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Third Party Funding and Cost in Investment and Commercial Arbitration
James Kwan

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WIN-WIN SOLUTION

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Notes to contributors

If you are interested in contributing an article about Arbitration & Alternative Dispute Resolution, please sent by email to **bani-arb@indo.net.id**. The writer guidelines are as below :

1) Article can be written in Bahasa Indonesia or English 12 pages maximum
2) Provided by an abstract in one paragraph with Keywords (Bahasa Indonesia for English article & English for Bahasa Indonesia article)
3) The pages of article should be in A4 size with 25 mm/2,5 cm margin in all sides
4) The article used should be in Ms. Word format, Times New Roman font 12 pt
5) Reference / Footnote
6) Author Biography (100 words)
7) Recent Photograph

From the Editor

In this edition we are pleased to present three articles presented in the recent APRAG Conference in Bali. The first article is written by James Kwan, who discusses the third party funding which has become increasing popular in numerous jurisdictions including England & Wales, various European countries, the United States, and Australia. Providing an additional means of funding arbitrations, and for some parties, the third funding would be only means of funding arbitration for meritorious claims.

The second article is by Nikolaus Pitkowitz who discusses harmonization of practices when dealing with security costs. The paper explores the conceptual basis for granting security for costs and and how it may be justified in contractual relations between commercial parties where a dispute has arisen. The issues include conflicts of interests, disclosures, influence of the funder on conduct of the arbitration and settlements and ethical issues arising for attorneys and their clients, including loss of privilege.

Finally, Andrew Moran's paper explores the conceptual basis for granting security for costs and how it may be justified in contractual relations between the parties where a dispute has arisen, the nature and extent of disparity in practices of awarding security for costs in some different seats, the underlying reasons for such disparity, if and how harmonisation of practices might be achieved, and, ultimately, taking a view to provoke discussion in answer to the question in the title of the presentation is concerned with orders for security for costs in circumstances where a respondent to a claim seeks to force the party bringing the claim (or counterclaim) to provide sufficient security to cover the anticipated costs of arbitral fees and legal expenses that may be awarded against it by the arbitral tribunal.

Last but least, we hope you enjoy your reading and welcome any comments arising from the content of the newsletter, contribution of articles or suggestion for improving the Newsletter. Our e-mail address bani-arb@indo.net.id (our web site: http:// www.baniarbitration.org).

Jakarta, December 2016

APRAG CONFERENCE 2016

THIRD PARTY FUNDING AND COST IN INVESTMENT AND COMMERCIAL ARBITRATION

James Kwan[1]

James Kwan is a Partner in the Hong Kong office. He specialises in international commercial arbitration, with a focus on healthcare/life sciences/medical devices, chemicals, technology, infrastructure, and energy disputes. He has represented clients in arbitrations in Asia, the U.S., the Middle East, and Europe under the major institutional rules such as ICC, HKIAC, SIAC, CIETAC, AAA, LCIA, DIAC, CAS, and in ad hoc arbitrations.

"Fire can burn down the earth, but if its use is regulated it can contribute to the welfare of all on the planet"[2]

Abstract

Third party funding has become increasingly popular in jurisdictions practice in several countries such as in: Europe, Australia, and The United States mostly because it helps to allow claims to be made as well as managing its financial risk. However, some countries in Asia such as in Singapore and Hongkong, such practice is prohibited. Actually, in practice, concerns of capital adequacy of funders , control and conflict of interest, if there is any can be addressed through self-regulation by a code.

Conclusively, since third party funding does not invent rights for claimants, then they should not create rights for respondents, whose right to obtain security for costs, should be independent from the claimants funding arrangements.

Introduction

Third party funding is the funding of claims in arbitration or litigation by commercial bodies in return for a share of the proceeds recovered in such proceedings, or some other financial benefit[3].

It has become increasing popular in numerous jurisdictions including England & Wales, various European countries, the United States, and Australia.

Arbitration is continuing to grow at a phenomenal rate in Asia. There are three key reasons why Asian venues are increasingly being chosen ahead of the traditional seats. First, Asian arbitral institutions like the Hong Kong International Arbitration Centre ("**HKIAC**") and the Singapore International Arbitration Centre ("**SIAC**") among others, are mature arbitral institutions that are cheaper than their European counterparts, but comparable in quality. Second, intra-Asian trade is on the rise. And third, China's emergence as a

[1] Partner, International Arbitration, Hogan Lovells, Hong Kong.

[2] Munir Maniruzzaman, Third Party Funding in International Arbitration: A Menace or Panacea? *Kluwer Arbitration Blog* (2012)

[3] Committee, in its Consultation Paper "Third Party Funding for Arbitration" October 2015. The *IBA Guidelines on Conflicts of Interest in International Arbitration*, adopted 23 October 2014, Explanation General Standard 6(b), 13 states "Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration." (our underlining).

[4] See HKIAC's website http://hkiac.org/about-us/statistics.

global superpower has seen bargaining power shift in contract negotiations.

The HKIAC reported strong growth in its case statistics for 2015, recording the highest number of new cases since 2010 and a record high total amount in dispute. A total of 271 new cases were filed at HKIAC in 2015, with 116 administered by HKIAC under the HKIAC Administered Arbitration Rules or the UNCITRAL Rules. The total amount in dispute of all arbitrations reached US$6.2 billion[4].

SIAC recorded similar growth. There were 271 new cases administered by SIAC, with a record total amount in dispute of S$6.2 billion. 84% of new cases were international, and 42% had no connection to Singapore[5]. The International Chamber of Commerce ("ICC") also reported tremendous growth in the number of cases it administered[6].

Hong Kong and Singapore are the third and fourth most preferred seats after London and Paris according to the Queen Mary University of London 2015 survey[7].

However, in both jurisdictions, there is traditional resistance against third party funding, due to doctrines of maintenance and champerty.

Maintenance is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever and where the assistance he renders to on or the other party is without justification or excuse. Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute[8].

There are also concerns that third party funding increases litigation, encourages frivolous claims and may tend to corrupt the arbitral process by a participant who is unconnected with the merits of the dispute and has a motive for profit. Other concerns relate to unfair contract terms, the need for disclosure and conflicts of interest, and the ability of the tribunal to make third party costs orders.

There is also the perceived threat to the foundations of the solicitor-client relationship and the perception that third party funding may risk corrupting, this relationship.

The current state of play in Asia

It is unclear whether Hong Kong permits third party funding. In Unruh v. Seeberger[9], the Court of Final Appeal expressly left open the question of whether maintenance and champerty applied to agreements concerning arbitrations taking place in Hong Kong. According to Ribeiro PJ:

> *"... I leave open the question whether maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong since it does not arise in the present case".*

However, the Court of Final Appeal emphasised the need for public policy considerations upon which the doctrines of champerty and maintenance were based to be evaluated through modern lenses and to be balanced against countervailing public policy considerations such as access to justice and the recognition of legitimate common interests in litigation.

In an earlier decision, the Hong Kong Court of First Instance in Cannonway Consultants v. Kenworth Engineering Ltd.[10] opened the door to third party funding of arbitrations in Hong Kong, regardless of the rule against champerty applying in litigation proceedings. According to Kaplan J:

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5 SIAC's Annual Report 2015: http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf

6 The ICC recorded the second-highest number of new cases in its 93-year history. 801 cases were filed in 2015. The average monetary value of disputes submitted to the ICC in 2015 rose to US$84 million, with the largest dispute valued at over US$1 billion. The aggregate value of all disputes pending before the Court at the end of 2015 stood at US$286 million. See http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/

7 The five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC and SCC. Respondents expressed the view that five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC, and the most improved arbitral institution (taken over the past five years) is the HKIAC, followed by the SIAC, ICC and LCIA.

