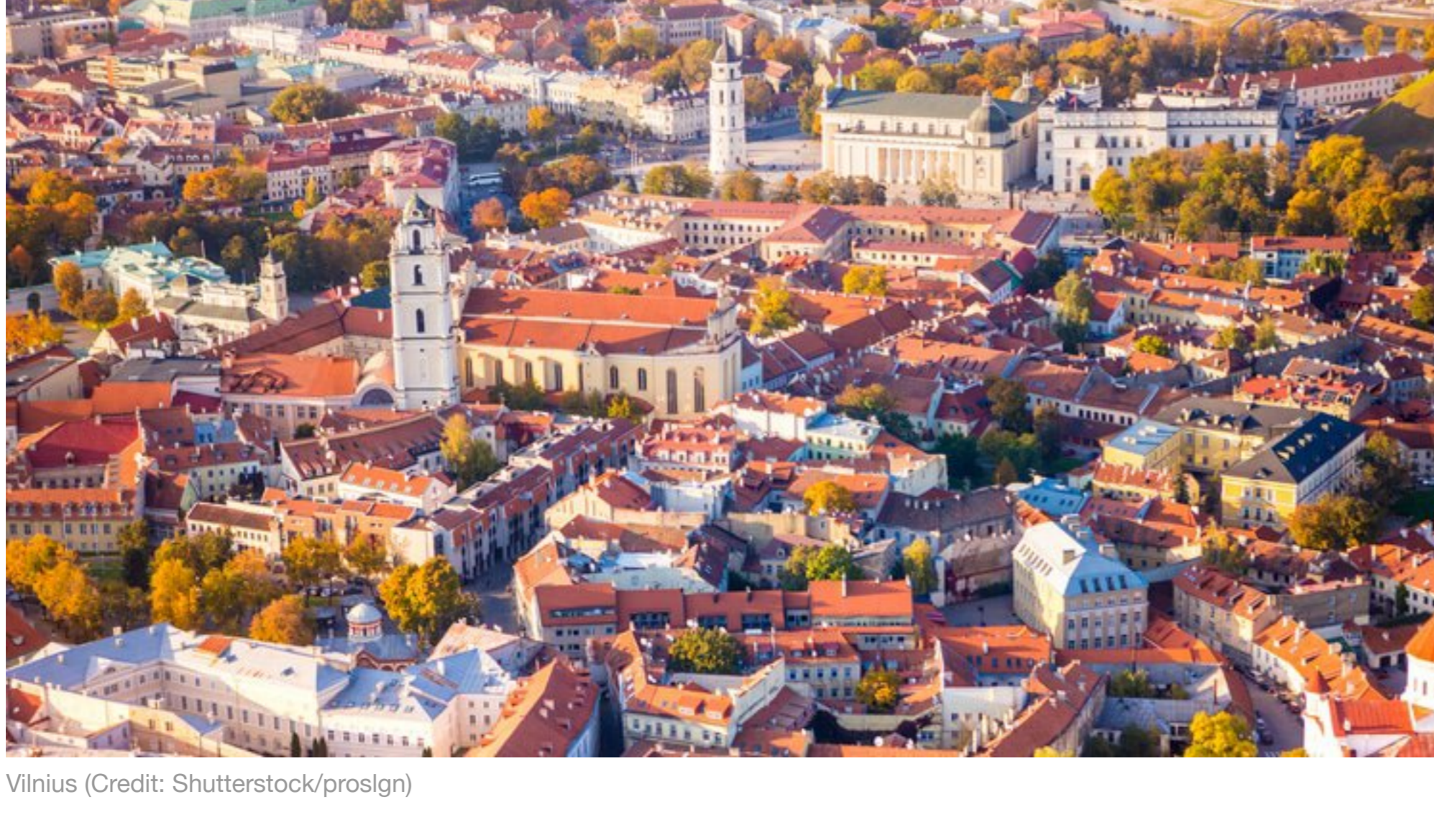
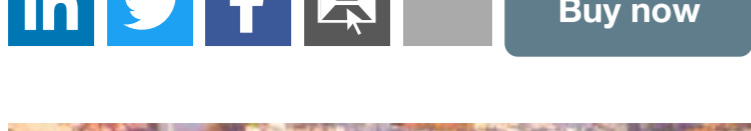


