YSIAC Advocacy Workshop in Beijing
By Hu Ke, Jingtian & Gongcheng

The Beijing segment of the YSIAC Advocacy Roadshow was held on 4 November 2015 at the premises of CIETAC. About 100 participants from law firms, arbitration institutions and universities were present at the event.

Dr Yu Jianlong, Vice-Chairman and Secretary-General of CIETAC and CMAC, delivered the opening address, followed by welcome remarks by Ms Lim Seok Hui, CEO of SIAC and SIMC. Mr Hu Ke, Member of the YSIAC Committee and Partner of Jingtian & Gongcheng, briefed the audience about the concept of the workshop and the case scenario.

The workshop format consisted of two sessions of unscripted mock cross-examinations, each followed by a panel discussion between tribunal members, counsel, and witnesses, who shared their insights and feedback with the audience. The mock case related to a construction contract of a hypothetical nuclear project in Guangdong, China.

The tribunal for the first session was composed of Mr Gary Born (President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr), Ms Ariel Ye (Member, SIAC Court of Arbitration; Partner, King & Wood Mallesons) and Mr Cao Lijun (Member, SIAC Court of Arbitration; Partner, Zhong Lun Law Firm) heard the first session. Mr Sun Wei (Partner, Zhong Lun Law Firm) cross-examined two factual witnesses played by Ms Monika Prusinowska (Associate, Yingke Law Firm) and Ms Mariana Zhong (Associate, Dechert LLP). Mr David Gu (Associate, Herbert Smith Freehills) cross-examined the expert witness played by Mr Derek Nelson (Senior Vice
President, Managing Director, Asia, Hill International). The second session was chaired by Mr Gary Born, with his co-arbitrators being Mr Tao Jingzhou (Partner, Dechert LLP) and Prof Lu Song (Professor, China Foreign Affairs University). Ms Edwina Kwan (Senior Associate, King & Wood Mallesons) cross-examined Mr Jiang Xuan (Associate, Junhe Law Offices) and Ms Lin Yanhua (Counsel, Fangda Partners) as factual witnesses, and Mr Darren Mayberry (Associate, Anjie Law Firm) then cross-examined the expert witness played by Mr Lee Baker (Associate Director, Hill International).

Each cross-examination session was followed by a panel discussion moderated by Mr Hu Ke, in which the tribunal gave penetrating insights on the dos and don’ts for cross-examination in international arbitration, shared tips on time management in cross-examination, how to plan questions and how to control hostile witnesses. There were interactive discussions between the speakers and the audience.

A networking lunch followed, at which participants mingled and relaxed over good food and good conversation.

The workshop attracted not only young professionals and students, but also established arbitration practitioners, and received very positive feedback. Three Beijing-based senior practitioners commented that they found the workshop to be “remarkably educational”, “practical and entertaining” and “excellent”, and looked forward to more such events in the future.

Board of Directors, and Mr Kevin Kim, Head of the Construction and Arbitration Group of Bae, Kim & Lee, formed the mock tribunal.

Participants from Bae, Kim & Lee, Hanol Law, Kim & Chang, KL Partners, Lee & Ko, and Shin & Kim, Yulchon, participated in their respective roles as either counsel or fact witness. Two representatives from Hill International, including Senior Vice President and Managing Director, Asia, Mr Derek Nelson, also participated as expert witnesses on both sides. Cross-examinations were conducted in two parts: examinations of the employer’s (claimant) witnesses, followed by examinations of the contractor’s (respondent) witnesses. After each segment, tribunal members offered valuable observations and comments on the presentations.

Ms Lim Seok Hui, CEO of SIAC

YSIAC Advocacy Workshop in Seoul

By Sue-Hyun Lim, Bae Kim & Lee LLC

Following the successes of the YSIAC Advocacy Roadshow series in Delhi, Mumbai, Jakarta and Beijing, the Seoul Advocacy Roadshow was held on 10 November 2015 at the main reception floor of Bae, Kim & Lee LLC.

Over 70 delegates attended this event, which featured mock cross-examination exercises based on a construction problem involving a nuclear power plant project. Mr Gary Born, President of the SIAC Court of Arbitration, Dr Eun Young Park, member of the SIAC Court of Arbitration and SIAC
YSIAC Advocacy Workshop in Tokyo
By Aoi Inoue, Anderson Mori & Tomotsune

The YSIAC Tokyo Advocacy Workshop was held on 12 November 2015 in the offices of Anderson Mori & Tomotsune. The Tokyo workshop was attended by over 50 delegates. Ms Lim Seok Hui (CEO, SIAC and SIMC) delivered the opening address and Ms Koh Swee Yen (Co-Chair, YSIAC Committee) provided an introduction to the case scenario and the concept of the workshop.

