

Parties' intention is paramount

Similar to arbitration where parties' intention is paramount, the Evidence given on 14 March indicated that if that is what the contracting parties intended, the third party rights are independent from the main contract. This corresponds with arbitration where parties' intention of submitting disputes to arbitration was taken seriously. Just like the Evidence has stated: 'If that is what the contracting parties intended, the third party right is independent of the contract in that sense.' Such a view would work well with the separability principle in arbitration. This principle is about the arbitration clause survives the voidness of the main contract.

Third party funder's issue

After the abolishment of maintenance and champerty, one has seen third party funding being developed into a phenomenon in the important European and Asian arbitration venues. This practice has been seen as the preferable alternative to legal aid for access to justice as well as a legal means to collect fees from clients in some jurisdictions. Section 9(2) of the Bill proposed to allow a third party funder to join arbitration and have his claims considered to avoid duplicated or conflicting decisions. Although the example used by the Scottish Law Commission is a third funder helping a happy couple in their purchase of house, questions arose whether the provision intends to address the issue of third party funding in commercial arbitration where funders involvement is not based on anything in the contract but have a share in the proceeds from arbitration between the disputants to an arbitration.

Concerns were due to the third party funders in commercial arbitration have no involvements in the substantial rights of the disputant. They were not part of the deal in the main contract. However, their funding agreement with one of the parties being funded may have impacts on confidentiality (rule 26 of the Scottish Arbitration Rules in Schedule one of the Arbitration (Scotland) Act 2010), legal privileges, arbitrator's duty of independence and impartiality (Rules 8 and 24 of the Scottish Arbitration Rules). Due to the lack of transparency, third party funders are usually not disclosed to the other disputing party whose procedural justice may not be properly served.

If third party funders are covered by section 1(1) of the Bill, the exclusion should be made clear to the users. If it is, then section 1(3) of Bill: 'The person who is to acquire a third-party right under a contract must be identifiable from the contract by being either named or described in it' may increase the level of transparency in such activities and serve as a safeguard for the procedural justice in arbitration. However, the interaction of section 1(3) and the confidentiality agreement between the funders and the funded parties will have to be looked into.