8 See *Unruh v. Seeberger* (2007) 10 HKCFAR 31 at 84 to 85.

9 (2007) 10 HKCFAR 31.

10 [1995] 1 HKC 179.

" … If it were to apply in the present case, it would be extending champerty from the public justice system to the private consensual system which is arbitration. The trend in recent years has been all the other way … It seems to me unwise to make any extension to the law of champerty given the reasons for its introduction have long since passed."

Kaplan J (as he then was) in Cannonway took into account the following:

- Arbitration is a private consensual system of justice
- Supremacy should be given to the doctrine of party autonomy
- There is a diminished role for the courts in arbitration
- The "international flavour" – parties should not be subject to a rule of law which is not applicable in many other jurisdictions, as this would make Hong Kong a less desirable venue for international arbitration.

In *Winnie Lo v. HKSAR*[11], the Hong Kong Court of Final Appeal held that maintenance and champerty continue to be part of the law in Hong Kong.[12] In HKSAR v. Mui Kwok Keung[13], a barrister of 19 years' call was jailed for over three years for charging his client a contingency fee. At present, Singapore prohibits third party funding. In Otech Pakistan v. Clough Engineering[14], arbitration funding was expressly prohibited due to the doctrine of champerty. The Singapore Court of Appeal relied on the English court decision of Ashford v. Yeandle[15] in applying the doctrine to both litigation and arbitration:

> *"Arbitration proceedings are a form of litigation. I find it quite impossible to discern any difference between court proceedings and arbitration proceedings that would cause any contingency fee agreement to offend public policy in the former case but not the latter".*

With maintenance and champerty, there was the perceived "tendency to pervert the course of justice"[16], and the Singapore Court of Appeal was concerned that a champertous funder may be tempted to engage in unscrupulous behaviour and pervert the administration of justice by inflaming damages, suppressing evidence or suborning witnesses. However, Ashford v. Yeandle was a decision dealing with contingency fee arrangements by lawyers, and different considerations apply to third party funding.

A counsel's fee sharing arrangement was prohibited as champerty in Singapore: The Law Society of Singapore v. Kurubalan s/o Manickam Rengaraju[17]. The Court of Appeal recognised that any reform in the rule against champerty had to come from the legislature and not the courts.

However, the modern trend is moving away from prohibiting third party funding in international arbitration.

In October 2015, the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission in Hong Kong issued a public consultation paper which recommended that third party funding be allowed in Hong Kong and that clear ethical and financial standards be developed.

On 30 June 2016, the Singapore Ministry of Law announced that it proposed to enact new laws that would allow for third party funding in international arbitration and related proceedings in the Singapore courts (including enforcement proceedings). It is proposed that the common law restrictions on champerty and

[11] [2012] HKEC 263.

[12] The Court of Final Appeal found on the facts that the appellant had simply discharged her duties as a litigation solicitor and received no more than her ordinary fee from the costs paid by the defendant. Her conviction was quashed and her sentence was set aside. The Court of Appeal recognised the need for legal reform regarding maintenance and champerty in Hong Kong. The crime and tort of maintenance and champerty have been abolished in England andWales and the States of Victoria, South Australia and the New SouthWales in Australia.

[13] [2014] 1 HKLRD 116.

[14] [2006] SGCA 46.

[15] [1999] Ch 239.

[16] [2006] SGCA 46 at para 32.

[17] [2013] SGHC 135. The Singapore Court of Appeal suspended the lawyer from practice for six months. It was the first time in 35 years that an individual was sentenced for the offence of champerty.

maintenance would be abolished. Conditions on funders would be imposed through subsidiary legislation. Funders who fail to comply with the conditions will not be able to enforce their rights under a funding agreement.

Third party funding is permitted in Australia, Korea (there are no laws expressly prohibiting third party funding although it appears to be a new concept), and the PRC (there are no laws expressly prohibiting third party funding although it is extremely rare). It is prohibited in India.

Benefits of third party funding

Allows claims to be made

Third party funding provides parties that lack the financial resources the means to pursue meritorious claims. Investment arbitration does not need to be the preserve of wealthy multinational corporations. In Arkin v. Borchard Lines Ltd.[18], the Court explained the role of commercial funders in the dispute resolution mechanism, which applies equally in international arbitration; commercial funders provide help to those seeking access to justice which they could not otherwise afford. Lord Justice Jackson gave support to the third party funding of litigation, as it promoted access to justice.[19]

In Australia, a jurisdiction which is leading the way on third party funding in the Asia Pacific, Justice Kirby of the High Court of Australia in Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd. stated "the importance of access to justice, as a fundamental human right which ought to be readily available to all …".20 Kirby also rejected the notion that a funder created a controversy:

> *"Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder … does not invent the rights. It merely organizes those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law."*[21]

Levels the playing field for settlement discussions.

The funding also provides an equal playing field for settlement discussions[22]. A larger respondent capable of bankrolling lengthy arbitrations is not incentivised to engage in settlement discussions with a smaller claimant incapable of sustaining similar costs. The disparity is amplified in investment arbitration, where states are generally better positioned for the long haul than claimants.

Allows companies to manage financial risk

The cost of international arbitration is seen as arbitration's worst feature[23]. The duration and costs of investment arbitrations are generally greater than commercial arbitration, requiring a larger up-front investment. Third party funding provides not only the financial resources with which to pursue a claim, but also opportunities to manage the financial risks associated with pursuing a claim. A claimant is able to diversify and transfer some or all of the risks to the funder. The claimant has the opportunity to spread and share these risks, without having to pay legal costs, or allocating funds if the claim fails[24].

Large companies can have the cash flow to fund their ongoing operations:

> *"in our case, we had money [for arbitration], but we decided that we wanted to use the money in what we do best, which is looking for mines and exploring – not just paying legal fees."*[25]

[18] [2005] EWCA Civ. 655.

[19] "Review of Civil Litigation Costs: Final Report", December 2009 at [117].

[20] [2006] HCA 41.

[21] *Ibid* at [145].

[22] Christopher Bogart, "Overview of Arbitration Finance" in Bernardo Cremades and Antonias Dimolitsas, eds., *Third Party Funding in International Arbitration*, (Dossiers, ICC Institute of World Business Law, 2013), at 53.

[23] Queen Mary University of London 2015 survey on "Improvements and Innovation in International Arbitration" at 24. Cost and lack of speed were both ranked by respondents as amongst the worst characteristics of international arbitration.

[24] See Clive Bowman, Kate Hurford & Susanna Khori, 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, 8(4) TDM 1,5 (2011).

[25] See Alisha Hiyate, "Gold reserve wins US$740M in 'stunning victory' against Venezuela", Northern Miner, 22 October 2014.

(TriMetals Mining's CFO in respect of Gold Reserve US$740.3 million successful claim in compensation for the expropriation of its Brisas gold project by the Venezuelan government).

Allows for an objective assessment of the claim.