Funding of SCC claim draws scrutiny in Lithuania

Cosmo Sanderson and Sebastian Perry 10 March 2020



Vilnius (Credit: Shutterstock/proslgn)

A deal agreed by the Lithuanian city of Vilnius to finance its €560 million SCC claim against France's Veolia has shone a rare spotlight on arrangements for third-party funding of claims by public entities – as well as drawing scrutiny from a local anticorruption body.

The Vilnius City Municipality Administration and the city's publicly-owned heat and hot water provider Vilniaus Silumos Tinklai (VST) entered into a funding agreement with Paris-registered Profile Investment in February 2019. Their counsel in the SCC case, Shearman & Sterling and regional firm TGS Baltic, are also parties to the contract.

The funding agreement and an engagement letter from Shearman were leaked to Lithuanian media outlet *Delfi* and have been [published online](#).

Profile Investment, or Pi, was [set up](#) in 2018 by [Iain McKenny](#), former general counsel of disputes and managing director at Vannin Capital; and [Alain Grec](#), former director of La Française International Claims Collection.

Under the agreement, Pi has committed to providing up to €5 million to allow the city and VST to pursue a counterclaim against Veolia in a pending SCC arbitration. The counterclaim was initially valued at €400 million but has now been increased to €560 million, Vilnius mayor Remigijus Šimašius announced at a press conference on 3 March.

Veolia's local subsidiary Vilnius Energija ran the city's heating grid and power facilities under a lease agreement from 2002 to 2017, when it came back under the city's control.

The Veolia entities [initiated the arbitration](#) in 2016, alleging breaches of the agreement including a failure to hire an independent expert to ascertain the technical status of its assets. The claimants are reportedly seeking €22 million in damages and declaratory relief relating to the handover of the facilities.

The city and VST argue that they are the real claimants and that Veolia only launched the arbitration pre-emptively. They seek compensation for damage allegedly caused to the heating grid and power facilities. The city's vice mayor said last week that Veolia had returned one power plant "in a completely inoperative state" and failed to deliver on its promise to upgrade the grid.

The dispute is before a Vilnius-seated SCC tribunal chaired by Switzerland's [Wolfgang Peter](#) of Peter & Kim and including Canadian [Henri Alvarez QC](#) and Germany's [Volker Triebel](#). Hearings are scheduled for August and September this year.

Veolia and its subsidiary are represented by Sidley Austin and its former head of international arbitration [Stanimir Alexandrov](#).

Funding terms in the spotlight

While third-party funding of arbitrations has become commonplace, this is a rare public example of the funding of claims by a public entity against a private investor. It is rarer still for the terms of such a funding arrangement to come to light.

The agreement as published appears to cap Pi's potential remuneration at €20 million after the recovery of its funding investment. Shearman confirmed to GAR that this is the maximum sum that Pi could recoup under the agreement.

The deal provides that Pi is entitled to collect: 5% of money recovered between 0 and €50 million; 4% of damages collected between €50 million and €100 million; 3% of damages collected between €100 million and €200 million; and 2% of damages collected between €200 million and €400 million. (Assuming full damages are awarded, that would amount to €11.5 million for Pi.)

The contract further states that if damages are received more than 18 months after the date of the funding agreement or if the funding from Pi exceeds €4 million, whichever occurs earlier, Pi will additionally receive twice the sum it has provided in funding.

It also states that the funder will be entitled to recover 150% of any additional funding it chooses to provide in excess of the budgeted €5 million.

The funding is on a non-recourse basis, meaning the city and VST will not be liable to Pi in the event their counterclaim is unsuccessful provided there has been no "wilful breach" of the contract's "fundamental terms".

One eye on potential ICSID outcome

The funding agreement also anticipates the possibility that the SCC arbitration may be affected by the outcome of a parallel ICSID claim that Veolia is pursuing against Lithuania under the France-Lithuania bilateral investment treaty.

