YSIAC Publications Subcommittee:
Darius Chan, Foo Yuet Min, Jonathan Lim, Nicholas Lingard, Julie Raneda

2017 Year in Review:
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by Parul Kumar
**Introduction**

2017 was a busy year for international arbitration. Taking a walk down memory lane, we saw new players and new industries entering the game, institutions adopting new rules, and we have had some new challenges to tackle.

With all the office parties to attend and holiday movies to watch, it is understandable that you might not have had the time to create your own Top 5 list of developments in 2017 for international arbitration. To fill that void, this note summarises some highlights and low points in international arbitration in 2017 from across the globe. These Top 5 issues were among the most talked-about over the past 12 months.

Happy Holidays and Happy New Year!

1. **New Players: Third party funders arrive in Singapore and Hong Kong**

   Third party funding involves a third party funder paying for the costs of a legal proceeding, in return for a share of the proceeds if the claim is successful.

   Previously, Singapore prohibited third party funding and Hong Kong did not have a legal framework expressly permitting it.

   In 2017, third party funding expanded its footprint to both markets, with third party funders gearing up for work. This is a welcomed development, bringing Singapore and Hong Kong in line with other common law jurisdictions.

   Singapore was first to establish a framework for third party funding in March 2017. Singapore adopted legislation (i) abolishing the common law torts of maintenance and champerty, and (ii) providing that third party funding by qualifying third party funders in relation to certain enumerated categories of dispute resolution proceedings is not contrary to public policy or illegal. For now, third party funding is limited to international arbitration and related court or mediation proceedings. But Singapore’s Senior Minister of State for Law, Indranee Rajah, SC, has indicated that the scope might be broadened. The legislation also sets out specific criteria a third party funder must meet to be able to fund a claim in Singapore.

   Shortly thereafter, in June 2017, Hong Kong passed long-awaited legislation making it clear that third party funding of arbitration is permitted under Hong Kong law. Similar to Singapore, the new legislation makes third party funding legal in arbitration, as well as in related proceedings including related court or mediation proceedings and proceedings before an emergency arbitrator. Outside of arbitration (and insolvency proceedings), the restrictions on third party funding remain. Unlike Singapore, though, the Hong Kong legislation has not yet come into force: watch this space in 2018.

   The new third party funding regime represents an important development for parties involved in Singapore- and Hong Kong-seated international arbitrations. Parties in these two important seats now have access to the same financing and risk-management tools available in other major international arbitration centers.

2. **New Industries: Arbitration continues to aim at financial industry disputes (with the rise of expedited and summary procedures)**

   Arbitration is widely used in some sectors, such as the oil and gas industry, but less widely used in others, such as the financial industry. The reason for this relative lack of popularity of arbitration in the financial services sector is partly because, among financial institutions, arbitration has perceived shortcomings. At the core of those shortcomings is the...
perceived lack of availability of “summary judgment” or similar mechanisms for early disposition of simpler cases.

Arbitration institutions have been continuously refining their procedural rules in order to address this issue. SIAC was a leader, having introduced its expedited procedure rules in 2010, and last year having made available a summary disposition procedure. Tribunals have arguably always had the authority and discretion to dispose of cases summarily, pursuant to their broad case management powers, but concerns about due process and the enforceability of arbitration awards (sometimes criticised as “due process paranoia”) appear to have deterred many tribunals from exercising that power.

Other institutions have addressed critiques of the efficiency of the arbitral process by including provisions for early dismissal or summary determination. In January 2017, the Stockholm Chamber of Commerce (SCC) adopted a new procedure which allows for summary proceedings when (i) “an allegation of fact or law material to the outcome of the case is manifestly unsustainable” (similar to a summary judgment motion); (ii) “even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law” (similar to a motion to dismiss); or (iii) “any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.”

In August 2017, the HKIAC also invited practitioners to weigh in on whether it should adopt a similar new procedure for the early determination of disputes.

The latest effort that has led to new rules came in March 2017, with the ICC Arbitration Rules revisions incorporating expedited proceedings. Those revisions introduced the Expedited Procedure Rules, which would apply automatically to any arbitration in which the amount in dispute was less than USD2 million, and may be applied by agreement to any other arbitration. Other key features of the Expedited Procedure Rules included: (i) the ICC Court would normally appoint a sole arbitrator, notwithstanding any contrary agreement by the parties; (ii) the Terms of Reference stage of the proceedings was dispensed with; (iii) awards must be made within six months from the initial case management conference, with extensions granted only in limited circumstances; (iv) the Tribunal would have discretion to decide the case on the papers, with no hearing, no requests to produce documents and no examination of witnesses; and (v) the proceedings would be subject to a reduced costs scale.

