Has the time come for full and frank financial disclosure in international commercial arbitration?

By

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The purpose of this brief contribution is to ask whether arbitration rules should require full and frank financial disclosure by the parties at the early stages of an arbitral proceeding? By this I mean a protocol whereby each party would be required to demonstrate its financial ability to:

Claimant

- Pay the costs of the arbitration, as may be ordered against it by the Arbitral Tribunal, if any
- Pay the Respondent's legal fees and expenses, as may be ordered against it by the Arbitral Tribunal, if any
- Pay such amount as may be awarded against it by the Arbitral Tribunal in respect of the Respondent's counterclaims, if any

Respondent

- Pay the costs of the arbitration, as may be ordered against it by the Arbitral Tribunal, if any
- Pay the Respondent's legal fees and expenses, as may be ordered against it by the Arbitral Tribunal, if any
- Pay such amount as may be awarded against it by the Arbitral Tribunal in respect of the Claimant's claims, if any

The foregoing would include, but would not solely focus on, full disclosure of all related financial arrangements (including intra-company loans, insurance, TPF). The disclosure would require be updated in the event of any material change to the original or subsequent disclosures.

It could help introduce greater transparency into a rather opaque area of international arbitration by:

- Requiring all parties to:

    - Address in a candid manner their financial ability to avail of the bespoke private service that is commercial arbitration
    - Honor the commitments they entered into in agreeing to commercial arbitration
    - Respect and help to uphold the integrity of the arbitral proceedings

- Exposing/shedding light on:

    - Impecunious and/or insolvent (or potentially insolvent) parties
    - Potentially defaulting parties (including by updating the disclosure for material changes)
    - All matters that could reasonably give rise to arbitrator conflicts (including by updating the disclosure for material changes)

- Assisting the Arbitral Tribunal in determining whether to:

    - Order (i) security for costs and/or (ii) security for the amount in dispute
    - Order any other measures and/or take any other steps which it determines is essential to preserve the integrity of the process, to ensure procedural fairness, etc.
    - Disclose the existence of conflicts (potential or actual)

There are many potential problems with this proposal, which would rely on the parties acting in good faith. Thus, there would be scope for abuse of the proposed protocol – parties might be tempted to mislead the Arbitral Tribunal. Such actions could be sanctioned by, among other things, a finding of an abuse(s) of process by the defaulting party and/or possibly drawing adverse inferences.

Other problems would include potential difficulties in quantifying claims at the early stages of the arbitral proceedings (although similar issues arise when quantifying ad valorem institutional fees), the scope for delay, the scope of disclosure and the standard of review by the Arbitral Tribunal.

It would also raise various practical questions, such as:

- At what stage of the arbitration process these should be disclosed?

- Could this be disclosed preliminarily to the arbitration institution, or only be disclosed directly to the Arbitral Tribunal?

If "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman", could such financial transparency make for more fair and efficient arbitration?