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by J. Sullivan

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Essar v. Norscot: Are The Costs Associated With Third Party Funding Recoverable?

*Jeffrey Sullivan**

Executive Summary

This piece considers whether procedural rules commonly used in investment arbitration allow for a successful funded party to recover the financial contribution of the third party to the arbitration, as well as any uplift fees that the third party funder might charge, from the unsuccessful party. In Essar v. Norscot, the English High Court upheld the view of the arbitrator under ICC Rules that Norscot could indeed recover such costs from Essar. This article considers whether the decision in Essar v. Norscot might have resulted from unique factual circumstances, making it difficult to apply the ruling more generally in other arbitrations. This piece also suggests, that Essar v. Norscot contributes to jurisprudence encouraging the disclosure of third party funding arrangements, particularly at the costs phase of the arbitration.

Introduction

Third party funding is a nebulous concept, capable of various definitions.[1] The quintessential scenario for third party funding is "[n]on-recourse financing, where repayment is contingent on the client's success in the dispute".[2]

It is no secret that the use of third party funding in international arbitration has undergone a significant rise. The increase in the popularity of third party funding has been attributed to the 2008 financial crisis.[3] Today, there are several examples of investor-state arbitration cases where external funding has been used by a party. For example, Canadian mining company, Crystallex, was awarded over USD 1.38 billion in a claim against Venezuela in which Crystallex was supported by third party funders.[4] Most recently, there have been reports of Canada's Eco Oro having filed an ICSID arbitration under the Canada-Colombia Free Trade

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[1] Article 1(2), Chapter 3, Section 2 of the EU published text of the Transatlantic Trade and Investment Partnership, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf, states that "'Third Party funding' means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant". It is stated that "One of the issues debated was the concept and nature of TPF itself. As the concept is ever evolving in recent years in the field of arbitration, the participants' views did not seem to point to a consensus on a fixed definition of TPF.": http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/

[2] Victoria Shannon and Lisa Bench Nieuwveld, Third-Party Funding in International Arbitration (Kluwer Law International 2012), p. 7.

[3] http://kluwerarbitrationblog.com/2017/02/02/third-party-funding-milan-event-offered-view-ahead/.

[4] http://globalarbitrationreview.com/article/1067260/crystallex-funder-backs-colombia-claim.

Agreement relating to the Angosutra gold and silver deposit in the country's Andean region with the backing of third party funders.[5]

This article intends to contribute to efforts made by practitioners and academics alike to better understand the use and regulation of third party funding in international arbitration. In this context, the English High Court's decision in *Essar Oilfield Services limited v. Norscot Rig Management Pvt Limited* ("*Essar v. Norscot*"), where the English High Court ordered the unsuccessful party to pay the costs of third party funding incurred by the successful funded party as well as the funder's uplift fee, will be considered in depth.

Much has been said already about whether the English High Court arrived at the correct decision in *Essar v. Norscot*.[6] However, this article does not address the merits of *Essar v. Norscot*. Rather, this piece looks at the impact that the decision might have, now that it has been delivered, on the ability of a successful party in future arbitrations to recover from the unsuccessful party the fees that it incurred in obtaining third party funding ("**Funding Fees**"). Although *Essar v. Norscot* is a commercial arbitration case, this article will also explore the possible relevance of this decision to tribunals in investor-state arbitrations. In order to assess the impact of *Essar v. Norscot*, this article will examine how arbitral rules commonly used in investment arbitration[7] approach third party funding. We will also consider the impact that *Essar v. Norscot* might have on other related areas in international investment arbitration, such as transparency of funding arrangements.

Third Party Funding in Investment Arbitration

In awarding costs, an investment arbitration tribunal is faced with two questions: which party must pay the costs, and what category of costs can be recovered by the successful party.[8]

The underlying arbitration in *Essar v. Norscot* was conducted under the ICC Rules. Article 37 of the 2012 ICC Rules, "Decision as to the Costs of the Arbitration", states that "[t]he costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by

[5] http://globalarbitrationreview.com/article/1078542/funded-icsid-claim-against-colombia-goes-ahead. GAR has reported that "Instead, Eco Oro has raised around US$14 million by issuing contingent value rights (CVRs) and convertible notes to Tenor and certain other shareholders in the company, including its CEO Anna Stylianides and private equity firms Amber Capital and Paulson & Co. Eco Oro has previously said that the CVRs would entitle Tenor to a 51% interest in the gross proceeds of the ICSID claim, though GAR has been told that other shareholders that acquired CVRs will also receive part of that interest."

