



CERTAIN ISSUES RELATING TO THIRD PARTY FUNDING AND THIRD PARTY DISCLOSURE IN INTERNATIONAL ARBITRATION

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ANNOTATION

This article is devoted to highlighting the issues of third-party financing in international commercial and investment arbitrations. The article analyzes the main concepts of third-party financing and defines the main directions of problems in this field. At the same time, the article presents the latest changes and news related to this concept. The article focuses on the requirements of transparency and disclosure, and these aspects remain one of the urgent issues of third-party funding in modern arbitrations. Specific aspects of the further development of third-party financing and its use include the main directions in this article.

Keywords: third party financing, international arbitration, investment disputes, transparency and disclosure.

INTRODUCTION

Today, the practice of third-party financing (hereinafter referred to as TPF) is widely used in many investment and commercial arbitrations to resolve international disputes. However, despite this, this practice has not yet been sufficiently researched and not fully regulated by law. On the one hand, third-party financing can be seen as an unknown practice for many. Because of this, in most disputes, the parties hide their financing third parties, they do not provide any information about them to the opposing party and arbitration courts. Because third-party financing is an emerging field, there is not much information about it yet, and most sources only cover ethics and procedural rules in arbitration. According to this practice, many arbitration courts have not yet adopted a separate regulation or a specific legal basis. This may be an obstacle for the developing industry to encounter some difficulties and to be used as an effective tool in resolving disputes. Therefore, the main purpose of this article is to highlight the latest trends and changes in third-party financing, as well as the shortcomings of its application in disputes. The article consists of three parts, the first part covers the concept of TPF, its description, advantages and disadvantages. In the second part, the role of TPF in international arbitration and the problems encountered in practice related to it are considered. The third part analyzes the principles of transparency and openness. In addition, the importance of transparency and openness will be discussed in detail through the analysis of recent TPF-related practices and the study of disputes.

The concept of TPF and its legal regulation

If we look at the history of the origin of TPF, it first arose in civil court cases. As a method of financing litigation, it is used in order to reduce or eliminate the risk associated

with the possible outcome of litigation¹. However, today TPF participates in international arbitrations between disputing parties (mainly by claimants) as their financing party. Without personally participating in the dispute, he covers the expenses of one of the parties related to the claim and arbitration. Such expenses include expenses related to lawyers, experts and consultants, fixed fees and court costs. Of course, TPF does not provide impartial financial assistance to the parties, it receives a certain amount of compensation from the compensation money obtained in case of winning the dispute, in agreement with the parties, together with its expenses. Another important feature of TPF is that the contract between the financing third party and the financed party is largely confidential and the arbitral tribunal with the other disputing party does not know about it. For this reason, there are many disputes and ambiguities in this issue today. Although TPF has not yet been fully explored, its emerging trend is recognized and defined in Article 8.1 of the Canada-EU Trade Agreement (CETA). According to it, "Third-party financing means financial assistance provided by any impartial third parties to the disputing parties for the purpose of future profit to cover court and other expenses."². At the same time, in Article 1.2 of the agreement concluded between the USA and the European Union (TTIP), "Third-party financing means the reimbursement of expenses related to court costs and other legal fees of the disputing parties by impartial third parties unrelated to the subject of the dispute." the understanding of giving is defined³. Although these tariffs give a brief explanation to TPF, it has not yet been fully legalized.

One of the main and most important aspects of the TPF is to assist the parties in exercising their right to a trial. Because it is known from practice that it is not cheap to see disputes in arbitration courts. Usually, the disputing party (plaintiff) has suffered serious damage as a result of a certain offense and is not always capable of such large payments. As a result, his right to trial may be limited due to his financial insufficiency. Therefore, today TPF is considered as an acceptable solution to such problems. Because it provides financial assistance to the parties to participate in the courts with their claims. This helps the parties to exercise their right to trial.

However, a number of shortcomings in the practice of TPF are visible. One of them is the demand of large sums of money from the claimants who won the dispute. The financing third party can demand a large amount of its profit from the financing party because it has covered all court costs and paid the fees. The party using third-party financing is also considered responsible to the financing party, limiting its independence.

Literature review and methodology

As for the analysis of the literature within the scope of the topic, third-party financing in international arbitration has been studied mainly by foreign experts.

In particular, according to C. Bogart, "financing of litigation and arbitration claims by third parties is neither new nor capable of being characterised in the rather black and white

¹ M. de Morpurgo, A comparative legal and economic approach to third-party litigation funding, "Cardozo Journal Of International & Comparative Law" 2011, p 350.

² The Comprehensive and Economic Trade Agreement (CETA), Canada and EI, Free Trade Agreement 2016, // URL: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> [accessed: 15.07.2017].

³ Transatlantic Trade and Investment Partnership, US and EI, // URL: <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> [accessed: 15.07.2017].

manner so often employed by press and academic writing. In reality, the practice is complex and multi-faceted"⁴.

According to M. Scherer, "TPF is any contract related to payments for legal proceedings"⁵.

Another source said, "TPF has many forms and it does not have a standard template. Because there are many forms of claim funding, they can include contingency fees or insurance contracts"⁶.

This practice is widely used mainly in North America and European countries. Looking at sources related to these countries, "Many countries, including Great Britain, Germany, the Netherlands and Belgium, have expressed a favorable attitude towards TPF in resolving disputes"⁷.

