Three ‘Pitfalls’ for the Unwary: Third-Party Funding in Asia

Kluwer Arbitration Blog

December 15, 2018

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Please refer to this post as: Darius Chan, ‘Three ‘Pitfalls’ for the Unwary: Third-Party Funding in Asia’, Kluwer Arbitration Blog, December 15 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/15/three-pitfalls-for-the-unwary-third-party-funding-in-asia/

Part I

For some time practitioners would have seen news alerts headlining that third-party funding is now permitted in Singapore and Hong Kong for arbitration and arbitration-related court proceedings. Digging a little deeper beyond the shiny new labels, this article highlights three practical “pitfalls’ which practitioners would have to be mindful of when dealing with third-party funding in Singapore and Hong Kong.

First, there are various disclosure obligations (and in Singapore, those obligations fall on counsel); secondly, funded claimants should expect to see respondents filing requests for the funded claimant to disclose the terms of the funding agreement; and thirdly, respondents ought to be aware that costs of litigation funding may be awarded against the respondent as part of a costs award.

Disclosure Obligations

Generally speaking, registered foreign lawyers and Singapore solicitors who are bound by Singapore’s Legal Profession (Professional Conduct) Rules 2015 (*Singapore PCR*) must disclose, to the court or tribunal and every other party to the proceedings, the *existence* of any third-party funding contract, as well as the identity and address of any third party funder, “*when conducting any dispute resolution proceedings before a court or tribunal*”. (Rule 49A(1) of the Singapore PCR) For funding contracts entered into prior to the commencement of proceedings, the disclosure must be made at the date of commencement of those proceedings. For funding contracts entered into on or after the date of commencement of proceedings, disclosure must be made “*as soon as practicable*”. (Rule 49A(2) of the Singapore PCR)

In Hong Kong, under Article 98U of the Arbitration Ordinance, a funded party is obliged to give written notice of the fact that a funding agreement has been made, and the name of the funder, to each other party and the arbitration body (which is defined to mean the tribunal or court, the emergency arbitrator or the mediator as the case may be). For funding contracts entered into on or before the commencement of proceedings, the disclosure must similarly be made on commencement of those proceedings. For funding contracts entered into after the date of commencement of proceedings, disclosure must be made within 15 days after the funding agreement is made.

Taking a step back, disclosure is seen to be important in avoiding potential conflict of interests, for example, an arbitrator or her colleagues or firm may have a relationship with a third-party funder involved in the case or where there are repeat appointments for an arbitrator in cases involving the same funder. However, unlike Hong Kong which places the disclosure obligation on parties, Singapore has chosen to place the disclosure obligation on *counsel* instead. This raises several issues.

First, it may create an uneven playing field. Unregistered foreign counsel who "fly in and fly out" of Singapore to represent parties in Singapore-seated arbitrations do not appear to be bound by the disclosure requirements under the Singapore PCR.

Second, the involvement of one Singapore-registered counsel (whether junior or otherwise) in an otherwise multi-jurisdictional counsel team may in and of itself trigger the disclosure obligations under the Singapore PCR.

Third, under section 98N of the Hong Kong Arbitration Ordinance, the disclosure obligation appears to be triggered not just for arbitrations seated in Hong Kong, but also for arbitrations where the legal services for that arbitration are provided in Hong Kong. The situation is less clear for Singapore. Are the disclosure obligations on counsel under the Singapore PCR triggered for Singapore-seated arbitrations, or arbitrations seated elsewhere but heard in Singapore, or both? The definition of "*tribunal*" under the Singapore PCR defines the term "*tribunal"* to mean "… *any tribunal in Singapore that is established by law*" including "*any arbitral tribunal as defined in … section 2(1) of the International Arbitration Act*". (Rule 2 of the Singapore PCR) Arguably this definition extends to (i) Singapore-seated arbitrations regardless of where hearings are conducted; and (ii) arbitration proceedings with hearings conducted in Singapore regardless of the seat of the arbitration; although this is by no means clear.