[6] http://kluwerarbitrationblog.com/2016/10/15/the-essar-v-norscot-case-a-final-argument-for-the-full-disclosure-wingers-of-tpf-in-international-arbitration/.

[7] Zachary Douglas, The International Law of Investment Claims (Cambridge: Cambridge University Press, 2009), pp. 3-5, states that the judicial forums that have been specified for the resolution of investor state disputes include municipal courts of the host state, Arbitration Rules of the International Centre for Settlement of Investment Disputes ("**ICSID**") or the ICSID Additional Facility Rules, Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**"), the Arbitration Rules of the International Chamber of Commerce ("**ICC**"), Rules of Arbitration of the Stockholm Chamber of Commerce ("**SCC**"), arbitration pursuant to the Rules of the Cour Commune de Justice et d'Arbitrage, or settlement procedures previously agreed to between the investor and the state. This article will look into the rules mentioned above as well as some additional rules that might be employed in investor state arbitration.

[8] Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure (Kluwer Law International, 2016), p. 368.

the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration."[9]

The question of whether the legal costs of a third party funder are recoverable has been considered in prior ICC awards in commercial arbitrations. In *Supplier v. First Distributor*, the tribunal, in awarding costs to the claimant had noted that the funded respondent's costs might have been recoverable had the respondent been successful. The tribunal held that "Defendants rather than the [funder] mandated counsel to represent them in the arbitration. By so doing, they incurred the primary obligation to pay such counsel's fees and expenses-one not negated by the fact that someone else, through prior arrangement, paid them on their behalf."[10] In another arbitration under the ICC rules, costs incurred by a parent company of the successful claimant were awarded against the respondent on the basis that such internal payment arrangements did not prevent full costs being awarded to the claimant.[11] This likewise suggests that the source of funds is not a key factor in determining the costs that can be awarded.

The ICC has reported that "approximately 18 per cent of BITs allow for the possibility of using the ICC Rules."[12] Although procedural rules that are commonly used in investment arbitration have different provisions on the allocation of costs, a recent study show that, in general, investment arbitration tribunals have not shied away from allocating costs to the unsuccessful party.[13] This chapter sets out the rules on allocation and recovery of costs in other arbitration rules, specifically, those published by Singapore International Arbitration Centre ("**SIAC**"), SCC, UNCITRAL, ICSID, and London Court of International Arbitration ("**LCIA**").

Given that third party funding is a relatively recent phenomenon, it is not surprising that there are very few institutional rules that contain provisions specifically dealing with third party funding. The 2017 SIAC Investment Arbitration Rules are an exception. The recently published 2017 SIAC Investment Arbitration Rules state that: "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. The Tribunal may take into account any third-party funding arrangements in ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party."[14] (emphasis added) Further, Article 33(1) of the 2017 SIAC Investment Arbitration Rules states that: "The Tribunal may take into account any third-party funding arrangements in apportioning the costs of the arbitration".[15]

Unlike the SIAC rules, the majority of institutional rules and international conventions are silent on the point of third party funding.[16] If Funding Fees that might be charged by the third

[9] Article 37, 2012 ICC Rules.
[10] *Supplier v. First Distributor, Second Distributor*, *cf* Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure (Kluwer Law International, 2016), p. 380.
[11] *Price Waterhouse SARL and PW Conseil SARL v. PricewaterhouseCoopers International Ltd.*, *cf* Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure (Kluwer Law International, 2016), p. 381.
[12] Arbitration Involving States and State Entities under the ICC Rules of Arbitration Report of the ICC Commission on Arbitration and ADR Task Force on Arbitration Involving States or State Entities, p. 2, para. 11.
[13] Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure (Kluwer Law International, 2016), p. 375.
[14] Article 35, 2017 SIAC Investment Arbitration Rules.
[15] Article 33(1), 2017 SIAC Investment Arbitration Rules.
[16] Francisco Blavi, Towards a uniform regulation of third party funding in international arbitration, 6 Intl. A.L.R. (2015), p. 146.

party funder, are indeed recoverable under these rules, it would have to be read into another existing category of recoverable costs.

