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Some notes about third–party funding: a work in progress

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Sumario: I. Introduction. II. Costs, *cautio judicatum solvi* and TPF. III. Can costs be recovered from the funder of an unsuccessful party?. IV. TPF and security for costs: a rule or an exception?. V. Does a funded party have to disclose to the other side that it is funded? VI. Conclusion

Abstract: Some Notes About Third–Party Funding: a Work in Progress

This article explores issues related with third–party funding (TPF), especially security for costs, duties of disclosure of information and allocation of costs in a situation in which costs are adjudicated against a funded party. It takes into account the recent Final Draft of the ICCA–Queen Mary Task Force on TPF in International Arbitration of 2018. The main conclusion is that TPF is a work in progress, as the system has yet to mature, under a complex number of contradictory constraints and needs. But it will always be a never ending history, as it needs to be faced as a case specific issue that depends of so many variables that the effort of creating complex regulations (be it included in national laws or seen as international soft law) will harm more than help the evolution of arbitration in the near future.

Keywords: THIRD–PARTY FUNDING – ARBITRATION – SECURITY FOR COSTS – DISCLOSURE – COST ALLOCATION N– ACCESS TO JUSTICE.

Resumen: Algunas notas sobre el financiamiento de terceros: un trabajo en progreso

Este artículo indaga en las cuestiones relacionadas con la financiación por terceros (TPF), especialmente en lo relativo a la seguridad de los costos, los deberes de divulgación e información y la asignación de costos en una situación en la que éstos se adjudican a una parte financiada. Tiene en cuenta el Borrador Final reciente del ICCA–Queen Mary Task Force sobre TPF en el Arbitraje Internacional de 2018. La principal conclusión es que TPF es un trabajo en progreso, pues el sistema aún no ha madurado por la existencia numerosas contradicciones. Siempre será una historia interminable, ya que debe abordarse como

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un asunto específico que depende de tantas variables que el esfuerzo de crear regulaciones complejas (ya sea incluido en las leyes nacionales o contemplado una soft law internacional) más que ayudar, perjudicará a la evolución del arbitraje en el futuro cercano.

Palabras clave: FINANCIACIÓN DE TERCEROS – ARBITRAJE – SEGURIDAD POR COSTOS – DIVULGACIÓN – ASIGNACIÓN DE COSTOS – ACCESO A LA JUSTICIA.

I. Introduction

The best way of looking at Third–Party Funding (TPF), as happens with many other issues, is to look through the window and not through the broken glass. However, this precaution is often not applied, with diverse but regularly negative and inconvenient consequences.

Life is not always easy and, therefore, not all the problems are visible in their exact profile, even after an effort to look at them carefully and with enough attention and concentration.

But that does not mean that lenses will always be of help; and, anyway, broken glasses will not do the trick.

This is reason enough to address this complex and fascinating issue starting with some general remarks that might be of help to enter into the real issues and through it to attain the different relevant points of view.

My first remark is that the TPF discussion reminds me of Mr Jourdain (of Molière's "Le Bourgeois Gentilhomme"), when that character finally understood that he was speaking prose without knowing it. Funders, in one way or another, were, are and will be with us forever in arbitration. I am not saying that they are part of the human tragedy, like taxes and death, anyway...

My second introductory remark is that this special and organized system has been arranged, as others, to allow companies to allocate resources more efficiently or to pick funding for dispute resolution. However, this special arrangement has some facets that are really new, as this system is born from special needs and opportunities. In a way, TPFs are a special animal. To give an example, nuclear plants provide energy as hydroelectric dams do, but they are really different. I am not saying that funders (or nuclear plants, for that matter) are toxic, anyway...

My third remark is that when something arises in business out of the blue, there is usually a gap to fill or a technological or sociological change that was asking for it. Third–Party funders are a tool that

arose out of the huge increase in costs and complexity of arbitration, and of the need to help and allow access to justice. They are then a force for good. But as D. H. Lawrence stated (“Two’s company, seven’s too much of a good thing”), they may be unpleasant, in spite of Kylie Minogue nice song about love (“too much of a good thing/you cannot have enough”)...

