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The Duty to Disclose Third-Party Funding in Arbitration

The figure of Third-Party Funding

In recent years, international arbitration has been influenced by "Third Party Funding", known as "TPF." In Spanish, it can be translated as "Terceros Financistas" (third-party financiers), "Inversionistas de Pleitos" (dispute investors) or "Financiamiento por Terceros" (third-party financing).

TPFs emerge as an alternative when parties do not have the financial resources to enforce their rights, given that arbitration generates considerable costs and expenses. In these cases, TPFs appear as third parties external to the process, with the role of financing the costs of the arbitration proceedings in return for a benefit.

The emergence of TPFs in the arbitration scene raises several questions and concerns as to whether the parties are required to disclose the existence of a TPF to provide full transparency in the arbitral proceedings and to enable the arbitrators to determine the existence of a conflict of interest that could affect the integrity of the arbitral proceedings and the validity of the arbitration award.

The duty to disclose or reveal the identity of the TPF has been reflected in the leading international arbitration rules, including the Arbitration Rules of the International Chamber of Commerce (ICC). The amendments that entered into force in January 2021 included the obligation for the parties to disclose financing agreements with third parties. Each party must promptly inform the secretariat, the arbitral tribunal, and the other parties of the existence of any third party that has agreed to finance the claims or defenses, within the framework of which it has an economic interest in the outcome of the arbitration.

In the middle of this year, the new Regulations and Rules of the International Centre for Settlement of Investment Disputes (ICSID) entered into force. With this update, it was established as a mandatory requirement that the parties to the arbitration disclose financing by third parties. In addition, the rule requires that, if a legal entity grants the funding, to disclose who controls it. The arbitral tribunal may order that additional information in relation to the financing agreement or the third-party financier be disclosed.

On its part, the International Bar Association (IBA), through

the IBA Guidelines on Conflicts of Interest in International Arbitration adopted in 2014, also provides that when one of the parties is a legal entity, other natural or legal entities may have a controlling relationship over that entity, a direct economic interest in, or an obligation to indemnify a party for the arbitration award to be issued in the arbitration. All of the above can be considered a potential conflict of interest. Therefore, it is the duty of the parties and the arbitrator to disclose, on their own initiative and as promptly as possible, any direct or indirect relationship that may exist.

In Panama, Law 131 of December 31, 2013, "That regulates National and International Commercial Arbitration in Panama", in its article 25 establishes that the arbitrator, from the time of his appointment and during all arbitral proceedings, shall promptly disclose to the parties, circumstances which may give rise to justified doubts about his impartiality or independence unless he has already informed about them. Thus, it can be concluded that under the Panamanian Arbitration Law, an arbitrator can be declared disqualified if he has any relationship with a TPF that can give rise to justified doubts about his impartiality or independence. However, it does not establish the obligation of the parties to disclose the existence of a TPF.