Kluwer Arbitration Blog

Admissibility of Third-Party Funding in Arbitration Proceedings in Serbia: A Search for a Definitive Answer

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Third-party funding is not directly addressed in Serbian legislation. Consequently, there is widespread debate as to whether third-party funding is allowed under Serbian law.

This post analyses whether third-party funding of arbitration costs and associated legal fees is admissible in Serbia. It further addresses the conditions that have to be met in order for such third-party funding arrangements to be carried out in accordance with Serbian law.

To this end, the post focusses on the following aspects of the topic: (i) whether the relevant domestic sources of law prohibit third-party funding contracts, (ii) the nature of the contractual relationship between the funder and the party's counsel; and (iii) the relationship between the funder and the arbitration process.

Do the Relevant Sources of Law in Serbia Allow for Third-Party Funding Arrangements?

UNCITRAL defines third-party funding as:

> "an agreement by an entity (the "third-party funder") that is not a party to a dispute to provide funds or other material support to a disputing party (usually the claimant or a law firm representing the claimant), in return for a remuneration, which is dependent on the outcome of the dispute".

Third-party funding may cover part or all of the costs associated with an arbitration proceeding, such as the cost of proceedings and legal fees.

As noted above, Serbian law does not directly address the permissibility of contractual arrangements being concluded by parties to arbitration proceedings to secure third-party funding arrangements in support of those proceedings.

In accordance with Art. 10 of the Law of Contract and Torts ("ZOO"), contracting parties may regulate their contractual relationship as they wish within the limits of mandatory rules, public policy, and good faith. As such, there are general conditions that contracts must comply with in order to be valid under Serbian law.

Art. 10 of the ZOO should be interpreted together with the relevant case-law of the Supreme Court of Cassation, especially for present purposes Decision No. 223/2010(2) dated 04 March 2010. In this decision, the Court concluded that uniform rules represent codified customs, meaning that the parties can incorporate them into their contract via Art. 10 of the ZOO.

Templates and good practices concerning third-party funding are being increasingly standardized by stakeholders, including by bodies such as UNCITRAL. However, it is questionable whether the current standardization efforts in this area would constitute "codified customs" in the sense understood by this decision of the Supreme Court of Cassation.

Nevertheless, even if they do not amount to "codified customs", such standards may become relevant under Art. 10 of the ZOO via its references to public order and good faith. These represent subjective criteria that are prone to constant change, and which may negatively impact the validity of unnamed contracts (those not listed in or regulated by the relevant legislation), insofar as such contracts must be in line with the relevant mandatory rules at the time of their signing.

Therefore, one must analyze the relevant mandatory rules concerning legal fees and costs of arbitration proceedings through the lens of the contractual relationships between, on the one hand, the funder and the party's counsel and, on the other, the relationship between the funder and the arbitration process.

The Contractual Relationship Between the Funder and the Counsel of the Litigant

Art. 30.2 of the Ethical Code for Lawyers allows the counsel of the client to seek and receive payments for their fees and costs or arrange acceptance of payments by contractual means from a third-party funder, but only if the client approves of this and provided also that the client is represented by counsel in the proceedings. Art. 30.2 in its current form would allow a funder to pay the legal fees of the parties' counsel under the condition that the counsel receives confirmation from their client to do so.

In addition to the question of admissibility of such a payment, there is also the lingering question of the disclosure of attorney-privileged information. More precisely, is the counsel allowed to disclose attorney-privileged information in the event that the funder asks for case-sensitive information prior to or at the moment of signing the third-party funding agreement?

The Ethical Code for Lawyers possibly provides guidance on this matter. It stipulates that counsel may disclose attorney-privileged information if the client provides an unequivocal confirmation to this end through a power of attorney.

Thus, a party seeking to have its arbitration funded by an external entity would be well advised to define within the relevant power of attorney the scope and the content of information that would be disclosed to the latter. For the sake of comparison, the Code of Conduct for Litigation of Funders of the Association of Litigation Funders of England and Wales dictates that, before requesting or receiving any documents from the litigant or their counsel, the funder is required to sign either a confidentiality or non-disclosure agreement with the litigant.

Relationship Between the Funder and Arbitration Process

The Serbian Arbitration Act is only applicable if the seat of arbitration is in Serbia, and it provides strict rules for costs of arbitration. Art. 18 of this Act states that arbitration costs fall on the

disputing parties. Given that the question of third-party funding is not directly or indirectly addressed or even prohibited by this Act, we must direct our attention to the arbitration rules of the major arbitral institutions in Serbia. Presently, both the Rules of the Belgrade Arbitration Center and the Rules of the Permanent Arbitration Court of the Chamber of Commerce and Industry of Serbia contain no references to third-party funding. Thus, it is questionable if these arbitral institutions would even accept such funding arrangements. Theoretically, if they end up accepting them, two questions will arise.