A by-product of third party funding is highlighted in *QPSX Ltd. v. Ericsson Australia Pty. Ltd. (No.3)*[26]:

> *"inject a welcome element of commercial objectivity into the way in which such budgets are framed and the efficiency with which the litigation is conducted."*

A funder's decision to fund a claim is an investment decision. The merits of a claim and the ability to successfully enforce are the funder's most important concern. Through the due diligence process undertaken by the funder, claimants obtain an objective assessment of their claim, and input on strategy as to how a claim should be pursued.

Enhances the attractiveness of the seat of arbitration.

The availability of third party funding promotes the growth of the seat as an arbitration venue. Third party funding is already permissible in pro arbitration seats such as London, Paris, and Geneva, and permitting it in seats in Asia such as Hong Kong and Singapore will allow commercial parties to follow business practices in other jurisdictions, many of who choose to arbitrate in those seats without any connection to Hong Kong or Singapore.

It is interesting that the authors of the London Centenary Principles for the Chartered Institute of Arbitrators do not mention third party funding being permitted in its set of principles for an effective and efficient seat in international arbitration.

Potential risks of third party funding

Increases the number of cases; slows the process.

Opponents against third party funding state that it increases the sheer number of litigations, and may slow down the process.[27]

While that may be true in the context of domestic litigation, it is less persuasive in the international arbitration context. Arbitral tribunals are constituted from among commercially sophisticated arbitrators, who are unburdened with immediate duties to the public as courts are. They are compensated for every case. As such, the availability of arbitration, unlike the courts, is market driven and resources do not diminish with every claim.

The fact that more arbitrations may be brought does not mean that other claimants are denied the expediency or access to arbitration. Conversely, institutions like the ICC are penalizing arbitrators if they delay in the rendering of their award, and themselves for delay in the scrutiny process.

Institutions are requesting arbitrators to indicate the number of cases their have as arbitrator and counsel before confirming their appointment.

A greater number of arbitrations is not undesirable if they result in greater access to justice granted to claimants who would not otherwise come before tribunals.

Increases frivolous claims

The funder has the greatest interest in assessing whether the claim is frivolous or merits funding. The funder's assessment helps dissuade frivolous and vexatious claims. Some funders state that they would only consider cases with a 70% chance of winning.[28] In Justice Jackson's report on the Review of Litigation Costs[29], it was suggested that litigation funders in the U.K. generally require a 70% prospect of success before they will invest in the case. In Anglo-Dutch Petroleum v. Haskell, the Court of Appeals of Texas stated that:

[26] (2005) 219 ALR 1.

[27] In Australia in 2011, one estimate identifies third party funding in one out of 25,000 cases: Barker "Third Party funding in Australia and Europe" (2011) at 32. In the U.S., funder Juridica Capital Management Ltd. considered 1,200 cases but only funded 30 cases.

[28] Cento Veljanovski, *Third Party Litigation Funding in Europe*, 8 J.L. Econ. & Pol'y 405, 424 (2011).

[29] Lord Justice Jackson, *Review of Civil Litigation Costs*, (2009) Vol. 1, at 161, at para 2.3.

> *"An investor would unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit."*[30]

Unfair terms in a funding agreement

There is a concern that a funder could take advantage of its economic power by insisting on unfair terms in a funding agreement.

The case of Chevron v. Ecuador, with funding terms that could entitle the funder to 80% of the award, is often used as this example. However, 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. With the best case scenario, the funder would only receive 5.5% of the award.

However, many clients that seek funding are themselves sophisticated users of international arbitration and have decided to obtain funding for their claim in order to manage the risks of pursuing the claim.

They also have access to legal advisers, and such risks can be minimized by clients seeking legal advice on funding agreements.

Competition among funders also provides a measure of protection against unfair terms.

Need for regulation

Bodies such as the Association of Litigation Funders of England & Wales may provide the appropriate approach for regulation.

The Code of Conduct for Litigation Funders ("**ALF Code**") is a useful starting point.[31] This needs to be adapted for international arbitration. Any code of conduct for arbitration funders ("**Code**") should contain provisions to ensure adequate capital requirements among funders, limit their control of cases, and provisions regarding the funding agreement on the funder's liability to meet adverse costs orders, security for costs, and input (if any) on settlement decisions.

Ethical and financial standards should be enforced by a comprehensive complaint procedure and sanctions imposed on members in the event of a breach of the Code.

In his report on the Review of Civil Litigation Costs: Final Report, Lord Justice Jackson was of the view that:

> *"provided that a satisfactory code is established and that all funders subscribe to that code, then at this stage, subject to my concern about capital adequacy requirements, I see no need for statutory regulation."*[32]

Funder's financial resources

Guidance can be obtained from the ALF Code which requires a third party funder to maintain access to a minimum of £2 million of capital or such other amount as stipulated by the ALF Code. There should be continuous disclosure requirements and audits. The amount should be at a level that is viable for third party funders of different sizes.

Funder's control over the claim

Opponents of third party funding contend that it increases the likelihood of settlement, regardless of whether such settlement is in the best interests of the client, as funders prefer a definite return on their investment.

This potential conflict could be dealt with in the funding agreement to provide that the decision to settle shall be exclusively taken by the claimant.[33]

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[30] Niccolo Landi, *The Arbitrator and the Arbitration Procedure: Third Party Funding in International Commercial Arbitration – An Overview*, in *Austrian Yearbook of International Arbitration* 85, 96 (Gerold Zeiler et al. eds, 2012).

[31] Code of Conduct for Litigation Funders (January 2014), which sets out the standards of practice and behaviour to be observed by funders who are members of the Association of Litigation Funders of England & Wales in respect of resolution of disputes within England & Wales. However, the ALF Code does not address international arbitration specifically.

[32] December 2009 at 121.

[33] Therium Capital Management Ltd. state that "*Whether or not to settle is your decision alone. However, Therium will expect you to behave reasonably and may require you to take advice from your solicitors and/or counsel on whether settlement is appropriate*."

There should be provision in the Code to provide that a funder:

(i) will not take any steps that cause or are likely to cause the funded party's solicitor or barrister to act in breach of their professional duties; and

(ii) not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

There are also provisions to resolve any deadlock in the decision making process, disputes regarding settlement and termination, such as referral to a nominated and neutral Senior Counsel or equivalent for a binding expert opinion on the decision. The impartial evaluation by a third party neutral would ensure that decisions are made in the best interests of the claimant.

The risk of a funder controlling the case to the detriment of the claimant's interests is also minimized by rules of professional conduct that state that lawyers must act in their client's best interests and funders do not attempt to control their professional judgment.

With the exception of some oil and gas corporations, most users of international arbitration are not repeat players. As the market develops, funders may be the main consumers of international arbitration. It will be interesting to see how the funding market develops – if funders gradually progress from funding to controlling to actually handling cases.

In investment arbitration, there have been cases where states have challenged the jurisdiction of the tribunal due to third party funding, and whether the investor has sufficient standing. These jurisdictional challenges have largely failed.

In *Teinver v. Argentina*[34], the investor had assigned certain rights in their claims to Burford Capital Ltd. The tribunal rejected the jurisdiction challenge on the ground that jurisdiction is assessed at the date on which the case is filed, so that subsequent events, such as a funding arrangement, did not affect it. This leaves open the question as to what happens to funding agreements are entered into before the commencement of proceedings.