For instance, some procedural rules allow for the recovery of "other costs" that might be incurred by parties, without specifically requiring that such costs be "legal" costs. For instance, Rule 31 of the 2007 SIAC Arbitration Rules entitled "Party's Legal and Other Costs" states that "[t]he Tribunal shall have the authority to order in its award that all or a part of the legal or other costs of a party (apart from the costs of the arbitration) be paid by another party."[17] (emphasis added) Article 50 of the 2017 SCC Arbitration Rules titled "Costs incurred by a party" stipulates that "Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."[18] (emphasis added)

The rules set out above are flexible in so far as they do not require that recoverable "other costs" must be connected with legal representation. Therefore, these rules might more easily allow for third party funding arrangements to fall within the scope of recoverable "other costs".

Other procedural rules allow for the recovery of "other costs", however, they circumscribe this within a larger requirement that these "other costs" be legal costs, be connected to the proceedings, or be associated with legal representation. This circumscription, in some rules, can be found in the text of the title of the rule on costs. For example, the 2010 UNCITRAL Rules include with the definition of the "costs of the arbitration", "the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable".[19] This implies that the "other costs" must be connected to the "costs of the arbitration". The 1976 UNCITRAL Rules contain a slightly different formulation. Article 38 of the 1976 UNCITRAL Rules states that "[t]he arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only . . . The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable."[20] Thus, any costs of "legal representation and assistance" must, arguably, be connected to the "costs of the arbitration".

Similarly, Article 61(2) of the ICSID Convention states that "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."[21] Thus, any costs claimed by a successful party in an ICSID proceedings must be "incurred by the parties in connection with the proceedings". Tribunals constituted under the ICSID framework have opined that the existence of a third party funding arrangement should be

[17] Rule 31, 2007 SIAC Arbitration Rules.
[18] Article 50, 2017 SCC Arbitration Rules.
[19] Article 40(2)(e), 2010 UNCITRAL Rules.
[20] Article 38(e), 1976 UNCITRAL Rules.
[21] Article 61(2), ICSID Convention. The wide discretion available to ICSID Tribunals in determining the allocation of costs in an arbitration was explained in *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 617: "In coming to its decision on costs, the Tribunal has also taken due note of the decisions made by previous ICSID Tribunals, in light of which it appears that the practice of such Tribunals has not been uniform and that the present Tribunal therefore has a broad discretion to apportion costs."

entirely disregarded when determining what reasonable costs can be recovered. In *Kardassopoulos and Fuchs v. Georgia*, the tribunal held that: "among those factors identified by the Respondent in support of its submissions on costs is the fact that the Claimants have an arrangement with a third-party concerning the financing of these proceedings. The Tribunal knows of no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs."[22] Further, the tribunal noted that: "[i]t is difficult to see why in this case a third party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery."[23] The view taken in *Kardassopoulos and Fuchs v. Georgia* was affirmed in *RSM Production and Company v. Granada*.[24] In *ATA v. Jordan*, the ICSID annulment committee, citing *Kardassopoulos and Fuchs v. Georgia* and *RSM Production and Company v. Granada*, held that third party funding arrangements were not relevant to determining the costs to be awarded in favor of the successful party. Hence, the tribunal ordered the claimant to pay costs to the respondent, taking in account "the Applicant's legal costs and associated expenses".[25] The tribunals in these ICSID cases did not accord weight to the existence of a third party funding arrangement in awarding costs: they were primarily concerned with the reasonableness of the costs claimed by the successful party. However, these awards do not elaborate upon exactly which categories of legal and other expenses were considered by the tribunals to be recoverable or explain specifically whether the Funding Fees payable to a third party funder would be recoverable.

In summary, most rules that might govern the procedure of investment arbitrations do not expressly state that a successful party can recover Funding Fees payable to a third party funder. However, the language of the majority of these rules allow for the recovery of "other costs". Whilst all these rules provide broad guidelines on the allocation and categories of recoverable costs, they currently do not provide any specific guidance on third party funding (save for the SIAC Investment Arbitration Rules). Thus, in principle, the language of most procedural rules commonly used in investor-state arbitrations is broad enough to allow parties to recover costs associated with third party funding.

