

Third Party Funding in Investment Arbitration

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A. Overview

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A. Overview

- *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597:

“Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely, maintenance of an action in consideration of a promise to give a maintainer a share in the proceeds or subject matter of the action....” (para. 33)

A. Overview

- Singapore Civil Law (Amendment) Bill, Second Reading, 9 Jan 2017:

“The Bill makes clear that while the tort is abolished, contracts affected by maintenance and champerty will continue to be contrary to public policy. Third-party funding contracts will therefore still be unenforceable.

It is only for certain prescribed categories of proceedings that a third-party funding contract will not be contrary to public policy or illegal by reason that it is a contract for maintenance or champerty.

a. These categories will be specified in subsidiary legislation after the Bill comes into force.

b. At the outset, third-party funding will only be permitted for international arbitration proceedings (and related court and mediation proceedings).” (para. 18)

A. Overview

- Singapore Civil Law (Amendment) Bill:

“2. The Civil Law Act is amended by inserting, immediately after section 5, the following sections:

“Abolition of tort of maintenance and champerty

5A.—(1) It is declared that no person is, under the law of Singapore, liable in tort for any conduct on account of its being maintenance or champerty as known to the common law.

(2) Subject to section 5B, the abolition of civil liability under the law of Singapore for maintenance and champerty does not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Validity of certain contracts for funding of claims

5B.—(1) This section applies only in relation to prescribed dispute resolution proceedings.

(2) A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.

A. Overview

- Hong Kong Arbitration and Mediation (Third Party Funding) (Amendment) Bill

“98K. Particular common law offences do not apply

The common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to third party funding of arbitration.

98L. Particular tort does not apply

The tort of maintenance (including the tort of champerty) does not apply in relation to third party funding of arbitration.”

B. Definitions

- Who is a third party funder?
- A simple third party financing arrangement:
 - Third party funder agrees to pay for the client's legal fees (usually including experts, outside counsel and disbursements) in accordance with an agreed budget
 - Financing and other terms agreed with the funder will be reflected in a funding agreement to be entered into between the client, client's lawyers and the funder
 - Usually provides for some degree of confidentiality

B. Definitions

- W. Park and C. Rogers, Third Party Funding in International Arbitration: The ICCA Queen-Mary Task Force, 2014:

“One reason why third-party funding is difficult to define is that economic interests in a party or a dispute can come in many shapes and sizes. Arrangements may be structured as debt instruments, equity instruments, risk-avoidance instruments, or as full transfers of the underlying claims. Some agreements permit or require active participation of the third-party funder in key strategic decisions in the case, while other agreements are limited to periodic updates.”

“The terms ‘third-party funder’ and ‘after-the-event-insurer’ refer to any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.”

B. Definitions

- IBA Guidelines, General Standard 6(b)

“any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.”

B. Definitions

- Transatlantic Trade and Investment Partnership (TTIP), Chapter II (Investment), Section 3, Art. 1.2:

“Third Party funding’ means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.”

- Comprehensive Economic and Trade Agreement (CETA), Chapter 8 (Investment), Section A, Art. 8.1:

“Third party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.”

C. Security for Costs

- The existence of third-party funding or a third-party funder raises a number of issues with respect to whether an arbitral tribunal can or should grant security for costs:
 - Should arbitral tribunals take into account the existence of a third-party funding arrangement or a third-party funder in assessing applications for security for costs?
 - What is the relevance of a third-party funding agreement, or particular terms in such agreement, in ascertaining whether a particular claimant is impecunious?

C. Security for Costs

- *Guaracachi America, Inc. and Rurelec PLC v. Bolivia* (UNCITRAL), Procedural Order No. 14, 11 Mar 2013:

*“The Respondent has not, however, been able to supply evidence to justify the extraordinary measure that it requests. As a factual matter, the Respondent has not shown a sufficient causal link **such that the Tribunal can infer from the mere existence of third party funding** that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not.” (para. 7)*

C. Security for Costs

- *RSM v. Saint Lucia* (ICSID), Decision on Saint Lucia's Request for Security for Costs, 13 Aug 2014:

“Moreover, the admitted third party funding further supports the Tribunal’s concern that Claimant will not comply with a costs award rendered against it ... it is doubtful whether the third party will assume responsibility for honoring such an award.” (para. 83)