Disclosure of funding and conflicts of interest

Except for SIAC's draft Investment Arbitration Rules, no institutional arbitration rules and arbitration laws currently oblige disclosure of the existence of a funding agreement.

SIAC's draft Investment Arbitration Rules empowers the tribunal to order the disclosure of the existence and details of a party's third party funding arrangement, including details of the identity of the funder, the funder's interest in the outcome of the proceedings, and whether or not the funder has committed to undertake adverse costs liability.[35]

Some commentators are of the view that it would be a breach of procedural good faith with which the parties should conduct themselves if there is funding without disclosure.[36]

Third party funding agreements should be disclosed in order to prevent the occurrence or perception of conflicts of interest. In the absence of disclosure, an arbitrator may not be aware that one of the parties before him is funded by a third party funder with whom he or his firm has a relationship. Moreover, many third party funders are now publicly listed companies, it is also possible for an arbitrator could have a material holding in a funder involved in the proceedings before him.

As a minimum, any regulation would necessarily insist on a duty to disclose not only the existence of third party funding and the identity of the funder. Other details of the funding

[34] ICSID Case No. ARB/09/1.

[35] Article 23(l) of the draft SIAC Investment Arbitration Rules, which were released on 1 February 2016 for public consultation.

[36] Bernardo Cremades, *Third Party Funding in International Arbitration*. Some institutional rules require the parties to act in good faith: see Article 9 of the CIETAC (2015) Arbitration Rules: "*Arbitration participants shall proceed with the arbitration in good faith*." The HKIAC's Administered Arbitration Rules 2013 provide that "The arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration" (Article 13.5) and "In all matters not expressly provided for in these Rules, HKIAC, the arbitral tribunal and the parties shall act in the spirit of these Rules." (Article 13.7). This could arguably cover the disclosure of third party funding.

agreement, such as the potential return of the funder and the level of control afforded over the claim also are relevant to the issue of conflict of interest.

As to the timing of the disclosure, it is logical to require disclosure prior to confirmation of the tribunal.

Guaracachi v. Bolivia : The respondent already knew the name of the funder. It required disclosure of the funding agreement. It argued this was relevant for security for costs and conflicts of interest. Tribunal declined disclosure but confirmed that they were unaware of any conflict of interest. The tribunal would draw inferences in the application for security for costs as the claimant admitted that the funding agreement did not cover payment of costs awards.

Eurogas v. Slovakia : The tribunal ordered the disclosure of the name of the funder.

South American Silver v. Bolivia : The tribunal ordered disclosure of the name of the funder, but not the funding agreement. The tribunal were of the view the terms were irrelevant as it already had decided to deny the security for costs application.

Sehil v. Turkmenistan : The tribunal ordered disclosure of the identity of the funder 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 the claimants may achieve in the arbitration. As a result, the funding agreement was produced.

Third party costs orders

Unlike in court litigation in some jurisdictions where third party costs orders can be made against funders[37], the tribunal lacks jurisdiction to order third party funders to pay adverse costs orders, as the funder is not a party to the arbitration agreement.

It has been suggested that third party funding could be likened to the involvement of a third party in the underlying agreement, which would allow an extension of the arbitration agreement to the third party funder. However, French law allows extensions of the arbitration agreement only on the basis that it was the parties' common intention to do so, in particular with due regard to the third party's "involvement and performance of the underlying agreement."[38] This would not be the case with a third party funder.

The draft SIAC Investment Arbitration Rules[39] empower the tribunal "to order in its award that all or a part of the legal or other costs of a party be paid by another party or, where appropriate, any thirdparty funder."

However, it is unclear in practice how enforcement would work in practice as the third party funder is neither a party to the arbitration agreement nor the arbitration.

Arbitration is consensual, and this writer is against amending arbitral legislation to allow for third party costs orders against funders. A more preferable approach is for the parties to seek security for costs in the appropriate circumstances. Another approach is for the parties to enter into a new tripartite arbitration

[37] See for e.g. *Excalibur Ventures LLC v. Gulf Keystone* [2014] EWHC 3436, where the court ordered the third party funder who funded an "objectively hopeless claim" to pay the winning side's costs on an indemnity basis; *Arkin v Bouchard Lines* [2005] EWCA Civ 655, which supported a limitation of liability for funders to the extent of the funding provided.

[38] See, for e.g. Paris Court of Appeal decision of *Dallah Real Estate and Tourism Holding Co. Ltd. v. The Ministry of Religious Affairs of the Government of Pakistan:* (*Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533))"[*the Government] behaved as if the Contract was its own; […] this involvement of [the Government], in the absence of evidence that the Trust took any actions, as well as [the Government's] behaviour during the pre-contractual negotiations, confirm that the creation of the Trust was purely formal and [the Government] was in fact the true Pakistani party in the course of the economic transaction*." See also *Korsnas Marma v Durand-Auzias*, Paris Court of Appeal, Rev Arb 1989, at 691; *Cotunav*, Paris Court of Appeal, 28 November 1989; Cour de Cassation, Cass (1st Civ Ch), 11th June 1991, Rev Arb 1991, at 453.

[39] Article 34 of the draft SIAC Investment Arbitration Rules, which were released on 1 February 2016 for public consultation.

agreement including the third party funder.

Security for costs

The way around third party costs orders is an opportunity for respondents to make applications for security for costs.

There should be mandatory disclosure if a party is being funded in an arbitration, so that the other parties to the arbitration can seek advice as to whether or not to make a security for costs application against the funded party. If security is ordered, the third party funder can provide funds for the funded party (under their funding agreement) to pay an amount into an escrow account held by the institution administering the arbitration (this is what happened in our experience).

If the amount is not provided as security within a time limit, then the arbitration and/or the claimant's claim is stayed. This obviates third party costs orders against the third party funder.

Although a tribunal cannot make third party costs orders, as a practical matter if a party is funded, the funder will stump up the amount ordered.

ICC Commission Report on Costs40 provides as follows:

> *"90. If there is evidence of a funding arrangement that is likely to impact on the non-funded party's ability to recover costs, that party might decide to apply early in the proceedings for interim or conservatory measures to safeguard its position on costs, including but not limited to seeking security for those costs or some form of guarantee or insurance. Such measures may be appropriate to protect the non-funded party and put both parties on an equal footing in respect of any recovery of costs."*

In the commercial arbitration context, the parties agree at some point to submit disputes arising between them to arbitration. Therefore, it does not suffice that the funded claimant is not likely to be able to pay a potential adverse costs award.[41] The parties take the risk of entering into transaction without other collateral.

Instead, a tribunal will need to consider whether the financial situation of the claimant has materially changed since the entering into of the arbitration agreement. The claimant should not be ordered to pay security for costs if it was foreseeable that the claimant could be in a precarious financial position at the time they entered into the arbitration agreement, even if funded by a third party. However, if the claimant is impecunious and the funding agreement does not provide for the funder to pay for adverse costs orders, or allows the funder to terminate the funding at any time, then it is appropriate for the tribunal to order security for costs.

In investment arbitration, the expropriation may have caused the claimant's financial circumstances. Access to justice is an important consideration.

RSM v. St Lucia[42] was the first ever decision ordering claimant in an ICSID arbitration to provide security.

St Lucia attracts sympathy as a respondent: small impoverished Caribbean Island; RSM owned by Colorado oil billionaire Jack Grynberg. The tribunal was unhappy with Grynberg's history of not meeting his obligations for costs awards in prior proceedings; he was a repeat offender.

