



## 2017 Hot Topics in International Arbitration for Life Sciences Companies: Third-Party Funding

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Intellectual property often is the most valuable asset of a growing life sciences company, and when IP becomes the subject of a dispute, companies may lack the means to protect their rights which, in turn, could adversely impact the company's development. In such a situation, third-party funding could be of assistance. This article will review ways life sciences companies could leverage third-party funding in connection with international arbitration. Third-party funding has grown in the last few years in many jurisdictions, including U.S., UK, EU, and Asia. The interest for such financing comes from the parties requiring funding to pursue sizable claims as well as from funders. For bet-the-company claims involving complex IP, third-party funding is a must-consider option for life sciences companies to consider in connection with international arbitration in 2017.

Third-party funding is an arrangement between a funder and a claimant for the funder to pay all or part of a claimant's legal fees and expenses in return for reimbursement of the funders' costs and a share of the claimant's recovery. In essence, third-party funding is akin to a contingency legal representation except that the financial risks are undertaken by the funder rather than by the claimant's attorney.

Each third-party funding arrangement is different, but typically funders seek a share of the recovery in the range of 15% to 50%, depending on the costs and risk. The funder's share may vary over the time to depending on the complexity and the anticipated length of the dispute. The funder may also agree to bear potential liability for legal fees of the opposing side and to provide security for costs potentially imposed in many international commercial arbitrations. If the claim fails, the funder receives nothing and, typically, remains liable for the claimant's legal fees and expenses. In certain cases, funders could provide an "after the event insurance" coverage to protect a claimant against the risk of having to pay the respondent's legal fee or the claimant's own legal fee and expenses if the claimant loses.

In deciding whether to fund the case, funders will conduct extensive due diligence assessing all aspects of the claim that bear on the financial risks it is being asked to assume. The life sciences company needs to be prepared to provide all relevant information to the funder. The factors considered by the funders may include:

- the prospect of the claim's success;
- the amount of the claim;
- terms of the arbitration agreement between the claimant and respondent;
- the seat of the arbitration; and
- the capacity of the respondent to pay the award and associated costs.

The core benefit of third party funding is clear – a company avoids spending valuable financial resources on legal claim, and instead focuses on business development. Legal fees, expert costs, and document review and production could be substantial in a complex international dispute, often costing into seven figures. A growing business may be simply unable to bear this burden potentially resulting in losing the IP and other rights that the company thought it would have in the relevant licensing, joint development, distribution, or other commercial arrangement. Given growing concerns over the costs of international arbitration, third-party funding could also be a valuable option for established companies with strong business and strong cash flow. One other benefit of

engaging a funder is that it brings highly commercial and objective perspective to the claim assessment while a claimant's motivation could be less objective, which could result in investing resources in unviable claims.

Third-party funding in international arbitration has risks, and these risks need to be fully understood by the claimant company and its counsel before engaging a funder. The funder's primary motivation is financial gain, and the offered terms would reflect that self-interest. If the claimant company does not fully understand implications of the funding agreements, it could end up with the funder being able to take economic advantage of it. The funder's control could be inconsistent in other ways with the claimant company's business interests. It is imperative for claimants to draft a clear funding agreement and have it thoroughly reviewed by counsel with relevant experience.

Funding arrangement is a source of potential additional conflicts of interest, for example, when the funder has the right to select the company's counsel. The lawyer may have an ongoing relationship with the funder, which could impact its duty of loyalty to the claimant. This issue could emerge particularly sharply in the context of settlement negotiations. The funder may have an interest in settling the case on the terms that are not most favorable to the claimant company. The funder-chosen lawyer's interest in the prospects of future business with the funder could impede on its interest in advancing objectives of the claimant company. Accordingly, the claimant company needs to make sure that the agreement with the funder provides for adequate protection of the company if the funder has the right to choose the arbitration counsel.

Keep in mind that although there is some soft law requiring disclosure of third-party funding arrangements, in general international arbitration rules do not require such disclosures. The lack of disclosure could lead to an undisclosed conflict arising out of the relationship between funder and one of the members of the arbitral tribunal; for example, if the arbitrator is a partner of a law firm with which funder has a relationship. On the other hand, the disclosure of funding could give a basis for the adversary to raise satellite arguments relating to the funding itself. For example, some tribunals consider funding as a factor in ordering the claimant to provide security for costs. The engagement of a funder could also prompt an argument that the claimant is not entitled to an award of legal fees and costs.

The company also needs to be conscious of issues relating to confidentiality and privilege. Typically, the funder would want to have complete access to information held by the claimant and its lawyer. At the outset, the funder should sign a confidentiality agreement to address the company's concerns. However, providing certain documents to the funder may waive attorney-client or work-product privilege. The company would be well advised to have its own counsel advising it on the negotiations with the funder.

Claimant companies can seek funding at any stage -- before the commencement of arbitration, during the proceedings, or even after the issuance of the award to provide to claimant funds for possible recognition and enforcement in the court. However, the earlier the company approaches a funder, the more beneficial it would be. If the company approaches the funder after its resources are exhausted, it would be in a worse negotiating position than if it would initiated the process before bringing the claim. Also, the company's failure to allocate necessary resources to its legal team could result in the limitation on their ability to adequately present the case.

## **AGG Observations**

- Third-party funding is appropriate not only for the growing companies but also for established companies with strong business and strong cash flow given increasing concern over the cost of international arbitration.
- Recent trends suggest that in 2017, third-party international arbitration funding will continue its growth. International arbitration professionals and arbitration institutions engage in active discussions to make third-party funding more acceptable.
- Two of the world's most popular centers for dispute resolution -- Hong Kong and Singapore -- moved forward with plans to legalize third-party funding through legislation. Both cited the need to be able to compete with other centers of international arbitration around the world, including London and New York.

- Along with the growth, there is also an increasing pressure towards more transparency and disclosure in third-party funding. The proponents of increased disclosure argue that tribunals need to know if there is an unrelated third party which has an interest in the outcome of the case. In 2017, arbitral institutions are likely to have a more in-depth discussion to address standing of third-party funders and disclosure requirements.
- Agreements related to third-party funding should be reviewed by the claimant company's external counsel.

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