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The Essar v. Norscot Case: A Final Argument for the 'Full-Disclosure-Wingers' of TPF in International Arbitration

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1. In the past weeks, much ink has been spilt over the recent decision of the High Court of Justice in the *Essar v. Norscot* case. In his decision, J. Waksman QC confirmed the award made by Sir Philip Otto in an ICC arbitration seated in London. A broad description of this case has already been posted here, and now it will suffice to point out that the arbitrator considered the financing arrangement it had made with a third party funder to be "costs" incurred by the claimant to pursue its claim. He further considered that the whole amount payable to the third party funder (i.e. 300% of the funding or 35% of the damages recovered, whichever was greater) should also be included in those costs.

Nonetheless, it seems that this award — and the court's related decision — may be subject to criticism: it produces an unjust outcome, it is a strong deterrent to arbitration, and is potentially damaging to the Third Party Funding industry.

2. I do not contest the court's decision as regards the power of the arbitral tribunal to order the Respondent to pay the costs of the arbitration and, as a result, to include the third party funder 'windfall' in those costs. Under the ICC Rules, or under many other arbitral institution rules and many national arbitration laws (such as the English Arbitration Act) that endorse the principle that "costs follow the event" and that, at the same time, convey broad discretionary powers to the arbitral tribunal in this regard, this decision is all but objectionable. This is a matter of the competence of the arbitral tribunal. The issue here at stake lies elsewhere: the way the arbitrator has used those powers in considering that such 'windfall' is covered by the notion of party's costs.

I do not contest either the correctness of the arbitrator's decision regarding the costs actually incurred by the Claimant in spite of being funded by a third party (in this respect, see *Kardassopoulos & Fuchs v. The Republic of Georgia*, ICSID Case no. ARB/05/18 and Case no. ARB/07/15, Award of 3 March 2010).

3. However, the uplift or 'windfall' payable to the funder is neither a party's cost, nor the damage suffered by the funded party. This share of the proceeds is nothing but a result of a contract privy to the funder and the funded party. Further, it forms part of the "alia" or the contractual risk arising from a particular bargain. Indeed, the funded party has not borne that sum that stems out of the funding arrangement. This uplift is a contingency of the contract. On the other hand, it is highly disputed that one may see such contractual uplift as a financial necessity of the funded party.

4. This contractual feature is not a party's damage either. Indeed, the uplift is nothing but a bonus (rightfully characterised as a "windfall") payable to the funder by the funded party. It is a disposition of a share of a future and hypothetical compensation payable to the prevailing party. The injured party will always be made whole irrespective of any payment it must make after being compensated — should an award be given to him. The destiny it gives to the outcome of that share is a totally different matter, to which the respondent is alien.

As has been said elsewhere, 'the success portion payable to a third-party funder results from a trade-off between the funded party and the funder, where the funder assumes the cost and risk of financing the proceedings and receives the reward if the case is won. This agreement is not linked to the arbitration proceedings as such.' (See Draft Report of the Subcommittee on security for costs and costs of the ICCA-QMUL Task Force on TPF in International Arbitration, November 2015, p. 10)

5. A second remark leads me to consider that this award conveys either a double (or triple or multiple) recovery or unjust enrichment attributable to the prevailing party. As mentioned above, the prevailing party hasn't had to bear this cost and hasn't lost any such right as a result of the losing party's conduct. As said, this uplift is neither a cost nor damage.

Viewed through these lenses, this uplift may amount to punitive damages merely at the option of the claimant.

6. The want of just cause for this enrichment is even more apparent when considering that there is no limit for applying the multiple underlying the uplift. If the arbitral tribunal enjoys broad discretionary powers to decide on costs, what would the limit be to award a multiple of 5, 10 or even 20 times the amount spent by the funder?

Is it the 'reasonability' of those costs — or rather, of those funding conditions availing the uplift? Well, if that is the case, I may well trust in Sir Philip Otto's judgement, but I really can't predict what the judgement of Mrs. X or Mr. Y will be in coming arbitrations.

7. These considerations have a direct impact on the arbitration setting, for the uncertainty that this award conveys.

Indeed, the uncertainty arising from this award and the criteria underlying it will certainly be a deterrent to arbitration. It is now well known that one of the most serious arguments that arbitration detractors level against this mechanism of resolving disputes is precisely the unpredictability of the final decisions.

8. Further, the perspective of being ordered to pay costs and the funders' uplift will certainly give rise to earlier requests to the parties to disclose if they are resorting to TPF, the identity of the funder and, more acutely, the details of the funding arrangement. Otherwise, the losing party may face a 'surprise request' (if not a 'surprise decision') at the very end of the proceedings.

In the light of this recent decision, this might be a helpful advice. Applications in numerous arbitrations will certainly follow.

For the funders, the worse part of this is that I can't possibly think of a reasonable argument to refuse such disclosure. This is indeed the final argument for the 'full-disclosure-wingers' in international commercial and investment arbitration.

Moreover, if funders are better off with this award/court decision and if, through this means, they are entitled to recover the uplift from the losing party, why not make this reasoning extensible for other purposes? Indeed, 'ubi commoda, ibi incommoda' — who benefits from a legal regime must also endure the downside of it. I am obviously thinking about the liability of funders for the costs of arbitration when their funded parties lose their cases and are ordered to pay the costs therefrom.

Thus, third party funders now have a double-edged sword in their hands.

9. Finally, the above-mentioned considerations have been premised on the typical cases of funding sought by claimants. However, there is still room for certain types of contingent fees for respondents' counsel (and therefore, for funders who might fund these arrangements).

10. It is true that the arbitrator's award on costs (and the court judge's decision upholding such award) was driven mainly on considerations of the Respondent's "reprehensible" conduct prior to the initiation of the arbitration. Whether or not such conduct was in fact "reprehensible" is a question that likely relates to the merits of the dispute, but in any case it should not have been used in a fashion that resonates to a punishment rather than a true compensation for actual damage suffered by the claimant, or costs actually incurred by it.

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