Judge Edward Nottingham (dissented) *"The majority's conclusion that there is third party funding here and that the existence of such funding supports its decision is based on a one-sentence admission elicited from Claimant's counsel. There is no evidence concerning the identity of the funder or any other information about the funder. There is no evidence of the funder's financial means. There is nothing in the record about the arrangement between*

40 "Decisions on Costs in International Arbitration", ICC Dispute Resolution Bulletin 2015, Issue 2.

41 See for e.g. Gavan Griffith, QC in *RSM v. St Lucia* (ICSID Case No. ARB12/10): "*That the claimant does not have funds to meet costs orders if unsuccessful is no reason to make orders for security*."

42 ICSID Case No. ARB12/10.

Claimant and the funder."

Assenting Judgment of Gavan Griffith, QC:

> "11. *However, in my view the preferred ground for making such orders here concern*
>
> *the third party funding issue*
>
> ....
>
> 13. *Such a business plan for a related or professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose.*
>
> ....
>
> 18. *My determinative proposition is that once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made."*

Interestingly, Mr. Griffith QC shifted the burden of proof onto a claimant to show why security for costs should not be granted if funding is present; the existence of third party funding creates a presumption in favour of security for costs. But his views are not adopted in subsequent investment treaty decisions.

But not all funded parties are unable to meet costs orders. Companies use funders to manage financial risk and assist in cash flow.[43]

e.g. *The Lawyer* on 26 January 2016 reported that Burford Capital has struck a landmark deal to provide third-party litigation funding to FTSE 20 telecoms giant BT Group.[44] A subsequent report stated that funding had also been secured for Grant Thornton.[45]

EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic[46]: mere presence of a funder did not alone justify a security for costs order.

Where an investor is unable to finance the costs of arbitration without the backing of a third-party funder, tribunals might consider ordering security to cover the costs incurred by the state where there is a chance that the investor will abandon its claims.

Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti v. Turkmenistan[47]: tribunal ordered the claimant to disclose whether the claimant was being funded and if so, the terms of the agreement, in part because of the possible need for security for costs, and to determine whether there existed any conflict of interest between the funder and members of the tribunal.

Guaracachi American and Rurelec v. Bolivia: although there were allegations that one of the claimants was a shell company and the other was financially unstable, and was being funded, the tribunal declined to order security. The mere presence of funding did not demonstrate that the claimant would be unable to meet any eventual costs order. The tribunal emphasised that such orders were rare and exceptional.

Addressing recoverable costs.

There have been arguments in investment treaty arbitrations that claimants should not recover their costs because third party funding has meant that the claimants have not themselves incurred any costs. This argument has been rejected in a number of investment treaty cases.

In *Fuchs and Kardassopoulos v. Georgia*[48], the tribunal held that it knew 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", and disregarded the existence of funding when determining costs.

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43 Harbour Capital in their response to the Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016 state that their experience from funding over the last 14 years in 12 jurisdictions, an increasing proportion of the users of third party funding are well-capitalised, solvent corporations and financial institutions.

44 "*BT signs $45m litigation funding deal with Burford Capital*" The Lawyer, 26 January 2016. https://www.thelawyer.com/bt-signs-45m-litigation-funding-deal-with-burford-capital/

45 "*Burford Capital launches ABS law firm Burford Law with Akin Gump hire*", The Lawyer, 5 October 2016. https://www.thelawyer.com/burford-capital-launches-abs-law-firm-burford-law-akin-gump-hire/

46 ICSID Case No. ARB/14/14, Procedural Order No. 3, 23 June, 2015.

47 ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June, 2015.

48 ICSID Case Nos. ARB/05/18 and ARB/07/1.

The Committee in *RSM Production Corporation v. Grenada*[49] also agreed with this view and did not take into account third party funding in its costs considerations:

> "*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* Fuchs-Kardassopoulos v. Georgia [that such an arrangement should not be taken into account when considering the amount to be recovered by the claimants for their costs]."

Similarly, in *ATA Construction v. Jordan*[50]:

> *"the Committee will only observe that, in any event, it 'knows of no principle why any … third party financing arrangement should be taken into consideration in determining the amount of recovery by [parties] of their costs' incurred in arbitration proceedings."*

Third party funding would be a snare for claimants if losing respondents successfully argue that funded claimants should not recover their costs because third party funding has meant that the claimants have not themselves incurred any costs, but, on the other hand, apply for security for costs because of third party funding.

What is the situation regarding including the costs of third party funding in the award? In *Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited,*[51] the English court refused a challenge under s68(2)(b) of the *Arbitration Act* 1996 and held that a sole arbitrator did not exceed his powers in including the costs of third party funding within a costs award.

The arbitrator's findings on Essar's conduct in the arbitration were a key consideration in the arbitrator's decision on costs. The arbitrator considered that Essar had set out to cripple Norscot financially. The arbitrator found that, as a consequence of Essar's treatment:

"Norscot had no alternative, but was forced to enter into litigation funding… The funding costs reflect standard market rates and terms for such facility". The arbitrator also found that "It was blindingly obvious to [Essar] that the claimant …would find it difficult if not impossible to pursue its claims by relying on its own resources. The respondent probably hoped that this financial imbalance would force the claimant to abandon its claims."

The ICC Commission Report on Costs recognises recoverability of the payment of an uplift or success fee:

> *"92. In reality, funding arrangements are rarely limited solely to the costs of the arbitration. Usually, the third-party funder will require payment of an uplift or success fee in exchange for accepting the risk of funding the claim, which is in effect the cost of capital. As a tribunal only needs to satisfy itself that a cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable, it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of the arbitration or loss of use of the funds, may be recoverable".*[52]

Conclusion

Commercial and investment arbitration should permit third party funding, subject to an appropriately regulated regime containing ethical and financial safeguards. Third party funding is already a part of business practices in other jurisdictions, and used in popular seats such as London, Paris and Zurich. It should be allowed in jurisdictions which currently prohibit it, such as Hong Kong and Singapore.

International arbitration can be an expensive process. Third party funding provides an additional means of funding arbitrations, and for some parties, the *only* means of funding arbitration for meritorious claims. Although a successful claimant foregoes a percentage of

49 ICSID case no. ARB/05/14.

50 ICSID Case No. ARB/08/2.

51 [2016] EWHC 2361 (Comm).

52 "Decisions on Costs in International Arbitration", ICC Dispute Resolution Bulletin 2015, Issue 2.

its damages, it is better for it to recover a substantial part of its damages than to recover nothing at all.

Concerns such as capital adequacy of funders, control, and conflicts of interest can be addressed through self-regulation by a Code.

Institutional rules should require disclosure of funding at the commencement of the arbitration or within 7 days of one of the parties entering into a funding agreement. This ensures the efficiency and integrity of the arbitral process. Arbitral laws should be amended to require disclosure of funding.

Even without amendment of their arbitral rules, institutions can play an immediate role if they requested information on funding before arbitrators are confirmed, for the purposes of establishing the independence and impartiality of the tribunal. It is not enough to just have guidance notes on disclosure of conflicts by arbitrators to disclose *"relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award"*.

Institutions such as CIETAC HK should be applauded in developing draft non-binding guidelines, which set out "certain principles of practice and conduct which CIETAC HKAC encourages parties and arbitrators to observe in respect of actual or anticipated arbitration proceedings in which there is or may be an element of third party funding." It is hoped that the IBA will also develop guidelines.

