

Research on Conflicts of Interest Arising from Third-Party Funding In International Investment Arbitration

Tian-Yu DU

9th Floor, East Campus, Wuhan University of Technology, Hongshan District, Wuhan, Hubei, China
13026349768@163.com

Keywords: International Investment Arbitration, Third-Party Funding, Conflict of Interest.

Abstract. In recent years, third-party funding in international investment arbitration has been developing rapidly, While this phenomenon is conducive to the realization of fairness and justice, it also brings many potential problems, Such as confidentiality issues, investors abuse of arbitration rights, conflicts of interest, etc. On the basis of defining the concept of third-party funding, this paper distinguishes the similarities and differences between it with other confusing concepts, then introduced the particularity of third-party funding in the field of international investment arbitration. Finally, this paper focuses on the analysis of conflicts of interest caused by third-party funding, and proposes to establish a third-party funding disclosure system.

Introduction

The history of third-party funding can be traced back to the feudal lords of the medieval common law countries who in order to obtain more land to finance other people's lawsuits, and to share the proceeds after winning the case, that is, "Package litigation". [1] Because this kind of behavior has the abuse of process and the violation of public policies were prohibited by Common law countries of the time. However, with the development of the world economy, governments have gradually realized that subsidizing the weak parties who are unable to litigate because of lack of funds is also a manifestation of the pursuit of fairness and justice, and gradually abolished the ban. Today, the active fields of third-party funding presents a trend from domestic to international, from litigation to arbitration, which has a profound impact on the field of international investment arbitration.

Overview of Third-party Funding in International Investment Arbitration

The concept of the third-party funding in international investment arbitration is still inconclusive, [2] General definition, in international investment arbitration proceedings, a third-party sponsor, independent of the both parties, provides financial support to one party to the arbitration case according to the agreement of the funding agreement, In return, receive a percentage of the award income after the case wins, If the case is lost, the sponsor has no right to ask the Subsidized party to return the subsidized property. [3] Most of the third-party sponsors set up special financial institutions, such as Bufford Capital, Credit Suisse subsidiary Ruger, or some hedge funds like EJF capital. [4]

Next, by distinguishing the similarities and differences between third-party funding and other confusing concepts, we further reveal the essential characteristics of third-party funding:

(1) Third-party funding and lawyer risk agency. In some cases, a special entrusted litigation agent between the lawyer and the client, The parties do not pay the attorney's fees first. After the execution of the case, the parties pay the lawyers a percentage of Contingent fee, If the case is lost or cannot be executed, the lawyer will receive nothing in return. From the final result of losing the case, the third-party funding and the lawyer risk agency will not get any benefit after losing the case, and the case will not be charged before the case is won. But the difference between the two is that third-party funding has the nature of financing, and lawyer risk agency are more about encouraging lawyers to provide services for related cases, In addition, the scope of third-party funding covers the entire arbitration process, including the cost of the arbitrator, the Fees paid to the arbitration institution, the cost of renting the venue, the expert fees that may be involved, the huge attorney

fees and possible witness fees, etc. The lawyer risk agent simply does not charge a lawyer's agency fee, but does not bear the remaining fees charged by the arbitration institution.

(2) Third-party funding and legal insurance. In international investment arbitration, Legal insurance mainly refers to Policy-holder purchases the relevant insurance from the insurance company, after the arbitration is lost, the insurance company pays a limited loss of costs through the settlement of claims, So as to share the economic losses caused by the failure of the insured. [5] The difference between legal insurance and third-party assistance is that, from the point of view of the policy-holder and the subsidized party, they pay different prices, the policy-holder has to pay the insurance company in advance, and the subsidized party has to pay no fee in advance. On the contrary, he will get the grant. From the point of view of the profit after winning the case, the insurance company generally does not get more income after winning the case, and the sponsor can share the winning income proportionally after winning the case. Overall, third-party funding is a more thorough approach of risk transfer, taking on greater risks and enjoying higher returns.

(3) Third-party funding and private lending. The difference between the two is significant, after the private loan expires, it is necessary to repay the principal and interest. In fact, it does not actually mitigate the risk of a party losing the case, and even increase the burden on the borrower.

Compared with other risk transfer methods, third-party funding has a higher ability to disperse the risk and is more helpful to the sponsors. Therefore, it is favored by the parties in international investment arbitration.

Finally, third-party funding has its particularity in international investment arbitration. The Respondent party in international investment arbitration can only be a state, and the state has dual attributes, On the one hand, it is a party to an investment contract in international investment, enjoys the rights stipulated in the investment treaty and fulfills its corresponding obligations. On the other hand, as the defender of social order and public interests in its territory, the sovereign state has to shoulder the responsibility of safeguarding the sovereignty and public interests, From the perspective of the subsidized party, the subsidized party will generally only be investors, and the state has only the possibility of being funded in theory. In addition, the host country may challenge the suitability of the investor for arbitration, on the grounds that the interests arising from the arbitration ultimately belong to the funder.[6]for example, in *Lemire v. Ukraine* case [7] , Ukraineasked asked the arbitral tribunal to dismiss the application for arbitration, But the opinion was not adopted.