Some commentators have taken the view that the existence of funding arrangements should not result in situations where an unsuccessful party is better off in the costs phase simply because the funded party made arrangements not to pay its legal costs were it to lose. This would unduly

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[22] *Kardassopoulos and Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 691.

[23] *Kardassopoulos and Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 691. This was decided on the basis that the BITs between Georgia and Greece and between Georgia and Israel, under which the claim was brought, both provides that a Contracting Party shall not raise as an objection at any stage of the proceedings the fact that the investor has received compensation under an insurance contract in respect of all or part of the damages incurred.

[24] *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Annulment Proceeding, Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011, paras. 68-69:

"68. As for the Applicant's submission that the Committee should not order costs where those costs have allegedly been met by 'an undisclosed third party', the Committee concurs with the Tribunal in Ioannis Kardassopoulos and Ron Fuchs v 19 Georgia (ICSID Case Nos ARB/05/18 and ARB/07/15, Award of 3 March 2010), which stated that it knew 'of no principle why any … third party financing arrangement should be taken into consideration in determining the amount of recovery' by parties of the costs incurred in arbitration proceedings (para 691).

69. Accordingly, the Committee hereby determines that the Applicant shall pay the Respondent its claimed costs of USD 186,072.81."

[25] *ATA Construction, Industrial and Trading Company v. Jordan*, ICSID Case No. ARB/08/2, Annulment Proceeding, Order Taking Note of the Discontinuance of the Proceeding, 11 July 2011, paras. 34-35.

privilege the unsuccessful party. It has thus been argued that "while the opponent should not have to pay for the risk aversion of the funded party (i.e., pay the [Funding Fees]), the opponent can still be expected to bear the risk of paying reasonable legal fees".[26]

Essar v. Norscot goes a step beyond this analysis by including Funding Fees payable to a funder in a costs award. This might be due to the specific circumstances in which the case was decided. A detailed case study follows.

Essar v. Norscot: A Case Study

The *Essar v. Norscot* case was decided based on factual circumstances quite distinct from the ICC cases briefly discussed above. Unlike *Supplier v. First Distributor*, it was the funded party that was successful in *Essar v. Norscot*. Further, unlike *Price Waterhouse SARL and PW Conseil SARL v. PricewaterhouseCoopers International Ltd.*, *Essar v. Norscot* did not involve funding by a parent company.

The *Essar v. Norscot* decision emerged from an award, which found Essar Oilfields Services Limited ("**Essar**") liable to pay Norscot Rig Management Pvt. Limited ("**Norscot**") damages for the breach of an operations management agreement of a sum of USD 12 million. The award included a sum of USD 4 million in legal costs.

The arbitrator had determined that Norscot was entitled to the costs of the litigation funding Norscot had obtained from Woodsford Litigation Funding in order to bring the arbitration.[27] Under the terms of the funding agreement, Woodsford Litigation Funding had advanced GBP 647,000 to Norscot on the condition of receiving Funding Fees of 300 per cent of the amounts advanced or 35 per cent of the recovery, whichever was higher, should Norscot have been successful in its claim.

Norscot, having succeeded in its claim, sought from Essar the sum it owed Woodsford Litigation Funding, inclusive of the Funding Fees, which amounted to approximately GBP 1.94 million. The arbitrator held that he was empowered to order the recovery of litigation funding costs under the category of "other costs" for the purposes of section 59(1)(c) of the 1996 English Arbitration Act.[28]

Essar made an application to the English High Court under section 68 of the 1996 English Arbitration Act to set aside the award in the arbitration between Essar and Norscot. *Inter alia*, Essar argued that the arbitrator committed an error in law in construing the term "other costs" as covering the costs of litigation funding.[29] Essar made a number of specific submissions in

[26] Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure (Kluwer Law International, 2016), pp. 388-389.
[27] *Essar v. Norscot*, para. 5.
[28] *Essar v. Norscot*, para. 5.
[29] *Essar v. Norscot*, para. 7(5). The objections raised by Norscot to include: (i) the claim brought by Essar before the High Court was out of time; (ii) there was no serious irregularity in the arbitrator's award within the meaning of S.68(2)(b) of the Arbitration Act; (iii) assuming that there was a serious irregularity under S.68(2)(b) of the Arbitration Act, there was no substantial injustice caused to Essar; and (iv) Essar had lost its rights to make a S.68(2)(b) claim by virtue of its pre- and post-Award conduct (*Essar v. Norscot*, para. 7)

this regard. In assessing these submissions, the High Court took into consideration the relevant provisions of the 1996 English Arbitration Act and the ICC Rules.[30]