The first question is: Does the party who has obtained external funding have the duty to disclose the third-party funding arrangement to the arbitral tribunal, and consequently, to the opposing party as well? In tackling this question, the optimal solution for Serbian arbitral institutions would be to follow the ICC Note to Parties and tribunals on the conduct of arbitration under the ICC Rules of Arbitration. The ICC approach imposes an obligation on the funded party to provide evidence of such an agreement to the ICC, and further requires that the legal document in question must be deemed satisfactory by the ICC's bank. Moreover, the litigant must report it to the relevant regulatory authorities. By implementing this note, the Serbian arbitral institutions would ensure that all of the parties' interests will be protected and that there would be a high level of legal certainty and transparency. The most relevant regulatory authorities for these matters in the Republic of Serbia would be the tax administration and the National Bank of Serbia.

The second question will most certainly be whether the arbitrators would be under an obligation to disclose possible conflict of interests in connection to the funder? One way for the Serbian arbitral institutions to approach this issue would be to heed the ICC Rules of Arbitration, and thus to introduce an obligation to arbitrators whereby they are obligated to determine if the disclosed third-party funding agreement presents a potential conflict of interest for them. This approach would most certainly reassure all the parties of the transparency of the disclosing procedure, and these additional steps would also ensure that the chosen arbitrator is neutral and free of conflicts of interests.

Conclusion

The relevant sources of law in Serbia at first glance may not give definitive answers as regards the admissibility of third-party funding. However, having in mind the above-mentioned definition of third-party funding agreements as well as the relevant provisions of the Ethical Code for Lawyers, these kinds of funding arrangements could theoretically be accommodated within the existing legal framework. The question of a separate third-party funding agreement that would cover the costs of arbitration proceedings solely depends on the will of the arbitral institutions in Serbia. If the said institutions were to accept such a contractual arrangement, the parties and the arbitral institution would be well advised to apply the best arbitration practices and the necessary screening tests concerning third-party funding due to them not regulating this matter in their respective rules.

To further deepen your knowledge on third-party funding, 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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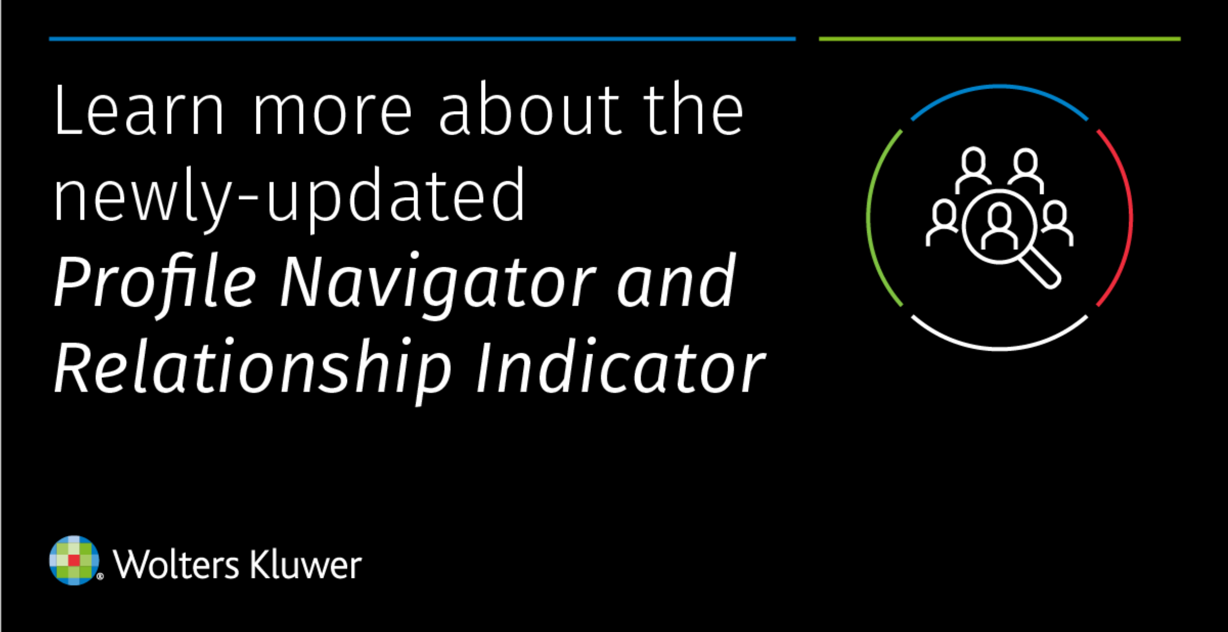

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