



An academic essay discusses impact of the relationship of a third party in financing international arbitration cases

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Abstract

The Claims business funding is considered one of the most important fields at the international level and is of interest to both law and law, especially in the field of international arbitration, because the international arbitration continues its dynamic growth on the one hand and the other hand the ability to trail the arbitration claims is reducing.

As is considered the Third-Party funding has become on the most important subject in international arbitration and is now becoming a feature of international arbitration.

For that, we have presented this essay its discussing the impact of the relationship of a Third-Party in financing international arbitration cases.

Keywords: Third party – Investment – International Arbitration

Introduction

Third party is identified legally that it is not a party at the contract or a successor of any of the contractors, whether no natural or legal person is considered a party to the arbitration procedures from third parties^[1] and we see that the issues of conflict of interest between the arbitrators and the third party ((TPF)^[2] are among the most important issues that affect the possibility of application of arbitration decisions and the integrity of the arbitration process, despite the development of the arbitration financing industry by the third party in international commercial arbitration, but the current arbitration rules do not keep pace with recent developments in this industry and lack the ability to solve problems that may face financiers, and therefore financiers prefers to maintain their investments in strict secrecy^[3], and for this reason, the arbitrating institutions shall have the burden of disclosure practically, otherwise, it almost the claimant party only should disclose the third-party funding. This is because the funded third party is not a party to the arbitration agreement, as well as the arbitral authority lacks the authority to impose any obligations on the funded party as a third party, and at the other side, in accordance with the investment arbitration rules SIAS, the arbitral authority is authorized to apply to disclose financing arrangements of a third party, rather than its validity to issue an order of disclosure of funding arrangements, so we shall identify the impact of the relationship that arises between the third party and the parties to the arbitration relationship in financing arbitral cases^[4] from other party outside the arbitral relationship between the claimant and the defendant provide any form of financial or in-kind support^[5] in exchange for a percentage to be agreed upon in case of the success of the arbitration case at the international level. Through this brief article, we provide the most important effects that result from the existence of such a relationship, as follows:

First: Non-disclosure of concealment of financing by the third party

Article (16/3) of the Egyptian Arbitration Law^[6] stipulates that: “The arbitrator must disclose upon his acceptance of the arbitration assignment any circumstances that may raise

doubts about his independence or impartiality.” As work is carried out in international arbitration^[7] provided that the arbitrator is required an acknowledgment at accepting his duty, there are no circumstances that affect his impartiality or independence, and the importance of disclosure lies not only in preventing the issuance of an invalid ruling, but rather in preparing the arbitrators to work calmly and not to be governed to a response by one of the parties, and if the arbitrator does not perform the duty of disclosure, and this arises non knoweldge of a party of the circumstance that would prejudice the arbitrator's impartiality or independence, and after that it was found that he had not disclosed it, does not prevent the arbitrator from being rejected, in addition to his right to claim compensation from the arbitrator because of his breach of his duty not to disclose^[8].

There is no doubt that disclosure is considered obligatory for the arbitrator even if it was not requested by the parties or the arbitral authority, whereas the texts contained in this commitment were obligatory and not permissible^[9]

As well as the criteria 3/A also stipulates: “If there are facts or circumstances that raise doubts in the discretions of the parties regarding the arbitrator's impartiality or independence, the arbitrator shall disclose these facts or circumstances to the parties to the arbitration center^[10].”

The standards of ethical behavior for arbitrators, criteria 2/A stipulates: “From the start of appointment of the arbitrator and during the arbitration proceedings, the arbitrator shall disclose in writing to the arbitration parties, of any circumstances that may give rise to justifiable doubts regarding his impartiality and independence”^[11].

Based on the above mentioned, we conclude that the arbitrator must disclose his indirect relationships that raise doubts about his impartiality and independence, whereas deviating from the application of the principles contradicts the application of criteria 6 (Relationships) of the Guidelines on Conflict of Interest in International Arbitration (IBA), and whereas the arbitrator is responsible for the identity of the law firm, because when examining the

facts or circumstances that identify whether or not there is a conflict of interest, the arbitrator should make a disclosure, meaning that his disclosure here is obligatory for every activity in the law firm, because it includes the identity of the arbitrator even if it is not necessarily from sight and the general existence of a conflict of interest^[12].

In the same context, we find that there is no general obligation to disclose the existence of a financing agreement or to disclose the identity of the financier (the third party), such as the mentioned items in the trade agreement between Canada and the European Union, which does not include mandatory disclosure^[13], however we find that the investment arbitral authority in Singapore were obligated to disclose public details of the funding and the identity of the third party financier^[14].