Elsewhere, in January 2017, Russia’s most prominent arbitral institution, the Moscow-based International Commercial Arbitration Court at the Chamber of Commerce and Industry, introduced expedited arbitration procedure in its revised International Commercial Arbitration Rules, which would automatically be employed for cases with a claim not exceeding USD$50,000. Notable features of this procedure included: (i) the dispute would be decided by a sole arbitrator; (ii) there would be only one round of pleadings; and (iii) there would be an oral hearing only upon a party’s special request and based on the arbitrator’s discretion. Similarly, in January 2017, the Vietnam
International Arbitration Centre also revised its rules to include expedited proceedings with shorter timeframes, a sole arbitrator and the possibility of no hearing.

It remains to be seen whether these changes in arbitration rules will influence parties in the financial services sector to choose arbitration as their preferred method for dispute resolution.


“Investment arbitration” refers to investment disputes between a foreign investor and a host State under a treaty between the host State and the investor’s home State. Even as debates about the legitimacy and future of investment arbitration have raged, there had been a steady increase in the number of investment arbitrations around the world. Historically, investment arbitrations had been administered mainly by ICSID under the ICSID rules, as ad hoc arbitrations under the UNCITRAL Arbitration Rules, or administered by the SCC.

In an effort to increase the number of investment arbitrations it administers, in January 2017, SIAC released specialised rules for investment arbitration: the SIAC Investment Arbitration Rules (SIAC IA Rules).

As the President of the SIAC Court of Arbitration said, the SIAC IA Rules “contain significant modifications to the 2016 SIAC Rules to reflect the special features and concerns arising in arbitration proceedings involving States, State-controlled entities and intergovernmental organisations. Both States and investors alike can be confident that, in resolving investment disputes under the SIAC IA Rules, they will be provided with a neutral, balanced, transparent and efficient procedural framework that addresses issues that ordinarily arise in international investment arbitration law”.

Some of these unique features as reflected in the new rules include (i) the possibility of submissions by third parties, (ii) discretionary publication of the Tribunal’s decisions and award, and (iii) different time limits for certain filings, for the challenge of arbitrators, and for the decisions by the Tribunal. These changes are consistent with the positions taken by a significant part of the arbitration community.

The SCC also introduced a separate set of rules in Appendix III of the 2017 SCC Rules which would be only applicable to cases based on “a treaty providing for arbitration of disputes between an investor and a state.” The 2017 SCC Rules entered into force on the same day as the new SIAC IA Rules, 1 January 2017.

SIAC and the SCC were the first major arbitration institutions to offer rules for commercial arbitrations and specialised rules for investment arbitrations, but they are not the only ones. In August 2017, the HKIAC also invited practitioners to weigh in on whether it should develop its own investment arbitration rules. On 1 October 2017,
in preparation for “One Belt, One Road” disputes, CIETAC also adopted new rules for investment disputes.

This development represents an effort by those institutions to attract investment disputes for resolution under their administration. This is also in recognition of the differences between commercial and investment arbitrations. Three main differences are often discussed. First, investment arbitrations may raise important issues of public interest and public policy which affect many people, not just the parties to the proceedings. For example, investment arbitrations have involved health-motivated regulations of cigarettes which affect the State’s population generally. In addition, the amount of claimed compensation is sometimes so high that it could affect a respondent State’s fiscal position. Second, while the choice of law plays a significant role in commercial arbitration, the issues in investment arbitration are generally to be decided in accordance with a treaty and international law. Third, in commercial arbitrations, the consent to arbitrate is based on an arbitration agreement agreed to between the parties, while the source of consent in investment arbitrations is generally derived from a treaty between two or more States.

4. New Challenges: TPPA and NAFTA trumped

Sticking with treaties and controversy: President Donald Trump lived up to his campaign promise and on his first full day in office, took action to withdraw the US from the Trans-Pacific Partnership Agreement (TPPA). Trump described the move as a “great thing for the American worker.”

The TPPA is a free trade agreement signed on 5 October 2015 by 12 States accounting for an estimated 40% of the global economy: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. It is (or, was) intended to create major links between the Americas and Asia (excluding China). It includes investor-State dispute settlement protection through binding arbitration.

As currently drafted, the TPPA can only enter into force if it has been ratified by the US. Thus, Trump’s withdrawal from the TPPA scrapped those plans, or so it seemed. The remaining 11 TPPA Member States are still considering whether to abandon the TPPA or to find a way to preserve it, without the US. The week of 30 October 2017, representatives from the 11 TPPA Member States met in Japan for formal negotiations. On 8 November 2017, they also met in Vietnam for further discussions. Following that meeting, the Government of New Zealand published an outline for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which is to incorporate the original
TTPA, with the exception of a few technical provisions including when the agreement becomes legally binding. It remains to be seen whether a new deal will be reached, but there is indication the 11 TPPA Member States are serious about it.

