ARBITRATION & ADR - GREECE

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.

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Is third-party arbitration funding common in your jurisdiction?

Third-party funding is uncommon in Greece and, to date, there is no known or recorded precedent of an arbitration funded by a third party. Although Greece has no specific regulation for third-party funding, it does not prohibit third-party funding in arbitration either. In this respect, Greek law recognises and regulates, to a certain extent, lawyer funding schemes in the form of contingency fee agreements (in which the lawyer gets up to 20% or 30% of a successful claim and may undertake to cover the expenses for pursuing the claim). A party would generally be allowed to agree and arrange an appropriate third-party funding scheme in an arbitration conducted in Greece on the basis of the general principle of freedom of contract (Article 361 of the Civil Code) or could resort by analogy to the existing regulation regarding contingency fee agreements.

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?

As aforementioned, third-party funding (either in litigation or arbitration) is not regulated in Greece, as there is no known or recorded practice. The absence of a regulatory framework includes soft law instruments, such as a code of conduct. With respect to punitive measures (eg, punitive damages), although there is no practice, their inclusion may be validly agreed, provided that they are not contrary to Greek public policy (mainly on grounds of disproportionality) in the first place, in which case they would not be enforced. However, after-the-event insurance, which covers risks such as legal costs after a claim has arisen, is not offered as a standard insurance product in the Greek market, and those interested in obtaining such cover should seek for tailor-made solutions.

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

Apart from the issues addressed in the following questions, which pose systemic risks to arbitration with a potential impact on the interests of the claimant companies, the involvement of third-party funding in arbitration may give rise to a variety of potential risks for claimant companies, such as a risk of:

- differing or even competing financial interests or priorities between the claimant company and the third-party funder;
- inadequate available funds or even a risk of insolvency of the third-party funder; and
- an adverse outcome in cost-related matters, such as an application for security for costs against the claimant company or a tribunal ruling relating to an award for costs.

Measures to avoid or minimise such risks can be taken through legislative enactment or private ordering (in the form of soft law, such as code of conducts). As such regulations are not currently in place, those intending to engage in third-party funding are strongly advised to address some of these matters (especially issues of financial interests) in carefully drafted funding agreements and other matters (eg, security for costs and awards on costs) in the arbitration agreement itself.

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

To the extent that a third-party funder becomes privy to any kind of information with respect to arbitration proceedings, this inevitably raises issues pertaining to the confidentiality of such proceedings and attorney-client privilege. The best way to ensure such issues are appropriately and efficiently solved is to address them in detail in the respective funding agreement.

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?

The absence of third-party funding practice does not call for immediate action in the form of external regulation. Nevertheless, as third-party funding will inevitably take its place in Greek arbitration practice, such regulation should be preventive rather than curative in nature. In this respect, potential conflicts of interest regarding the role of counsel – who should serve both the interests of the third-party funder, which may have appointed him or her, and the party to the arbitration to which he or she owes a professional duty – should be addressed and resolved in the law regulating lawyers' conduct. A stark conflict of such interests and duties may emerge especially in settlement negotiations. In the same vein, arbitrators should be independent and impartial not only towards the parties to the arbitration, but also towards third-party funders. To ensure that the arbitrators' duties of independence and impartiality are addressed, a corresponding duty of the parties to disclose third-party funding should also be put in place.

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