At the same level, neither the Washington Agreement, nor the rules of the International Center for Settlement of Investment Disputes (ICSID), nor the rules of UNCITRAL, included any provision obligating the funding applicant to disclose any funding agreement to the arbitral authority or to the other party, and was assigned to other parties to conduct investigations regarding the existence of a third party or not by their private method^[15], but in recent years, it came with a new amendment to its rules for more transparency in arbitration, as it amended its texts, especially in 2013, in light of recent trends on transparency, so it should treat a third-party financing with in the same direction with more transparency, although this approach does not go ahead along to discover to highlight the importance of disclosing the essence of financing agreements, and thus it becomes clear to us that the matter of disclosing the existence of funding from a third party in arbitration has become common.

We note that the repeated appointment of the arbitrator from the same subsidiaries of the parent finance company, if indicative, it indicates that he has obtained a financial benefit represented in the arbitration fees, these reasons are sufficient for the existence of doubt at the impartiality and independence of the arbitrator in accordance with the IBA Guidelines where these circumstances are not mere coincidence, therefore, his appointment is considered made in a manner contrary to the law, in addition to considering that the ruling may be invalid, due to the fault of the mistake of distorted the party's satisfaction with the arbitrator and is mainly related to the arbitrator^[16] so he must withdraw from hearing the case in dispute based on criteria 2/D (1)^[17] of IBA Rules, while the arbitrator must step down if he has a direct or indirect personal interest in the outcome of the dispute, or if he feels biased towards one of the parties to the lawsuit, or if he has personal knowledge of facts related to the issues in the lawsuit, because the disclosure of the terms of the concluded agreement between any party to the lawsuit and a funded third party that would reveal, on the one hand, the nature of the participation of the third funded party in the relevant procedures, and it could be an element in evaluating an existing relationship between an arbitrator and a funder, as well as such disclosure could also raise related issues to contractual confidentiality and strengthen the position of the opposing party in settlement negotiations by disclosing the economic terms of that agreement, and most national arbitration laws and rules leave these matters at most to be dealt with at the discretion of arbitrators, who usually enjoy extensive control over the legal proceedings

they consider including identification whether the requested documents are subject to any privileges^[17].

Second: The impact of the third party in the case (the financial return of the financier)

Third-party financing is identified as: "an agreement by an entity that is not a party to the dispute, provided that a party to the dispute with funds or any other form of material support with the aim of financing some of the costs of the legal proceedings^[18].

Litigation financing is identified as a ruling issued in favor of the funded litigant, and the litigation financier gets a share of the proceeds from the lawsuit^[19].

Whereas the financier conducts an initial assessment of the case, and always relies on the legal and feasible financial claims and relying on good foundations in the case that enables them to reach a conclusion in this case on the individual level, whereas for the institutional level, the financing institutions take a number of procedures prior to making the final decision regarding funding arbitration through, whether or not to form a team to evaluate the issue with a group of specialists and highly qualified professionals to assess the importance of funding or not^[20].

The Abu Dhabi Global Market Courts^[21], have launched an integrated framework for financing litigation provided by the third party, if the litigant succeeds in his claim, the financier gets a pre-agreed share of the outcome of the case, which often represents a percentage of the refund amount, in case that the litigant's case is unsuccessful, so that the financier does not pay anything to the financier and the financier loses his money^[22], so the claimant takes benefits from the existence of a company (the parent company) in risk management^[23] and whereas the third party financier benefits financially from the success of the case, and on the contrary, in case the arbitration case in dispute does not succeed, the financier loses his money that he financed.

From this it is clear to us that we must deal with the issue of third-party financing from two parts, the first part indicates in the substantive aspect and related to the applicable law to the dispute before the arbitral authority, and the second part is represented in the procedural aspect of the arbitral institution or the arbitral authority^[24].

We find that there are a number of countries that were clearer and open in their dealings with the third party in matters of financing arbitration cases^[25].

Whereas there are countries that have reservations about the idea of financing litigation by the third party^[26].

Therefore, we conclude that the claimant must disclose his relationship with the funded third party and his control over the conduct and structure of the arbitration procedures, in addition to the right of the other party in the arbitration relationship to request the arbitrator's resignation for the purpose of accomplishment the impartiality, independence and integrity of the arbitral authority, whereas criteria 7 (A) of the Principles requires the revised IBA Guidelines, that parties shall disclose on their own initiative and at the earliest opportunity any relationship with the arbitrator and the standard considers the duty to disclose the existence of any direct or indirect relationship between the arbitrator and the party extends to relationships with persons or entities that have a direct economic interest at the arbitration to be submitted in the arbitration is such that the entity providing the funding for the arbitration, there was a milestone

towards transparency considered the first rules to directly address TPF^[27].

