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NAI Jong Oranje Hosts Third-Party Funding Event

Lisa Bench Nieuwveld (Conway & Partners) · Saturday, October 20th, 2012

On September 27, 2012, the Netherlands Arbitration Institute's Jong Oranje group was fortunate enough to host an event on third-party funding. Yes, a common and hot topic these days and certainly not my first blog on the matter, but I was one of the speakers at the event and felt it worthwhile to mention.

The other two speakers were Mick Smith, Co-Founder of Calunius Capital LLC ("Calunius") in London, and Sara Liesker, founder of Liesker Legal NV ("Liesker") in Breda, The Netherlands. Contrasting the two experiences was indeed intriguing. I have recently co-authored (along with Victoria Shannon, Deputy Director at the International Court of Arbitration – ICC – in NYC) a book on third-party funding in international arbitration to be available this month via Kluwer Law (see https://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041140794), and so am fairly familiar with the various topics and diverging opinions on this area. As a point of interest, Mick Smith wrote a chapter for us on the mechanics of the funding agreement.

What was intriguing was the different perspectives represented by these two funders. Liesker represents an almost exclusively domestic practice. Although international matters may come through, the target audience is truly Dutch litigation and perhaps some Dutch arbitration. It is in this arena that they have carved an expert niche. They are also the only ones in The Netherlands targeting this niche (although after the interest sparked by the audience, one questions for how long). They are happy to consider matters with damages as little as EUR 200,000 (if I am not mistaken); the important point being, not large ticketed cases.

In contrast was Mick Smith from Calunius. Based out of London, this third-party funding group works namely with large ticketed cases, which also includes international arbitrations. In fact, especially as of late, their name is no stranger to the media. His practice considers global norms, is voluntarily subject to the Voluntary Code of Regulation for third-party funders recently put into place in England, and handles larges international cases.

What they definitely had in common was the stance on disclosure: sometimes it is important or even necessary to voluntarily disclose the presence of a funder. However, most often it is not. What is the main fear driving this reluctance? Look at the insurance market in some industries (especially the defense insurance market in the US) where there have been instances in which the insurer's presence was seen as "deep pockets", possibly softening a jury's discomfort in awarding large damages. In international arbitration, it may often be the claimant who is funded and no juries are around, but there are frequently counterclaims brought. Either way, perhaps a tribunal may feel more "comfortable" being less concerned about the damages when deeper pockets are involved?

Whether the deep pocket phenomenon will or already could exist in the third-party funding arena for international arbitration is obviously premature to answer. There is simply insufficient information at this time as to whether or not to disclose. It remains interesting for a client and the

client's advisors to follow and consider when considering whether or not to use funding. This is especially true as a growing number of funded clients are those looking for better cash flow options or strategies to keep certain costs off the books and not necessarily the impoverished claimant.

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