It may be a matter of time before all major arbitral rules (and investment treaties) require parties to disclose the existence of third-party funding arrangements. For instance, Rule 44 of the new 2018 HKIAC Administered Arbitration Rules coming into force on 1 November 2018 contains such disclosure rules. Under Rule 24(l) of the SIAC Investment Arbitration Rules, the Tribunal has the express power to order disclosure of the existence of a party's third-party funding, including details of the funder's interest in the outcome of the proceedings.

In this connection, practitioners should be aware of SIAC Practice Note PN – 01/17 dated 31 March 2017 (*SIAC Practice Note*) which sets out standards of practice and conduct to be observed by arbitrators in SIAC arbitrations that are funded. The SIAC Practice Note provides that arbitrators have the power to order the disclosure of the existence of third-party funding, including details of the funder's interest in the outcome of the proceedings.

What next if one finds oneself in a proceeding where a funded party (typically the claimant) has made a disclosure on the existence of a funding agreement?

Part II

Security for costs & disclosure of terms of funding agreement

A possible first reaction may be to think about applying for security for costs against the funded claimant. Such an application may be accompanied or preceded by an application seeking an order that the claimant discloses the terms of the funding agreement. Consequently, funded claimants should expect to see respondents filing such disclosure requests.

Respondents seeking security will typically argue that, in the absence of security, the respondent will be unable to enforce a potential costs award against the claimant because the claimant has no funds of its own, and the respondent has no means of enforcement against the third-party funder directly. The counter-argument for claimants has been that "*[t]he fact of having financing alone does not imply risk of non-payment*" and that ordering security every time that third-party funding is established would "*increas[e] the risk of blocking potentially legitimate claims*".[fn] *South American Silver Limited (Bermuda) v Bolivia (UNCITRAL), Procedural Order No. 10*, 11 January 2016, paragraphs 75 to 77.[/fn] The SIAC Practice Note expressly states that the involvement of a funder alone shall not be taken as an indication of the financial status of a disputant party.

Hitherto, investment and commercial arbitration tribunals tend to reject security for costs applications which are *mainly* or *exclusively* based on the grounds that the claimant is funded by a third party funder.[fn] See for instance, *Guaracachi America, Inc. and Rurelec PLC v Bolivia* (UNCITRAL), Procedural Order No. 14, 11 Mar 2013; *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic* (ICSID), Procedural Order No. 3, 23 Jun 2015; *South American Silver Limited (Bermuda) v Bolivia* (UNCITRAL), Procedural Order No. 10, 11 Jan 2016. See also ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, Chapter 6.[/fn] Nevertheless, there is a practical difference when it comes to *burden of proof*. At one end of the spectrum it is well-known that, Gavan Griffith QC, in his capacity as tribunal member in an investor state arbitration has suggested that, once third-party funding is revealed, "*the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs should not be made*".[fn] *RSM Production Corporation v St Lucia*, Assenting Reasons of Gavan Griffith QC, 12 August 2014, paragraph 18.[/fn] A similar approach has been suggested by others, namely "*where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists*".[fn] Gary Born, *International Commercial Arbitration*, page 2496.[/fn]

In relation to an application for security for costs, the terms of a funding agreement are arguably relevant, such as whether the funder is liable to pay an adverse costs order against the claimant and whether and under what conditions the funder can stop funding the claimant. Consequently, practitioners acting for respondents may consider taking out applications requesting that the claimant disclose the terms of the claimant's funding agreement—one would expect such applications to made almost routinely when a claimant has disclosed the *existence* of a funding agreement in the first instance.

