

Third party funding: adding to the war chest of procedural tools available to Respondents?

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Overview

1. Disclosure
2. Challenge of arbitrators
3. Security for costs
4. Jurisdiction and admissibility
5. Allocation of costs
6. Stay of enforcement of an award

1. DISCLOSURE - Guidelines/Rules

- **IBA Guidelines on Conflict of Interest** (October 2014)
 - Parties to disclose 'any relationship, direct or indirect, between the arbitrator and...any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.'
- **ICC - Guidance Note on the disclosure of conflicts by arbitrators** (February 2016)
- **Singapore**
 - Disclose the existence and identity of the funder.
 - Third party funders must meet certain 'qualifications' (carrying on the principal business of funding and having access to sufficient funds).
- **Hong Kong Law Reform Commission** (October 2016)
 - Recommendation: Disclose the existence and identity of the funder.

1. DISCLOSURE - Cases

- ***Teinver v. Argentina*** (21 December 2012)

- Respondent: Requested that the Claimants 'provide all available information regarding the matter and the content of the agreement... and to also submit all related documentation'.
- Tribunal: Refused - it was not justified, however, it did not preclude granting a similar request in the future once the main pleadings had been filed.

- ***Guaracachi v. Bolivia*** (21 February 2013)

- Respondent: Requested the funding agreement in order to evaluate a security for costs request and to confirm that there were no conflicts of interest.
- Tribunal: Refused – the Respondent 'had failed to specify what the conflict of interest created by the "agreement" would be'.

- ***RSM v. St Lucia*** (8 April 2015)

- Respondent: Requested suspension of proceedings and for the disclosure of the funding arrangements on the basis that the Claimant had defaulted on payment of the security.
- Tribunal: Refused - disclosure was not relevant to its decision to suspend or discontinue the proceedings.

1. DISCLOSURE - Cases

- ***Muhammet Çap v. Turkmenistan***

- **1st attempt (15 February 2013)**

- Respondent: Requested whether there was funding and, if so, the terms of such funding.
- Tribunal: Denied - no grounds justifying the request. Tribunal notes the factors that 'may be relevant to justify an order for disclosure': conflicts of interest for the arbitrator; 'transparency and to identify the true party to the case'; costs allocation; security for costs application; and to ensure confidential information is not disclosed to parties with ulterior motives.

- **2nd attempt (12 June 2015)**

- Respondent: Requested disclosure on the basis of conflicts and a possible security for costs application.
- Tribunal: Granted - ordered the disclosure of the identity of the funder and 'the nature of the arrangements' with the funder, 'including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration'.

- ***EuroGas v. Slovakia (17 March 2015)***

- Respondent: Requested the identity of the funder to be disclosed.
- Tribunal: Granted - so that the arbitrators could check for conflicts.

1. DISCLOSURE - Treaties

- **EU – Vietnam FTA**
 - Disclosure of the existence and nature of the funding arrangement, and the name and address of the third party funder (Chapter 3, Article 11(1))
- **CETA – Canada and EU**
 - Disclosure of the name and address of the funder (Chapter 8, Article 8.26)
- **TTIP**
 - Disclosure of the name and address of the funder (Section 3, Article 8)

2. CHALLENGE OF ARBITRATOR

- *RSM v. St Lucia* (23 October 2014)
- The Claimant unsuccessfully challenged the arbitrator for having an underlying bias against third party funders because he compared them to 'gamblers' and 'adventurers' in his assenting opinion.

3. SECURITY FOR COSTS

- ***Guaracachi v. Bolivia*** (11 March 2013)
 - The mere existence of third party funding is not a sufficient causal link such that the tribunal can infer that the Claimants will not pay an eventual award of costs.
- ***RSM v. St Lucia*** (13 August 2014)
 - The Tribunal granted security for costs. The Tribunal's decision was largely based on the Claimant's history of not respecting cost orders, but it did also consider relevant the existence of third party funding.
- ***SAS v. Bolivia*** (11 January 2016)
 - The 'existence of a third-party funder may be an element to be taken into consideration'.

4. JURISDICTION AND ADMISSIBILITY - Issues

- Can the funder be the 'real party in interest'?
- What if the funder fully controls the proceedings?
- What if all of the economic interest in the claim is transferred to the funder – should the funder be the correct Claimant and not the party with the nominal ownership? If not, should the assessment of quantum account for the beneficial interests owned only by the Claimant?
- What if there has been a full assignment of the claim to the funder?

