Kluwer Arbitration Blog

Third party funding in international arbitration – lessons from litigation?

Daniel Kalderimis (Chapman Tripp) · Monday, December 15th, 2014

and Paula Gibbs, Chapman Tripp

Introduction

The spotlight continues to shine on third party funding in international arbitration, following the recent *Alemanni* decision and unsuccessful disqualification proposal filed against Dr Gavan Griffith QC in the *RSM v St Lucia* ICSID arbitration (reported on in this blog by Carlos Gonzalez-Bueno and Laura Lozano).

A similar spotlight shines also in domestic litigation. For instance, the English High Court in *Excalibur Ventures LLC v Gulf Keystone* [2014] EWHC 3436 (Comm) recently ordered third party funders who funded "a hopeless case" to pay the winning side's costs on an indemnity basis.

This blog briefly explores whether international arbitration can learn any lessons from litigation regarding how best to approach third party funding.

Lessons from the Courts

There are presently several questions facing the international arbitration community in relation to third party funding:

1. Is automatic disclosure of the existence of third party funding required?
2. In what circumstances, if any, must the details of the third party funding agreement be disclosed?
3. Can, and if so when should, a tribunal order security for costs against third party funders?
4. Can, and if so when should, a tribunal award costs against third party funders?
5. Can third party funders recover their costs as part of a costs award?

Many of these questions have already been addressed in domestic courts. But the results have not always been consistent.

Some courts remain resistant to third party funding:

• In Singapore, due to the enduring influence of the common law torts of maintenance and champerty, third party funding agreements may be unenforceable (see *The Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] SGHC 135; *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989)

• In New Zealand, a claimant must automatically disclose third party funding and may be ordered to disclose details of the funding agreement (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC

89). A defendant can apply for a stay of the proceedings if the "level of control able to be exercised by the funder and the profit share of the funder" amounts to an assignment of the legal claim
• In Finland, Nigeria, Sweden and Brazil, third party costs may be irrecoverable because the claimant has not incurred those costs, and the funder does not have standing to recover its own costs.

Other courts have accepted third party funding:
• In Switzerland, the role of third party funding in providing access to justice prompted the Supreme Court to strike down a law prohibiting it (*Bundesgerichtsentscheid* 131 I 223, 2P.4/2004, 10 December 2004)
• In France (where litigation funding is relatively uncommon because parties typically bear their own costs), the Versailles Court of Appeal held that it lacked jurisdiction to consider the validity of a third party funding agreement in an international arbitration, and declined to declare the agreement void (*Société Foris AG v SA Veolia Properte*, CA Versailles, No 05/01038, 1 June 2006)
• In Australia, it is not an abuse of process for a funder to exercise a degree of control which renders the plaintiff's interests subservient (*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41). In New South Wales, South Australia, ACT and Victoria the torts of maintenance and champerty have been abolished
• In England or Ireland, it is not necessary to disclose the details of the third party funding agreement. As noted above, funders were recently ordered to pay indemnity costs in *Excalibur Ventures.*

Other jurisdictions are cautiously embracing third party funding. In certain states in the US, including Maine and Ohio, legislation has been introduced to deal with litigation funding. In other states, the level of control exercised by funder may have costs implications. For instance, Florida's Third District Court of Appeal has held that a funder was a party to the suit and liable to pay costs where it had such control as to be entitled to direct the course of the proceedings (*Abu-Ghazaleh v Chaul* 36 So 3d 691, 694 (Fla App Dist 2009)).

What to make of it all?
On one view, domestic case law on third party funding does not send a clear message, and so is of little interest to the international arbitration community.

On another view, however, the disparate domestic case law reveals a conceptual struggle as to how properly to regard third party funders. This struggle is relevant to international arbitration, because it needs to make the same choices.

The domestic cases reveal a continuum between those jurisdictions which essentially see third party funding as illegitimate, and those which essentially see it as legitimate. The first category, which might be called the 'true claimant' approach, is influenced by the concern with officious intermeddling inherent in the maintenance and champerty torts. It takes the view that there is a true claimant who must either bring, or not bring, its own claims.

The second category takes a more 'market-oriented' approach. It is animated by the access to justice principle. It regards legal claims as assets which, like any other asset class, can be funded by the financial market. Accordingly, claimants can go to the market and partner with financial backers to prosecute their claims.

Certain procedural decisions relating to third party funding follow from either perspective. With the true claimant approach comes the notion that third party funding should be closely scrutinised by the court or tribunal and only permitted in appropriate cases. This is where Singapore and New Zealand tend to come from. Where third party funding is used inappropriately, security for costs should be ordered, or the claimant's action should be stayed. But, as in Finland, orders are not made against the third party funder directly, as they are not the true claimant.

By contrast, with the market approach, the third party funder is regarded almost as a shadow co-claimant. There is no need for the court or tribunal to review the funding agreement. But it may be necessary for the court or tribunal to make orders directly against the funder. Accordingly, as in Florida, orders for costs – or as in the *Excalibur* case, orders for indemnity costs – can be made against them if the claim is unsuccessful. On this approach, funders are treated as having a legitimate seat at the table, but must accept the concomitant responsibilities.

It is tempting to think that arbitration should follow the market approach; not least because it is itself a market-based system. But it is constrained by its contractual foundations which require that any claimant be a party to an arbitration agreement against any respondent. Thus, while it may be tempting to embrace the market model, the main tool of that model is the power to make costs orders directly against third party funders. If this tool is unavailable, the practicalities of this model need to be considered.

For this reason, there is some merit in international arbitration adapting techniques from the true claimant model of seeking to regulate and supervise third party funding from the outset, where it is less likely to cause jurisdictional problems down the road. But this can lead to the criticism levelled at the *St Lucia* decision on security for costs, which are – at least traditionally – a rarity in international, and especially ICSID, arbitration.

However, even if arbitration has no option but to use the tools of the true claimant model, it can choose to use them in different, and perhaps more permissive, ways. International arbitration is, for good reason, not influenced by historical common law torts. Third party funding is effectively after-the-event insurance and whether one likes it or not, is now a part of the landscape.

Future tribunals must use the tools at their disposal to ensure that the presence of a third party funder does not give rise to injustice and practical difficulties in making effective costs orders for either side. For this reason, tribunals will continue to contend with: (i) applications by respondents for security for costs orders against claimants who are significantly funded by third parties; and (ii) applications by successful claimants for costs which have been incurred through third party funding. It is hoped that, when faced with such applications, a spirit of common sense and pragmatism will prevail.

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