My understanding is that these general remarks will help to find the more relevant and adequate answers to the questions.

In a nutshell, TPF is one among other possibilities to look from a corporate finance view point at the needs and constraints of allocating scarce resources to help or even make it possible to start dispute resolution or create the conditions for a defence against a dispute started by others.

However, it is clearly a special system that may not be analysed only through the similitudes, but rather or mostly through what is different and peculiar.

At the same time, this is a system that appeared out of necessity, which usually generates opportunities, but has the upsides and downsides of the facts of life. It is undoubtedly a very positive and needed system, but at the same time, it is or may be used for purposes that are not to be without side effects.

Like the Internet (or steam engines, combustion engines, electricity, for that matter), TPF can be used for good, or not. Some say this is why it needs to be regulated, but others consider that regulation is quite often just an ersatz for common decency, that does not impeach the wrongs, and only complicates the good things to be developed.

II. Costs, *cautio judicatum solvi* and TPF

International arbitration proceedings usually cannot avoid the high costs relating to lawyers, experts, logistics, arbitrators and the institution that administers the case in accordance with its rules. These costs easily reach more than one million euros in an average arbitration, and the common understanding is that, with exceptions, the costs follow the event, meaning that the losing party will bear all the cost of the winning party, or part of them depending on the relief being total or partially adjudicated to one side or the other.

If not for other reasons, issues of access to justice are at the cornerstone of the arbitral systems, as there is no organized solution which

could apply the solutions already existing and available in the national courts of law to arbitration.

Companies under financial or economic duress quite often face enormous difficulties in exercising their rights in arbitration, let alone in defending themselves if another party starts arbitration against them.

And this unbalanced situation is an opportunity for abuse if the other party has muscle to fight, bringing the weaker opposite party to surrender for lack of capacity to resist.

Among the possibilities able to level the playing field (or at least to reduce an unbalanced situation), TPF is a very good example, and even more relevant if the weaker party's situation has been created by actions of the other side.

But it also happens in the arbitration world that a party with a weak case starts a process aiming to force the other party to settle. And it is also very common that a party with a case prefers to inflate the amount of the relief, expecting that it would increase the probability of a higher payment than if it chooses the option of being more conservative.

If a party with this latter strategy has the opportunity to find a TPF prepared to back it, then risks might arise for the other party if it prevails and afterwards is entitled to recover its costs. Then the financed party might be unable to respect the tribunal's decision, as its balance sheet will not allow for the recovery of those amounts without recourse to the funder.

Therefore, it is increasingly common for the other party to request a *cautio judicatum solvi* by means of a bond and/or the obligation of the TPF to cover those costs if allocated by the award against the funded party. Security for costs is therefore a very relevant issue, which is contemplated in several arbitration laws and rules¹.

To assess these issues and decide on them, if and when necessary, another (ancillary) issue exists: how to decide about, for example,

¹ *Vid.*, for example, article 20, 2, c), of the Portuguese Voluntary Arbitration Law and article 26, 2, (c), of the UNCITRAL Arbitration Rules. Although not explicitly, both of these provisions seem to admit the tribunal's power to order security for costs. And a strong majority of legal authorities (including tribunals' decisions) are in favour of that possibility. *Vid.* also the ICCA–Queen Mary Task Force on TPF in International Arbitration Final Report (April 2018), p. 147 onwards. It suffices the mere fact that in the Final Report “security for costs” is probably the expression most often written to reach the conclusion of the centrality of this issue.

security for costs and how to allocate the burden of costs payment to the funder without access to the structure of agreements between funder and funded?².

These issues are in the cornerstone of the TPF system. The solutions that will be consolidated through arbitral and/or court precedents, scholars' and other authors' doctrinal approaches and proposals, regulators if and when they exist, and even the trends of the market, will define this system as they will interfere in one way or another in its business model.

III. Can costs be recovered from the funder of an unsuccessful party?

The automatic driver answer is no. And I am in good company: The ICCA–Queen Mary Task Force on TPF in International Arbitration ("Task Force") considers, in its draft report ("Draft Report"), that "*Generally, a tribunal lacks jurisdiction to issue a costs order against a third-party funder*"³. However, the same Task Force also refers for another purpose that "*in the absence of exceptional circumstances, the cost of funding, including a third-party funder's return is ordinarily not recoverable as costs*"⁴.

