

THE OUTSIDER'S IDENTITY IN INTERNATIONAL COMMERCIAL ARBITRATION—FROM THE GROUP OF COMPANIES DOCTRINE AND IBA GUIDELINES ON CONFLICT OF INTEREST TO ADVERSE COSTS AWARDS AGAINST THIRD-PARTY FUNDERS

*Tsai-fang Chen**

ABSTRACT

This paper studies the outsider's role in international commercial arbitration, comparing two scenarios where an outsider to an arbitration procedure takes up the identity of one of the parties based on their relationship and economic interests. In the first scenario, this paper looks into a non-signatory to the arbitration agreement that participates in the proceeding based on the group of companies doctrine. This controversial doctrine may allow a non-signatory third-party to be joined to the procedure based on the third-party and one of the signatories of the group of companies forming one and the same economic reality as well as the non-signatory third-party being involved in the negotiation, performance or termination of the contract. The economic interests of the parties involved in the transaction as well as the participation of the non-signatory are key to the changing of role of outsiders in an arbitration. In the second scenario, this paper focuses on the third-party funder's impact on an arbitration proceeding with regard to the disclosure and conflict of interest of arbitrators. International Bar Association [hereinafter IBA] Guidelines on Conflict of Interest in International Arbitration, General Standard 6(b) provides that a "legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party". The Explanation to this provision further clarifies that "third party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such, may be considered to be the equivalent of that party". The economic interests may therefore allow the arbitral tribunal to determine that the outsider would bear the identities of the funded parties for the purpose of the conflict of interest determination. These two scenarios are quite different regarding the role of the outsiders, as one scenario involves the outsider becoming a party to the dispute, while the other scenario is about conflict of interest of arbitrators. It does suggest that in different contexts, an outsider could take up the identity of a party to the arbitration as long as the involvement of the outsider can be justified in that particular context. The paper further reviews the issue related to the arbitral tribunal's jurisdiction over the funder, particularly with regard to whether the tribunal can make adverse costs awards directly against the funder. This paper proposes that the funder's economic interests relating to the outcome of the arbitration, in addition to the funder's control over the arbitral procedure, if sufficiently strong, could allow the arbitral tribunal to make binding costs awards against the funder. This is because in this particular context the funder could be considered to be the equivalent of the funded party based on a determination of implied consent. Otherwise, it can also be justified under an approach that focuses on the arbitral procedure instead of the arbitration agreement.

* Associate Professor, National Chiao Tung University, School of Law, Taiwan. A previous version of this paper has been presented at 2018 Taipei International Conference on Arbitration and Mediation, Taipei. Part of this research has been supported by a grant from Ministry of Science and Technology, Taiwan (107-2628-H-009-002). The author would like to thank the excellent research assistance of Yun-Wen Tsang and Shin-Ying Tsai. The author can be reached at: tchen@g2.nctu.edu.tw.

KEYWORDS: *the group of companies doctrine, third-party funding, adverse costs awards, conflict of interest*