*“The difference between the present proceeding and previous ICSID arbitrations in which the request for security costs was in every case denied, is that in this case the circumstances ... occur cumulatively. Those circumstances are, in summary, the proven history where Claimant did not comply with cost orders and awards due to its inability or unwillingness, the fact that it admittedly does not have sufficient financial resources itself **and the (also admitted) fact that it is funded by an unknown third party** which, as the Tribunal sees reasons to believe, might not warrant compliance with a possible costs award rendered in favor of Respondent.” (para. 86)*

C. Security for Costs

- *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID), Procedural Order No. 3, 23 Jun 2015:

“[T]he underlying facts in [RSM v St Lucia] were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders.” (para. 122)

*“The Tribunal is of the view that financial difficulties and third party-funding – which has become a common practice – **do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs.**” (para. 123)*

C. Security for Costs

- *South American Silver Limited (Bermuda) v. Bolivia* (UNCITRAL), Procedural Order No. 10, 11 Jan 2016:

*“The **existence of the third-party funder alone does not evidence the impossibility of payment or insolvency.** It is possible to obtain financing for other reasons. The fact of having financing alone does not imply risk of non-payment.” (para. 76)*

*“If the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims. In sum, **the existence of a funder is an element to take into account.** but tribunals have been clear in that the existence of the funder alone is not sufficient to grant security for costs.” (paras. 77-78)*

C. Security for Costs

- EU-Vietnam FTA, Chapter 8 (Trade in Services, Investment and E-Commerce), Article 11:

*“3. When applying Article 22 (Security for Cost), **the Tribunal shall take into account whether there is third party funding.** When deciding on the cost of proceedings pursuant to Article 27(4) (Provisional Award) the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 have been respected.”*

C. Security for Costs

- ICCA-QMUL Task Force on Third Party Funding in International Arbitration, Subcommittee on Security for Costs and Costs, Draft Report, 1 Nov 2015:

“As regards security for costs, the report has reviewed a number of arbitration laws, arbitration rules and arbitral awards on security for costs to conclude to the following observations and recommendations:

*1. Arbitral tribunals should ascertain the financial situation of the claimant starting from general financial records, such as annual accounts and statutory returns. **A third-party funding agreement may be considered as an indication of the funded party’s financial situation along with other financial records, however on its own it is no necessary indication that a claimant is impecunious.**”*

2. ... [I]f the test in commercial arbitration is that the applicant must show material change of circumstances that were commercially unforeseeable (consent perspective), then procuring external funding of legal costs should not usually be proof that circumstances have materially changed in a way that is commercially unforeseeable.”

C. Security for Costs

- ICCA-QMUL Task Force on Third Party Funding in International Arbitration, Subcommittee on Security for Costs and Costs, Draft Report, 1 Nov 2015:

“3. ... [I]f the test in investment arbitration is that the applicant must show that there are extreme circumstances that warrant a security for costs order, then mere recourse to third-party funding by a claimant that has become impecunious cannot readily be characterized as carrying an element of abuse, and cannot of itself be taken as a reason for tribunals to award security for costs.

*4. When reviewing third-party funding agreements for the purposes of assessing security for costs applications, tribunals should pay particular attention to **clauses on termination rights and clauses on funders’ liability for adverse costs.**”*

D. Disclosure

- The existence of third-party funding or a third-party funder raises a number of issues with respect to disclosure:
 - Should or must parties disclose the existence and/or identity of a third-party funder, and if so, on what basis and when?
 - Should or must parties disclose the terms and/or nature of a third-party funding arrangement, and if so, on what basis, which terms and when?

D. Disclosure

- *Teinver S.A. et al v Argentina* (ICSID), Decision on Jurisdiction, 21 Dec 2012

*“[I]t was reported that the alleged majority shareholder of some of the Claimants had transferred part of its ICSID claim to a U.S. investment fund in exchange for a contribution to pay the costs arising in the proceedings. Respondent requested that the Tribunal require Claimants to provide **all available information regarding the matter and the content of the agreement that was signed with said investment fund, and to also submit all related documentation.**” (para. 24)*

*“[A]fter careful consideration of their respective positions on the matter of obtaining third-party funding, the Tribunal had **decided not to grant Respondent’s request** at this early stage as it did not consider the currently available information on record as sufficient. However, the Tribunal added that it did not preclude granting a similar request in the future once the main pleadings had been filed.” (para. 26)*