The Final Report of the ICCA–Queen Mary Task Force on TPF in International Arbitration ("Final Report") – presented at the April 2018 ICCA Conference in Sydney – goes in the same direction⁵, in spite of paying attention to the opinions that push in the opposite direction, mostly from a *de iure constituendo* view point⁶: "arbitral tribunals will typically lack jurisdiction to issue a costs order against a third-party under because of the consensual nature of arbitration"⁷.

Then I dare to say that if in "exceptional circumstances" or in "atypical" situations, one can envisage that, if we admit recoverability by

² The access to the agreements between funder and funded may present several concerns concerning the confidentiality of those agreements.

³ Draft Report dated 1 September 2017, pp. 114 and 148.

⁴ Draft Report, pp. 114 and 148.

⁵ Final Report, p. 160 onwards

⁶ "However, shifting focus of the inquiry from whether a third-party funder *can* be brought within the jurisdiction of an arbitration tribunal to whether it *should*, the issue has interesting, and potentially important, policy implications which were the subject of a large number of comments received during the period of public consultation" (Final Report p. 162).

⁷ Final Report p.161.

the funder of its return/costs, then – at least because it would be the other side of the coin – recovering costs from the funder cannot be refused without exceptions.

However, as usual when faced with complex issues, this is easier said than done. One of the foundations of arbitration is the privity of contracts⁸. Another is that the Arbitral tribunal is a creature of the parties and only has jurisdiction on issues that the parties decided to allocate for decision by the tribunal and in relation to them⁹. And a final one, for the purposes of this analysis, is the principle that, as a rule, it is not possible to adjudicate against non-parties to the agreement under which the tribunal is empowered¹⁰.

In any event, as the Task Force relates in the Draft Report and the Final Report, there are precedents of costs awarded against the Funder, at least in UK and US litigation, if there is “a sufficient degree of economic interest and control in relation to the claim”¹¹.

Reference should also be made to the SIAC 2017 Investment Arbitration Rules and to the interesting solutions provided there concerning TPF, as information usually means power¹². And it is also noteworthy that the Final Report states that “the *substantial majority* of the submissions received by the Hong Kong Law Reform Commission during its public consultation, which supported the position that tribu-

⁸ As it is well known, “consent is the cornerstone of arbitration”. *Vid.*, for instance, F. Mantilla-Serrano, “Multiple parties and multiple contracts: divergent or comparable issues?”, in *Multiparty Arbitration*, Dossier VII, ICC, Paris, 2010, p. 25; B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer Law International, The Hague, 2005, pp. 32–33, and N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, 2015, p. 71.

⁹ In other words, the tribunal’s jurisdiction is confined both *ratione materiae* and *ratione personae*.

¹⁰ One should not forget the principle that “an arbitration agreement is a contract between, and binding on, the ‘parties’ to that agreement, and not on other persons” (G.B. Born, *International Commercial Arbitration*, vol. I, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 2014, p. 1407).

¹¹ Draft Report, pages 122 and 129. *Vid.* also Final Report, p. 162.

¹² See particularly: (i) article 24, I) (the tribunal’s power to “order the disclosure of the existence of a Party’s third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder’s interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability”; (ii) article 33.1 (the possibility of the tribunal to “take into account any third-party funding arrangements in apportioning the costs of the arbitration”); and (iii) article 35 (the possibility of the tribunal to “take into account any third-party funding arrangements in ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party”).

nals should be *given the power to make Third-Party Funders directly liable for adverse costs awards in appropriate circumstances*¹³.

However, the Task Force in its Draft Report seems to disagree with those possibilities. The Final Report follows the same trend, insisting that “this issue can be better addressed by binding rules either in national law or arbitration rules, expressly granting tribunals the power to order, if necessary, costs against third-party funders at laws”¹⁴.