Trump has also lived up to his promise to go after NAFTA. Trump’s Administration started renegotiations of NAFTA in August 2017. It remains unclear whether the Administration will keep the investor-State dispute settlement in its current form or whether it will reform or replace it. In its renegotiation objectives paper, the Administration stated simply that it will seek to provide “meaningful procedures for resolving investment disputes,” encourage “settlement of disputes through consultation and other mechanisms” and “establish a dispute settlement mechanism that is effective, timely, and in which panel determinations are based on the provisions of the Agreement and the submissions of the parties and are provided in a reasoned manner.” It remains to be seen what that means in practice.

5. The Next Big Thing: IA meets AI?

Many say the legal industry, including the practice of international arbitration, needs updating. The legal industry was shaped to suit the rules of a different era. With the rise of new technology, it is undergoing a technological revolution.

This is particularly apparent in Singapore where the importance of technology is impressed upon lawyers by the government in its effort to position Singapore as a legal hub and make it a “Smart Nation.”

The buzz phrase in the legal industry in 2017 was certainly “technological innovation”, including artificial intelligence (AI) and machine learning systems such as Ross, Watson, Kira and others.

Legal technological innovation has been used in litigation and corporate work for some time, with software used to review large sets of documents for document production or due diligence, to do legal drafting or research through automated processes, for general case management and document organisation, and to complete such mundane tasks as proofreading, formatting and editing legal documents. It is also making its way into ADR proceedings, with the latest being the use of DRExM in Egypt to resolve construction disputes, as it has the ability to recommend the most suitable ADR method for the particular dispute based on the project information, the nature of the dispute and the relationship between the parties. In March 2017, the Swiss Chambers Arbitration Institution held its first legal innovation conference where technological innovation in the practice of international arbitration was discussed. There have also been discussions whether machine learning systems would be used as arbitrators, although the technology has not evolved to that extent just yet and there is still a strong preference for an “emotional” arbitrator.

Legal technological innovation has been and can be highly beneficial in international arbitration, providing numerous benefits for a more efficient and effective way of working, including by reducing costs, avoiding mistakes, and lowering lawyer stress, saving time and identifying risks early on. The demand for quality work at a reduced price to be done within a limited time frame requires the right base systems in place so that the lawyers’ efficiency and effectiveness are as good as they possibly can be and add value where it matters most.
Recent Developments in the PRC – A Change in Tide for Arbitration?

By Holly Blackwell, King & Wood Mallesons

There have been a number of recent developments in Chinese judicial law and practice. These include, among others, the first known enforcement of foreign court judgments in China on the basis of reciprocity, as well as China’s signing of the Hague Convention on Choice of Court Agreements (Hague Convention). While these developments are welcomed, they are unlikely to ignite a shift from arbitration to litigation as the preferred forum for dispute resolution involving Chinese parties. More likely, they demonstrate a continued commitment to promoting the rule of law and the integration of China into the global economy, from which users of litigation and arbitration both benefit.

They may also provide solace to a party compelled to litigate in a foreign court, perhaps due to a pathological arbitration clause or the non-existence of an arbitration clause, who may take comfort in the increased possibility of enforcing a foreign court judgment in China.

Recent developments concerning the enforcement of foreign court judgments in China

In China, foreign court judgments are enforceable pursuant to international treaty or on the basis of reciprocity. To date, China has concluded approximately 33 bilateral treaties concerning the mutual recognition and enforcement of foreign court judgments, as well as arrangements with Hong Kong and Macau. However, China has not entered into bilateral enforcement treaties with some of its largest trading partners such as Australia, Germany, Japan, Singapore, the US, or the UK. At present, there are also no binding international conventions such as the New York Convention that would require China to enforce foreign commercial court judgments. In the absence of a binding treaty obligation, litigants must rely on the principle of reciprocity to enforce foreign court judgments in China.

Previously, there was no reported case of a foreign court judgment being enforced in China on the basis of reciprocity. This has changed with the reported cases of US and Singapore court judgments being enforced on the basis of reciprocity.

On 30 June 2017, in Liu Li v Tao Li and Tong Wu, the Wuhan Intermediate People’s Court in Hubei Province recognised and enforced a monetary judgment issued by the Los Angeles Superior Court in California.^

Given the absence of a binding treaty between the US and China on the mutual recognition and enforcement of court judgments, the Wuhan court cited the case of Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co Inc, where a US federal court in California had enforced a judgment from the Hubei People’s High Court, and recognised and enforced the Los Angeles judgment on the basis of reciprocity.

The Liu Li case was preceded by Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd, in which the Nanjing Intermediate People’s Court in Jiangsu Province recognised and enforced a monetary judgment issued by the Singapore High Court. Similar to the US, there are no binding treaties between Singapore and China on

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1 Many thanks to Ma Xiao, Associate at King & Wood Mallesons, for his assistance in preparing this article.
2 Liu Li v Tao Li and Tong Wu, (2015) E Wuhan Zhong Minshang Waichuzi No 26
3 Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co Inc, 2009 WL 2190187 (CD Cal 2009)
4 Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd, (2016) Su 01 Xie Wai Ren No 3
the mutual recognition and enforcement of court judgments. The Nanjing court cited the case of Giant Light Metal Technology (Kunshan) Co v Aksa Far East Pte Ltd, where the Singapore High Court had enforced a judgment from the Suzhou Intermediate People’s Court in Jiangsu Province, and recognised and enforced the Singapore judgment on the basis of reciprocity. The Kolmar case was the first reported Singapore court judgment to be enforced in China and is believed to be the first foreign court judgment enforced in China solely on the basis of reciprocity.