As well as we find the text of Article 26 of the ICSID arbitration rules, which requires the arbitrator to announce the professional, commercial, and previous and current business relations with the parties and any other party, for the purpose to confirm the arbitrator's credibility in issuing an independent ruling that provides for the disclosure of relations with the financier^[28].

The I.C.C has adopted the Guidance Note for Disclosure of Disputes by Arbitrators as part of the Memorandum to the Parties and the Arbitration Courts on Arbitration Conduct under the Chamber's Arbitration Rules, and to oblige all arbitrators to act at all times, in an impartial and independent manner^[29].

Finally

Whereas the control of the funded third party in the case is evident in the extent of its impact on the management of the case procedures and the structuring of financing agreements based on the sent emails among themselves, which contradicts the legal privileges of disclosing^[30] of the identity of the funded third party, and it is clear the none compliance of the claimant to disclose the identity of the funder and announcement the fact of financing, which proves the existence of bad faith on the part of the appellant^[31].

References

1. See the administrative decision number (18) issued from the Arbitration and Mediation Center of the Brazilian-Canadian Chamber of Commerce (CAM-CCBC) of July 20, 2016.
2. Third-Party Funding is now becoming a feature of international Arbitration, some funders report an increase of ten percent of their investments in international arbitration disputes. C.
3. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders", Penn State Law Research Paper No. 51-2013 2013,3 and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962; S. SEIDEL, "Maturing Nicely", CDR May2012, <http://fulbrookmanagement.com/wp-content/uploads/2012/05/1May2012-MaturingNicelyb.pdf>.
Handed in by Thibault De Boule, "Third Party Funding" in international Commercial Arbitration, Master Thesis of the education" Master of Law"Faculty of Law Ghent University Academic year 2013-2014, Page 123.
4. Whereas TPF requires the investment of Third-Party capital, contingency fee arrangement require lawyers to invest their professional services instead of capital. - look for: M Steinitz, whose claim is this anyway? Third-Party Litigation Funding,95 Minn.L.Rev, 2011, 1293.
5. In a definition of the Voluntary Code of Conduct for Litigation Funders in England which states that "when a third party provides the financial resources necessary to enable an expensive litigation or arbitration to proceed, and the litigant obtains funding to cover all or some of its legal costs from a litigation funder a private commercial entity, that has no direct interest in the relevant legal procedures." From that definition, it becomes clear to us that funding mostly covers most of the costs of the arbitration proceedings, which represented in legal and judicial fees before the courts of execution and appeal.
6. Types of financial and kind support (Legal expenses insurance is one of the most common types of TPF& is used to cover the financial risks associated with a lawsuit& The second example the Loans are usually used to obtain small loans from the client's attorney or law firm or from a traditional bank or other financial institution, to finance claimants with small claims in exchange for a share of favorable outcome)- look for; "Third-Party Funding" in International Commercial Arbitration- Master thesis of the education" Master of Laws" handed in by Thibault De Boule, Faculty of Law-Ghent University, A cadmic year 2013-2014, 18-20.
7. Egyptian Arbitration Law No. (27) of 1994, as well as the text of Article (7) of the rules of the ICC international chambers of commerce of 1919 and Article 9 of the rules of the Cairo Regional Center for International Commercial of 1979. Article (3) of the rules of professional conduct for arbitrators and the text of Article (9) of the Uncitral Rules of 1985 and its amendments 2006-2011. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules that parties can agree upon for the conduct of arbitral proceedings that may arise out of their commercial relationship, and are widely used in ad hoc arbitrations as well as in institutionalized arbitrations.
8. Refer to the rules of the ICC international chambers of commerce, as well as the rules of: Cairo Regional Center for International Commercial Judgment of the Cairo Court of Appeal 91 Commercial, Session 30/3/2004 AD, in Case No. 78 of the year 120 BC.
9. An example of some rules containing mandatory texts (the rules of international chambers of commerce ICC and the rules of the American Association of Arbitration A.A.A).
10. The third criterion of general standards with regard to impartiality, independence and disclosure, Guidelines on Conflicts of International Interest Arbitration an adopted by resolution of IBA-2014.
11. The second criterion of the standards of ethical conduct for arbitrators of the Saudi Center for Commercial Arbitration, for the year 2016, PAGE 6, paragraph A.
12. Based on the above, the arbitrator who doesn't disclose his identity article 1-4 red regulation and non-valid for assignment by the Guidelines on Conflicts of Interest in Arbitration (IBA) regarding the contradictory of interests at arbitration that permits the termination of the arbitrator.
13. Refer to context text of Article 26/8 of CETA.
14. Look for at article 23/1 of the SIAC agreement, which includes the authority of the arbitral authority to request disclosure of the funder and the details of the financing agreement.
15. This is despite the fact that the phenomenon of the third party is widespread in the field of investment arbitration widely, as it is considered:
TPF in international arbitration is a relatively recent phenomenon in both international investment arbitration and international commercial arbitration.