Once more, the reality is much more complex than the apparent simplicity of these foundations suggests. Precedents, scholars, rules and even law, admit in certain circumstances at least an interpretation of the said basic criteria with a more open approach, and even clearly to extend to non-signatories of an agreement the effects of the arbitration agreement and of the award.

To name but a few examples, piercing the corporate veil, alter ego, group of companies are among the situations that may be considered as exceptions to those rules¹⁵.

And this is not the whole history. As an issue of applicable material law, there are a number of situations which allow the transfer of a burden, including arbitration costs, to a party not directly responsible for them. In Portugal and other jurisdictions, this is the case of the successive responsibility of a company for the debts of a full controlled subsidiary¹⁶. And a number of situations in which insurance policies protect third parties regardless of whether any contracts linking them to the insurer also exist¹⁷.

The legal systems are clearly worried – and the trend is growing with the increasing globalization of trade, opaque structures, sophisticated arrangements for concealing ownership, and the like – about situations that do not correspond to the traditional concept that ownership means control, and control means power, as this kind of equivalence is being blurred.

¹³ Final Report, p. 162.

¹⁴ Final Report, p. 163.

¹⁵ On these issues, *vid.*, for example, G.B. Born, *International Commercial Arbitration*, vol. I, *op. cit.*, pp. 1410–1489; A.M. Steingruber, *Consent in International Arbitration*, Oxford International Arbitration Series, Oxford University Press, 2012, pp. 144–164, and K. Sachs y T. Niedermaier, “Zur Group of Companies Doctrine und der Auslegung der subjektiven Reichweite von Schiedsvereinbarungen— Welches Recht ist anwendbar?”, in *Festschrift für Siegfried H. Elsing zum 65. Geburtstag*, Fachmedien Recht und Wirtschaft, 2015, pp. 475–491.

¹⁶ Article 501 of the Portuguese Commercial Companies Code.

¹⁷ Final Report, p. 52.

The issue may be really material: think about a situation under which the behaviour of the funder caused true unnecessary and unacceptable costs to the other party, through a strategy of abusing the process aimed at creating an irresistible pressure to give the other party no choice other than to surrender and settle¹⁸.

I am not forgetting the issue of lack of jurisdiction and in spite (or perhaps because) of my age, I am still really naïve on tribunals' behaviour. But too many times I saw sophisticated tribunals finding jurisdiction when it would be easier to find a needle in a haystack (whether later on they are able to ascend to the Kingdom of God is another matter...), to be able to admit that when in "exceptional circumstances" it would be feasible.

It is easy to envisage situations under which a TPF might be in a position of control and power that goes beyond the traditional boundaries of funding entities like banks. These boundaries are not marked in stone. They are subject to the specific characteristics of the case, the agreements and the applicable law, and therefore it would not be useful (if not detrimental) to define a general theory applicable to TPF. However, the fact is that in a continuum that starts with traditional loans that only give the bank the right to enforce against assets of the financed company and ends in situations under which lenders gain full control of the entity being financed, there is a point at which a qualitative modification can be understood and implemented.

At this stage of the reflection, suffice to say that situations might occur under which the situation of a TPF appears more similar to the one of a controlling entity than to a simple funder of a going concern for a special purpose; and in this case to it make possible, or at least less burdensome, to develop an arbitral process to claim (and/or to resist to a claim) certain amounts or other relief.

The situation also needs to be scrutinized in accordance with the new trends of the adjudication of costs in relation to the behaviour of the parties¹⁹. If and when the TPF has been instrumental in certain strategies that might unfairly or even illegally increase the costs incurred by the opponent to the funding entity, then (also using here the above mentioned continuum pattern) it may make sense for a funder (irrespective of being a traditional lender or a modern TPF)

¹⁸ This might be a situation of "moral hazard" (*vid.* A. Goldsmith & L. Melchionda, "Third Party Funding in International Arbitration— Everything you ever wanted to know (but were afraid to ask— Part 1", *Int'l Buss. L. J.*, 2012, n° 1, p. 61).

¹⁹ *Vid.* for example, article 38.5 of the ICC Arbitration Rules.

to be called in one way or another to grant the conditions for the repayment of costs, as adjudicated by the tribunal.