First, Essar argued that the term "costs of the arbitration" does not include third party funding because third party funding is not the cost of arbitration but the cost of funding it.[31] The High Court held that "'cost of arbitration' is not some prior limiting definition."[32] Accepting that "other costs" must be related to the arbitration proceedings, and taking a functional approach to the term "other costs",[33] the High Court stated that "where a party to an arbitration is funding it by obtaining specific litigation funding which is now available in a variety of forms, so as to enable him to specifically enforce his legal rights, it is very hard to see how that is excluded for all purposes from expression 'other costs'".[34]

Second, Essar contended that the term "other costs" must be construed *eiusdem generis*, i.e. it must be construed narrowly to cover only costs that are analogous to legal costs.[35] However, the High Court rejected this proposition. The court held that:

> 'Legal costs' is not some defining "genus" whereby the use of "other" may be expressed simply to catch any costs which almost by accident, as it were, fall outside the definition of "legal costs". The better "genus", in my view, is the costs of the arbitration to be regarded in a broad sense. There are legal costs of the arbitration and there are other costs of the arbitration. The real limiting factor, in my view, is the functional one. Do the costs relate to the arbitration and are they for the purposes of it? If the costs have not been incurred in order to bring or defend the claim in question, I would accept that they fall outside the definition of "other costs" and they would not relate to the arbitration – but that is not the case here.[36]

Third, Essar submitted that section 59(1) of the 1996 English Arbitration Act does not specifically state that third party funding is included within the definition of costs.[37] The High Court held that "[t]hat is hardly surprising, for, if it were otherwise, S.59(1) would have to include each and every example of what could or did include 'other costs'. The lack of a specific reference to third party funding is immaterial, in my view."[38]

The High Court arrived at that decision that "as a matter of language, context and logic, it seems to me that 'other costs' can include the costs of obtaining litigation funding…[a]ll that this conclusion entails is that such litigation funding costs falls within the arbitrator's general costs discretion."[39]

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[30] *Essar v. Norscot*, paras. 13, 17, 48.
[31] *Essar v. Norscot*, para. 53.
[32] *Essar v. Norscot*, para. 53.
[33] *Essar v. Norscot*, para. 55.
[34] *Essar v. Norscot*, para. 54.
[35] *Essar v. Norscot*, para. 57.
[36] *Essar v. Norscot*, para. 58.
[37] *Essar v. Norscot*, para. 59.
[38] *Essar v. Norscot*, para. 59.
[39] *Essar v. Norscot*, para. 68.

Is *Essar v. Norscot* Unique?

The arbitration between Essar and Norscot involved specific facts and circumstances that seem to have supported the decisions of both the High Court and the arbitrator regarding the recovery of costs associated with third party funding.

For example, the High Court took particular note of the "exploitative" nature of Essar's behavior towards Norscot before the dispute and pending the arbitration. Likewise, in the arbitrator's view, this had left Norscot with no alternative but to enter into the litigation funding agreement.[40]

In particular, the High Court drew upon the arbitrator's observation that Essar was aware that Norscot's costs could not be financed from its own resources.[41] The arbitrator had suggested that "[t]he respondent probably hoped that this financial imbalance would force the claimant to abandon its claims".[42] In fact, the arbitrator suggested that Norscot's impecuniosity might have been "deliberately caused, or substantially contributed to by Essar".[43]

Relying on the testimony of personnel from Norscot, the arbitrator was convinced that there was no alternative source of funding available to Norscot.[44] There was no reason, in the arbitrator's view, to believe that the deed of agreement was other than genuine.[45]

Most crucially, the arbitrator made disapproving comments regarding the overall behavior of Essar over the course of the arbitration.[46]

Although the High Court analyzed in depth whether the costs associated with the third party funding of Norscot would fall within the definition of "other costs", it could be said that the arbitrator's underlying decision to actually *order* recovery of the third party funding costs may have been influenced by other factors. Perhaps the facts of the case were such that the funding costs were awarded against Essar as a result of perceived bad faith on the part of Essar. The specific circumstances of *Essar v. Norscot* might make the case distinguishable from other cases where arbitral tribunals are faced with the question of whether to order recovery of third party funding costs (as opposed to the question of whether there is the power to do so).[47]

