
THE IBERIAN CHAPTER WEBINAR with BERNARDO M. CREMADES

April, 6th 2022 | 16:00 h. CET Madrid

THEME: THIRD-PARTY FUNDING and LITIGATION FUNDS

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WELCOME

Our fourth event in this year's program is very special to us. We have the presence of a Master of Masters, and he is Spanish: Bernardo M. Cremades, arbitrator maker. He will speak and we will listen, we will ask and he will settle on those most outstanding aspects of Litigation Funding and on the figure of the Third-Party Funding of Arbitration that should not be overlooked.

Mr Cremades, our today's guest, visits us for sharing his thoughts and criteria with us about the demands on applying new drivers to institutions rooted in tradition, accepting the risk which means push for innovations over very consolidated legal buildings, thanks to his long-standing experience.

Thus, it seems appropriate to us to consider that his comments on Litigation Funding in general and on Arbitration in particular are precisely timely and relevant, and will enrich our ground of knowledge with the keys within immerse ourselves in dealing with specialized Funds in litigation. Thus, in order for anyone to feel comfortable sailing this sea of dispute financing schemes, first of all, it is necessary to understand what they are, what they imply, what should be done and what should be cautious into.

¹ Article published in Magazine "El Economista | BUEN GOBIERNO", num. 53, Feb 18, 2022 (pg. 70 ss).
Download: https://drive.google.com/file/d/1sO_OGBKk_O_KY2M_dqs824mu7pawr3_F/view?usp=sharing.

² Some selected papers we consider relevant for introductory purposes have you listed in 'Documentae'. We take them from free and public sources and authority and recognition are recognized and we share them in the same manner.

There would be going to be a bunch of good ideas unable to develop due to time restrictions, but the ones that we address with his necessary guidance promise to be nutritious and prolong their effects on our performance along the time.

With our sincere wishes that this very special webinar marks a before and an after in you on these issues, we hope to hear your opinions and comments about these matters and have the Iberian Chapter members as a reference concerning these businesses, as well.



Antonio Amusatogui Batalla (MCI Arb)
Chair of the Iberian Chapter
Member of the European Branch Committee of CI Arb

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FINANCING BY THIRD PARTIES IN ARBITRATION, TODAY IS EVER ALWAYS

by Nazareth Romero³

Controversial, existing, necessary before insolvency situations caused by the global pandemic, joined with the complicated scenarios in international economic geostrategic that, descending to companies, the self-employed or consumers, implement an adverse scenario that other approaches must be faced. Financing by third parties in arbitration or, Third party funding - TPF is defined as a financial instrument for risk diversification that allows tackling the companies' own resources and having cash-flow to continue with the usual economic activity, mitigate expenditures, entailed strategies in an appropriate standards that implies arbitration procedure's which do not have an impact on the balance sheets of the companies.

The Parties demand this type of financing with greater insistence due to the amounts in dispute are usually higher, the fees of law firms, experts, other translation costs, accommodation, travel. Some or other expenditures are carefully observed in the income statements. This is linked to the predisposition on Third Party funding's because they envisage international arbitration as a financial asset given the amounts claimed, relative fastness in resolving disputes and approximate certainty of the date on which the award will be issued, plus certainty derived from the fact that the arbitrators they are experts in the issue involved: predictable. It is protected by the international legal certainty provided by the Conventions on the recognition and enforcement of Arbitral Awards, New York 1958, and the Dispute Settlement Convention, ICSID Washington 1965, instead of the Court system on domestic enforcement in national legislations.

Before accepting the viability of the financing scheme, the third-party funding submit the procedure to a Due Diligence risk assessment and prevention methods that allow them to dedicate their investment effort only to claims with a probability of success greater than 65%, which translate into easily enforceable resolutions on a solvent defendant, with a reasonable retrieve period: it allows high returns and great benefits. Initially the legislation viewed with suspicion or

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prohibited the TPF in general terms. This situation is being modified, many of these prohibitions have disappeared: (i) judicial proceedings in the United Kingdom and some Common Law countries have declared the invalidity of institutions such as maintenance, champerty and barratry; and (ii) through legislation: among others, the ban disappeared in Singapore after the entry into force of the Civil Law (Amendment) Bill-Third-Party for Arbitration and Related proceedings. Joined to International Investment Protection Treaties that among others, it is contemplated as those signed by the European Union and Canada CETA or the EU - Singapore. In Ireland, the TPF agreement would be null and void, although it shows a possible openness, as demonstrated by *Thema International Fund v HSBC International Trust Services (Ireland) Ltd.* It would be allowed, being that third party with a legitimate interest in the procedure: Creditor, shareholder of a company that is a party in that process.