It is therefore possible to draw a scale on which the degree of control on one side and the level of participation in the party's behaviour that justified a special allocation of costs on the other side, might interact to attain a point of intersection after which the TPF should be obliged to guarantee the payment of the costs.

Behaviour by the party and/or the TPF might be relevant for the purposes referred to above. In a case-by-case analysis, the tribunal may order the disclosure of the contract and other arrangements between funder and funded²⁰. If those entities decide not to act in accordance with the procedural order, with or without acceptable grounds as seen by the eyes of the tribunal, then this issue could be taken into account for the purpose of costs (or security for costs, as detailed below) by the tribunal.

However, these avenues are to be exploited with care. I agree with the Task Force: requesting the payment of costs directly from a TPF is clearly the exception and not the rule. Tribunals must be very careful on this issue, as the refusal by the TPF to comply with the order might create a procedural nightmare.

The problem is that when faced with this issue, tribunals are not usually yet able to anticipate the outcome of the case, let alone the adjudication of costs. If and when this is not the case, and if the funded party has at least to a certain extent some success, the issue is easier to face: as ordering the TPF to pay the costs would always come as a joint and several duty with the funded party. This means that if costs are not paid, this would be an issue for the parties to resolve through compensation: any payment by the non-funded party will be net of the adjudicated costs. Needless to say, also, that if the funded party wins more than it loses (or if the tribunal adjudicates costs under a different criterion than "costs follow the event" in a way that is favourable to the funded party) there is no issue in relation to any payment by the TPF.

If these situations were the only possible, this would be the end of the story. However, and probably, it will be more common to have a tribunal deciding to request the payment of costs directly from the TPF when the outcome is very low compared with the relief sought and/or the behaviour of the party justifies some kind of punishment and/or the funded entity abused the process to try to pressure the

²⁰ *Vid.* article 24, I), of the SIAC 2017 Investment Arbitration Rules.

other side to settle through an excessive claim, rather than to fight for decent compensation.

Accordingly, tribunals need to take this into account and find solutions that will protect their future decision if later it will include some kind of costs attributed in one way or another to the TPF.

They face therefore a sort of dilemma. When tribunals admit that it is possible that, at the end of the arbitral process, a TPF may be called on to pay costs, they need to choose the lesser of two evils. To do nothing, wait and see, and if they consider it appropriate to call on the TPF to pay costs, to trust that the issue will be solved by itself or to admit that, for any kind of reason – including reputational – the TPF will respect the award and will act accordingly. Or, playing on the safe side, to anticipate the problem and to find a preventive solution that – if needed – will be enough to assure its award is respected smoothly.

I would therefore propose that “yes” might be a good answer in certain situations. And the issue of security for costs is related to this dilemma. It actually occupies its centre stage.

IV. TPF and security for costs: a rule or an exception?

The issue of security for costs is present as a possibility in many jurisdictions and in arbitration rules, like the English Arbitration Act 1996 and the LCIA Rules²¹. However, until recently it has not been a very permanent issue. The appearance of TPF as an organized system has brought new light to this issue, with some authors correlating the existence of TPF to an increased justification for adjudicating security when requested.

Some years ago, I was faced with the duty of deciding together with my fellow co-arbitrators²², as President of the UNCITRAL Guaracachi vs Bolivia arbitral tribunal²³, on a *cautio judicatum solvi* requested by the respondent, precisely due to the entry of a funder onto

²¹ Final Report, p. 163–5. *Vid.* also M.K. Harwood, S.N. Batifort & Ch. Trahanas, “Third-Party Funding– Security for Costs and other Key Issues”, *The Investment Arbitration Rev.*, 2017, p. 106 and the very comprehensive text of A. Goldsmith y L. Melchionda, “Third Party Funding in International Arbitration– Everything you ever wanted to know (but were afraid to ask– Part I)”, *Int'l Buss. L.J.*, n° 2, 2012, n° 2, p. 221 onwards.

²² Manuel Conthe and Raul Vinuesa.