Transparency of Funding Arrangements

One of the key concerns raised in the context of the growth of third party funding is that such arrangements are not routinely disclosed. Most arbitration and litigation funding agreements

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[40] *Essar v. Norscot*, para. 22.
[41] *Essar v. Norscot*, para. 23.
[42] *Essar v. Norscot*, para. 23.
[43] *Essar v. Norscot*, para. 27.
[44] *Essar v. Norscot*, para. 24.
[45] *Essar v. Norscot*, para. 27.
[46] *Essar v. Norscot*, para. 34.
[47] *Essar v. Norscot*, para. 69: "this was a case, perhaps unusual, where the arbitrator rules in detailed and robust terms that Essar drove Norscot into this expensive litigation because of its own reprehensible conduct going far beyond technical breaches of contract, in order to vindicate its rights. Further, as the tribunal found, Norscot had no option, but to obtain this funding from this third party funder. As a matter of justice, it would seem very odd and certainly unfortunate if the arbitrator was not entitled under S.59(1)(c) to include the costs of obtaining third party legal funding as part of "other costs" where they were so directly and immediately caused by the losing party."

contain a confidentiality clause. It has been reported that third party funders are generally cautious about extensive disclosure of the terms and conditions between the funder and its client.[48] Moreover, there are many reasons why a funded party might not wish to disclose that it is being funded. As one commentator has noted, "…the respondent may then decide to change its strategy and deliberately increase the claimant's costs or create tension between the claimant and its lawyers and/or the funder."[49]

The confidentiality associated with third party funding has raised certain questions about the need for guidance regarding the disclosure of third party funding arrangements in dispute resolution. One concern that has been raised is whether confidential third party funding arrangements might result in unintended conflicts of interest between funders and arbitrators involved in the same case.

The ICC has provided guidance to parties and arbitral tribunals to the effect that "[r]elationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case".[50] Commentators have also drawn attention to the potential adverse implications that third party funding may have if the funder has substantive control over the arbitration, which might "affect parties' choice in selecting legal counsel, appointing parties' nominated arbitrator and, less obviously, the strategies to be adopted in the arbitration proceedings."[51]

In investor-state arbitration, the non-disclosure of third party funding arrangements is seen to be potentially problematic when the state is the funded party. In particular, questions have been raised about the policy implications of a private party exercising control over the state's strategy in the dispute.[52]

At the same time, it has been pointed out that "this regulation of disclosure, however, merely concerns the obligation of the funded party towards the funder, but does not address the issue of whether the funded party would have an obligation to disclose the existence of a funding agreement during the arbitral proceedings towards the tribunal or the other party."[53]

Several ICSID tribunals have held that they can order the disclosure of details regarding third party funding arrangements under their inherent powers, or pursuant to the parties' obligation to arbitrate in good faith. For example, the tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* stated that "it has inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the

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[48] http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/.

[49] Eric De Brabandere and Julia Lepeltak, Third-Party Funding in International Investment Arbitration, 27(2) ICSID Review (2012) 379-398, p. 395.

[50] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 22 September 2016, para. 24, available at http://www.iccwbo.org/News/Articles/2016/ICC-Court-adopts-Guidance-Note-on-conflict-disclosures-by-arbitrators/.

[51] Khushboo Hashu Shahdadpuri, Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory, 12(2) Asian International Arbitration Journal (2016) 77-106, p. 83; Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, (Kluwer Law International, 2016), p. 41.

[52] http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/.

[53] Eric De Brabandere and Julia Lepeltak, Third-Party Funding in International Investment Arbitration, 27(2) ICSID Review (2012) 379-398, p. 394.

process. Claimants have not challenged this inherent power under the ICSID Rules."[54] The tribunal also noted that the claimants had not denied that there is a third party funder for the arbitration claim.[55] The tribunal proceeded to order the claimants to disclose whether their claims were being funded by third parties and, if so, the names and details of the third party funders as well as the terms of the funding.[56] Interestingly, it appears that there are examples of claimant parties in investor-state arbitration who have voluntarily disclosed their third party funding arrangements.[57]

In any event, it appears that there is a growing trend in recently negotiated and concluded investment agreements to encourage greater disclosure of third party funding arrangements.

