ADR

Third-party funding in arbitrations lack guidelines, legislation

The increasing trend of third-party funding in arbitrations is a fairly controversial concept that lacks clear guidelines, says Toronto commercial arbitrator Marvin Huberman.

A recent article in *Lexpert* discussing trends in litigation points to third-party funders becoming increasingly involved in arbitration claims. The article notes that while it's more common in international arbitrations, where the parties are located in different jurisdictions, some third-party funders have also shown an interest in financing domestic arbitration claims.

Essentially, a third-party funder invests in arbitration claims as a business and receives a portion of the return if the claim is successful, the article says.

Huberman tells AdvocateDaily.com that third-party funding agreements (TPFAs) are becoming more popular in both international and domestic claims and he draws similarities to TPFAs used in class-action proceedings in Ontario.

"The proponents of TPFAs argue that they are levelling the playing field between the parties, thereby providing access to justice," he says. "Typically, where one party has far more financial resources than their opponent, a TPFA permits lawyers to assume the risk and cost of high-stakes litigation including adverse cost awards."

However, he says there is still reticence around TPFAs because for centuries it was a crime and actionable civil wrong for a third party to "officiously intermeddle with another's litigation" — the common law doctrines of champerty and maintenance.

"Historically there has been objection to somebody officiously intermeddling with another's litigation. Until recently, contingency-fee agreements, for example, were categorically illegal and enforceable as champerty," Huberman says. "In Ontario, the law of champerty and maintenance still apply under an old statute called an An Act Respecting Champerty."

However, over time, public policy has shifted so that now contingency fees and third-party funding are permissible in certain realms, he says.

Huberman points to *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 (CanLII), where the plaintiffs in a proposed class proceeding entered into a funding agreement with CFI, an Irish corporation, where CFI would pay an adverse costs award made against the plaintiffs in return for a commission of seven per cent of the amount of a settlement or judgment, subject to a cap of $5 million prior to a pre-trial and $10 million thereafter. Justice George R. Strathy approved the funding agreement subject to certain conditions.

More recently, Huberman notes *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215 (CanLII) signals potential further expansion of third-party funding agreements in commercial litigation.

Huberman says that while TPFAs provide access to justice, there are concerns around third-party funders' interference with the litigation or arbitration as well as conflict-of-interest issues.

"This can be addressed in part by disclosing the identity of the funder and the terms of the TPFA to the arbitral tribunal," Huberman says. "If there's an issue relating to third-party funding that might impact the fairness to both parties, then the funding information should be disclosed so the process remains effective and fair for both parties. These agreements must be reviewed by an arbitral tribunal to ensure there is no interference with the administration of private justice."

Huberman says the problem, particularly in Ontario, is that there is no legislation or a code of conduct governing TPFAs.

"Right now, there are no clear guidelines," he says. "TPFAs in arbitration cases are, at best, problematic and, at worst, unlawful and unenforceable."

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