There is very little local research on TPF and this concept is covered only in some sources.

In the book "The Principles and Practice of International Commercial Arbitration" by Margaret L. Moses, edited by Professor Islambek Rustambekovich, it is stated that TPF can be an insurance company, investment fund, litigation finance firm, bank or other persons⁸.

Discussion

TPF is widely used in investment arbitrations as well as international commercial arbitrations. The principles of confidentiality in commercial arbitrations are quite strict, and investment disputes also contain a certain amount of confidentiality standards. Violation of this principle has caused a number of problematic situations in practice.

In 2015, a survey was conducted by Queen Marry and White & Case on "Improving International Arbitration, Obligation to disclose the fact of use of TPF by claimants and the identity of TPF". According to the results of the survey, 76% voted for the disclosure of the contract concluded with the financing third party, and 63% voted for the disclosure of the identity of the financing third party. According to the opinions expressed by the participants, transparency is of great importance in the impartial resolution of the dispute between the parties. However, 71% of the participants did not approve of another point of the survey, that is, mandatory disclosure of all conditions agreed on TPF. As a reason for this, some people said that such mandatory disclosure could create a conflict between the financing party and the financing party, and moreover, it could have an adverse effect on the decision of the arbitration court.

Based on the results of the survey, Queen Marry and the International Commercial Arbitration Council will jointly form a special Working Group. Its purpose was to study the arbitration process, its ethics, the relations between the parties related to TPF, and develop proposals and recommendations for the regulation of the industry. In 2017, a discussion will be held on the issues and proposals collected by the Working Group, and accordingly, the following issues will be considered:

⁴ C. Bogart, "Third party funding in international arbitration", Burford Capital, 22 January 2013, // URL: www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#.

⁵ M. Scherer, A. Goldsmith va C. Flechet, "Third Party Funding in International Arbitration in Europe: 1 – Funders' Perspectives", RDAI/IBLJ 2019, p 209.

⁶ Brekoulakis, S., Third parties in international commercial arbitration, New York, Oxford University Press, 2017, p 290.

⁷ S. Martin, "Litigation financing: another subprime industry that has a place in the United States market", 53 VILL. L. Rev. 2018, 107

⁸ M. L. Mozes, The Principles and Practice of International Commercial Arbitration. / T.: Lesson press, 2020, p 502.

1. Transparency,

2. Privileges

3. Costs (to what extent the existence of TPF should be taken into account in the resolution of the dispute)

4. Definitions (Who exactly is the third-party financing?)

It can be seen from the surveys conducted and the information collected by the workforce that third party financing needs to be regulated legally and legally.

As for the disclosure of TPF, there are two main aspects. One of them is whether the parties must disclose the existence of an agreement with a third party financier and the identity of the financier, and if so, on what basis should they do so?

Second, should the parties also disclose the terms of the agreement with the funder?

Currently, the parties are not required to disclose the agreements concluded with such third parties, therefore, the relations of the parties with these financing parties, their interaction with lawyers have not yet been fully studied. In addition, the financing third party usually does not want information about itself to be disclosed. This is one of the unique aspects of the issue.

If we talk about why the disclosure of TPF is one of the important aspects, it comes from the requirement of impartiality of arbitrators, conflict of interest and transparency requirements. Although TPF is not directly involved in the dispute, it is also interested in the outcome of the case to some extent.

Based on the experiences of well-known international arbitration courts on TPF, the Singapore International Arbitration Center (SIAC) will amend its rules on investment disputes in 2017. Pursuant to Article 24 thereof, the Tribunal was empowered to disclose the existence of third-party funding. It was determined that the court may request information about the financing third party and its identity from the parties. This right gives the Tribunal not only information about the financier, but also an opportunity to determine the relationship between the parties and the financier.

Based on Hong Kong's experience with TPF, this arbitration requires parties to provide written notice of TPF. In the notification, he controls the inclusion of information about the identity, location, employment or absence of the relevant financier. When deciding a case, the arbitrator will consider the information about the relevant TPF and verify that it is only for the purpose of obtaining material benefits. If any other objectives are identified, the TPF will be disregarded and excluded.

CONCLUSION

TPF is one of the emerging areas of international arbitration. According to some sources, two-thirds of the claims received by the ICSID (Center for International Dispute Settlement) are filed by the parties participating in the TPF⁹. This also indicates the growing scope of TPF and the need to regulate it.

First of all, it should be mentioned that the existing established rules used in the arbitration process cannot provide sufficient legal regulation of TPF. Solving issues related to TPF requires the use of additional measures on a large scale. This goes directly to the principles of transparency and openness. We can single out the analyzed experiences of Hong

⁹ Although no reliable statistics were gathered, the estimation was made by the Task Force on the basis of information provided by major funder, see: W. Park, A. Rogers, op. cit., p. 3.

Kong and Singapore as leading measures in this regard. At the same time, additional obligations should be imposed on the parties, arbitrators and financing third parties to ensure high efficiency. The reason for this is that the application of additional measures and norms related to TPF and their participation in the work may require additional knowledge and skills when considering the work related to them. In addition, transparency measures can provide information about third-party funders and their identity, determining how involved they are in the case, and whether they have any motives other than financial gain.

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