

## A rare public example of litigation funding of a BIT case

It is rare in the commercial litigation funding industry, which is heavily dominated by the parties' desire to keep their transactions and related disputes confidential, that the fact that litigation funding was in place for a high profile case becomes public information. The cases of Messrs' Kardassopoulos and Fuchs against the Republic of Georgia that came to a conclusion in November 2011, are such an example. It has been reported in the press that the case was funded by Allianz Litigation Funding<sup>1</sup>, and reference to the third party funding arrangements was even made in the award of March 2010. The tribunal held that the presence of litigation funding does not (adversely) affect the recoverability of costs from the losing defendant. The fact that in the equally publicly available award<sup>2</sup> a sum of USD8m in fees and disbursements is awarded to the claimants indicates that the amount of funding provided must have been significant.

The claim was for compensation for the unlawful termination of a concession to build and maintain a pipeline in the country. The claimants had tried for the best part of a decade to obtain compensation without having to resort to arbitration. When all other avenues led nowhere, the arbitration before ICSID began. After a positive award on jurisdiction in 2007, the merits phase of the proceedings began, and ended in an award in early 2010 for roughly USD90m plus costs in favour of the claimants. One of the noteworthy things about the award was that ca two thirds of the awarded amount was interest, due to the long delay of the compensation, and one third was compensation for the value of the concession valued at the time it was taken away.

USD98m is a large amount of money for an economy the size of the Republic of Georgia's<sup>3</sup>. This may have been one of the reasons why the Republic reacted not only with annulment but also revision proceedings<sup>4</sup> to dispose of the award and the liability. At the very least this triggered an automatic stay of enforcement that bought the government some time to deliberate its next move. As it turns out the next move was to invite one of the claimants into the country, apparently to finalize a settlement<sup>5</sup>; instead of entering into a settlement, the claimant was arrested and subsequently sentenced to a lengthy prison term for trying to bribe a government official, as has been widely reported in the media. The domestic criminal proceedings led to a result that was very convenient for the government, and speculation about the government's motives for inviting the claimant into Georgia in the first place is rife<sup>6</sup>. Be that as it may the claimant spent more than a year in a Georgian jail, while the annulment and revision proceedings proceeded.

<sup>1</sup> [http://www.businessweek.com/magazine/content/11\\_10/b4218058741193.htm](http://www.businessweek.com/magazine/content/11_10/b4218058741193.htm)

<sup>2</sup> <http://italaw.com/documents/KardassopoulosAward.pdf>

<sup>3</sup> According to [http://en.wikipedia.org/wiki/Republic\\_of\\_Georgia](http://en.wikipedia.org/wiki/Republic_of_Georgia), Georgia has 4.6 million inhabitants and a GDP of \$5,100 per capita.

<sup>4</sup> As can be seen from the ICSID website <http://icsid.worldbank.org/ICSID/FrontServlet>

<sup>5</sup> As reported in [http://www.foxnews.com/projects/pdf/Georgia\\_doc.pdf](http://www.foxnews.com/projects/pdf/Georgia_doc.pdf)

<sup>6</sup> See footnote 1

The claimants decided to enforce the award in the US, as reported in GAR<sup>7</sup>. A combination of time running out for the government, and promising enforcement attempts will probably have facilitated the settlement agreement that was confirmed by the government late last week, which led to the release of the claimant and payment of USD37m, as was also reported in GAR<sup>8</sup>.

This case has many remarkable features. It demonstrates the well-known fact that it can take a very long time to obtain compensation from an unwilling debtor government; the termination of the licence occurred in 1996, which means that there are 15 years between the relevant act and the conclusion of the proceedings. It is fair to say that in 1996 litigation funding would not have been available to fund the proceedings. The reported funder in the case did not set up its litigation funding business until six years after the relevant events took place, and did not start funding cases outside of German speaking continental Europe until 2005. Most other providers of litigation funding for large commercial disputes, arbitration or litigation, did not start funding until 2007. Of course that does not mean that claimants were longingly waiting for the industry of litigation funding to come into existence before bringing their claims. But it does show that litigation funding has an important role to play in providing funds to pursue meritorious claims, and therefore access to justice, especially in so-called 'David v Goliath' situations; Georgia may be a small country, but it does have all the funds required to make proceedings both costly and lengthy. One needs highly skilled, specialised counsel to run such a case, and over the years that it invariably takes to bring investment disputes to a conclusion it is hard to imagine that the legal costs will not run into millions of dollars. Not every investor has the means to last the distance; one can only speculate why these cases do not settle earlier, whether it is an intentional attempt to deter potential claimants, a lack of actual authority by the responsible civil servants or a lack of commercial as well as legal assessment by the respondent states of whether an early settlement may be in the economic interest of the country.

It is interesting to note that the tribunal decided that the presence of third party funding did not have an impact on the recoverability of legal costs; in other words litigation funding arrangements do not have an influence on the determination by the tribunal that costs follow the event. There can be little doubt that the decision is correct, because it is hard to see a difference between a claimant who is funded by a bank loan, and one who utilizes third party litigation funding.

And finally, when solicitors ask a litigation funder how many arbitration cases of this kind are backed by third party funding arrangements, this rare public example helps to show that there is a genuine need for this type of funding, and that it is more prevalent than is commonly known.

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<sup>7</sup> <http://www.globalarbitrationreview.com/news/article/29975/fuchs-kardassopoulos-seek-enforcement-new-york/>

<sup>8</sup> <http://www.globalarbitrationreview.com/news/article/30007/fuchs-released-settling-georgia/>