HOW THIRD PARTY FUNDING COULD WORK FOR YOUR BUSINESS

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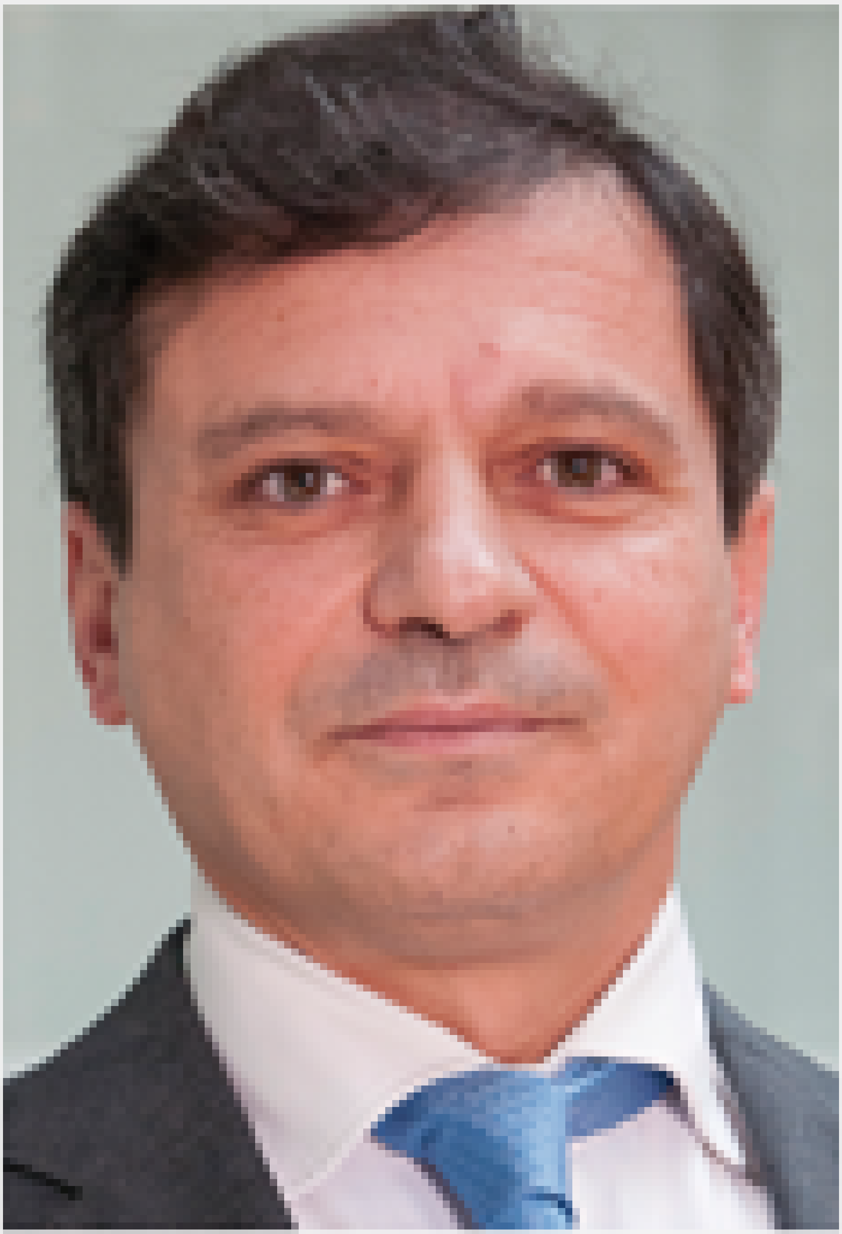

Category: Opinions

The emergence of third party funding is revolutionary and is providing greater access to justice – this type of funding could help your business bring a claim it would not otherwise be able to afford

The establishment of third party funders (TPF) in Spain, and the consequent press coverage, has generated significant interest from clients and practitioners. Some believe TPF encourages unmeritorious claims, but others argue it provides access to justice for claims that - while having a good chance of success – are denied a legal remedy due to restrictions on parties' finances.
TPF may also provide a means for converting what would otherwise be an accounting expense into free cash and therefore a receivable on the asset side of a balance sheet. How? TPF pays the costs of litigation or arbitration, increasing the profitability of the company, which can then allocate cash to other projects.
TPF agreements are being used more and more, but they are not new and have been in existence since the early 1990s. While they were originally used more frequently in litigation, they are increasingly common in commercial and investment arbitration. TPF agreements involve a third party investor covering part or the full cost of the legal and ancillary expenses of litigation or arbitration. In return, if successful, the third party funder takes a percentage of the final amount awarded to the funded party and/or a multiple of the amount invested by the third party funder.
TPF agreements have been used in a wide variety of disputes, including breach of contract claims, trust claims, insolvency and fraud related claims, professional liability claims, intellectual property and patent infringement, business defamations, shareholder/company disputes, tax disputes, anti-trust/competition claims, class actions and investor-state and commercial arbitration.
When is it appropriate to use a TPF agreement? Typically, in the following situations: the claimant has been so damaged by the defendant they cannot afford litigation/arbitration; the claimant could potentially afford the litigation, but wants to focus on running its business and avoid wasting time and resources on litigation/arbitration; the claimant wants to generate cash quickly and is willing to sell rights to the claim for a lump sum; or the claimant is insolvent and may have neither the money nor the ability to pursue a claim. The claimant can be either an individual or a company. However, although TPF is primarily aimed at claimants, it may also be available to respondents to fund a counter-claim and/or defend a claim.
What the funder receives depends on the dispute's complexity and level of risk. The greater the uncertainty, the greater risk. The greater the risk, the greater the level of potential recovery for the third party funder. Typically, where a third party funder is operating on a contingency basis they might expect to recover 25-50 per cent of the final amount awarded. Where a third party funder is operating on a multiplier basis, in the event of a successful outcome they might recover a multiple of 5-10 times the level of investment plus the return of the original investment.
The key considerations third party funders take into account when considering a claim, include: whether or not it is a commercial dispute; the amount involved; the solvency and creditworthiness of the defendant; the complexity of the dispute; the probability of winning the claim; the costs estimate; the ratio of claim value to costs; the legal team's experience; the jurisdiction; the feasibility of enforcement; and the timetable.

Transforming the landscape

Generally, the first step in obtaining funding is the preparation of a detailed proposal setting out the background to the case, the merits of the claim, and an outline estimate of costs. Next, a list of potential third party funders will need to be identified. The prospective funders will enter into a non-disclosure agreement and undertake an initial review of the claim with the input of their own in-house or external counsel and other advisers. A shortlist of prospective third party funders is then prepared with a view to refining the outline terms of funding.

The rise of TPF is revolutionary. It has transformed the legal landscape. What was for centuries impermissible in almost all jurisdictions is now thriving in many parts of the world and providing greater access to justice. The ever-increasing cost of contentious proceedings is a perennial problem that clients struggle to deal with. TPF provides an effective means of address.

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