The agreement provides that if the SCC tribunal reduces the damages to the city and VST to take into account damages awarded to Lithuania in the ICSID arbitration, that reduction shall form part of the "recovered damages" from the SCC case.

It also anticipates a scenario where the funded parties are refused damages in the SCC case and Lithuania wins damages in the ICSID case that "correspond" to the losses claimed in the SCC arbitration. If Lithuania receives payment of such an ICSID award, the city and VST will "endeavour to negotiate" for the state to transfer them the corresponding amounts. Those amounts would then be treated as part of the recovered damages under the funding agreement.

In fact, those provisions may turn out to be moot. Lithuania did bring a €130 million counterclaim in the ICSID arbitration but has since withdrawn it in light of the European Court of Justice's 2018 ruling in *Achmea* that intra-EU bilateral investment treaties are incompatible with EU law. It is understood the state may reassert those claims before national authorities under the terms of a [plurilateral treaty for the termination of intra-EU BITs](#), which is expected to be concluded by EU member states this year.

Veolia has said it is seeking €100 million in the ICSID claim, which concerns unfair and discriminatory changes in laws and regulations concerning renewable energy services. The claimant filed a rejoinder on jurisdiction in January this year.

The ICSID case is being heard by a tribunal composed of Brazilian-Swiss chair [Laurent Lévy](#), Canada's [David Haigh QC](#) and British barrister [Toby Landau QC](#). Haigh replaced Chilean arbitrator [Francisco Orrego Vicuña](#), who resigned shortly before his [death](#) in 2018. Counsel is the same as in the SCC case.

Other terms come to light

The contract expressly provides that the city and VST will be solely liable for any adverse costs order. They can request Pi to arrange adverse costs insurance.

Pi has undertaken not to issue any instructions to the city and VST and their lawyers in respect of the conduct of the claim but "will be free to share its thoughts or considerations".

In the absence of voluntary payment by Veolia, the agreement imposes an obligation on the city and VST to seek enforcement of any award in their favour and empowers Pi to take recovery action in their name if they fail to do so. Pi has also committed to help them find a buyer for the award if they wish to sell it.

The agreement does not appear to contain a dispute resolution clause but specifies it is governed by Pi's "General Terms" as separately provided to the parties.

In its amended letter of engagement dated March 2019, Shearman estimates the total legal and expert fees and arbitration costs for the case at €6.4 million, of which €5 million will be borne by Pi and €1.4 million by the city.

Shearman is charging a discounted, flat hourly rate of €500 for partners, counsel and associates and will not charge VAT on that amount. TGS Baltic's equivalent rate is €100 plus VAT.

The engagement letter is governed by Lithuanian law and provides that disputes will be resolved in the courts of Lithuania.

Public controversy and corruption allegations

The city's agreement with Pi has been the subject of controversy in the Lithuanian press and has given rise to investigations by two different authorities, both of which have now concluded.

On 26 February, the Lithuanian Prosecutor General's Office announced it was satisfied that the contract terms did not conflict with the city council's January 2019 decision authorising the signing of such an agreement. The office therefore said it would not open any public interest procedure to contest the contract.

A parallel investigation by Vilnius city council's anti-corruption commission is also understood to have come to an end, although its findings have not yet been made public. The commission, which is chaired by council member Vydūnas Sadauskas, has [publicly criticised](#) the contract and said that it should be amended.

Former Vilnius mayor Artūras Zuokas has also said he doubts the contract is "transparent" or legal.

However, it could be argued Zuokas is not a neutral observer in the matter. He was the mayor at the time the lease agreement with Vilniaus Energija was concluded, and it is part of the city's case in the SCC arbitration that Zuokas engaged in corruption for the benefit of Veolia and its subsidiary.

In 2009, Zuokas and a former Vilniaus Energija board member, Andrius Janukonis, were convicted in 2008 of bribing a former member of the city council with the aim of securing Zuokas' re-election.

