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Insights

REFORM OF THE ARBITRATION ACT: SHOULD DISCLOSURE OF THIRD-PARTY FUNDING BE ON THE AGENDA?

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On 30 November 2021, the Law Commission announced that it would be conducting a review of the Arbitration Act 1996. The aim of the review is to maintain the attractiveness of England and Wales as a "destination" for dispute resolution and the pre-eminence of English Law as a choice of law.

The Law Commission has identified a number of potential areas for review including summary disposal, the courts' powers exercisable in support of arbitration proceedings, the availability of appeals on points of law and confidentiality.

However, there is one notable omission from the list and that is third-party funding (TPF) and, specifically disclosure obligations surrounding TPF. This blog considers whether the Arbitration Act should include express provisions setting out the rules on disclosure of TPF for arbitrations seated in England.

THIRD PARTY FUNDING

There is no statutory regulation under English law either in litigation or in arbitrations seated in England of the traditional form of TPF, where a commercial third party funder pays some or all of a party's legal fees and expenses in return for reimbursement of its outlays and a share of any sums recovered. Instead, commercial third party funders have been encouraged to self-regulate, following the Legal Services Act coming into force in 2007 and the subsequent creation of the Legal Services Board.

The leading commercial funders have adopted a Code of Conduct for Litigation Funders in January 2018. However, the Code seemingly is not intended to apply to arbitration proceedings, as the relevant disputes are defined in the Code "*as disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England & Wales*."

DISCLOSURE OF TPF

There is currently no obligation to disclose the existence of TPF in arbitration proceedings seated in England, as the Act is silent on the issue of TPF in general. However, within the international

arbitration community there is a general acceptance that the disclosure of the TPF is desirable to prevent challenges to the arbitral tribunal's independence and impartiality.

In October 2014, the International Bar Association Guidelines on Conflicts of Interest were revised with the introduction of new provisions in General Standards 6(b) and 7(b) to the effect that third-party funders and insurers were effectively equivalent to a party to the arbitration for the purposes of assessing arbitrator conflicts of interest. The rationale for the amendments was a recognition of the potential for conflicts of interest arising from the relationships between arbitrators and funders. The examples that spring to mind are when an arbitrator has close links with a funder by virtue of being a member of its corporate bodies or if he/she holds a substantial stake in the funder, given that some of the commercial funders are now publicly traded companies. This leads to concerns that non-disclosure of TPF at an early stage of the arbitration, may lead to the arbitrator being challenged at a later stage of the arbitration or at the worst-case scenario an arbitral award being set aside or not enforced on the basis that the arbitrator lacked the requisite independence or impartiality.

Looking outside of arbitrations seated in England, the current trend internationally leans towards the disclosure of TPF.

Recent amendments to the ICSID Rules have made the disclosure of third party funding mandatory. A number of arbitral institutions, including the SIAC, the HKIAC and the ICC have now included in their Rules either the power of a tribunal to order the disclosure of the existence of TPF and the identity of the funder or the requirement that a party should do so. Hong Kong SAR has passed law to this effect in the Hong Kong Arbitration Ordinance (Cap. 609) (Part 10A (sections 98U–98W)). Singapore has implemented similar requirements through amendments to the Legal Profession (Professional Conduct) Rules 2015.

Interestingly, in both Hong Kong SAR and Singapore the position is that only the existence and identity of the funder are to be disclosed as a default, but are silent on disclosure of other details of a TPF arrangement. This is in line with a series of investment arbitration cases where tribunals ordered disclosure of the existence and identity of a funder, but not the terms of TPF (see e.g. *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 1, 29 November 2019; *Latam Hydro LLC and CH Mamacocha SRL v. Republic of Peru*, ICSID Case No. ARB/19/28, Procedural Order No. 2, 13 May 2020; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Procedural Order No. 1, 19 February 2019).

By contrast, neither the LCIA Rules 2020, under which a large number of arbitrations seated in England are conducted, nor the Act contain any requirement to disclose a TPF arrangement to an opposing party or to the tribunal.

Historically, the main argument against the disclosure of TPF in international arbitration was to prevent unnecessary applications for security for costs from an opposing party. However, in a

number of reported investment arbitration cases, applications for security for costs based on the involvement of TPF alone have been rejected, thereby alleviating this concern

CONCLUSION

One of the stated aims of the Law Commission's review of the Act is to maintain the attractiveness of England and Wales as a "destination" for dispute resolution. Given the proliferation of TPF in international arbitration and the buoyant litigation funding market in England, which now stands at £2.2bn according to a recent report issued in June 2022 by RPC, now is a good opportunity to address the disclosure of TPF in English seated arbitrations.

The introduction of clearly drafted, statutory provisions requiring a funded party to disclose the existence of TPF and the identity of a funder would reflect what is generally accepted as best practice in international arbitration. It would also provide clarity for funders, funded parties and arbitrators and be a positive step towards preserving the integrity of the arbitral process – avoiding potential conflicts of interest between funders and arbitrators and preventing belated challenges to arbitrators or arbitral awards.

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