The mock arbitration tribunal consisted of Mr Gary Born (President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr), Mr. Hiroyuki Tezuka (Member, SIAC Court of Arbitration; Partner, Nishimura & Asahi) and Ms. Yoshimi Ohara (Partner, Nagashima Ohno & Tsunematsu).

During the first cross-examination session, Respondent’s counsel, played by Mr Daryl Chew (Counsel, Shearman & Sterling LLP) and Ms Ng Sook Zhen (Foreign Legal Associate, Anderson Mori & Tomotsune (Singapore) LLP), cross-examined Claimant’s witnesses, played by Mr Michael Mroczek (Partner, Okuno & Partners), Ms Ng Sook Zhen (Foreign Legal Associate, Anderson Mori & Tomotsune (Singapore) LLP) and Mr Derek Nelson (Senior Vice President, Managing Director, Asia, Hill International).

For the second cross-examination session, Claimant’s counsel, played by Mr Takaumi Ochiai (Of Counsel, Atsumi & Sakai) and Mr Hiroki Aoki (Senior Associate, Nagashima Ohno & Tsunematsu), cross-examined Respondent’s witnesses, played by Mr Tsuyoshi Suzuki (Partner, Momo-o, Matsuo & Namba), Mr Yutaroh Kawanaba (Counsel, Nishimura & Asahi) and Mr Lee Baker (Associate Director, Hill International).

The panel discussion which followed each session was moderated by Mr Aoi Inoue (Member, YSIAC Committee; Special Counsel, Anderson Mori & Tomotsune). During the panel discussion, the speakers were able to share their views and experiences as to how to conduct cross-examinations and the tribunal members provided useful and informative advice. The workshop received extremely positive feedback from participants who also enjoyed the lighter exchanges between counsel and witnesses during the lively cross-examination sessions.
"ISDS" (short for "investor-state dispute settlement") was a less-known acronym some years back. Now, it has been given an increasingly bad name, no doubt fuelled by Vattenfall’s claim against Germany following the shutting down of its nuclear plants after the 2011 Fukushima disaster, tobacco giant Philip Morris’ high profile claims arising from Australia’s plain-labelling laws, and other like claims brought by corporations affected by domestic regulations that are seen as being in the public interest.

Indeed, those who were loudly opposed to the inclusion of any ISDS mechanism in the TTP (and its European counterpart, the TTIP, which is still undergoing negotiations) had relied on these examples to support their indictment of ISDS as a one-sided, democracy-destroying evil that would enthrone corporate interests over that of the people.

The fallacies in such anti-ISDS rhetoric would be obvious to those familiar with investment law, and one notes with relief that such rhetoric (fortunately) did not derail negotiations on the TTP which was concluded in Atlanta earlier this month. But congratulations are still premature – the TTP must still be ratified by its 12 signatories before coming into force, and the debate on ISDS can be expected to rage on as the TTP embarks on a potentially long and rough road to ratification.

Insofar as these anti-ISDS rhetoric continue to threaten to drown out fact-based discourse when the debate reaches this part of the world, they cannot therefore be ignored. For a start, it may be useful for the record to be set straight on the 3 most common charges made against ISDS.

---

1. “ISDS is a one-way street to which only investors can have recourse.”

ISDS is often cast as a one-sided mechanism giving investors (but not states) the right to arbitrate their claims before an international tribunal. But it is simply not the case that states cannot institute ISDS proceedings; while indeed less common, states can (depending on the wording of the relevant dispute resolution provision on which the tribunal’s jurisdiction is based), and do claim or counterclaim in ISDS proceedings. The institution of claims and counterclaims by states is also expressly provided for in Articles 36 and 46 of the ICSID Convention, under which a large portion of investor-state arbitrations is conducted.

2. “The value of ISDS is suspect as views are divided on whether its inclusion in bilateral investment treaties would increase capital inflow for host States (as often claimed).”

Professor Schreuer had provided the short answer to this in the following terms: “Is the existence of a functioning non-coercive method for the settlement of dispute not enough justification? I
have never heard anyone trying to justify the work of the Law of the Sea Tribunal in terms of additional volume in international shipping.” Indeed, ISDS fulfils an important access to justice function, i.e., the creation of a neutral and depoliticised dispute resolution forum for the adjudication of investor-state claims. Without this, foreign investors are invariably stuck between a rock and several hard places, namely, the unattractive alternatives of diplomatic protection (which is subject to the political discretion and will of their home states), suing in the host state’s court system (which gives rise to partiality concerns, and which is also not viable where the complaint relates to legislation which the domestic court would be bound to apply), or suing in other court systems (where the investor would then have to contend with the state immunity defence, act-of-state doctrine, and other jurisdictional issues).