D. Disclosure

- *Guaracachi America, Inc. and Rurelec PLC v. Bolivia* (UNCITRAL), Procedural Order No. 13, 21 Feb 2013
 - The Respondent requested the funding “agreement” and “further documentation” in order to evaluate a security for costs request and to confirm that there were no conflicts of interest “ (para. 6)

*“The Tribunal decides not to order the production of the “agreement” or “further documentation” by the Claimants. Regarding the possible existence of a conflict of interest, the **Respondent has failed to specify what the conflict of interest** created by the “agreement” would be. Moreover, the Respondent states in its request for *cautio judicatum solvi* (security for costs) that **it has discovered by means of other documents the identity of “The Funder”, Salvia Investment Limited.** In any case, the applicable provisions governing conflicts of interest ... do not foresee the production of document by the Parties, but rather disclosure by the arbitrators upon becoming aware of circumstances that could create a conflict of interest.” (para. 8)*

D. Disclosure

- *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID), Procedural Order No. 3, 12 Jun 2015
 - The Respondent requested disclosure of “the identity and nature of the involvement of third-party funders for Claimants in this proceeding” on the basis this was necessary to ensure there were no conflicts of interest, and that such disclosure may be relevant to a potential security for costs application

*“[T]he Tribunal has decided and hereby orders that within 15 days of the date of this Procedural Order, Claimants shall confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, **shall advise Respondent and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.**” (para. 13)*

D. Disclosure

- *South American Silver Limited (Bermuda) v. Bolivia* (UNCITRAL), Procedural Order No. 10, 11 Jan 2016:
 - The Respondent requested disclosure of name of third-party funder on the basis that it was necessary to ensure the integrity of the arbitration and ensure the tribunal’s independence and impartiality.
 - The Respondent also requested the terms of the funding agreement in order to determine whether the arbitration claims had been assigned, and whether the third-party funder had committed to pay for an adverse costs order

“In the Tribunal’s opinion, there is basis to order the *disclosure of the name of the third-party funder, but not to order the disclosure of the agreement entered into with the third-party funder.*” (para. 84)

D. Disclosure

- IBA, Guidelines on Conflicts of Interest in International Arbitration (Oct 2014), General Standards:

*“(7) **Duty of the Parties and the Arbitrator.** (a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or 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. The party shall do so on its own initiative at the earliest opportunity.”*

D. Disclosure

- ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 22 Feb 2016:

“Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.”

- SIAC Investment Arbitration Rules, 1 Jan 2017, Rule 24

“In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to: [...]

l. order the of the existence of a Party’s third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder’s interest in the outcome of the proceedings, and/or whether or not the funder has committed to undertake adverse costs liability”

D. Disclosure

- Transatlantic Trade and Investment Partnership (TTIP), Chapter II (Investment), Section 3, Art. 8:

“1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to ... the Tribunal ... the name and address of the third party funder.

2. Such notification shall be made at the time of the submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.”

- Comprehensive Economic and Trade Agreement (CETA), Chapter 8 (Investment), Section A, Art. 8.26:

“1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.

2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.”

E. Allocation of Costs

- The existence of third-party funding or a third-party funder raises a number of issues with respect to the allocation of costs between the parties:
 - Should a funded party that has prevailed in the arbitration be able to recover costs where these costs have been funded by a third party?
 - Should a funded party that has prevailed in the arbitration be able to recover outcome-dependent payments made to the third-party funder?

E. Allocation of Costs

- *Ioannis Kardassopoulos & Ron Fuchs v. Georgia* (ICSID), Award, 3 Mar 2010:

“The Respondent claims that the Claimants’ legal costs are excessive and because the Claimants’ costs have been borne in part by a third party investor it is questionable whether such costs are properly recoverable.” (para. 686)

*“The Tribunal is not persuaded in the circumstances of these cases that the Claimants should not be allowed to recover their reasonable costs. The Tribunal observes that among those factors identified by the Respondent in support of its submissions on costs is the fact that the Claimants have an arrangement with a third-party concerning the financing of these proceedings. **The Tribunal knows 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.**”* (para. 691)

E. Allocation of Costs

- *Ron Fuchs v. Georgia* followed in subsequent cases:
 - *RSM Production Corporation v. Grenada* (ICSID Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 Apr 2011, para. 68,
 - *ATA Construction, Industrial and Trading Company v. Jordan* (ICSID Annulment Proceeding), Order Taking Note of the Discontinuance of the Proceeding, 11 Jul 2011, para. 34.