Recently, China has taken a further step towards the recognition and enforcement of foreign court judgments. On 12 September 2017, China joined, amongst others, the EU, Mexico, Singapore, and the US in becoming a signatory to the Hague Convention on Choice of Court Agreements (Hague Convention). China has yet to ratify the Hague Convention, thus it is not yet binding on China. Once ratified, China would be committed to, amongst other things, recognise and enforce civil and commercial judgements rendered by the courts of other contracting states pursuant to exclusive jurisdiction clauses in favor of those courts.

**Potential impact of these developments on judicial and arbitral practice in China**

The potential impact of these developments remains to be seen. While these developments provide insight into how a Chinese court may treat an application to enforce a foreign court judgment, they demonstrate the uncertainty and complexities of enforcing foreign court judgments in China. They also provide insight into how a Chinese court may treat the enforcement of certain types of foreign arbitral awards.

First, the Liu Li and Kolmar cases demonstrate that a party seeking to enforce a foreign court judgment in China on the basis of reciprocity will need to establish de facto reciprocity between China and the foreign state. That is, the party will need to demonstrate that the foreign state has already recognised and enforced a Chinese court judgment, failing which enforcement might be refused. This was indeed the result in the 1996 and 2006 cases in which Chinese courts refused to enforce Japanese court judgements, respectively, given the absence of a binding treaty or de facto reciprocal relationship. In June 2015, however, the Supreme People’s Court issued the Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts (Belt & Road Opinions) which permit a Chinese court, in its discretion, to take the first step in establishing reciprocity. The Belt & Road Opinions only apply to Belt & Road countries and would not extend the same discretion to a court faced with enforcing a judgment from a country outside of the Belt & Road initiative and with which China has no binding treaty or de facto reciprocal relationship.

Second, it is unclear how broad a construction the Chinese courts would apply to construe the reciprocal relationship between the US, Singapore, or other foreign states with whom a de facto reciprocal relationship may be said to have been established. The Liu Li and Kolmar cases involved mutual recognition and enforcement of judgments rendered within the same regions.

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5 Giant Light Metal Technology (Kunshan) Co v Aksa Far East Pte Ltd (2014) SGHC 16
The Liu Li case involved judgments issued by courts in California (albeit state and federal courts) and Hubei Province; the Kolmar case involved judgments issued by courts in Singapore and Jiangsu Province. It is unclear whether a Chinese court would construe the reciprocal relationship more broadly to enforce judgments issued by other courts from other regions or districts in these countries (e.g. whether a Beijing court would recognise and enforce a New York state or federal court judgment on the basis of a de facto reciprocal relationship between China and the US).

Third, the Hague Convention is still limited in its application. While China has signed the Hague Convention, there is still no timeline for China to ratify the treaty. By comparison, the US signed the Hague Convention in 2009 but has yet to ratify it. Even when ratified, the Hague Convention has limited territorial reach, at least for now. Unlike the New York Convention, which applies to more than 150 countries globally, the Hague Convention applies to only 30 countries (including countries which comprise the EU and excluding many key Belt & Road countries).

Further, the Hague Convention applies only to civil and commercial disputes where the parties from contracting states have agreed to the exclusive jurisdiction of the foreign court whose judgment is sought to be enforced. It is uncertain whether a Chinese party would agree to submit to the exclusive jurisdiction of a foreign court at the contracting (or any other) stage, particularly when investing in developing countries. The same may be true of a foreign party faced with acquiescing to the exclusive jurisdiction of a Chinese court.

Moreover, at present, there is no legislative or judicial guidance on the procedure for enforcing foreign court judgments in China. Unlike the framework for foreign arbitral awards, there is no requirement for reporting to a higher court if a lower court is inclined to refuse enforcement of a foreign court judgment. By contrast, if a lower court is inclined to
refuse enforcement of a foreign arbitral award, it must report to the higher court and ultimately to the Supreme People’s Court for approval. This requirement has reduced the risk of local protectionism and increased the likelihood and predictability of enforcing foreign arbitral awards in China.

Finally, the judgment sums in the Liu Li and Kolmar cases were not significant (approximately USD 250,000 and USD 350,000, respectively). It is unclear whether a higher judgment sum against a prominent private or state-owned company would encounter the same ease of enforcement. The limitations discussed above, amongst others, may provide a basis for a lower court to decline enforcement.