States, conversely, have other legal / non-legal means of exerting pressure upon foreign investors – in Judge Schwebel’s words, the state has muscle to “prescribe, delay, enjoin, renegotiate, renege, decree, tax, incite, strangle”. ISDS goes some way to right this imbalance.

First, as with international commercial arbitration, ISDS proceedings can only ever take place with the consent of all parties. By agreeing to an ISDS clause (whether in a BIT, a national legislation or subsequent agreement), a host state, in its exercise of sovereign power and in light of its own policy judgment, freely and deliberately accepts some curtailment of such power vis-à-vis its future conduct towards the foreign investor. In doing so, it is also up to the state to legislate or negotiate for clear parameters of the clause so as to delineate or reduce the power of a tribunal it may subsequently come before. As the Legal Adviser of the US Department of State, Catherine Amirfar, observed at the 4th Annual GAR Live New York that took place in September this year, investment treaties have gone from being “three pages long in the early days to 30 pages long in recent times” as countries seek a bigger say over how their treaty obligations are interpreted. Based on what has been disclosed of the TPP’s text, the dispute-settlement clause that has been negotiated also contains an express carve-out which effectively bars tobacco companies from suing under the TPP. The image of an unwilling and powerless sovereign being hauled before an investment tribunal, to answer obligations that were foisted upon it, is therefore fallacious.

Second, investment tribunals do not order states to amend their policies or laws. The typical order vis-à-vis a State who is found to be in breach of its obligations towards the foreign investor is, instead, an order for damages. The concerning notion of an unelected 3-men tribunal having the power to decree a change in national laws is therefore also unfounded.

Hyperboles of this nature fail to recognise important realities of ISDS proceedings.

ISDS fulfils an important access to justice function, i.e., the creation of a neutral and depoliticised dispute resolution forum for the adjudication of investor-state claims.

3. “ISDS subverts the sovereignty of states who are forced to defend claims before unelected tribunals and forced to rewrite their national policies and laws.”

The indictment of ISDS on these fundamentally misconceived bases seems indeed to miss the mark, coming after 50 years of the ICSID Convention and the signing of close to 3,000 BITs worldwide. Let the record on ISDS be set straight, and airtime be given to fruitful, fact-based discourse when the debate reaches our shores.
Third party funding in international arbitration: a slippery slope or levelling the playing field?

By Derric Yeoh, Michael Hwang Chambers LLC

Introduction

Third-Party funding (“TPF”) has attracted significant attention, with its presence met by either welcome or suspicion. Where advocates of TPF are accused of downplaying concerns raised by its critics, detractors are often guilty of committing the proverbial mistake of throwing the baby out with the bathwater in trying to solve the problems brought about by TPF. This paper will argue that the benefits of TPF in levelling the playing field in arbitration outweigh the risks of a slippery slope, and that there are viable solutions for the associated risks of TPF. As the benefits and dangers of TPF are often the flipside of a coin, this paper will approach the question by examining how TPF levels the playing field, evaluating the veracity of arguments that TPF is a slippery slope, and also proposing solutions for the perceived risks.

Definition of TPF

Before beginning the discussion proper, a difficult preliminary issue must first be dealt with: what is TPF? As TPF can come in a multiplicity of forms such as contingency fees, debt instruments, or as full transfers of the underlying claim, a proper definition is required to anchor the entire discussion. This paper defines a “Third-Party Funder” (“TPFer”) as (a) a professional person or entity that (b) finances a legal claim or defence which it has no pre-existing interest in it and (b) receives a financial benefit from it. The definition is framed narrowly, unlike definitions proposed by other commentators, in order to exclude cases of ad hoc financing such as borrowing from relatives, which is not controversial.

Levelling the playing field: access to the playing field

Before there can be any consideration on levelling the playing field, there must first be access to the playing field. TPF provides for this crucial step by allowing impecunious claimants the opportunity to bring about their claim when they would not otherwise be able to afford it. This would usually arise in two situations: where the claimant is unable to afford the legal fees, or is unwilling to do so due to financial risks.

