The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction

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The ICC's adoption, on 12 February 2016, of a "Guidance Note for the disclosure of conflicts by arbitrators," which "aims at ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts" (*See* ICC Press Release dated 23.2.2016, "ICC Court adopts Guidance Note on conflict disclosures by arbitrators"), is a development of interest in the context of the ICC's ongoing campaign to increase transparency in ICC arbitration proceedings. Of particular interest is the inclusion in the Guidance Note of a reference to third-party funding ("TPF"). Specifically, the Guidance Note states that arbitrators should consider, when evaluating whether to make a disclosure, "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award." This definition of TPF tracks, word for word, the definition of TPF found at General Standard 7a of the IBA's 2014 Guidelines on Conflicts of Interest, which requires the party in receipt of TPF to disclose any such entity "at the earliest opportunity".

The reasons why disclosure of relationships between arbitrators and providers of TPF may be necessary in certain cases have been well explained elsewhere. In

short, undisclosed ties, even if unknown to the arbitrator, may give rise to grounds for removal of the arbitrator or challenge to the arbitral award. Early disclosure of the presence of TPF associated with a party to the arbitral proceeding is therefore worthwhile as a means of eliminating the costly and problematic potential consequences of belated disclosure or non-disclosure.

The ICC's new Guidance Note represents an important step in taking on the challenges of transparency associated with TPF in international arbitration. As a recent post has noted, there are currently no provisions in any national arbitration laws or arbitration rules addressing TPF in international arbitration. This is true despite the significant role that TPF has come to play in connection with international arbitration proceedings, a trend which is unlikely to abate. Indeed, prior to the ICC's Guidance Note, the closest thing the arbitration community has known to regulation of TPF was found in the IBA's 2014 Guidelines on Conflicts of Interest, which require parties to disclose "any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration." The IBA Guidelines remain, however, only soft law. At the same time, a number of investment arbitration tribunals have recently issued procedural decisions recognizing the importance of disclosing the identity of the source of TPF associated with claims (*see, in particular,* Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 of February 21, 2013; Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 of June 12, 2015; South American Silver v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 of January 11, 2016).

In the absence of formal rules requiring disclosure at the outset of the arbitration proceeding, parties will increasingly be confronted with scenarios – given the rise of TPF – in which undisclosed ties linger, and may not be teased out until a subsequent stage of the arbitration, if ever. While the ICC Guidance Note confirms that the arbitrator should consider TPF when making his or her own disclosures, this assumes that the arbitrator will be made aware of the presence of TPF in the proceeding. Where the party has not disclosed the existence of TPF, as is often the case, the arbitrator will not be apprised of the presence of TPF and thus have no means of evaluating whether to make disclosures on this subject.

Although the ICC, which seeks to promote transparency, has taken the significant

first step of directly addressing TPF in the disclosure context, the Guidance Note has stopped short of mandatorily calling for the disclosure by each party, at the outset of the arbitration, “of any entity having direct economic interest in the dispute or an obligation to indemnify a party for the award.” Providing for such disclosure would enable the arbitrators to consider whether they have any form of relationship with the revealed funder that may require further disclosure on the part of the arbitrators. Providing for disclosure at the outset of the proceeding would also protect the integrity of the administering institution.

Indeed, one may wonder what consequences would arise if it were discovered that a member of the ICC Court participated in deliberations on a matter referred to the Court, in an arbitration in which the member had a significant relationship with an undisclosed funder backing a party to the proceeding. Under any other circumstances, for example, where the party were represented by the law firm of the member, the member would be excused from participating in the ICC Court’s deliberations. The reasons for this policy are obvious. Once again, however, in order to permit proper screening to take place within the administering institution, it would be necessary for the institution to know whether any party to a proceeding before the institution is backed by TPF. Without party-based disclosure at the outset of the proceeding, the institution will not necessarily know what it needs to know to ensure that conflicts are avoided.

In summary, the authors suggest that the time has come for more direct mechanisms to define and regulate the disclosure of TPF in arbitration proceedings. Institutions should adopt a clear definition of TPF and require the disclosure by parties of any relationship covered by the definition.

Disclosing the identity of any funder associated with a claim by the funded party does not mean requiring disclosure of the terms of funding, which should be considered only upon a demonstration that such additional information is necessary and relevant. Abstract invocations of transparency interests arguably would not suffice. Moreover, parties that exploit disclosure to raise frivolous procedural motions related to TPF, such as unwarranted applications for security for costs, may be dealt with through the customary mechanisms that exist to address such conduct. While the “wait and see” attitude might have made good sense a few years ago, when the desire to avoid overreacting to the TPF phenomenon was fully understandable, the rapid and persistent rise of TPF in the arbitration community suggests that the time has come for action.

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