During elections last year, the incumbent mayor Šimašius also accused Zuokas of taking a €724,000 bribe from Veolia. Zuokas has [denied the allegations](#) and said that Šimašius was looking to "publicly defame" him in to win re-election. He also reportedly lodged a criminal complaint against the incumbent mayor for defamation.

The city's vice mayor Benkuskas alleged at the press conference last week that the city's contract with Veolia "was entwined with corruption" and only served the "narrow interests of business entities."

TGS Baltic partner [Vilius Bernatonis](#) also suggests the investigation of the Pi funding agreement that by the city council's anti-corruption commission may be politically motivated and that there are "serious concerns about impropriety" regarding that investigation.

Bernatonis says that, as is democratic tradition in Vilnius, the commission is controlled by the city's political opposition in the city, which is allied to Zuokas. Besides their corruption allegations against Zuokas in the arbitration, Bernatonis says his clients believe the former mayor is "actively trying to disrupt the municipality's work on the arbitration from the inside."

Pi founder McKenny tells GAR that the funder operates in full compliance with EU regulations and was "chosen after a rigorous selection process owing to a unique ethical funding model that offers terms specifically calibrated to the sensitivities of the public purse."

"Our terms were reviewed and approved by Vilnius Municipality and VST who remain the true claimants pursuing an extremely meritorious claim against a large, litigious, multinational corporation."

Shearman partner [Yas Banifatemi](#) says "the funding arrangement allowed our clients, which are public entities with extremely limited resources, to fight this mega dispute against a multinational with nearly unlimited resources on an equal footing."

Veolia's counsel Sidley Austin declined to comment.

Veolia Environnement and Vilnius Energija v Vilnius City Municipal Administration and Vilniaus Silumos Tinklai (SCC Case No. 2016/183)

Tribunal

- [Wolfgang Peter](#) (Switzerland)(President)
- [Henri Alvarez QC](#) (Canada) (appointed by Veolia)
- [Volker Triebel](#) (Germany) (appointed by Vilnius City Municipal Administration)

Emergency arbitrator

- [Christer Söderlund](#) (Sweden)

Counsel to Vilnius City Municipal Administration and VST

- Shearman & Sterling

Partners [Emmanuel Gaillard](#) and [Yas Banifatemi](#), counsel [Ilija Mitrev Penusliski](#) and associates [James Herbert](#) and [Vincenzo Speciale](#) in Paris

- TGS Baltic

Partners [Vilius Bernatonis](#) and [Valentinas Mikelėnas](#), associate partner [Paulius Zapolskis](#), and senior associate [Gailė Juozapaitytė](#) in Vilnius

Counsel to Veolia Environnement and Vilnius Energija

- Sidley Austin

Partner [Marinn Carlson](#) in Washington, DC

- [Stanimir Alexandrov](#) of Alexandrov Law (continued working on the case after leaving Sidley in 2017)

Veolia Environnement S.A. and others v. Republic of Lithuania (ICSID Case No. ARB/16/3)

Tribunal

- [Laurent Lévy](#) (Brazil-Switzerland) (Chair)
- [David Haigh*](#) (Canada) (appointed by Veolia)
- [Toby Landau QC](#) (UK) (appointed by Lithuania)

*replaced Chile's [Francisco Orrego Vicuña](#) following his resignation in 2018

Counsel to Veolia

- Sidley Austin

Partner [Marinn Carlson](#) in Washington, DC

- [Stanimir Alexandrov](#) of Alexandrov Law (continued working on the case after leaving Sidley in 2017)

Counsel to Lithuania

- Shearman & Sterling

Partners [Emmanuel Gaillard](#), [Yas Banifatemi](#), counsel [Ilija Mitrev Penusliski](#), associates [James Herbert](#) and [Vincenzo Speciale](#) in Paris, and associate [Marc Jacob](#) in Frankfurt

- TGS Baltic

Partners [Vilius Bernatonis](#) and [Valentinas Mikelėnas](#), associate partner [Paulius Zapolskis](#), and senior associate [Gailė Juozapaitytė](#) in Vilnius

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