Despite the foregoing, the Liu Li and Kolmar cases are notable. They signal an increased openness of the Chinese judicial system and an increasingly liberal approach to the enforcement of foreign court judgments on the basis of de facto reciprocity. Further, both cases involved the enforcement of default judgments against Chinese parties. In the Liu Li case, the defendants challenged enforcement on the basis that they lacked adequate notice of the proceedings and had not participated in the litigation (the defendant in the Kolmar case did not challenge enforcement on this basis). The Wuhan court rejected these arguments and ordered recognition and enforcement. The same treatment would be expected when seeking to enforce a default arbitral award in China, provided adequate notice of the proceedings and an opportunity to participate were given.

In addition, the Wuhan court’s treatment of the Liu Li case demonstrated that a Chinese court would be expected to abstain from review of the merits of the case when tasked with enforcing a foreign court judgment. In that case, the California court ordered monetary damages and pre-judgment interest in favor of Mr Liu. In the enforcement proceeding, Mr Liu also sought post-judgment interest. The Wuhan court considered this to be an issue concerning the merits of the case, which was beyond the scope of its mandate, and rejected the requested for post-judgment interest. A similar approach would be expected of a Chinese court tasked with enforcing a foreign arbitration award.

Concluding remarks

Foreign arbitral awards have benefited from increased enforcement in China in recent years. From 2011 to 2015, foreign arbitral awards were enforced in China at a rate of more than 85 percent. Despite recent debates about the legitimacy of arbitration, it is unlikely that the benefits surrounding the enforcement of foreign arbitral awards, as well as neutrality and confidentiality, amongst others, will give way to a notable increase in the use of foreign courts to resolve disputes involving Chinese parties. Parties that find themselves before foreign courts, however, particularly courts in the US, Singapore, or Belt & Road countries or countries that have previously recognised and enforced Chinese court judgments (for example, England or Germany, whose courts have both recognised and/or enforced Chinese court judgments), now have the benefit of knowing that enforcement of a foreign court judgment against assets and parties in China, while still challenging, might not be futile.

How Do You Tax the Costs of International Arbitration Proceedings?\(^1\)

by Colin Liew, Essex Court Chambers Duxton (Singapore Group Practice)

**Introduction**

Section 10 of the International Arbitration Act (IAA), allows a party to challenge an arbitral tribunal’s determination of its jurisdiction. Section 10(7) further provides that, where the Court rules under Section 10 that the tribunal has no jurisdiction, it may make an order as to the costs of the arbitral proceedings.

I was recently involved in a case where, upon a successful challenge to the tribunal’s jurisdiction under section 10, the Court made an order under section 10(7) of the IAA for the costs of the arbitration to be “taxed by the Registrar of the Supreme Court if not agreed”.

The subsequent taxation proceedings were far from straightforward and threw up a number of issues which have yet to be fully resolved by the courts.

**How are the costs of the arbitration to be taxed?**

The precise procedure to be adopted by the Registrar of the Supreme Court (Registrar) in taxing the costs of the arbitration is not stated in the IAA, but is left to the Rules of Court (Rules). Although the position is not entirely clear, it appears that the procedure for taxing the costs of the arbitration is regulated by Order 59 of the Rules (pursuant to Order 59, rules 2(1) and 12(1) (c)).

**To what extent is taxation in the Registrar’s discretion?**

Typically, subject to the provisions of Order 59, the amount of costs to be allowed in taxation is in the discretion of the Registrar, which is to be exercised having regard to the principle of proportionality as well as all the relevant circumstances: Order 59, rule 31(1) read with paragraph 1(2) of Appendix 1 to Order 59.

This is similar to how arbitrators are expected to approach the issue of costs under various institutional rules. For instance, Article 38(5) of the International Chamber of Commerce Arbitration Rules provides that, in making decisions as to costs, the tribunal “may take into account such circumstances as it considers relevant”.

However, in taxation proceedings, the application of the principle of proportionality can result in significant sums being taxed off a Bill of Costs (Bill). Indeed it is quite possible for a successful litigant’s party and party costs to be taxed down by more than 75%.

Such drastic discounts have been justified on the basis that there is a public interest in controlling the costs of litigation in order to ensure adequate access to justice: *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [77].

By contrast, there is no similar public interest in controlling the costs of private arbitration: *VV v VW* [2008] 2 SLR(R) 929 (*VV*) at [31]. Perhaps as a result, in practice, successful parties in arbitration tend to recover a larger proportion of their costs as compared to successful parties in litigation.

Hence, where an order is made by the Court under section 10(7) of the IAA that the costs of the arbitration are to be taxed by the Registrar, it is not obvious that the procedure prescribed by Order 59 of the Rules is well-suited to this exercise, since it is predicated upon the different principles which apply in a taxation of litigation costs.

For instance, given that international arbitration practitioners are not necessarily regulated by the Legal Profession Act, it is possible for the Registrar to be confronted with a Bill containing legal fees of a quantum or nature that

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\(^1\) A longer version of this blog post was published in the September 2017 issue of the Singapore Law Gazette.
would not typically be permitted in taxation, e.g. contingency fees.