E. Allocation of Costs

- *Quasar de Valores v. Russia* (SCC), Award, 20 Jul 2012:

*“The usual arguments about the recoverability of costs where a party’s representation in a case has been financed by a third party are inapposite here, because such third-party financing is typically part of a legally enforceable bargain under which the prevailing party in the arbitration has given up something in return for that support. Here, it is conceded that there is **no legal duty on the part of the Claimants to hand over any recovery on account of costs to Menatep.**” (para. 223)*

*“The Respondent’s position is this: **[The Claimants] have incurred no costs** in this case. Stipulation from counsel: they don’t have to pay a penny of any recovery to counsel or to Menatep. **It is a total free ride.**” (T:Day 9:13: 1-4.) **This straightforward proposition must be right.** On the one hand, the Claimants have neither expended money nor incurred obligations on account of the costs of pursuing their claims. On the other, Menatep, the Claimants’ Good Samaritan (as it were), has no standing before this Tribunal or indeed more generally under the BIT. ” (para. 224)*

E. Allocation of Costs

- ICCA-QMUL Task Force on TPF in International Arbitration, Subcommittee on Security for Costs and Costs, Draft Report, 1 Nov 2015:

“The fact that a party’s costs have been funded should generally not be regarded as a relevant factor in determining whether or not costs are to be allocated based on the outcome of the case.”

“It is not appropriate for tribunals to award funding costs (such as a conditional fee, ATE-premium or litigation funder’s return), as they are not procedural costs incurred for the purposes of an arbitration.”

- Could such funding costs be claimed as a head of damages (as opposed to being claimed as costs)?

E. Allocation of Costs

- *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited* [2016] EWHC 2361 (Comm)
 - Arbitrator held Norscot was entitled to the costs of litigation funding, which included not just lawyers' costs but also sums due to Woodford Litigation Funding under funding agreement
 - Challenge brought on the basis that arbitrator exceeded his powers (S. 68(2)(b) of the English Arbitration Act)

*“In my judgment, therefore, I unhesitatingly conclude that the arbitrator's interpretation of "other costs" was **correct, in that it extended in principle to the costs of obtaining third party legal funding. Whether then to award it is a matter of discretion.**” (para. 70)*

“Thus the arbitrator was entitled to interpret "other costs" so as to include the costs of third party funding. There was therefore no error of law anyway. Given my decisions on the two key issues of Characterisation and Construction in favour of Norscot, I deal with the remaining issues somewhat more shortly.” (para. 72)

F. Cost Orders against Funders

- Can arbitral tribunals render costs orders directly against third-party funders?
- *C.f.* English courts: see *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144:

*“However I particularly agree with and wish to associate myself with the judge's general approach, which is to emphasise that **the derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs** on the basis upon which they have been assessed against those whom he chose to fund. That is not to say that there is an irrebuttable presumption that that will be the outcome, but rather that that is the outcome which will ordinarily, in the nature of things, be just and equitable.” (para. 27)*

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F. Cost Orders Against Funders

- ICCA-QMUL Task Force on TPF in International Arbitration, Subcommittee on Security for Costs and Costs, Draft Report, 1 Nov 2015:

*“In principle, **a tribunal will lack jurisdiction** to issue a costs order against a third-party funder. The third-party funder is not typically party to the arbitration agreement, and has no involvement in the underlying dispute between the two parties in an arbitration. While funders may be involved in the proceedings, this cannot readily be interpreted as consent to arbitrate. The sub-committee is **not aware of any arbitral award ordering a third-party funder to pay adverse costs.**”*

- But might it be possible, in particular cases, to award costs against third-party funders, based on various theories that could bind non-signatories to the arbitration agreement?

G. Future Directions

- Disclosure
- Cost orders (and other orders, e.g. security for costs) against funders
- Funding for Respondent States
- Further regulation for funders?
 - See Singapore Civil Law (Amendment) Bill (references to new Sections 5B(3), 5B(8)(a), 5B(10)): Minister for state for law is empowered to make regulations prescribing the qualifications and other requirements which every qualifying third-party funder must comply with
 - If regulations are not complied with, funder would cease to be a “qualifying Third-Party Funder” and funding contract would be unenforceable: Singapore Civil Law (Amendment) Bill (references to new Section 5B(2)).