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New Options for Funding International Arbitration

An arbitrator's Perspective

by

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Introduction

The arbitrator's perspective has limitations.

That already appears from the distinction between, on the one hand, the contract between the parties in respect of which the arbitrator is to decide and, on the other, the contract between one of the parties and a TPF. An arbitrator has jurisdiction over the former, but not over the latter. So, in principle, an arbitrator need not be concerned about issues such as maintenance and champerty or TPF liability for costs (mostly in Common Law countries). But it is not so black and white, as it may be that an arbitrator needs to be involved in issues relating to the TPF in the case before him or her.

Actually, looking at the brochure, I will not address any of the so-called “key issues” and “issues” that the “Participants will debate”. There are two reasons for this. First, they are all issues between parties, their lawyers and TPF's. The arbitrator is not involved in almost any of those aspects, at least not directly. Second, some issues have been raised, be it indirectly, in cases in which I am currently an arbitrator.

As a general matter, I think that, in principle, TPF is a good thing, provided that ethical and practical issues are addressed satisfactorily (those issues are outside the jurisdiction of arbitrators—most of them belong to the competent Bar Associations). The reasons why I believe TPF to be a good thing include:

- It may provide access to justice for those parties who cannot afford to arbitrate their international claims. Think about small investors. International arbitration should not be justice for the rich only.

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- It may provide another filter for frivolous claims. A TPF will not fund unless it has a prospect of success.

Some Issues from the Arbitrator's Perspective

Disclosure of TPF?

Situation to be avoided: unbeknownst to arbitrator, his or her firm is involved, or becomes involved during the proceedings, with a TPF which is also behind one of the parties before him or her.

The surest solution is that a party always discloses the involvement of a TPF. In such a case, a prospective arbitrator can investigate potential conflicts of interest.

Question here is: what is the legal basis for such a disclosure by a party? To my knowledge, there are no specific rules. May be the general notion of “good faith in arbitral proceedings”, but that is a pretty big basket.

An alternative solution is the “reverse conflict check”: an arbitrator discloses to the parties all TPFs in which his or her firm is involved, and a party must disclose the TPF that is on the list produced by the arbitrator. It raises the same legal question regarding the legal basis. Moreover, it may be quite a burden for an arbitrator to find out who in his or her firm uses which TPFs. The arbitrator should then also advise all lawyers in the firm that they have to inform him or her if they intend to retain any TPF so that he or she can notify the parties in the arbitration. This may be answered differently if the arbitrator does not have a large law firm, or no firm at all (e.g., law professor).

Another alternative solution is that the party ensures that the TPF in question has not and will not have any relationship with the law firm of the arbitrator. Such duty of the party would continue to apply during the course of the entire arbitration. The legal basis would be that a party has a duty to see to it that it does not bring an arbitrator in a situation of conflict of interest. Problem here is how this can be policed.

If disclosure of TPF in arbitration is to take place, a number of further questions arise, including: (1) What must be disclosed: the identity of the TPF only, the extent of the TPF's involvement, or the terms of the entire TPF contract? (2) When? (as early as possible?) (3) To whom? (the arbitral tribunal and the other side, or to confidentiality advisor?).

Who is the Investor?

If the investment claim is “sold” to a TFP who then comes in lieu of the original investor, questions may arise whether the investor still meets the criteria of the relevant BIT. There may also be a timing element: prior to the commencement of the arbitration and during the arbitration. I will not go into this, except that it underscores that the TFP should be carefully structured and drafted.

Production of Documents Request

If the TPF is not disclosed, what happens if a party requests to order the production of the TPF contract by the opposing party? It may be a “fishing expedition”, based on a suspicion, or knowledge that there is a TPF.

My answer is that, in principle, the request can be honored only if relevance and materiality are shown in relation to the issues in dispute. It is an open question whether the request should be granted if questions regarding potential conflict of interest of an arbitrator due to a TPF are raised.

Confidentiality Order

Orders regarding confidentiality regarding certain information produced in an arbitration are quite common. That applies also in investment arbitration.

Usually, the Order identifies “Authorized Persons” who are allowed access to the Confidential Information. The Order has also an Annex which contains the form of a Confidentiality Undertaking that has to be signed by each Authorized Person and to be communicated to the other side and the arbitral tribunal.

If the TPF is not disclosed, can the Confidential Information be shared with the TPF? Probably not. It therefore seems to be prudent to disclose the TPF if and when confidentiality issues arise and include it – if that is what is desired – as an Authorized Person.

An alternative solution may be to have a general provision in PO1 in which the position of a disclosed or undisclosed TPF is regulated. One may wonder, however, whether the parties would be prepared to agree beforehand that Confidential Information can always be disclosed to a known or unknown TPF.

Cost Decision

Two questions.

First, should an arbitrator award cost to a successful party which has a TPF behind it? In my view, the answer is that the existence of a TPF is not relevant to an award of cost. The situation is not fundamentally different from an insurer which has paid the claim. In the same vein: ICSID case *Fuchs-Kardassopoulos v. Georgia*, Award of 3 March 2010 (and three other decisions in ICSID cases).

Second, what about the TPF who is accused of “legal blackmail”? It is said that certain TPF’s engage in full blown procedural warfare in order to wear out an economically weaker opposing party. That may be one of the ethical questions of TPF. In awarding costs in arbitration, it should not make a difference with the situation where party is unnecessarily delaying or making more complex the proceedings. In that case too, the Tribunal has to take into account the conduct of such a party.

It underscores the need for arbitral tribunals to be more conscious of the circumstances when awarding cost. In investment arbitration, it was long time believed that cost should always be split. This is changing, and arbitrators should give due consideration to all aspects of cost decisions.