Conflicts of Interest about Third-party Funding

The risk of conflict of interest about third-party funding is also called the challenge of arbitrator independence and impartiality. Mr. Yang Liangyi once said: "Today's London is the center of international maritime arbitration, but if our arbitrators move together in the Sahara Desert, then the Sahara Desert tomorrow will become the center of international maritime arbitration." This statement may be exaggerated, but it also illustrates the importance of the arbitrator in the arbitration system. Almost all arbitration rules can find requirements for the independence and impartiality of arbitrators. For example, Article 14 of the Washington Convention "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the Fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgments." If an arbitrator's independence and impartiality are challenged and established in an arbitration case, it will lead to the arbitrator's withdrawal, and the arbitral award will be refused recognition and enforcement by the host country, the entire arbitration effort will be overwhelmed.

The involvement of third-party funding may face more doubts about the independence and impartiality of arbitrators in international investment arbitration for two reasons:

On the one hand, there are few full-time arbitrators in international investment arbitration. The elected arbitrators often have multiple identities such as lawyers, international law scholars, legal counsel. The "industrialization" of third-party funding makes those institutions specializing in third-party financing have inextricable relations with arbitrators in international investment

arbitration. There is evidence that these institutions often sponsor activities in the arbitration industry and maintain close contact with international investment arbitration lawyers.[8] It is worth mentioning that those who are eligible to be elected as arbitrators in international investment arbitration must be people who have made achievements in some area of international law. That is to say, this is a relatively narrow circle, which makes the probability of third-party funding linking arbitrators in the field of international arbitration more than in other areas.

In order to get the benefit after winning the case and avoid the drift of the pre-payment, the sponsor will try to "control" the sponsored party as much as possible, including negotiating the arbitration strategy, requiring the sponsor to appoint a lawyer recommended or approved by them. Also including the selection of arbitrators, through funding agreement, the sponsor often requests the sponsored party, also is the applicant for arbitration, to select arbitrators who may make a favorable decision for them. This "favorableness" is reflected in the relationship between the arbitrator and the sponsor, big or small. For example, Jake is a legal advisor to a third-party funding agency, and Jake is elected as an arbitrator in the A arbitration case. If the funding agency funds the A arbitration case, there will be a conflict of interest. There is also a third-party funding agency that cooperates with a law firm, and a lawyer in that firm is selected as an arbitrator in an arbitration case, at this time, the funding agency will have a conflict of interest in the case. Even a good personal relationship between an arbitrator and a leader in a third-party funding agency may raise questions about the impartiality of the arbitrator. [9]

On the other hand, the relationship between the third party sponsor and the arbitrator is invisible. Most sponsors and sponsored are reluctant to disclose the existence of funding agreements, and existing arbitration rules lack the rules for mandatory disclosure of third-party funding agencies.[10] The other party and the arbitral tribunal have no way of knowing the existence of the funder. Naturally, it is not possible to investigate whether the third-party funding agency has contact with the arbitrator. If the other party discovers the existence of the third-party funding during or after the arbitration, it is found that the third-party funding agency has an interest link with the arbitrator, which will inevitably lead to doubts about the independence of the arbitrator. In practice, the sponsor's exposure is often the result of a dispute between the funder and the funded party or its lawyer, for example, In the case of "S&T Oil v. Romania"[11], The third-party funding agency Juridica funded S&T Oil, but then Juridica no longer provided funding for S&T Oil's concealing of important evidence, making S&T Oil unable to pay for the arbitration of the case, and the final case was revoked by ICSID, so S&T Oil went to The US federal court sued Juridica, claiming that it violated the funding contract, which led to the exposure of third-party funding. However, it is a minority that disclosure of third-party-funded arbitration cases due to disputes, and the disclosure rules need to be improved to bring the third party sponsorship into the scope of regulation.

Establish a Third-party Funding Disclosure System

The purpose of the disclosure system is that the parties or arbitrators consciously disclose matters that may affect their independence and impartiality, thereby protecting the right of the other party to apply for withdrawal. The disclosure system is the most important means to protect the independence and impartiality of arbitrators in cases without third-party funding intervention. The third-party funding intervention makes the scope of disclosure more complex, but its importance has not decreased.

The international documents stipulated in the third-party funded disclosure system are most instructive by the International Bar Association's 2014 IBA 'Guidelines on Conflicts of Interest in International Arbitration(hereinafter referred to as the IBA Guidelines).Article 6 (2) of the IBA Guidelines generally states that in determining whether there is a conflict of interest, a third party that has a direct economic interest in the arbitral award shall be considered to be equal to the party's status, and the rules applicable to the parties shall also apply to the third party. Investors. Where the first paragraph of Article 7 directly stipulates that when there is a third party that has direct economic interests with the outcome of the award, or if the third party bears the liability for compensation to the other party, if the arbitrator has a direct or indirect relationship with the third

party, The parties shall notify the arbitrator, the arbitral tribunal, the opposing party and the arbitral institution at the earliest possible time. [12]

According to the IBA Guidelines, the status of third-party funding agencies is equated with the parties, so that third-party funding is included in the scope of disclosure. Although the IBA Guidelines are not mandatory, the arbitral tribunal cannot request mandatory disclosure according to this, but in practice it the arbitral tribunal had a huge impact on the disclosure of the matter. For example, in the case of *Sehil v. Turkmenistan*, the arbitral tribunal first refused the request of the applicant to request the applicant to disclose the sponsor, and then the 2014 IBA Guidelines were issued. This request was made again and the arbitral tribunal approved its request.

There are few formal provisions in the current international arbitration rules for third-party funded disclosure systems, including disclosure subject, scope of disclosure, time of disclosure, and consequences of undisclosed, and third-party funding for international investment arbitration has emerged as a fact. it is foreseeable that the research on the third-party funding disclosure system will be put on the agenda by the arbitration institutions.

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