²³ *Guaracachi America, Inc. (U.S.A.) and Rurelec plc (United Kingdom) v. Plurinational State of Bolivia* (PCA Case No. 2011–17), Procedural Order No.14 (11 March 2013).

the playing field. It seems to have been the first case explicitly addressing the issue of that correlation²⁴. At that time, we were then still in uncharted territory, and our decision was much more based on instinct and soft skills than on any actual analysis of relevant precedents and scholars' reasoning.

After all these years, I am still convinced that our procedural order was the right thing to do: we went unanimously against directing the claimant to provide security for costs²⁵. We decided it after a fact-specific analysis, rather than by a theoretical or biased approach. But I thought and still think that in certain (but not necessarily "exceptional") circumstances (and also taking into account that its extent, characteristics and conditions might be a relevant issue to analyse), security for costs would be the right thing to order.

The issue of security for costs being adjudicated needs to be – as happens will all the major issues relating to TPF – a fact and case specific issue. And it is also very important that the tribunal's decisions do not pre-judge the merits of the case (or give that impression to the parties), when deciding about security for costs.

In the process of decision, the tribunal must take into account a number of issues, which I admit are quite often contradictory. Among them, the fact that adequate security is easier to decide than to obtain in the market if the party is under duress or at least in financial difficulties or the financial/banking market is in a conservative phase in relation to risks. Also relevant is the inevitable first impression about strengths and weaknesses of the case, the value of the relief at stake and the costs that will arise out of it, the behaviour of the parties before and during the arbitration, and the difficulties that the lack of security may create unfairly for the other party.

But at the same time, attention must be paid to the fact that security cannot appear as another barrier to access to justice or the right to due process, including the principle of the equality of arms. Quite often the world of arbitration is better understood by those familiar with the famous Lewis Carrol novel "Alice's Adventures in Wonderland": Things are not always as they appear to be, and the meaning and intentions of characters or actions is not always obvious.

²⁴ Final Report, p. 176, quoting in detail the contents of the Procedural Order.

²⁵ A. Goldsmith, in *Cahiers d'Arb.*, 1/7/2016, n°2, pp. 348–349, suggests that "the arbitral tribunal appears to have struck an artful compromise between claimant's confidentiality interest in not disclosing the funding documentation, and respondent's interest in ascertaining the terms of funding that might be relevant to its pending application for security for costs".

Arbitration is not only the world of a process to attain solutions aimed to settle a given situation; it is also a battlefield, where war and guerrilla tactics play a part. Tribunals need to take into account this environment and the consequences of their acts, usually called procedural orders.

What TPF brings to this world is some muscle provided to a weaker party, or food for fighting more than would be probable for a party eager for it, let alone access to more sophisticated and skilled practitioners.

This new situation needs to be assessed. On one side, the mere fact of a TPF jumping into the wagon is not enough *per se* to justify the security for costs²⁶, if compared with any other situation in which an SPV (or an entity without sound assets or strong balance sheet) is funded by different means.

But on the other side, the appearance of TPF increases the muscle enough to provide opportunities for riskier or more aggressive behaviour. And it is also – even if it will probably never be admitted by any tribunal – an opportunity to look at a request for security for costs with different eyes (or glasses...), as the funder has the means to satisfy the protection of the other party if the latter prevails and is entitled to recover huge costs.

In a nutshell, for any decision about security for costs, it is of paramount importance to take into account issues of access to justice, past behaviour of the parties in their interactions, the reasons for the financial and/or economic difficulties of the funded party (if any), the amounts at stake, the moment at which the issue was brought to the attention of the tribunal, etc.

If a word would make the day, it is “optimization”: in this kind of situation we are usually facing a conflict of rights and duties, risks and opportunities, protection and abuse, unbalanced positions, economic muscle and the lack of it, strong and weak cases and the secular conflict between the human drive for justice against the societal need for certainty.

Security for costs cannot be construed either as a rule or as an exception, but more something in between. It needs to be decided with a case-by-case analysis and certainly after a careful perusal of information (in which the tribunal may be active to the point of a degree of

²⁶ I agree with the Task Force conclusion: “An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement” (Final Report., p. 145).

inquisitorial approach), sound contradictory rights granted to the other party, etc.

