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The Impact of Third-Party Funders on the Parties They Decline to Finance

Victoria Shannon Sahani (Arizona State University, Sandra Day O'Connor College of Law) · Monday, July 6th, 2015 · Institute for Transnational Arbitration (ITA)

Third-party funding is a controversial, dynamic, and evolving phenomenon in international arbitration. Proponents and opponents of third-party funding debate whether the practice will make a positive or negative impact on the worldwide system of dispute resolution. Both sides of the debate make predictions regarding the effect of third-party funders through the cases that they finance. Such an effect is likely dwarfed, however, by the impact of third-party funders on the cases that they assess but choose *not* to finance.

A few third-party funders operating in different jurisdictions were informally asked to estimate the percentage of parties whose cases they ultimately fund among those that seek their services. The responses from those funders ranged from less than 1% to around 5% of the parties who seek their services. One funder mentioned that the number of cases offered funding could be as high as 10-20% but that not every case offered funding is a case that ultimately goes forward with funding. For example, sometimes when the opposing party learns that the funder is involved, the case settles even before it is filed. In essence, the number of parties actually funded is very low relative to the number of parties that seek funding. This small number of funded parties is important to the study of third-party funding, but it is likely that funders will have a more dramatic impact on the dispute resolution system through the vast majority of parties that they *decline* to finance.

As a sophisticated potential investor, the funder invests considerable time, money, and effort into performing a thorough legal and financial analysis of the case during the due diligence period. Thus, the funder is extremely well positioned to offer a preliminary case assessment to a declined party. What information might the funder share with a party it declines to fund? Funders often provide a “reality check” for parties that have unrealistically high expectations regarding the amount of damages they should claim. Funders may also tell the party that its case is too expensive relative to the potential recovery amount, that the likelihood of winning is low, or that the likelihood of recovering money from the respondent is remote. Funders may also share other reasons and valuable information with the party, if the party is receptive. While the funder’s reasons are certainly colored by its business objectives, the funder has no reason to exaggerate or lie to a party when explaining the reasons for declining to fund that party’s case. In addition, parties often consult more than one funder while seeking funding, so the party will likely hear multiple perspectives regarding why their case has not received funding. All of these conversations provide valuable information to the party, even if they do not result in a funding arrangement. Conversely, sometimes the declined party is not ready to hear the funder’s reasons for declining its

case, thereby foregoing this valuable service that the funder may provide. Finally, it is important to note that the funder decides whether to finance a case based on its commercial viability as an investment. A funder rejecting a case does not mean that the case lacks merit. Many parties that are declined funding go on to pursue their cases successfully using other financial means.

The funders responding to the informal survey either already explain to the party why they declined to finance their case or expressed a willingness to do so. Thus, many funders are providing (or could provide) “free” case assessment to the vast majority of parties they encounter, regardless of whether they decide to finance the party’s case or not. After the funder has expended considerable resources to evaluate the case, providing reasons to the declined party is likely a nominal additional cost (if any) for the funder. In fact, the proceeds from winning funded cases are likely more than enough to cover the additional cost of providing this information to the parties that are declined funding.

Parties who are rejected by third-party funders and who receive a substantive explanation from the funder will be better informed when making their decision regarding whether to file, continue, or settle their cases. From a practical perspective, increasing access to accurate, timely case assessment information at essentially zero cost to those rejected parties is highly desirable for our dispute resolution system. Thus, any potential regulation of third-party funding should take care not to discourage funders from providing this valuable case assessment service to rejected parties. Ideally, regulators should encourage funders to continue (or start, if they are not already) providing this information to rejected parties.

I also predict that as the number of third-party funders and parties who seek funding grows, the most significant aggregate effect will be a dramatic increase in the number of better-informed parties, regardless of whether those parties actually receive third-party funding. Over time, an increase in the number of well-informed parties will have a very positive impact on our international system of dispute resolution.

To further deepen your knowledge on third-party funding in international arbitration, including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available [here](#).

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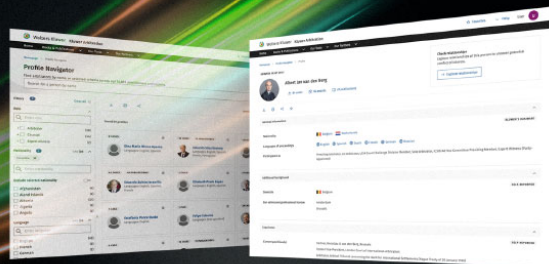
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