In investment arbitration, states could expressly provide for disclosure of third party funding in their investment treaties. The recent draft proposal of the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP), the European Union inserted a provision requiring disclosure of third party funding[53]. The Comprehensive Economic and Trade Agreement (CETA) is a freshly negotiated EU-Canada treaty. The CETA text in February 2016[54] also provides that *"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".*[55]

In investment arbitration, tribunals have seemed to ignore third party funding in respect of jurisdictional challenges, allocation of costs, and security.

Arbitration is consensual. There should be no third party costs orders against funders. Parties have the opportunity to apply for security for costs. It should not be granted against a claimant due to the mere existence of third party funding. Justice Kirby of the High Court of Australia in *Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.* stated the following:

> *"A litigation funder … does not invent the rights. It merely organizes those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law".*[56]

If third party funding does not invent rights for claimants, then they should not create rights for respondents, whose right to obtain security for costs, should be independent from the claimant's funding arrangements.

6 October 2016

James Kwan
Partner, Hogan Lovells

53 Article 8 of Section 3 - Resolution of Investment Disputes and Investment Court System.

54 The European Commission proposed the signature of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to the Council of the EU in July 2016. If the Council approves the agreement, it will need the European Parliament consent for it to be finalised. If the Council ratifies the agreement, it can be provisionally applied in areas where the governments of EU Member States deem the EU to have responsibility. The national parliaments of the EU Member States would then also need to ratify CETA for the areas which fall under their responsibility to take effect.

55 Article 8.26 of CETA.

56 *Ibid* at [145]

APRAG CONFERENCE 2016

ISSUES OF CONFIDENTIALITY AND PRIVILEGE - CAN THIRD-PARTY FUNDING BE REGULATED ?

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Abstract

This paper explores the question weather self-regulation approach adopted by (certain) Third-Party Funders was an acceptable route or should the industry as a whole be regulated? If so, how could this be realized in the borderless world of arbitration? These and other questions was addressed in connection with practical issues arising in the context of third party funding such as conflicts of interests, disclosures, influence of the funder on conduct of the arbitration and settlements and ethical issues arising for attorneys and their clients, including loss of privilege.

Definition of Third Party Funding

The growing presence of third party funders in international arbitrations has raised a number of new issues for counsel, especially in an international context. The first issue is to clarify what exactly Third Party Funding encompasses. I will apply the following definition:

- Third Party Funding is as a **non-recourse investment** commitment by a Funder in **exchange for a success fee**. The success fee can be paid in any form, e.g. a multiple of the funding, a percentage of the proceeds, a fixed amount or a combination of the above.
- The **Funder** is a **party different from the party to the dispute**, including an after the event (ATE) insurer and a law firm handling the case under a conditional fee agreement (CFA).

The above definition is the one used by the ABA Section of International Law Working Group on

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Counsel Guideposts on Third Party Funding in International Arbitration. It is wider in scope than the definition used in the 2014 IBA Guidelines on Conflicts of Interest which covers funders and insurers who have a "*direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration".*

Third party funding can appear in different shapes. For example as a single incident ("one-off") funding, as loan to a counsel, as repeat funding by a fund raiser, as funding by private equity or an investment fund, as funding by a publicly listed funder, or as funding by an after-the-event insurer. Funders may act directly or via brokers.

Existing Regulation?

Third-party funding raises a number of novel issues. This is owed to the entry of funders in the ordinary relationship between counsel and client. Although rules exist that regulate the relationship between client and counsel, rules on the relationship between funder, client and counsel are in short supply. Certain Funders may be subject to statutory control, others to self-imposed codes of conduct and even others to no externalgovernance at all.

The complexity is increased by the fact that in certain jurisdictions third party funding or specific forms of third party funding are either illegal or prohibited. The common law principles of maintenance (support of a third party's litigation), champerty (litigation support against a share of the proceeds) and barratry (continuing maintenance or champerty) could provide such confines. Third party financing could also fall under usury (interest rate in excess of legal maximum). Certain civil law jurisdiction consider contingency agreements (*pactum de quota litis*) as illegal.

The International Arbitration Committee of the ABA Section of International Law has established a Working Group aimed to identify the challenges counsel are confronted with in third party funding and to prepare "guideposts" assisting counsel to deal with these. The Working Group recognizes that counsel has the obligation to assure that the client's interests are at all times best protected and must comply with ethical and professional rules of conduct. Whereas US counsel generally have to comply with ethical rules of their home jurisdiction, counsel in other countries, such as for example Europe, will have to be abide to the rules of the host jurisdiction. The aim of the Guideposts is not to impose any new ethical rules but rather create an awareness of issues that could potentially arise.

With third-party funding becoming more and more prevalent in international arbitration, calls for the regulation of Funders and their relationship with counsel and client, are also becoming more and more frequent. The Queen Mary University/White & Case 2015 survey found that the majority of the international arbitration community is of the view that third-party funding should be regulated in some way, and that disclosure of the identity of the third-party funder is appropriate[2]. This paper will address the need for regulation in connection with several practical problems which typically may arise when a Third Party Funder enters the stage and actively (or passively) participates in the various scenes of an arbitration proceedings.

Liability and Privilege

Even though counsel will typically not provide any direct advice to the Funder but rather only to its client, counsel could nevertheless be subject to ethical, contractual and tort liabilities. In US it is for example recognized that there is an ethical obligation of truthfulness[3] (which in some aspects may also reaches out to third parties); furthermore, there are common law duties owed by attorneys to non-client third parties which could impose liability in contract and tort[4].

[2] QUEEN MARY UNIVERSITY OF LONDON, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATION IN INTERNATIONAL ARBITRATION 47—48, http://www.arbitration.qmul.ac.uk/docs/164761.pdf (finding that 71% of survey respondents thought third-party funding should be regulated, and that 63% thought disclosure of the identity of the funder should be mandatory).

[3] MODEL RULES OF PROFESSIONAL CONDUCT, RULE 4.1

[4] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §51, *cmt e*

A problem can occur when information is exchanged with the Third Party Funder in order to provide to the Third Party Funder adequate substance to make an informed business decision about its "investment" into the dispute. The much debated question arises if case information in the hands of the Funder continues to enjoy privilege.

There are a number of common law doctrines which can be taken into consideration preventing discovery of communications between counsel and the Funder. The work-product doctrine, primarily but also the common interest doctrine need to be mentioned in this respect.

Neither the UNCITRAL Model Law on International Commercial Arbitration nor national laws do explicitly address the issue of document disclosure requests nor do they address the issue of privilege[5]. Also most of institutional arbitration rules refrain from providing details in this respect. Depending on the applicable law, different legal privilege regimes might apply and, following, the scope of document production before an arbitral tribunal might be different. Different practical conduct of arbitral tribunals might eventually trigger different obligations and best practices on the part of counsels.

In any event, counsel should obtain the consent of the client before transmitting any information to a Third Party Funder. In case counsel believes that a Funder may be subject to discovery counsel should take reasonable steps to limit the amount of information provided to the Funder.