The issue is even more complicated if the tribunal has already assessed the reasonable costs of the arbitration. Although in theory the tribunal’s assessment has no legal effect since it was, ex hypothesi, made without jurisdiction, in practice the Registrar has no realistic basis upon which to disagree with the tribunal’s assessment.

This then begs the question of whether an order under section 10(7) of the IAA that the costs of the arbitration be taxed serves any useful purpose, if the reality is that the Registrar will not second-guess the tribunal’s assessment of reasonable costs.

Indeed, given that the costs of the taxation proceedings themselves are frequently heavily taxed down in “Section 2” of the Bill, the only result of such an order appears to be to unjustly penalise a party who successfully invokes section 10 of the IAA.

**Costs in a different currency?**

Taxation of the costs of the arbitration is even less helpful when those costs have been incurred in a foreign currency, as they were in my case. Not only is it then difficult for the Registrar to determine whether such costs are reasonable, of the more fundamental issue is whether and how costs can be dealt with in a foreign currency.

Damages can of course be ordered in a foreign currency, and there appears to be some authority that so can costs: *Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France SA* [2016] EWHC 3421 (Pat) at [11].

However, as a matter of procedure, in taxation the Bill must be accompanied by a summary which, like the eventual Registrar’s Certificate, is composed electronically through the eLitigation platform (Paragraph 95(1) and (4) of the *Supreme Court Practice Directions*), which only permits the inclusion of figures in Singapore Dollars.
As such, I had to submit the costs of the arbitration, although incurred in a foreign currency, for taxation in Singapore Dollars, which raised the issue of the appropriate date of conversion.

In theory, the date of conversion ought to be the date on which the costs were incurred, but this was impracticable given that different costs were incurred on different dates. A more convenient date was the date of the tribunal’s award, but the date of the order under section 10(7) of the IAA seemed more principled, since that was the date my client’s entitlement to the costs of the arbitration crystallised.

Having said that, the reasonable costs which the successful party is entitled to are not finally quantified until the taxation hearing, and on that basis the date of conversion arguably ought to be the date of the taxation. However, this presents a problem if the taxation hearing is part-heard (as it was in my case): it seems unacceptable that a party’s recoverable costs should fluctuate based on exchange rate movements in the intervening period.

**Conclusion**

As successful jurisdictional challenges under section 10 of the IAA have been rare, the practical implications of an order under section 10(7) of the IAA that the costs of arbitration proceedings be taxed have not yet been fully worked out.

However, it seems likely that section 10 of the IAA will be resorted to with greater frequency, and with more success. If section 10(7) of the IAA is to provide an effective means of providing for the costs of the arbitration proceedings, it will be necessary for the courts to explain exactly how the taxation of such costs is to work.
Can or should costs be awarded against third-party funders by an arbitral tribunal? If so, in what circumstances? Should arbitral tribunals award successful claimants that have received third-party funding the cost of their third-party funding?

by Parul Kumar, Luthra & Luthra Law Offices, New Delhi, India
2nd Runner Up of the YSIAC Essay Competition 2017

INTRODUCTION

Even as third-party funding (TPF) makes inroads into international commercial arbitration, two crucial issues remain unresolved: the liability of third-party funders to bear adverse costs, and the right of the funded party to claim the costs of third-party funding.

I. CAN OR SHOULD COSTS BE AWARDED AGAINST THIRD-PARTY FUNDERS BY AN ARBITRAL TRIBUNAL?

The liability of third-party funders to bear adverse costs has been recognized in litigation cases, where the funders were made to join the proceedings. The judgments in Arkin v. Borchard Lines Limited¹ and Excalibur Ventures LLC v. Texas Keystone Inc. and Others v. Psari Holdings Limited and Others² are established precedents for such liability in the United Kingdom, although they differ on the extent of such liability.

There is a jurisdictional barrier to applying the principles from these litigation cases to arbitration cases. Since arbitration is a private contractual remedy between parties who have consented to it, the third-party funder is not technically a party to the dispute that it funds.³ Moreover, at present, there is little support in the existing legal regime and institutional framework to extend to third-party funders, the liability to bear costs.

However, this is not to say that sound and well-founded reasons do not exist to support the awarding of costs against third-party funders by an arbitral tribunal. Notably, the Law Reform Commission of Hong Kong recently expressed its in-principle approval for this proposition.⁴

A. Risk and reward

A third-party funder enters the realm of an arbitral dispute as an investor in an asset: the arbitration claim. The best case scenario for a third-party funder is its client succeeding in its claim, so that the funder can claim a percentage of the awarded claim as its fee, and thus make a return on its investment. Inherent in this investment, as in any, is the risk of losing.

Where the funded party loses, the successful party has been forced to expend costs in an arbitration claim funded and enabled by a third-party funder, and should be permitted to claim those costs.

