

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan
(ICSID Case No. ARB/12/6)

PROCEDURAL ORDER NO. 3

Professor Julian D.M. Lew QC, President of the Tribunal
Professor Laurence Boisson de Chazournes, Arbitrator
Professor Bernard Hanotiau, Arbitrator

Secretary of the Tribunal
Mr Paul-Jean Le Cannu

I BACKGROUND

1. In April 2014, Respondent asked the Tribunal to order Claimants to disclose, *inter alia*, whether they had entered into third-party funding arrangements to finance their claims in this arbitration, and if so, the terms of such arrangements. That application was refused in the Tribunal's Procedural Order No. 2 dated 23 June 2014 as the Tribunal was not persuaded that there were reasons to make such an order. In that Decision the Tribunal gave several reasons which could justify an order for disclosure of a third-party funder, including in particular to avoid a conflict of interest for the arbitrator, for transparency and to identify the true party to the case, and if there is an application for security for costs.
2. By letter dated 10 April 2015, Respondent again requested the Tribunal to order Claimants to disclose "*the identity and nature of the involvement of third-party funders for Claimants in this proceeding*". To justify this application Respondent noted that Claimants had changed their legal counsel (who are also now representing the claimant in the annulment proceedings in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1). Claimants refused to disclose details of third-party funding when requested to do so by Respondent. Respondent said that disclosure was necessary for various reasons including to ensure there are no conflicts with those involved in the arbitration, including in particular the arbitrators. In this respect Respondent relied on the 2014 IBA Rules on Conflicts of Interest in International Arbitration. Respondent said it was considering making an application for security for costs because of its concern that a third-party funder "*may elect to withdraw at any time and [...] may be able to evade a costs award in the event of an adverse decision*". Further Respondent said it was necessary to check that Claimants, Mr Çap and Sehil İnşaat, are still the actual owners of the claims in this arbitration.
3. On 20 April 2015, at the request of the Tribunal, Claimants commented on Respondent's application for disclosure arguing, *inter alia*, that Respondent had previously sought to derail the arbitration and by its jurisdictional objections had caused significant costs, and it has now

declared its intention to request reconsideration of the Tribunal's Decision dated 13 February 2015. Claimants stated that the conflict of interest issue did not stand as the alleged relationship between Professor Hanotiau and Vannin Capital was unfounded. Claimants stated that they "*have not assigned their claims*" in this arbitration. Claimants further argue that Respondent's application is "*audacious*" as it "*has defaulted on payment obligations under 31 construction projects*", and "*has expropriated Claimants' equipment*" without any compensation leaving Claimants no choice but to bring this arbitration. Claimants therefore ask the Tribunal to deny Respondent's application.

4. On 21 April 2015, Respondent replied noting that Claimants had not denied that this arbitration is being financed by a third-party funder. Respondent argues that it is necessary "*to have disclosure of the third-party funder who has a direct economic interest in a potential award in this case, in order to determine if there are any conflicts and to have full transparency of all parties in interest with respect to this case*".

II TRIBUNAL'S ANALYSIS

5. § 14 of Procedural Order No. 2 stated:

This Decision does not preclude Respondent from making a further request for disclosure at a later stage in this arbitration if it has additional information to justify the application.

6. As stated at § 9 of Procedural Order No. 2 the Tribunal considers 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 process. Claimants have not challenged this inherent power under the ICSID Rules.
7. Accordingly, there is no reason why Respondent cannot make this application for disclosure and for the Tribunal to consider the application again in light of changed circumstances and

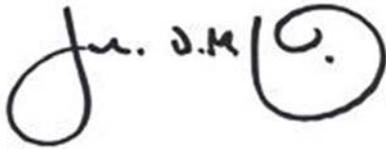
new arguments. The question for the Tribunal now is whether the circumstances exist to justify the Tribunal ordering Claimants to make the disclosures sought by Respondent.

8. The Tribunal has decided that Claimants should disclose whether their claims in this arbitration are being funded by a third-party/parties, and, if so, the names and details of the third-party funder(s) and the terms of that funding. The Tribunal's decision is based on the following factors.
9. First, the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder. In this respect the Tribunal considers that transparency as to the existence of a third-party funder is important in cases like this.
10. Second, although it has not yet done so, Respondent has indicated that it will be making an application for security for costs. It is unclear on what basis such application will be made, e.g. Claimants' inability to pay Respondent's costs and/or the existence of a third-party funder.
11. There are two additional factors which the Tribunal considers support the conclusion it has reached. Claimants have not denied that there is a third-party funder for the claims in this arbitration. It would have been straight forward to do so, just as they denied having assigned any of their rights to another party. Furthermore, and this was not denied by Claimants, Respondent has alleged that the order for costs in favour of Respondent made by the *Kılıç* Tribunal has not been paid even though the claimant (*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi*) has funded the annulment proceedings.
12. In the circumstances, the Tribunal is sympathetic to Respondent's concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration.

III TRIBUNAL'S DECISION

13. Accordingly, the Tribunal has decided and hereby orders that within 15 days of the date of this Procedural Order, Claimants shall confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, shall advise Respondent and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.

For and on behalf of the Tribunal

A handwritten signature in black ink, appearing to read "Jul. D.M. Lew" followed by a large, stylized circular flourish.

Julian D.M. Lew QC
President of the Tribunal
Date: 12 June 2015