- United Kingdom -

SHOULD THERE BE FULL AND FRANK FINANCIAL DISCLOSURE IN INTERNATIONAL ARBITRATION?

MATTHEW KNOWLES

Noted arbitration practitioner and commentator John Gaffney has raised the interesting question of whether institutional rules should require full and frank financial disclosure by the parties at the early stages of an arbitral proceeding. As he recognises, the proposal gives rise to "many potential problems". It seems to me that the answer is "no", but there are aspects of the proposal that may benefit the arbitral process. First of all, some points of principle:

- What consequence, if any, should follow from a party's unwillingness or inability to provide financial comfort? While generally (although not always) of central commercial concern, a party's financial position is likely to be at most incidental to the merits of any dispute, and is irrelevant to the validity of the arbitration agreement. It should certainly not affect a respondent's right to be heard fully in its defence nor, subject to certain limitations, a claimant's right to advance its claim.

- If a party considers that its financial circumstances could be a useful lever in resolving a dispute, whether they are in reality stronger or weaker (on a short or long term basis) than perceived to be, it will generally raise those circumstances.

- Ability to pay at any point in time prior to delivery of an award does not equal willingness to comply with the award voluntarily, nor should it necessarily do so.

- Other issues include whether:

  - such a change would unduly fail to reflect the differing approaches that national (and supranational) legal systems take to: (a) the allocation of party costs, and (b) ordering security for a respondent's costs; and

  - a respondent's solvency is a matter that the claimant (and any backers) must take a risk upon (in the absence of sufficient evidence to persuade a tribunal or court to order an asset freeze, typically on the basis of risk of dissipation).

That said, the principles that inform the proposal – transparency and the tribunal taking a firm case management approach from the outset of an arbitration – are broadly to be applauded. Can these aims be achieved without the need for a new protocol?

Existing tribunal powers and voluntary disclosure

Tribunals have a number of case management tools at their disposal to protect one party against another's unduly prejudicial behaviour. These include ordering the preservation of assets (supported by a court order if appropriate), ordering a party to provide security for costs, and a broad discretion when making costs awards.

Tribunals can, however, be hesitant to make full use of their powers. This may be due to a desire not to stifle a claim (for whatever reason), or because the use of such tools is not part of their legal tradition or the legal tradition of one or more of the parties and they feel the obligation to adopt a lowest common denominator trans-nationalism. Equally, it can be because they feel that the parties are commercial beasts, have accepted the rules and risks of the game in agreeing to

arbitration, and should broadly be allowed to get on with it, even if that means, for example, spending more than seems proportionate or making a claimant stump up all the tribunal's fees.

These reservations are not necessarily misconceived. It is, however, important to weigh against them the fact that it may be of significant value to a party deciding how much to spend on a particular issue, as well as informing its broader resolution strategy (*vaut le détour* or even *le voyage*?) for:

- The parties to exchange information about their respective budgets; and
- The tribunal to give early indications, even if non-binding, about the type and amount of costs awards that it might be prepared to make.

For example, is the costs award likely to be 'winner takes all' or prepared on an issue-by-issue basis? Will any notion of proportionality affect the amount of the costs award(s)?

On a slight tangent, much ink has been spilt (including by this writer) on whether a party's use of third party funding or litigation finance in the broader sense should affect a tribunal's decision as to whether to order a claimant to provide security for a respondent's costs. This is not the place to rehearse those arguments yet again (sighs of relief all round, no doubt).

It is certainly the case, though, that if a claimant who might be thought to be impecunious were to volunteer information about its financial position and ability to meet an adverse costs award, it might avoid the potential delays and loss of the tribunal's goodwill involved in resisting an application. Of course, whether or not that is the most attractive course of action will depend on a number of factors, including the likelihood and economic implications of being ordered to, say, post a bond. There is nothing objectionable about this; it is a commercial risk assessment. Counterparties can make investigations if they see fit and draw matters to the tribunal's attention, and in the absence of disclosure, tribunals should feel empowered to draw inferences and make appropriate orders.

Finally, to keep this response brief, there is a trend towards tribunals being expressly empowered to dispose of cases or issues summarily where appropriate. This power, used reasonably but robustly and supported by institutions and national courts where it is used appropriately, would seem likely to have a much more immediate and direct impact on cost rationalisation than a duty of disclosure.

It will be interesting to see how this debate develops.

Matthew Knowles
Partner, International Arbitration

ABOUT THE AUTHOR

Matthew has deep experience in international dispute resolution across many forums. Drawing on insights from senior roles in-house and in third party funding, he combines analytical and strategic excellence with project design and costs management expertise to provide his clients with outcome-focused advice.

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