In Spain, the TPF agreements are protected by the principle of private autonomy, one part of the Doctrine considers that the assignment of litigious credit arts. 1535 and 1536 Civil Code would constitute a form of TPF. It is consciousness regulated in Soft Law provisions, we remark: IBA Rules, ICC Note-Guide addressed to the parties and arbitral tribunals, Code of Good Arbitration Practices CBBPP-CEA/2019, or from the Chartered Institute of Arbitrators – CI Arb in the Code of Professional and Ethical Conduct/2009.

On April 6, 2022, from the Iberian Chapter where I am a co-founder and which territorially encompasses Spain, Andorra and Portugal, within the European Branch of the Chartered Institute of Arbitrators (CI Arb) we will have the opportunity to analyse this matter with Mr Bernardo M. Cremades, a pioneer in introducing the knowledge of the CI Arb in Spain.

The TPF must be considered from the perspective of an economic analysis of arbitration, which analyzes the issues of: Human capital, social capital, analysis of rules and arbitration institutions in their understanding of economic phenomena. The Economic Analysis of Law (Law and Economics) has notably influenced legal researchers in: Jurisprudence and Arbitral Awards, joined on the theoretical justification for terms such as: Efficiency, Equity, Justice, Individual Preferences, Freedom, Wealth. Applying Pareto Optimality, a party has its resources and goods allocated to the maximum level of efficiency, and no change can be made without making someone worse off.

The shift from a Jurisdictional Solution to an Arbitration Solution will increase social well-being, only if it does not affect individual well-being and as a minimum requirement improves the situation of a Party. It must be submitted to Legality (public order), Legal Security and Legal Ethics: undertaking its adequate development and respect. Avoid Conflict from prevention, capacity building inside the Company, the Parties in order to remain in control of the business such as: Advance in the control of internal and external processes, preservation of the relationship with suppliers, with the Parties. Know in depth the improvement that is proposed from an appropriate dispute resolution solution using the multi-tiered Clauses. Evaluate yes or yes, disclose information to the Parties to prevent the Conflict as an Effective Culture of Knowing the Resolution of Disputes: $P = CCECC$ when P is greater than CCECC social benefit, business benefit, personal benefit symmetrical cost.

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OUTLINE WITH IDEAS FOR A DEBATE ON TPF

The list that follows is the result of having analyzed most of the publicly available and accessible publications in recent years on the introduction, acceptance and development of financing tools for procedures where disputes are resolved, whether litigation or arbitration (or other ADRs). suitable for using this financing mechanism) and on the Special Purpose Vehicles (SPV) -Funds- that develop this type of financing agreement. It does not pretend to be exhaustive, but it aims to establish a general scenario on which to approach a possible investigation regarding this type of institution and contract.

The core **scheme** of issues to analyze consists of four parts, plus the last one about the general perspective on the influence and usefulness of the TPF.

- on **Definitions**;
- on the **Mechanics** of the financing agreement;
- about the current scenario around the TPF **Regulations** and how they are addressed in the different regulatory forums;
- on the aetiology of **Problems** that may cause the existence of a TPF in the procedure; and
- The general **Perspective** of the Institute and reasonable projection of the same; and precautions.

- 1) **Definition of TPF:**

- Difference between Litigation and Arbitration Financing;
- Definition (doctrinal legal: atypical contract; demarcation of other figures, such as:
 - Financing of the contractual relationship whose controversies are submitted to Arbitration (commercial or corporate credit; asset securitization; structured funding),
 - Guarantee figure for contractual operations subject to an arbitration clause in the event of a dispute (guarantees, insurance, mortgages),
 - Contractual arrangements arising from the controversy (assignment of non-litigious credit subject to Litigation, idem to Arbitration; assignment of litigious credit before Judgment, idem before Award; assignments in the execution phase of the Judgment, idem of Award).

- Broad Definition⁴ vs Narrow Definition⁵; and, in addition, to distinguish in the specialization processes between:
 - **TPF Portfolio** (the Party or Client transforms the internal legal department: risk contingency structured financing), and
 - **TPF Agency** (the Advisor -external- finances the regularity of its portfolio of procedures).