16. French cassation ruling, session of April 13, 1972, referred to in *Mattie de Boisson* - Item 267, p. 233, referred to by Dr. Fathi Wali, *Arbitration Law in Theory and Practice*, Knowledge Manshaat, Alexandria, 2007, 230.
17. Refer the Standards of Ethical Conduct for Arbitrators of the Saudi Center for Commercial Arbitration, P 6.
18. We find available awards that the arbitral tribunals have required the parties to disclose the existence and identity of a third-party funder v. Slovakia, Belmont Resources Inc. International Settlement Center. and EuroGas Inc. Plurinational State of Bolivia, South American Silver and Investment Dispute No. 14 ARB/14/ Inc. (in some cases also requested disclosure of details - Permanent Court of Arbitration Case No. 2013-15 and in some private cases also requested disclosure of details) Financial arrangements (the case of Muhammet Cap & Sehil Insaat Endustri and Tivaret Ltd.Sti Company against Turkmenistan, the International Center for Settlement of Investment Disputes No. ARB-12-6). French cassation judgment, April 13, 1972 session, referred to in *Mattei de Boisson* - item 267, p. 233 Referred to Dr. Fathi Wali, *Arbitration Law in Theory and Practice*, Manshaat al-Maarif, Alexandria, 2007, P 230.
19. Refer to the report issued by the institute: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, page 38
20. Refer to the Voluntary Code of Conduct for Litigation Funders in England and Wales published by the Litigation Funders Association Association of Litigation, page 33.
21. Third party financing may act as a risk management tool by jointly covering potential risks or against any unforeseen events in litigation. Refer to: C Flake, In *Domestic Arbitration Chamber or Social Utility? Dispute Resolution Journal*, 2015:2(70):115-117.
22. See an article about the litigation financing laws of the Abu Dhabi Global Market. WWW.adgm.com website that had been visited on 2/13/2023G.
23. Law firm therefore welcome TPF because it means paying of their fees on a regular basis (C.Bogart, "Third Party Funding in International Arbitration " *Burford capital* 22 January 2013).
24. It is the process of measuring and evaluating risks and developing strategies to manage them. These strategies include transferring risks to another party to avoid them, reduce their negative effects, and accept some or all of their negatives. It can also be identified as the administrative activity that aims to control risks and reduce them to acceptable levels, and more precisely it is the process of identifying, measuring, controlling and reducing the risks facing the company or institution.
25. At this case we should inquire, why does the third party make financing? In international arbitration, party autonomy is sacrosanct principle and it allows parties to determine how the proceedings are to be conducted, subject to mandatory rules of jurisdiction and, if applicable, to arbitral institution rules, TPF of arbitration claims is therefore, in principle, often allowed, the attention given to TPF in recent years can be explained by some important advantages that TPF entails. look for; "Third-Party Funding" in *International Commercial Arbitration- Master thesis of the education" Master of Laws"* handed in by Thibault De Boule, Faculty of Law-Ghent University, A cadmic year, 2013-2014, 31.
26. Such as Honk Kong, Singapore referred at the example's such as: K Rooney, *Recent Legal Developments in Third Party Funding of Arbitration & Mediation in Hong Kong 2017*, 19 *Asian Dispute Review* 172- M Secom & others, *third Party Funding for Arbitration: An Opportunity for Singapore to lead the way in Regulation*, 18 *Asian dispute Review*, 2016, 182.
27. Such as Ireland at the examples as follows: G Colombo & D yokomizo, *A Short, Theoretical*, p.112.
28. IBA Guidelines on Conflicts of Interest international Arbitration an adopted by resolution of the IBA Council on Thursday 23-10-2014.
29. ICSID, the ICSID rules, [http; inside world bank org.en.Documents.Vol-3-AR.pdf](http://inside.worldbank.org/en/Documents/Vol-3-AR.pdf). P.13.
30. The I.C.C, s Guidance Note, on Disclosure & Third-Party Funding; A step in the Right Direction *Kluwer Arbitration blog* 14.03.2016.
31. Disclosures must be very clear and the disclosure should include a sufficient amount of detail so that the parties are aware of their matter regarding the potential conflict of interest. See the Disclosure Guidelines for Arbitrators Managed by the Saudi Center for Commercial Arbitration, p. 77.
32. These issues are left to the discretion of the arbitral tribunal, as solutions to them vary according to the different legal traditions between countries, Refer to: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, page 123