What this means is that security for costs, allocating costs to the funder and disclosure of contracts between funders and funded are, one way or another, to be treated as interrelated facts.

V. Does a funded party have to disclose to the other side that it is funded?

Life is not always easy, to say the least.

Disclosure is usually a by-product of the conflict between transparency and confidentiality, which are conflictual concepts that, as a binomial, are part of the DNA of arbitration. Since the old day of arbitration, we have met those that look to confidentiality as the *raison d'être* of parties to contracts to resort to arbitration²⁷. But one is also confronted with other opinions that consider transparency as the only way to ensure the future of this peculiar dispute resolution system that is not without enemies²⁸.

Confidentiality is probably the past and transparency is the future, I dare to say, not as a reciprocal self-excluding situation, but rather as an emphasis. As a matter of fact, openness and transparency, disclosure of arbitration conflicts and equivalent situations have existed since arbitration was born²⁹. And, even in arbitration with state parties, confidentiality may be maintained at least to a certain extent³⁰.

²⁷ S. Lazareff (*ICC Bulletin 2009 Special Supplement, Confidentiality in Arbitration, "Theoretical and Philosophical Reflections"*, p. 81) refers that confidentiality is "the twin sister of arbitration".

²⁸ For a good example of the discussions in favour of transparency, J. Fernandez-Armesto, "The Time has come: a plea for abandoning secrecy in arbitration: CAPJA2012-3-002", *Cahiers de l'Arb.*, Juillet 2012 n° 3. And in the opposite direction P. Hodges, "The Perils of complete transparency in international arbitration— should parties be exposed to the glare of publicity?", *Cahiers de l'Arb.*, Juillet 2012 n° 3, p. 589. Also J.M. Júdice, "Confidencialidade e Publicidade. Reflexão a propósito da Reforma da Lei de Arbitragem", *Arbitragem— Estudos sobre a Lei n° 13.129, de 26/5/2015*, S. Paulo, Editora Saraiva, pp. 297–312.

²⁹ For some examples of the duty to disclose information even when confidentiality rules are to be applied, J.M. Judice, "Confidencialidade e Publicidade. Reflexão a propósito da Reforma da Lei de Arbitragem", *loc. cit.*, p. 300 and "Confidencialidade e Transparência em Arbitragens de Direito Público", *Liber Amicorum Fausto Quadros*, Almedina, 2016, pp. 87–103.

³⁰ *Ibid.*, pp. 300–301, and "Anotação ao Acórdão "Esso Australia Resources Limited and others vs. The Honourable Sidney James Plowman and others", in 100

This short digression helps to clarify how and when to build the answer to the question at stake. And it needs to take into account the fact that the news about the death of confidentiality is greatly exaggerated, as Mark Twain would say, but also that the future of transparency will be really bright³¹.

At the same time, seen from a different perspective, and as already mentioned, Third-Party funding – in one way or another – has happened since the birth of dispute resolution systems. Issues of disclosure in the situation of entities funded by third parties, have also always been with us.

If in a more traditional funding environment, a putative claimant restructures its liabilities towards banks as a way to obtain more liquidity in the following years, or if a law firm agrees to be paid with a success fee or even (when legal) under a success or contingency fees scheme, it is common ground that these situations would not need to be disclosed.

Then the answer happens to be a new question: where do we draw a line? Or, for that matter, does a line even need to be drawn as a general rule?

One line undoubtedly needs to be drawn, to cover the rules relating to conflicts of interest. Arbitrators need to be informed of the appearance of a new player and also about who that player actually is, for only with that information will they be able to rule on the usual conflict check and inform the parties accordingly³². Nowadays, this is common ground between those who addressed this issue³³.

Anos de Arbitragem, os Casos Essenciais Comentados, Coimbra Editora, 2016, pp. 153–164.

³¹ To name but a few, there are a number of recent international conventions relating to transparency, such as the 2015 Mauritius Convention (*United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*). It is also important to emphasize the 2013 *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, as well as the 2010 Hague Conference Report “Confidentiality in International Commercial Arbitration”.