Lord Justice Jackson’s observations in the context of litigation funding are equally relevant in the context of arbitration:

“[In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape a part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also

¹ [2005] EWCA Civ. 655.
² [2014] EWHC 3436.
⁴ The Law Reform Commission of Hong Kong Report on ‘Third Party Funding for Arbitration’ (October 2016) at 106.
to the client (who may be exposed to costs liabilities which it cannot meet).”

B. Costs are a function of actual expenses

The jurisprudence on the awarding of costs in arbitral proceedings has developed on a foundation of procedural expenses and party expenses, which are incurred in the pursuit or defence of an arbitral proceeding. A party is typically permitted to claim these costs, which are ultimately awarded at the discretion of the arbitral tribunal.

These are well-established principles on cost allocation and there is no reason they should be undermined merely on the technical ground that the funder, who possesses the capacity to pay costs in lieu of an impecunious party (for example), is not a party to the arbitration.

C. The principle of agency

It has been suggested that the common law principles of agency and contract may provide the basis for arbitral tribunals to make adverse cost orders against funders.\(^7\) The International Bar Association (IBA) has recognized the principle that an entity with “a controlling influence” or “a direct economic interest” in a party to the award to be rendered in an arbitration “may be considered to bear the identity of such party.”\(^8\)

Even though they are not parties to the arbitration, third-party funders stand to benefit from its results and have a direct economic interest in the disputes they fund. Indeed, as the controller of the “power of the purse”\(^9\), a funder is inherently in a position to exercise a great degree of control over a funded party, giving further credence to the principle of agency.

II. IN WHAT CIRCUMSTANCES SHOULD COSTS BE AWARDED AGAINST THIRD-PARTY FUNDERS BY AN ARBITRAL TRIBUNAL?

Some factors are relevant for assessing the question of whether a tribunal should award costs against third-party funders, although the exercise of the tribunal’s discretion would undoubtedly be based on

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\(^8\) General Standard 6(b), IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

Can or should costs be awarded against third-party funders by an arbitral tribunal? If so, in what circumstances? Should arbitral tribunals award successful claimants that have received third-party funding the cost of their third-party funding?

A. Permissibility under the legal and institutional framework

Adverse cost orders against third-party funders should necessarily be supported by the legal and institutional framework governing the arbitration. An institution may, for example, require mandatory disclosure of TPF, or require funders to join arbitral proceedings brought by their clients. This is important for giving adequate fair warning to funders before they enter into funding agreements, and for institutionalizing hearings on TPF disclosures and costs allocations at the beginning of the arbitration.

With TPF being a relatively nascent practice in arbitration, currently no express rules exist to permit tribunals to make adverse cost orders against third-party funders. However, some institutions have taken steps to acknowledge the need to consider TPF arrangements, especially at the stage of allocating costs.

For example, the draft version of the SIAC Investment Arbitration Rules expressly provided that a third-party funder could be made liable for adverse costs orders.\(^{10}\) Although this position stands diluted in the final version of the Rules, they may still be interpreted to imply such a liability.\(^{11}\)

B. Degree of control exercised by the funder and the conduct of the arbitral proceedings

The extent of control exercised by a third-party funder over its client may vary from case to case. This may manifest in various aspects of the conduct of the proceedings, including the selection of legal counsel, participation in case strategy and management,\(^{12}\) appointment of arbitrators, and the conduct of settlement talks.\(^{13}\)

Costs incurred during arbitration depend on the manner in which a party (or the third-party funder controlling it, as the case may be) chooses to steer the proceedings. The pursuit of arbitration proceedings in an aggressive or even prolix manner at the behest of a third-party funder may increase the costs the opposing party is constrained to incur. The control exercised by the funder must, therefore, be given due weightage at the time of making an adverse costs order.

C. Liability of the funder under the funding agreement

Some funding agreements expressly provide that the funder will be liable for costs orders, while others provide for indemnity or insurance clauses. The contents of such contracts ought to be considered by an arbitral tribunal while awarding costs against the funder.\(^{14}\)

For example, the SIAC Investment Arbitration Rules, 2017 empower the arbitral tribunal to order the disclosure of a third-party’s contractual commitment to undertake adverse costs liability.\(^{15}\)

The question however, of whether such liability should be extended to the funder even in the absence of an agreement to be bound by such liability, remains open to debate.

III. SHOULD ARBITRAL TRIBUNALS AWARD SUCCESSFUL CLAIMANTS THAT HAVE RECEIVED THIRD-PARTY FUNDING THE COSTS OF THEIR THIRD-PARTY FUNDING?

When a funded claimant successfully makes a claim before an arbitral tribunal, it must pay a contractually agreed percentage of the amount awarded to the third-party funder as its fee – this

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10 Rule 34, Draft SIAC Investment Arbitration Rules (February 1, 2016).
13 *Supra* note 10, at 1655.
14 *Supra* note 3, at 18.
15 See Rule 24(l), SIAC Investment Arbitration Rules, 2017.
is the “cost” of the third-party funding for the claimant.

