispute, will fund the legal costs of a claimant, usually on the basis that the funder will only be paid out of the proceeds of any amounts recovered following a successful outcome in the claim. Often the amount of the funder's recovery is a pre-determined percentage of the amount recovered by the claimant.

In May 2016, BLG and Arbitration Place co-sponsored a panel discussion entitled Third Party Funding in Arbitration: Views from Counsel, Funders and Arbitrators. The panel included speakers from each professional perspective, including counsel (BLG litigation partner, Ira Nishisato), funder (Senior Counsel at Vannin Capital, Jeffery Commission), and arbitrator (Arbitration Place member arbitrator, The Hon. Ian Binnie).

The discussion provided insight into the unique challenges and opportunities involved in pursuing claims with the involvement of a third party funder. In particular, the panel raised the following points:

1. Third Party Funding is growing: third party funding is growing in Canada, but it is still less prevalent than in other jurisdictions such as England, the US, and Australia. Nevertheless, Canadian Courts have determined that third party funding is a legitimate practice in appropriate cases, that can offer greater access to justice and effective scrutiny of legal claims and risks.
2. Third Party Funding has broadening appeal: as explained by the participating funder, many users of third party funding are not impecunious or otherwise unable to fund their own legal claims. Rather, third party funding has become an attractive option for businesses seeking to manage and spread the risks associated with long or complex legal proceedings. This is particularly the case in certain sectors where current margins cannot justify the immediate pursuit of legal claims, which are characterized by long time horizons and uncertain outcomes.
3. Third Party Funding is flexible: funders and claimants are able to negotiate the terms of a funding arrangement at the outset of proceedings. The terms of funding can be flexible to suit the risk profile of the claim and other factors relevant to the conduct or outcome of the proceedings.

TPF can also introduce legal and practical challenges for managing the relationship between the funder and counsel, as well as between counsel and adjudicators. These complexities are best managed by experienced counsel in order to avoid unexpected developments in the proceedings that may arise by virtue of the involvement of a third party funder. Managed correctly, TPF may offer a means to recover losses in a variety of sectors and projects as part of a robust and balanced legal strategy.

Should you have any questions about third party funding, please contact one of the authors.

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