The former case may occur in the context of investor-state disputes where illegal expropriation has occurred, leaving the claimants insolvent to contest such egregious behaviour. An example

---

is the recent Yukos saga where the claimant relied on TPF to bring its claim and was awarded $50 billion of damages against Russia, the largest award in the history of arbitration. 4

The latter situation arises when a claimant is able to afford a lawsuit, but is unwilling to take the financial risk and the opportunity cost of using its limited funds, which could be better used in other investments. With TPF, a claimant is able to transfer some or all of those risks unto the funder. Accordingly, TPF allows claimants “the opportunity to achieve a successful recovery, without having to pay legal fees and other costs...or having to provision or allocate funds to deal with the consequences should the claim fail.” 5

Frivolous claims

TPF has nonetheless drawn allegations of a slippery slope in opening up the floodgates of frivolous claims. This is a pertinent matter in investor-state disputes where a funded party who fails in their claim and is unable to pay costs to the state saddles the country with legal fees which taxpayers have to bear. As the tribunal has no jurisdiction over TPFers, detractors argue for a restriction of TPF to prevent the waste of taxpayer’s moneys in fending off such claims.

However, this problem may be resolved by ordering a security for costs. Born has expressed the view that, “Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security of costs exists.” 6 This would require disclosure of the presence of a TPFer which is discussed later.

Furthermore, it is submitted that the critic’s argument conflates an increase in TPF cases with an increase in unmeritorious claims. Due to the substantial costs involved in funding, funders would conduct extensive due diligence, assessing all aspects of the claim for prospects of success, 7 with some funders stating that they would only consider cases with a 70% chance or greater success rate. 8

Evidence from Australia has found that TPF cases are cited more and reversed less often than comparable cases, indicating the strong screening effect of TPF. 9 As the funder’s profit and the success of the case are intertwined, it would be counterintuitive for funders to invest in unmeritorious claims. 10 The Court of Appeals of

---


5 S. Khouri and others, “Third party funding in international commercial and treaty arbitration- a panacea or a plague? A discussion of the risks and benefits of third party funding” TDM 4 (2011)p4


7 Ibid(S) S; Eri Brabandere and others, “Third-Party Funding in International Investment Arbitration” (2012) ICSID Review Vol. 27, No 2 p384


9 Daniel L. Chen and others, “A Market for Justice: The Effect of Third Party Litigation Funding on Legal Outcomes” (2011)p1

Texas observed in *Anglo-Dutch Petroleum v Haskell*, “An investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit.”

These reasons should allay any fears of a flood of frivolous cases.

**Unfair terms**

Another concern is that TPF would facilitate the exploitation of claimants due to the asymmetry in bargaining power which may see funders strong-arm claimants into unfair contracts. The example of *Chevron v Ecuador*, with funding terms that could entitle the funder to 80% of the award, is often used as an indictment on TPF. However, what is omitted is the fact that this would only occur under the worst-case scenario of a low award, as it is based on a fixed sum rather than a percentage of the total award. This should be balanced with the best-case scenario award, where the funder would receive only 5.5% of the award. Obtaining such large proportions of returns is also atypical of TPF, where ranges of 20%-40% are far more common.

This is because funders are also reliant on the goodwill and continued co-operation of the claimant and are keenly aware of the detriments of taking more than 50% of the claim value, as it would then entail dealing with a de-motivated and uninterested client.

Similar to the rule of caveat emptor, such risks can be greatly minimised by seeking legal advice on TPF contracts and ensuring that the agreement is clear and well drafted. Keen competition amongst other TPFers would also allow claimants a choice of funders, thereby safeguarding against the risk of having no choice but to sign an unfavourable TPF contract.

On a theoretical plane, it may be argued that even if a funder was to obtain a large percentage of the award, there should not be any issue provided that parties had willingly entered into the contract, having due consideration of the terms. After all, “it is better for him to recover a substantial part of his damages than to recover nothing at all.”

**Levelling the playing field: equalising effect**

Apart from providing access to the playing field, TPF also has an equalising effect for the weaker claimant. It levels the playing field by increasing the claimant’s leveraging ability in the settlement process, and offers legal expertise and experience in the trial process.

**Leverage in settlement**

Pursuing a claim against large multinational corporations or sovereign states is a daunting task for any claimant who may not have any prior legal experience. In contrast to the claimant, the defendant is often likely to be highly experienced
in legal disputes and is able to hire the best legal team for their defence. This asymmetry in financial power would translate into a strong bargaining chip against the claimant, with both parties acutely aware that the defendant could take advantage of the claimant’s limited financial resources by waging a war of attrition, thereby strangling an otherwise meritorious claim. Without TPF, “the one-time, risk-averse participant will be more fearful of proceeding to trial, more eager to settle, and [be] in a weaker bargaining position.”

TPF levels the playing field by providing sufficient funds for the claimant to sustain a protracted legal battle, thereby nullifying the threat of a protracted battle. The presence of a TPFer backing the claim is also leverage for the claimant in the settlement process as it would signal the funder’s confidence in the claimant’s meritorious claim and the claimant’s ability to sustain a long trial.