For example, Article 8.26, Chapter 8, of the Comprehensive Economic and Trade Agreement between the European Union and Canada states that:

> 1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.
>
> 2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.[58]

Similarly, Article 11, Section 3, Chapter 8 of the Free Trade Agreement between the European Union and Vietnam[59] states that:

> 1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder.

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[54] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2005, para. 6.

[55] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2005, para. 11.

[56] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2005, para. 8.

[57] *Oxus Gold plc v Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Final Award, 17 December 2015, para. 127: "It is undisputed that Claimant is being assisted by a third party funder in this arbitration proceeding".

[58] http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. See also, Article 8, Chapter 3, Section 2 of the EU published text of the Transatlantic Trade and Investment Partnership, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf, which states:

"1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third party funder.

2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made."

[59] http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf

> 2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement concluded or the donation or grant is made.

The underlying arbitration in *Essar v. Norscot* is consistent with this trend, particularly as it relates to the costs phase of the proceeding. Indeed, it has been submitted that "[o]nly if the tribunal is aware of the precise structure on which the claimed costs are based can it take into account the possibility of overcompensation, decide whether to allow or disallow recovery of the success based cost element, and assess the amount of otherwise reasonable legal costs".[60] The High Court in deciding *Essar v. Norscot* noted that the arbitrator had studied the terms of the litigation funding agreement and had observed that "[t]he funding costs reflect standard market rates and terms for such facility…"[61]

Thus, the existence of the funding agreement and the identity of the funder, as well as the terms of the funding agreement in *Essar v. Norscot* were disclosed to the arbitrator. The nature of the funding agreement was a key factor that influenced the decision of the arbitrator to award the Funding Fees as part of the costs awarded in favor of the claimant. In fact, in *Essar v. Norscot*, the arbitrator even engaged an expert in order to determine whether the terms of the third party funding agreement were acceptable.[62]

The case provides no specific guidance on what information would be reasonably required by tribunals ahead of deciding whether the funder's Funding Fees can be awarded to the successful party, but provides a good example of what steps tribunals might take. One could argue that the possibility that the tribunal might, as in *Essar v. Norscot*, consider awarding Funding Fees against the unsuccessful party based on the circumstances of the funding arrangement should require the disclosure of the terms relating to the uplift fees at an earlier stage in the arbitration. This would allow the unfunded party access to information regarding the costs that it might bear were it to lose the arbitration, permitting the unfunded party to evaluate its potential financial exposure.

Conclusion

The recovery of Funding Fees of the funder as ordered in *Essar v. Norscot* falls within the broad wording of the ICC Rules on the point of costs and could be read into the widely phrased texts of other similar procedural rules that allow for "other costs".

However, the decision of the High Court in *Essar v. Norscot* seems to be contrary to general principles applied by investment arbitration tribunals, *albeit* under different rules, that the third party funding agreement should be altogether disregarded in the determination and allocation of costs between parties.

A possible reason for this departure from the general rule might be the specific facts in *Essar v. Norscot*, which, according to the High Court, involved the successful claimant being driven into impecuniosity by the respondent, which compelled the claimant to enter into a third party funding arrangement in order to meet its arbitration costs. On this basis, it might be considered

[60] Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, (Kluwer Law International, 2016), p. 399.
[61] *Essar v. Norscot*, paras. 22, 25.
[62] *Essar v. Norscot*, para. 22.

that the Funding Fees of the claimant's third party funders in *Essar v. Norscot* were allocated as costs payable by respondent mainly on account of the respondent's conduct. Indeed, the prevailing legal framework does not prohibit Funding Fees associated with funding being awarded to the successful funded party, in principle. However, the decision to do this in *Essar v. Norscot* might have been more immediately driven by the tribunal's concern regarding bad faith on the part of Essar.

Hence, whether the decision of *Essar v. Norscot* on the award of Funding Fees will be readily used by other tribunals remains an open question. Yet, it is also true that *Essar v. Norscot* has expanded arbitral practice in awarding costs in matters involving third party funding. The decision shows that successful parties seeking payment of their funder's Funding Fees might have to be more agreeable to making disclosure of the terms of the funding arrangement. The tribunal might adopt methods, such as the appointment of an expert, in order to scrutinize the funding arrangement and assess whether the terms of the funding arrangement are reasonable.