4. JURISDICTION AND ADMISSIBILITY - Russia

- ***RosInvestCo v. Russia* (12 September 2010)**
 - Respondent: The Claimant was not an 'investor because the Claimant was left as a mere nominal owner.
 - Tribunal: Rejected - the treaty contained a 'very wide' definition of investor. 'Claimant remained at all times...the formal and legal owner...Nothing in the Investment Definition excludes an "*investment*" in which an economic interest has been transferred to a third party'.
- ***Quasar de Valores v. Russia* (20 July 2012)**
 - Respondent: The Claimants had no real stake in the arbitration and were not in control and therefore the entire arbitration would be an abuse of process, depriving the tribunal of jurisdiction.
 - Tribunal: Rejected - 'there is no reason or principle why they were not entitled to pursue rights available to them under the BIT, and accept the assistance of a third party, whose motives are irrelevant as between the disputants in this case'.

4. JURISDICTION AND ADMISSIBILITY - Argentina

- ***Abaclat v. Argentina*** (4 August 2011)

- Respondent: The Claimants did not consent to arbitrate or the claim was not admissible because the funder had control of the proceedings and there was a conflict of interest between the funder and Claimants. Further, the claims were inadmissible because the third party funder was pursuing hidden interests.
- Tribunal: Rejected - the Claimants has validly expressed their consent to arbitration, as the transfer of case control to the funder has been agreed on a free and informed basis.

- ***Ambiente v. Argentina*** (8 February 2013)

- Respondent: The funder was the 'driving force behind the arbitration' and it was in full control, which created 'an impermissible barrier between the Claimants and their lawyers' and rendered the funder the 'real party in interest'.
- Tribunal: Rejected - the funder was 'no more than a third party which had a special relations to the claimants'. The funder 'does not interfere with the ability of the claimants to conduct the present proceedings in their best interest and to instruct their counsel accordingly'.

- ***Giovanni v. Argentina*** (17 November 2014)

- Tribunal: 'individual views may differ as to whether third-party funding is or is not desirable or beneficial, either at the national or at the international level, but the practice is by now so well established both within many jurisdictions and within international investment arbitration that it offers no grounds *in itself* for objection to the admissibility of a request to arbitrate'.

4. JURISDICTION AND ADMISSIBILITY - Argentina

- ***Teinver v. Argentina*** (21 December 2012)
 - Respondents: The Claimants were not the real parties in interest and instead the funder, Burford, must be considered to be the Claimant because it was the 'only party that would seem to be potentially benefited in the case'. Burford did not fulfill the basis requirements of being an 'investor'.
 - Tribunal: Dismissed - the events post-dated the filing of the arbitration and therefore there was no need to address the funding agreement's effect on the Claimants' standing.

5. ALLOCATION OF COSTS

- States have sought to deny claimants a right to be indemnified for their legal costs on the ground that they were funded by a third party.
- Tribunals have consistently held that they know of 'no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs.' *Fuchs v Georgia*; *ATA v. Jordan*; *RSM v Grenada*.
- ***Quasar de Valores v. Russia* (20 July 2012)**
 - Respondent: The Claimants 'have incurred no costs in this case...as they don't have to pay a penny of any recovery to counsel or [the funder]. It is a total free ride'.
 - Tribunal: No costs award to the (successful) Claimants because they had incurred no costs. Instead, the costs (which were substantially higher than the award of damages) were borne by a third-party funder that had no standing before it. **However, the tribunal distinguished this case from more conventional third-party funding agreements which aim at generating immediate financial returns.**

5. ALLOCATION OF COSTS - a tool for Claimants?

- ***Essar Oilfields Services Limited v Norscot Rig Management PVT Limited*** (15 September 2016)
 - Arbitrator required Essar to pay Norscot's costs of the litigation funding of £1.94 million (300% of the funding or 35% of the recovery).
 - The funding costs were deemed to be 'other costs' under s59(1)(c) of the Arbitration Act.
 - Essar challenged the Award on the grounds of serious irregularity under s68(2) (b) of the Arbitration Act alleging that the arbitrator had exceeded his powers since 'other costs' did not include litigation funding costs.
 - The application was refused.

6. STAY OF ENFORCEMENT OF AN AWARD

- ***Adem Dogan v Turkmenistan*** (24 November 2014)
 - The *ad hoc* Committee refused to lift the stay of enforcement, in part, because if the funds were transferred by Turkmenistan and the award was annulled it would be difficult for Turkmenistan to recoup such funds if the funds had been transferred to the third-party funder.

CONCLUSION

- Likely to be used more frequently by States
- New treaties will address the issue
- More guidelines on disclosure
- More development in the case law:
 - Disclosure
 - Jurisdiction
- Enforcement