Disclosure

Conflicts of Interest may occur in several situations. The IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") define commonly accepted situations. In the list below therefor reference is made to the IBA Guidelines:

- An arbitrator is affiliated with a Funder (e.g. as a member of its board of directors or as an advisor to the funder)[6].
- An arbitrator or the arbitrator's law firm has a recurring relationship with a Funder[7].
- An arbitrator acts as an arbitrator in a case funded by a Funder and as counsel in another case, funded by the same Funder[8].
- An arbitrator holds shares in Funder that is funding an arbitration before the arbitrator[9].
- An arbitrator is repeatedly appointed in cases involving the same Funder[10].

On the basis of the above the question arises to what extent an arbitrator is under the obligation to address that issue. There appears to be room for regulation. In particular for arbitral institutions to address these issues and to address the arbitrator's disclosure obligation. The trend has been spotted by some:

The ICC's guidance note on the ICC Rules of Arbitration 2012 expressly acknowledges that arbitrators should consider, for purposes of disclosure, "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award"[11].

On 20 July 2016 the Brazilian arbitral

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5 See *Elisabeth Metzler*, Chapter II: The Arbitrator and the Arbitration Procedure, The Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration – An Austrian Perspective, p. 233 in *Klausegger*, *Klein*, *Pitkowitz et al. (eds)*, Austrian Yearbook on International Arbitration 2015, 231.

6 IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION Part I, General Standard 6(b) and Explanation to General Standard 6, p. 14.

7 IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION Part I, General Standard 6(b) and Explanation to General Standard 6, p. 14.

8 See "[t]he arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties". IBA Guidelines, Part II, Waivable Red List, par. 2.3.1.

9 See: "The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held". IBA Guidelines, Part II, Waivable Red List, par. 2.2.1.

10 IBA Guidelines, Part II, Practical Application of the General Standards, p. 18 and Orange List, par. 3.1.3 ("The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties".)

11 ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (July 13, 2016), ¶ 24.

institution CAM-CCBC, based in São Paulo issued a Resolution regarding the disclosure of third party funding[12].

The CETA (Comprehensive Economic and Trade Agreement between Canada and the EU) and the EU's draft proposal for the investment chapter of the TTIP (Transatlantic Trade and nvestment Partnership) contain an obligation to disclose "the name and address of the third party funder"[13].

Investor-State tribunals have also ordered claimants to disclose whether they are being financed by third-party funders and the details of their funder on the basis of concerns regarding potential conflicts of interest. Cases reported are *Sehil v. Turkmenistan*, *South American Silver v. Bolivia*, *Eurogas v. Slovakia* and *Corona Materials v. Dominican Republic*.

Conduct of the Arbitration and Settlement

Much will depend on the Funder itself. If a Funder tends to intervene in the proceedings more issues will arise than with a Funder who opts not to get involved after the strategy and case theory is settled. Typically, a Funder will receive regular reports as to the case progress and in particular, if something unexpected happens or budget adjustments have to be made.

A situation where conflicts are most likely to arise is a (potential) settlement. Here, interest between client and Funder are often diverse. The client's interest may be drive by pure numbers but often also other (non-monetary) circumstances such as the interest in a continued to business relationship with the opponent or on the contrary a desire to fully defeat its opponent. Also, if the costs approved by the Funder pass the agreed limit and the client must self-fun, the client's interest in the arbitration may change. On the other hand, the Funder will typically look at the return of its investment and may even introduce language in the funding agreement requiring its direct or indirect approval to a settlement. Early in the proceedings, it may be in the Funder's interests to accept a settlement. At that point in time, the Funder has not spent too much in terms of costs. At a later stage, however, the Funder maynot wish to have a settlement. Because at that point in time, the Funder has already paid significant amounts and will try to recover significantly more if it considers its client will ultimately succeed. On the contrary, the client may have a different view, expecting to have its "day in court" on the basis of the funding.

So how to avoid these apparent conflicts? One way is addressing them at the outset and dealing with these in the funding agreement. There, the Funder and its client agree upon to the settlement amount the client will accept at various stages of the proceedings.

Another way is to rely on the self-regulation of certain funders. For example, the Code of Conduct for Litigation Funders who are Members of the Association of Litigation Funders of England & Walesset out that for funding (in within England and Wales) stipulates that if the Funder and the client cannot agree on a settlement a neutral third party should render a binding opinion.

Beyond that, there is only the call for regulation which could arise if the Funders (or black sheep among them) should overstretch their influence on the arbitration. Fortunately, there is no record that such a situation has occurred and it remains to be hoped there never will be. Nevertheless, the door to the debate on national laws (e.g. in Hong Kong and Singapore) and an international code of conduct has already been opened and we will no doubt soon see more rules evolving.

[12] See http://www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016 (last checked on 30 September 2016).

[13] Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, revised text circulated 29 February 2016, available at http://ec.europa.eu/trade/, Article 8.26; EU Draft of the Transatlantic Trade and Investment Partnership as of 12 November 2015.

SHOULD THERE BE HARMONISATION OF PRACTICES WHEN DEALING WITH SECURITY FOR COSTS IN THE ASIA PACIFIC REGION ?

ANDREW MORAN QC

Andrew Moran QC is a senior English Queen's Counsel appointed in 1994, an arbitrator and Deputy High Court Judge in England and Wales, with an impressive repertoire of experience in civil, maritime and commercial litigation and arbitration, acquired through 40 years in practice (including nearly 23 years in silk).

His wide training and experience as an advocate, and sitting as a part-time judge (for 25 years) has enabled him to conduct and preside over a wide variety of commercial cases both in court and in international arbitration. He also sits at first instance and as an occasional Judge of Appeal in the Isle of Man dealing with heavy commercial and banking cases. He has presided as the Chairman of specialist market disciplinary tribunals of the International Petroleum Exchange, the International Commodities Exchange, and the London International Financial Futures Exchange in the City of London.

He came to reside and practice in Singapore nearly four years ago. He is the holder of a Foreign Law Practising Licence under the Legal Profession Act and holds many appointments as arbitrator in a wide range of maritime and commercial arbitrations seated in Singapore and abroad. He is a panel arbitrator at SIAC, SCMA, KLRCA, and a supporting member of the LMAA. He is a Master of the Bench of the Honourable Society of Gray's Inn, a member of the Baltic Exchange, a member of the Worshipful Company of Arbitrators and a Freeman of the City of London.

Andrew is recommended as a leading Silk in the Legal 500 Asia Pacific in Shipping and International Arbitration for 2016, and in the Singapore section for "Dispute Resolution: Arbitration (International): The English Bar" in Chambers & Partners Asia Pacific 2016.

ABSTRACT

This paper explores the conceptual basis for granting security for costs and and how it may be justified in contractual relations between commercial parties where a dispute has arisen. Further more, it discussed in detail on the nature and extent of disparity in practices of awarding security for costs in some different seats, the underlying reasons for such disparity, how harmonisation of practices might be achieved, and, ultimately, taking a view to provoke discussion in answer to the question in the title of the presentation.

INTRODUCTION

1. This paper is concerned with orders for security for costs in circumstances where a respondent to a claim seeks to force the party bringing the claim (or counterclaim) to provide sufficient security to cover the anticipated costs of arbitral fees and legal expenses that may be awarded against it by the arbitral tribunal. Examples to illustrate points made are taken only from arbitration environments in which orders for security for costs can, or arguably can, be made. Inevitably, having been asked to opine on a question concerning arbitration law across an entire region – in no part of which I am qualified to practise law! – I must begin by issuing a disclaimer and invitation to my better-qualified colleagues present, to correct any errors of interpretation or understanding of their laws.