**Expertise and experience**

TPFers are able to provide the necessary expertise, specialist skills and experience which the claimant would not usually have access to. This would help to level the playing field as funders are able to advise the claimant on an appropriate choice of counsel, expert witness and arbitrator that would be favourable to their case.

**Concerns**

The risk of a funder controlling the case to the detriment of the claimant’s interests is greatly mitigated by professional code of conduct rules that mandate lawyers to act in their client’s best interests. However, the TPFer’s input in the decision-making process may imbue them with control over the claim which they may use to further their interests over that of the claimant. This is exacerbated by their role in recommending counsels for selection, due to the fear that “an attorney’s primary loyalty will, as a practical matter, rest with the person or entity who pays him.”

The claimant’s lawyer may also have an incentive to side with the funder in influencing the claimant’s decision, due to the prospect of repeated business from the funder. Nevertheless, it is argued that TPFers should have a degree of control over the case because of their financial investment, a position reiterated by the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited*. The risk of a funder controlling the case to the detriment of the claimant’s interests is greatly mitigated by professional code of conduct rules that mandate lawyers to act in their client’s best interests.

---

20 Ibid (12)
21 Ibid (5)p6
26 D. Richmond, ‘Other People’s Money: The Ethics of Litigation Funding’ (2005) 56 Mercer L.Rev. p669
27 [2006] HCA 41 para 88-9
28 Singapore Legal Profession Act, Rule 2(c)
professional code of conduct rules that mandate lawyers to act in their client’s best interests, and in some jurisdictions, to insist that TPFers do not attempt to control their professional judgement. These rules can be set out in the funding agreement should the counsel be located in a jurisdiction where professional liability is not an enforceable concept or where the professional code does not contain such duties.

Funding agreements would also contain provisions to resolve any deadlock in the decision-making process, such as the referral to a nominated and neutral English QC or equivalent for a binding expert opinion on the decision. The impartial evaluation by a neutral party would ensure that the decisions are made in the best interests of the claimant.

Conflict of interests

Another cause of concern is the conflict of interests that TFP brings to arbitration. A classic scenario where TFP causes a conflict of interests is where X acts as counsel for a TPFundied case while at the same time sitting as an arbitrator in a case where the claimant is funded by the same TPfer. This has the potential to be a slippery slope for arbitration, where the independence and impartiality of the arbitrator may be called into question, thereby endangering the legitimacy of the arbitration process.

The disclosure requirement can be enforced through a tribunal’s general power to preserve the integrity of the arbitral process and the good faith of the proceedings.

Disclosure

Despite such possible repercussions, this problem may be easily resolved through a requirement to disclose TPF, which would maintain the independence and impartiality of arbitrators, a fundamental principle of arbitration. It is suggested that a simple disclosure of the presence of TPF, without going into the details of the agreement, to the tribunal at the earliest notice would be sufficient for the purposes of protecting the integrity of the arbitral process. This would also minimise any delays and inconvenience in finding and bringing a replacement arbitrator up to speed with the case.

The disclosure requirement can be enforced through a tribunal’s general power to preserve the integrity of the arbitral process and the good faith of the proceedings.

Arbitral institutions can also include such a requirement in their institutional rules. The International Bar Association has led the way in providing rules on the disclosure of TPFers. It is therefore no longer accurate to call this area an “ethical no-man’s land” as previously termed.

Conclusion

While it is acknowledged that there is potential for TPF to lead to a slippery slope of ruin for arbitration, it remains a highly valuable asset in levelling the playing field of arbitration by providing claimants with the financial ability to bring a claim, as well as the experience and expertise to stand on an equal footing against the defendant in the arbitration process. With the careful use of security for costs and a requirement for a limited disclosure of TPF, many of its potential risks and pitfalls can be avoided or brought to a minimum. The nascent TPF industry should be carefully nurtured, with its various negative externalities kept firmly in check.

---

22 New York Rules of professional Conduct 1.8(f)(2), 2.1 and 5.4(c)
23 Ibid (16)p217
24 Ibid (24)
25 Ibid (5)p8
26 Ibid (3)p5
27 Ibid (3)p3,10
28 Nigel Blackaby and others, Redfern and Hunter on International Arbitration (5th Edn, Oxford University Press 2009) para 4.72
29 Ibid (5)p3,10
30 Khaled Moyeed and others, “A Guide to the IBA’s Revised Guidelines on Conflicts of Interest” 29 Jan 2015<http://kluwerarbitrationblog.com/blog/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/> accessed 1 May 2015; General Standard 7(a) and 6(b)