The recent judgment from the United Kingdom in Essar Oilfields Services Limited v. Norscot Rig Management Private Limited has created ripples in the arbitration fraternity by upholding the ICC’s award of the costs of third-party funding to the claimant.

For a variety of reasons, arbitral tribunals should not be permitted to award successful claimants that have received third-party funding, the costs of their third-party funding.

A. Fees payable to third-party funders are not “costs”

The amount payable by funded claimants to their funders is contingent on an award being made in their favour, since this amount is typically a percentage of the awarded amount. This is different from the amounts which are traditionally viewed and awarded as “costs” by arbitral tribunals.

Unlike actual costs, which a party incurs to pursue or defend its claim, a successful claimant is not technically “out of pocket” for the success fee paid to funders – this is apportioned from the amount awarded by the arbitral tribunal. Since the claimant has not itself “borne” this cost, it is incorrect to characterize such a payment as “costs”, and to make the respondent liable for it.

B. The cost of access to justice / risk of losing must be borne by the funded party

The third-party funder’s fee is, in a sense, the cost of accessing a legal remedy through TPF. It stands in the way of the claimant being made “whole” in the event of success.

It is also the cost of hedging the risk of losing and the claimant is best placed to eliminate (should it choose not to pursue a claim for being unmeritorious) this risk. As in the case of insurance contracts – where the premium paid is not recoverable regardless of the insurable event occurring – the cost of obtaining the TPF must be borne by the funded claimant alone.

C. No legal basis to make the respondent liable for the payment of the cost of the claimant’s TPF

1. No privity

The unsuccessful respondent is a stranger to the TPF contract, which exists to provide the claimant a chance to pursue its legal claim, or to hedge the claimant’s risk of failure in the claim. It would be inequitable if the cost incurred by the claimant to hedge a risk is imposed on the respondent, who has no control over the pursuit of an unmeritorious claim against it.

2. Costs versus Damages

While the damages computed as part of an arbitration claim are subject to scrutiny under the relevant substantive law, the payment of costs is not made subject to the same degree of scrutiny. Unlike the computation of damages, arbitral tribunals do not usually require detailed documentary or other evidence in relation to costs. When an unsuccessful respondent is made liable to pay the “cost” of the claimant’s TPF just by virtue

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16 [2016] EWHC 2361 (Comm.).
19 Supra note 19
21 Supra note 22.
22 Supra note 20.
23 Supra note 14, at 3097.
24 Supra note 3, at 10.
of the claimant being funded externally, the TPF fee is given a “back-door entry” into the allocation of costs. It may be more appropriate to claim and assess funding costs as damages.\(^{25}\)

3. Arbitrariness

The fee for TPF could range from 15% to 50% of the total amount awarded by an arbitral tribunal.\(^{26}\) The actual percentage agreed upon is a function of the negotiation between the funder and the funded claimant; as far as the respondent is concerned, this is a random figure. It is unfair to burden the respondent with an arbitrary mark-up in the award amount to the extent of the fee percentage decided between the funder and the funded party, which could be the result of several factors entirely beyond the control of the respondent.

D. Impact on arbitration and the TPF industry

If awarding a successful claimant the costs of funding becomes a routine feature, the arbitration landscape will be impacted in a number of potentially undesirable ways.

1. There will be “an upgrade to a Claimant’s general position”, since the claimant will be confident of shifting the risk of bringing a claim to the respondent.\(^{27}\)

2. There will be a reduced incentive for the claimant to negotiate for a lower TPF fee.

3. Such a shift will enable third-party funders to charge a higher fee, and gain windfall amounts as part of their success fee,\(^{28}\) which unsuccessful respondents may be unjustly burdened with.

4. With the possibility of a substantial enhancement in the returns on their investment, third-party funders may be incentivized to take bigger risks. This could lead to third-party funders playing a more indiscriminate and pervasive role in the arbitration industry. Such a development may translate directly into a proliferation of merit-less arbitration claims.

CONCLUSION

There are convincing reasons for awarding costs against third-party funders. However, in the absence of concrete provisions under the relevant legal framework, particularly to overcome the jurisdictional barrier, such a proposal “remain[s] the subject of theoretical discussions, not the legal reality”.\(^{29}\)

On the other hand, the awarding of TPF costs to a successful claimant is based on a flawed understanding of TPF arrangements, and should not be permitted. While *Essar v. Norscot* has provided food for thought, it is debatable whether this ought to be accepted as a settled position of law for the future.

Arbitration institutions should proactively deliberate to formulate their stance on the various unresolved issues that arise from the practice of TPF.

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\(^{25}\) *Supra* note 3, at 10.


\(^{27}\) *Supra* note 19.

\(^{28}\) *Supra* note 22.

\(^{29}\) *Supra* note 7, at 176.