³² But, even in more traditional situations, some tribunals have been confronted with requests for disclosure (and/or challenges) relating to banks with whom one party works to the point of being dependent upon the strategy of those banks in matters of restructuring of liabilities or in situations of which the party's failure to prevail in an arbitration might create downstream/upstream difficulties for other companies or groups.

³³ *Vid.* M. K. Harwood, *et al.*, *loc. cit.* p. 103–104 and D.G. Henriques, “Third-Party Funding, a protected investment”, *Spain Arbitration Rev.*, n° 30/2017, p. 115; for disclosure of insurers, Final Report, p.10 and 14. About Spain, *vid.* C.J Hendel, in “Annex to the Draft Report”, *op. cit.*, September 2017, p. 81–2

However, does the duty to disclose only relate to conflicts of interest³⁴? Or do other values need to be protected to the point of creating a general rule of transparency? And then, where do we stop? And what are the consequences of stopping at a lower level of disclosure, if not sufficient?

And with these questions the previous issues already referred to will return, as imagined.

If security for costs is requested, after TPF is revealed by the beneficiary (or, even more so, if discovered by chance), the disclosure issue will probably have a greater presence in the tribunal's deliberation and the tendency to grant security will be stronger than if the tribunal in the case at stake is more in favour of refusing security irrespectively of the facts of the case and/or if no TPF exists.

In this kind of situation, a request for disclosure might be a first step before deciding about *cautio*. Lack of cooperation by the funder will be considered as a relevant element to take into account for the decision. And the opposite is also true: disclosure may help the tribunal to decide that, under the circumstances, it is not worthwhile to decide in favour of granting security.

If security is not requested and/or if the facts of the case already established convince the tribunal that the risks for the other side not to recover its possible costs (if the case is adjudicated in its favour) are lesser than the risks of interfering with the access to justice principle due to difficulties in obtaining the security (or in finding a solution through some kind of *ad hoc* or contractual commitment by the funder) then requesting or mandating disclosure of the TPF contract with the beneficiary will undoubtedly be less probable.

If the request for security appears late in the case (and if not because the TPF was not disclosed³⁵) without any new facts that would create a situation not envisaged before, it is then more probable than not that security for costs will not be granted or that the decision on it will not be based – at least to a certain extent – upon the cooperation or lack of it by the funder.

Candid disclosure of the arrangements between funder and funded (even in a redacted form) will probably be paramount (at least from a

³⁴ A. Goldsmith speaks of “an incremental methodology for disclosure”, in *Cahiers d'Arb.*, *loc. cit.*, p. 339.

³⁵ Taking into account the known need for a conflict check by the arbitrators in a situation of TPF, the non—disclosure of its existence will and must be a relevant fact to consider in any decisions relating to it by the tribunal.

psychological viewpoint) for the way the tribunal will look at the situation if the case arises.

But redaction of the material aspects of the contract (notably of the thresholds that will create an increase of the advantage for the funder) must be accepted by the tribunal as a normal and correct degree of care that only demonstrates professional behaviour. Even very skilled and sophisticated arbitrators may look to those arrangements as exhibit 1 for the quantum determination. The fact that this would be an incorrect conclusion is not enough to have funder and funded playing in the direction of transparency, as many reasons may justify an optimistic or pessimistic forecast for the case, and many if not all of them will be inaccessible to the tribunal.

IV. Conclusion

We all know that some practitioners love to bring to the world of conferences, seminars and the like, topics that are not meritless, but are probably not a very relevant trend or issue either.

This is not the case of TPF. If there is a relevant work in progress issue in the arbitral environment (even in the dispute resolution field at large), then TPF is the one.

The appeal for national laws and arbitral institutions to rule on the complexities of TPF is doubtlessly a piece of good advice. But it takes time and uniformity will not be the outcome.

However, to help achieve the highest degree of uniformity (and therefore certainty for parties and practitioners) reflections like the ICCA–QMUL Task Force are a fantastic platform to motivate the international discussions. This article is also, and will be, a work in progress, as a contribution to motivate others. I hope it can bring some light and be a useful help to the arbitration community make progress in addressing this very complex (and interesting) issue.

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