- **2) TPF mechanics:**
 - the *participants* involved (the financed party, the legal advisor, the financier);
 - Viable and non-viable ADRs for TPF (ex-ante vs ex-post dispute: Arbitration, Mediation, Conciliation, Dispute Board, Expert/Witness determination, Cross-examination, others...);
 - financing *agreements* (and their relationship with the arbitration clause), differentiating between:
 - The *legal terms* (financing contract, letter of commitment from the legal advisor, fees to result and quota litis, termination of financing due to excessive risk or insolvency of the financed party),
 - *Due diligence* before financing agreements and reserve and exclusive agreements,
 - The *economic terms* (claim volume, financing without recourse's risk, amount evaluation, financier's yields, amount distribution, safeguard investment, automatism when collecting).

- **3) TPF regulation:**
 - Official Regulations (state or supra-state origin): on the acceptance of the TPF and conflicts with other rules (regarding the counterpart: maintenance, champerty, third parties and credit assignments; regarding the Legal Advisor: conditional fees and quota litis), differentiating:

⁴ The canonical definition arose by the ICCA - Queen Mary Report of 12019 says that the TPF is “an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that part, a) funds or other material support to finance part or all of the cost of the procedure, either individually or as part of a specific range of cases, and b) such support or financing is provided in exchange for remuneration or reimbursement that depends in whole or in part on the outcome of the dispute, or is provided through a subsidy or in exchange for payment of a premium.”

See at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf

⁵ “TPF may denote 'non-recourse' legal financing provided by a commercial financier under the terms of a financing agreement, usually to a plaintiff (or sometimes defendant) in exchange for a portion of proceeds recovered in the proceeding.” This definition excludes the interdiction of the third party with no interest in the lawsuit (maintenance) and that of the third party with no interest in the result (champerty).

- The situation in common law jurisdictions,
- The situation in civil law jurisdictions;
- The existence of rules or guidelines from Arbitration Institutions, Associations or Professional Associations of Advisors or Arbitrators;
- Self-regulation by Private Financing Associations (the Code of Conduct by the Litigation Financing Association; other cases);
- The situation in Supranational Institutions:
 - UNCITRAL and the working group on the possibilities of regulating TPF and limiting some of its potentialities (see *documentae*);
 - EU and the recommendations on the regulation of TPF in the Union (see *documentae*).
- **4) Some problems that are generated in the arbitration procedures that make up a TPF:**
 - Size of the claim;
 - The confidentiality of the contract with the TPF;
 - TPF and the staggered Clauses scenario;
 - The duty of disclosure;
 - Conflicts of interest and moral hazard (agency risk), such as:
 - Financing control (and rescission clauses),
 - Control of the procedure (and commitments with the legal advisor);
 - Other assumptions to take into consideration:
 - Singularity in Investment Arbitration,
 - Singularity in M&A Arbitration,
 - Cost insurance measures;
 - The risk of the funder, apart from the uncertainty of the result of the controversy;
 - Supervision of the monetary or financial authorities on the structure and work of the SPV: Funds.
- **5) Perspectives of the TPF industry in the transformation of the ADR industry in general and Arbitration in particular.**

DOCUMENTAE

Litigation Funding en LEXOLOGY GTDT (for searching purposes)

<https://www.lexology.com/gtdt/workareas/litigation-funding>

TFP in SPAIN (generated by LEXOLOGY GTDT⁶)

(Diciembre 2021 | contributors: Jesús Rodrigo, Fernando Grajera and Isabel Ochoa | Procurator Litigation Advisors)

[Litigation Funding | SPAIN Q&A](#)

El Financiamiento del Arbitraje Internacional: una guía práctica

(May 2019 | por Peter Hirst y Alejandro García | CLYDE&CO)

[El Third Party Funding: una guía práctica \(ESP\)](#)

Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?

(Vol.33/687 2020 | by Jarret Lewis | The Georgetown Journal of Legal Ethics)

[Third-Party Litigation Funding](#)

UNCITRAL and the Work Group

[\(Third-Party Funding\)](#)

EUROPEAN PARLAMENT (DRAFT REPORT on Recommendations about Private Litigation Finance)

(June 2021)

[ESPAÑOL](#) | [INGLÉS](#)

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⁶ Grabbing resources from LEXOLOGY, would eventually need of being registered.