

Is Arbitration Portfolio Financing Going to Grow In 2018?

Kluwer Arbitration Blog

February 2, 2018

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Please refer to this post as: Tobey Butcher, 'Is Arbitration Portfolio Financing Going to Grow In 2018?', Kluwer Arbitration Blog, February 2 2018,

<http://arbitrationblog.kluwerarbitration.com/2018/02/02/arbitration-portfolio-financing-going-grow-2018/>

The progress in the development, acceptance and understanding of third-party financing of dispute resolution costs by lawyers and clients, will undoubtedly continue in 2018. The model of third-party based financing of arbitration costs will be no exception, it being generally accepted that it is here to stay and that it provides a solution, in particular, to the high cost of arbitration proceedings.

In 2017, Singapore established a framework for third party financing of international arbitrations by yet to be prescribed qualifying third-party funders¹Civil Law (Amendment) Act (Bill No. 38/2016), see <https://sso.agc.gov.sg/Bills-Supp/38-2016/Published/20161107?DocDate=20161107&ProvlDs=>; also, Hong Kong passed legislation making it clear that third party financing of arbitrations is permitted under Hong Kong law²Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Bill 2016 dated 14 June 2017, see <https://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf>. In April 2018, the final report by a Task Force made up by the International Council for Commercial Arbitration and the Queen Mary University of London about third-party funding in international arbitration is due to be published³ For the draft report see Krestin/Mulder: [Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?](http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/) <http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/>. The report provides detailed background focusing on the issues dispute cost financing raises in international arbitration and how those issues might be addressed. Initiatives like this will serve to ensure that the quality and professionalism of those providing third-party finance for dispute resolution costs is kept in focus and further integrate the concept into mainstream arbitral processes.

In addition to the acceptance and understanding of third-party financing by the wider arbitral community that the above developments demonstrate, the third-party finance community itself will continue to provide innovative solutions. Particularly with regard to the adoption of portfolio financing which will further expand in 2018.

Under the portfolio model, finance is provided across multiple arbitrations. If the first award under the arbitrations included in the portfolio does not provide a complete, or any, return to the finance provider, the balance due in relation to that arbitration is included in the return to be paid upon the next successful outcome of an arbitration which it has been agreed between the client and the third-party finance provider should be included in the portfolio. Through this approach, the arbitration finance provider's return is cross collateralised and relying upon the overall performance of the portfolio, rather than a single arbitration.

A significant advantage of the portfolio model from the client's perspective is the ability to include a range of cases in the portfolio that would not otherwise qualify for a case by case financing. The finance provider is certainly seeking to include claims likely to provide the agreed return for the portfolio. However, the client may be able to include claims anticipated to achieve outcomes, whether by settlement or award, which on their own would not be sufficient to secure financing on a single case basis. In addition, the client might be able to include in the portfolio arbitrations where it is the respondent and thereby finance defence costs. So long as across the entire portfolio there is sufficient potential value to generate the required return, the third-party finance provider will be prepared to advance the funds required, enabling the client to pursue, or defend the arbitration and court claims, or even to monetise a potential award or judgment.

Any form of third-party financing of dispute costs benefits clients from an accounting perspective as it removes a present-day cost P&L expense, and a contingent liability for future costs. The legal fee spend is transferred to the finance provider and becomes an off-balance sheet transaction. The portfolio financing model extends the accounting advantages because of the potential ability to include in the portfolio claims that would not otherwise qualify for case by case financing.

Arbitration financing on a case by case basis will continue but will increasingly be supplemented in 2018 by more and more sophisticated arrangements including financing based on a portfolio model. In this way, as the understanding by clients and lawyers of the advantages of third party financing in arbitration develops, the use of it will advance beyond application just as a matter of necessity by entities subject to liquidity or budgetary issues, to use as a tool by corporates as a matter of choice to manage legal budgets. This will include actively seeking to identify claims that might not otherwise have been pursued, in order to realise the value locked-up in claims which would otherwise be lost with the passage of time.

References

1. ↑ Civil Law (Amendment) Act (Bill No. 38/2016), see <https://sso.agc.gov.sg/Bills-Supp/38-2016/Published/20161107?DocDate=20161107&Provids=>
2. ↑ Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Bill 2016 dated 14 June 2017, see <https://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf>
3. ↑ For the draft report see Krestin/Mulder: [Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?](http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/) <http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/>