Hitherto, investment arbitration tribunals have been divided on whether to allow such applications for disclosure.[fn] See, for instance, *South American Silver Limited (Bermuda) v Bolivia* (UNCITRAL), Procedural Order No. 10, 11 Jan 2016; *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan* (ICSID), Procedural Order No. 3, 12 Jun 2015; *Guaracachi America, Inc. and Rurelec PLC v Bolivia* (UNCITRAL), Procedural Order No. 13, 21 Feb 2013; *Teinver S.A. et al v Argentina* (ICSID), Decision on Jurisdiction, 21 Dec 2012. [/fn] It has been suggested that tribunals ought to accept an application for disclosure of third-party funding agreements, but should limit disclosure orders to the provisions that are strictly necessary to assess the extent to which the funder may cover (or not) an adverse costs order.[fn] ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, Chapter 6.[/fn] In any event, a funded claimant ought to be prepared that all the terms of its funding agreement would be subject to disclosure.

Does the foregoing mean it would be in the claimant's interest to *resist* disclosure of the terms of its funding agreement?

Costs of Litigation Funding Included As Part of Costs Award

Arguably no. This is because an arbitral tribunal seated in Singapore or Hong Kong could order that the costs incurred by a party to obtain funding is to be borne by the opposing party.

The Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration has suggested that costs of obtaining third-party funding could be awarded as part of a costs award, subject to (i) the test of reasonableness; and (ii) disclosure of the details of funding costs from the outset of or during the arbitration so that the award debtor can assess its exposure.

In *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), the English High Court upheld a costs award under which an ICC tribunal awarded Norscot, *inter alia*, £1.94m, being the sum owed by Norscot to a third-party funder for advancing Norscot the legal costs to bring the underlying claim against Essar. The funding arrangement was as follows: Norscot obtained funding of £647,000 in exchange for which the funder was entitled, if Norscot succeeded, to an uplift equivalent to 300% of the funding or 35% of Norscot's recovery, whichever was greater.

Under sections 59 and 61 of the English Arbitration Act 1996, a tribunal may make an award allocating the costs of the arbitration between the parties. The costs of the arbitration include "legal *or other costs of the parties*". The English High Court took the view the phrase "*other costs*" can include the costs of obtaining litigation funding. The awarding of such costs was therefore within the tribunal's general discretion on costs.

It was not clear from the judgment whether Essar was aware, at the outset, of Norscot's terms of funding, but the judgment did record how Essar had forced Norscot, by Essar's unreasonable conduct, into a position where Norscot had no alternative, but to obtain third-party funding.

The statutory provisions in Singapore and Hong Kong do not provide that an arbitrator can award "legal *or other costs* of the parties". For instance, Article 74 of Hong Kong's Arbitration Ordinance provides that an arbitral tribunal may include in an award directions "*with respect to costs of the arbitration proceedings*".

Institutional rules are perhaps clearer on this issue. Rule 37 of the 2016 SIAC Rules provides that the tribunal shall have the authority to order "the legal *or other costs* of a party be paid by another party" (italics added). The SIAC Practice Note further states that a tribunal may take into account the existence of any funder in (i) apportioning the costs of the arbitration; and (ii) in ordering in its award that all or a part of the legal *or other costs* of a party be paid by another party. Similarly, Rule 35 of the SIAC Investment Arbitration Rules and Rule 34.4 of the 2018 HKIAC Administered Arbitration Rules both allow an arbitral tribunal to take into account any third-party funding arrangement in fixing and apportioning the costs of arbitration.

Hitherto, the Singapore courts have been reluctant to interfere with a tribunal's costs award.[fn] *VV v VW* [2008] 2 SLR(R) 929.[/fn] The Hong Kong courts have gone a step further by granting, in the absence of special circumstances, indemnity costs for unsuccessful challenges to an arbitration agreement or to an award.[fn] *Chimbusco International Petroleum (Singapore) Limited v Fully Best Trading Limited* [2015] HKEC 2573. *See also Peter Cheung & Co v Perfect Direct Limited & Yu Guolin* (HCMP 2493/2012) and *New Heaven Investments Limited & Rondo Development Limited v Yu Guolin* (HCA 115/2013).[/fn] In an appropriate case, it is therefore arguable that a SIAC or HKIAC tribunal in a Singapore or Hong Kong-seated arbitration could award the costs of third-party funding as part of its costs award against a respondent.