International Arbitration

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THIRD PARTY FUNDING COSTS IN ARBITRATION PROCEEDINGS: DEVELOPMENTS IN SINGAPORE AND THE SINGAPORE PERSPECTIVE ON A KEY ENGLISH JUDGMENT

At present, Singapore law generally prohibits third party funding in litigation or arbitration. However, this looks set to change.

The Civil Law (Amendment) Bill 2016 was read in the Singapore Parliament for the first time on 7 November 2016 and is widely expected to be enacted as law in early 2017. The legislative amendments in the bill includes provisions to allow third party funding in international arbitration which, if accepted, will continue to strengthen Singapore's reputation as a leading venue for the resolution of disputes.

This comes at a time when third party funding is becoming more widely accepted in the context of international arbitration in other jurisdictions. On 15 September 2016, the English High Court upheld the decision of an arbitrator where the successful party was awarded its full costs on an indemnity basis, including the cost of third party litigation funding. This decision could have implications for Singapore (and other) arbitration.

The English judgment

The English High Court reached its landmark decision in *Essar Oilfield Services v Norscot Rig Management Ltd*, affirming an arbitral award made under ICC 1998 Rules (the ICC Rules).

Norscot was the claimant in the arbitration proceedings and successfully brought a claim for repudiatory breach of an oilfield operations management agreement against Essar. Norscot relied on financial stimulus from London based Woodsford Litigation Funding (WLF) to the tune of £647,000. The terms of such funding, considered to reflect standard market rates by the arbitrator, entitled WLF to either (i) 300% of the funding, approximately £1.94 million or (ii) 35% of the recovery in the event that Norscot's claim succeeded.

The arbitrator decided that £1.94 million in costs was recoverable in full against Essar under both the Arbitration Act 1996 (the Act) and the

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ICC Rules. The arbitrator was highly critical of Essar's conduct through out the performance of the contract and the arbitration. He stated that by withholding unrelated payments and exerting undue commercial pressure on Norscot, Essar had set out to financially cripple Norscot and therefore left it with no credible alternative method of pursuing its claim, other than by securing third party funding. Essar appealed to the English High Court.

The crucial issue at stake in Essar's appeal was whether the arbitrator's finding that the additional litigation funding costs were recoverable as *"other costs of the parties"* under s.59 of the Act amounted to a serious irregularity. Essar argued that it was a serious irregularity because the arbitrator was exceeding the powers granted to him under s.68 of the Act and Article 31 of the ICC Rules.

The English High Court concluded that the arbitrator had not exceeded his powers. The relevant case law is clear that in order to do so, a tribunal must exercise a power which it does not have; merely incorrectly exercising an available power does not amount to an irregularity.[1] The court not only concluded that the arbitrator had the authority to make such a decision but furthermore, it was not an erroneous use of an available power for the arbitrator to interpret that third party funding costs fall under the ambit of *"other costs"*.

Implications for international arbitration

This decision is the first by the UK courts to ratify an arbitral tribunal's decision where the 'losing' party was not only required to foot the bill for their opponent's costs, but also for the additional costs incurred as a result of the use of third party funding.

It not only represents an endorsement of arbitral independence but may also open the door for arbitrators in other jurisdictions to award successful claimants their litigation funding costs.

It has been suggested that due to the specific facts of the case, the precedent may not be more widely applied; Essar deliberately caused Norscot's impecuniosities, leaving it with no choice but to take the gamble of third party funding. This judgment should not therefore be perceived as a blanket affirmation that a successful party will automatically be allowed to claim and recover any third party funding costs incurred during an arbitration.

Implications for Singapore arbitration

There are significant implications for Singapore arbitration too.

The new SIAC Rules, released in June 2016, confer far reaching powers in terms of awarding costs on the arbitral tribunal. Rule 37 states:

"The Tribunal shall have the authority to order in its Award that all or a part of the legal or other costs of a party be paid by another party."

Should the Civil Law (Amendment) Bill 2016 become law, it is likely that the arguments set out in Norscot will be considered highly persuasive in Singapore, particularly when considering that the relevant terms of the ICC Rules are so similar to that of the SIAC.

In addition, the SIAC Rules no longer pre-select Singapore as the seat of arbitration (where it has not been agreed between the parties) and now provide that the tribunal is to select a seat it considers to be appropriate. Parties to a SIAC arbitration with its seat in England and Wales could rely on third party funding if necessary and seek to try and recover the associated costs with more confidence.

1 *Lesotho v. Impregilo* [2006] 1 AC 221; *Abuja International v. Meridien* [2012] 1 Lloyd's Rep 461

The judgment in *Essar Oilfield Services v Norscot Rig Management Ltd* not only represents an endorsement of arbitral independence but may also open the door for arbitrators in other jurisdictions to award successful claimants their litigation funding costs.

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Come 2017, regardless of whether the seat of the arbitration is in Singapore or London, the use of third party funding in Singapore arbitration and the recovery of the associated costs by a successful claimant appear far more likely.

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