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Recoverability of Funder's Fee by a Third Party funded Claimant in International Arbitration

There are not many international arbitration cases that explicitly address questions of the extent of cost recovery by a claimant who has benefitted from funding by a third party litigation funder. In this short document we will focus on two of these cases to highlight the development of third party litigation funding (TPF) from the relatively early days of such funding to today.

Kardassopoulos v Georgia, Fuchs v Georgia (2010)[1]

The first cases date back to early 2010, when funding of international arbitrations was in its infancy – in two parallel cases (Kardassopoulos v Georgia and Fuchs v Georgia) the losing respondent argued that a winning claimant who is supported by a litigation funder should not be able to recover its costs. The award is in the public domain and the tribunal held that

> *'ICSID arbitration tribunals have exercised their discretion to award costs which follow the event in a number of cases, demonstrating that there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs.'* (Para 689).

That in itself is a fairly uncontroversial statement. The Tribunal in that matter went on to add the following with regard to the possible impact of the fact that a claimant is supported by external financing from a dispute funder:

> *'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. … The Tribunal finds that it is appropriate and fair in this case to*

[1] http://www.italaw.com/sites/default/files/case-documents/ita0445.pdf

> *award the Claimants their costs of the arbitrations, including legal fees, experts' fees, administrative fees and the fees of the Tribunal.' (Para 691, 692)*

The principle set out in the Kardassopoulos and Fuchs cases has recently been developed further in a commercial arbitration matter.

ESSAR OILFIELDS SERVICES LIMITED v NORSCOT RIG MANAGEMENT PVT LIMITED [2016] EWHC 2361 (Comm)[2]

In short the sole arbitrator in that case held that a funded claimant is at least in certain circumstances entitled to recover from the defendant the share of the proceeds that it is contractually obliged to pay to the litigation funder. The defendant applied to the English courts to have the decision set aside but failed. Some of the key statements of both the sole arbitrator and the judge are worth repeating here:

At para 31 of the judgment the judge quotes the sole arbitrator (Sir Philip Otton) as having stated that *'Arguments based on 'maintenance' and 'champerty' are outdated and can be safely ignored'.*

At para 38 the court quotes the interpretation of the relevant provisions in the English Arbitration Act 1996 that was applied by the tribunal:

> "*The tribunal has no hesitation in deciding that the combined effect of the provisions of the Act [and then he inserts 'i.e. s.59(1) and s.63(3)'] and both rules give it a wide discretion as to what costs it can Award. This discretion includes the power to include in 'other costs' the cost of litigation funding and, if so, whether on the indemnity and standard costs basis*."

The English High Court upheld the tribunal's decision.

The judge held that "*as a matter of language, context and logic, it seems to me that "other costs" can include the costs of obtaining litigation funding*" (Para 68). Para 69 then contains perhaps the most relevant finding by the judge:

> "*Further, as the tribunal found, Norscot had no option, but to obtain this funding from this third party funder. As a matter of justice, it would seem very odd and certainly unfortunate if the arbitrator was not entitled under s.59(1) (c) to include the costs of obtaining third party funding as part of "other costs" where they were so directly and immediately caused by the losing party.*"

[2] http://www.4newsquare.com/files/Essar_Oilfields_v_Norscot_15_09_16Jud.pdf

Brief assessment:

It is important to note that a High Court judge in England and Wales clearly states that in English law in 2016 arguments based on 'maintenance' and 'champerty' are outdated and can be safely ignored.

Both decisions are instructive as they reflect the growing acceptance of TPF as a normal way for a company to fund its legal budgets. Both cases can be viewed as expressions of the point that a funded claimant should be no worse off than a self-funding claimant (or in fact a claimant who has other external ways of funding like a bank loan) in terms of cost recovery. However it is clear that the Norscot decisions go further than the earlier decision in that they allow the claimant to recover the share of the proceeds payable to the funder in accordance with the funding arrangement. That is not a benefit that was enjoyed by the claimants in the Kardassopoulos/Fuchs cases.

One of the questions raised by the Norscot decisions is whether a funded claimant can only hope to recover the funder's fee if it did not have the means to self-fund the case. That would treat users of TPF differently depending on whether they are in a financially distressed situation or not. It would be hard to understand why only distressed users of TPF should be in a position to recover the market standard funder's fee from a losing defendant, but only future case law will show whether that is the way in which tribunals will exercise their wide discretion in this respect.

Some of the commentary on the decision has noted that this was a case where the English indemnity principle was applied to costs allocation, and that this influenced the decision to extend the costs award to include the cost of TPF. This might suggest that future tribunals would only use their discretion to make such an extension, in circumstances where the Respondent's conduct warranted such an extension. In other words, the test should be to look objectively at how the Respondent had behaved, rather than simply focus on the impact on the Claimant's particular financial position.

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