2. The title of the paper in fact begs the prior question:

   "Could there be harmonisation of practices when dealing with security for costs in the Asia Pacific region?"

3. The ability to answer both questions requires first an understanding of (a) fundamental underlying

tensions between arbitral theory and effective dispute resolution, which includes restorative justice; and (b) how and why different systems of law, different jurisdictions of seat, and different arbitral and institutional rules and practices, have managed or responded to those tensions; when providing (or not providing) for security for costs.

4. The facile explanations commonly given for lack of harmony, include:
   (a) that security for costs is an English or common law creation, not instinctively favoured by parties and arbitrators from a civil law background;
   (b) the belief held by some, that if security for costs is not expressly provided for in the arbitration agreement or in the rules chosen to govern the reference, then principles of party autonomy and deemed assumption of the commercial risk of dealing with a counterparty (extending to the potentially irrecoverable expense of vindication in the agreed dispute resolution process), should preclude the grant of the relief; and
   (c) that it is impossible to deduce common criteria for the grant or refusal of security for costs; or to find consistency in weight given to criteria used across the different systems of law, *leges arbitri*, rules and practices under which international arbitration is conducted.

5. In fact, all of those explanations are wrong or flawed (at least to some extent) and deeper analysis reveals, amongst other things, that security for costs was known to the civil law – even Roman Law – as *"cautio judicatum solvi"* long before it was dreamt up in England! Civilian lawyers are increasingly driven by pragmatism in their drive to achieve effective dispute resolution instead of rigidly adhering to and maintaining the purity of arbitral theory. The lack of expression of power to order security for costs is no hindrance to its grant; in the presence of fairly exercised broad-based powers, the granting of interim or protective measures aids effective arbitration.

6. But that note of optimism should not obscure the difficulty of harmonisation. For the purposes of this introduction, this difficulty can be illustrated by pondering the following factors influencing differences in practice across the region – indeed across the world:
   (a) presence or absence of a "costs shifting rule" and exceptional variants in some arbitration environments;
   (b) different views of arbitral jurisprudence;
   (c) different underlying systems of law and traditions – common law and civilian;
   (d) different approaches in *leges arbitri*;
   (e) different approaches in arbitral rules;
   (f) lack of universal acceptance of the Model Law, or even of the same version of the Model Law where it is accepted;
   (g) application of different criteria for the grant of security;
   (h) different weight given to commonly accepted criteria; and
   (i) different reported or encountered arbitral precedents influencing present practice and rulings.

7. It takes only a moment of such pondering to see how all of these differences, interacting in different ways and combinations, can produce a muddle of outcomes and consequent disparity in practice across the jurisdictions of seat.

8. Despite all of that, my answer to both questions – could and should there be harmonisation – is a resounding "*yes!"* for reasons now to be explained. I have to say that my answer and optimism is given with confidence only in relation to international ***commercial*** arbitration for reasons which I hope will become apparent. (The title of the paper I was asked to prepare does not distinguish between commercial arbitration and state ***investment*** arbitration.) Perhaps more importantly, I hope to persuade you that there is a recently available, ready-

made *vade mecum* or guide which provides a means to achieve harmonisation of practice in the area of international commercial arbitration, that ought to be acceptable to arbitrators from all traditions, in all arbitral environments.

A CLOSER LOOK AT SOME OF THE DIFFERENCES CONFLICTING THEORIES OF ARBITRATION

9. The tension is between the theory on the one hand that if the parties have agreed to arbitrate without pre-conditions as to security, then a tribunal has no business in adding to or re-writing that bargain – and certainly not so as to favour one party just because it is the respondent to a claim. The notion is that because the parties have agreed to enter a contractual relationship in business, they are deemed to have taken the risks consequent on their choice of who they do business with, where that entity resides, its creditworthiness and even its trustworthiness. Thus tribunals have no business interfering when a dispute emerges, to skew the balance of that relationship and secure a party in the costs of the prosecution of its case on one side of the dispute but not on the other. It has been argued that it is only where there has been a fundamental change in circumstances since the agreement was concluded (not brought about by any conduct of the respondent applicant) affecting a party's ability and willingness to pay a costs award that orders for security might be made.

10. On the other hand, if, a party can show it has a reasonable case that it has been wronged and denied agreed rights, it is implicit in the bargain for the effective resolution of the ensuing dispute that it should not be required to risk throwing good money after bad in order to achieve or vindicate those rights. The purists would contend that on any view of this approach, a tribunal would be forced to take a provisional view of the merits of a case before hearing full argument and evidence. This may impair the fact and appearance of impartiality, which it is vital to preserve until the rendering of an award. It gives rise to a risk of prejudice, which cannot be corrected since there is no right of appeal – minds may be set by first impression formed in a truncated non-contractual procedure. Even if the tribunal confines itself to an American Cyanamid type of assessment of merits, as it must, the damage envisaged is unavoidable.

11. The tension between these schools of thought is exacerbated at the next stage to be contemplated, which is the means by which the order for security is to be enforced or non-compliance sanctioned. Ultimately, only barring the claimant from proceeding with its claim or the threat of doing so will produce the desired result. But no arbitrator is likely to be willing to take that step of shutting out a claimant and consequently the prior step of making the order, unless certain there is a consensual power (by contract or agreed applicable rule) or local legal power at the chosen or deduced seat.

12. If (as one would hope and expect) all arbitrators, whatever their background and tradition, strive for effectiveness in arbitration, then the first step, in ascertaining if there could and should be harmonisation in the approach to orders for security for costs, is for the Tribunal to be satisfied of the existence of the power and jurisdiction to make the order, in a given arbitration environment.

JURISDICTION FOUND IN DIFFERENT FORMS IN *LEGES ARBITRI*

13. Some examples may be given of the various different types of statutory provision, which are obviously or less obviously the source of the power to make an order. It is possible to discern three legislative techniques in both arbitration statutes and rules.

14. First and most obvious are those arbitration statutes of *leges arbitri* which contain the power in clear and express terms, *e.g.*

    (a) <u>In England and Wales,</u> Section 38 of the Arbitration Act 1996 (mentioned only because of its influence in the common law jurisdictions of this region) which provides thus:

"38 General Powers Exercisable by the Tribunal.

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

(3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is—

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom".

(b) In Singapore, Section 12 of the International Arbitration Act Cap 143A (IAA) includes the following provisions:

"Powers of arbitral tribunal

12.—

(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for—

(a) security for costs;

...

(4) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1)(a) shall not be exercised by reason only that the claimant is—

(a) an individual ordinarily resident outside Singapore; or

(b) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore."

The position in Singapore is interesting; it has been particularly well-described by Alastair Henderson in his article *"Security for Costs in Arbitration in Singapore" Kluwer Law International 2011 Volume 7 Issue 1 pp54-75*. Mr Henderson first notes that the IAA, by its amendment in 2009, removed the power of Singapore judges, which they had held for 50 years, to grant orders for security for costs in international arbitration (but preserved it for domestic arbitrations) and placed that power in the exclusive hands of the tribunal. He also demonstrates that the courts in Singapore had drawn a distinction between the principles applying to the granting of orders for security for costs in domestic cases and those applying in international cases, which they considered to be much more restrictive.

(c) In Australia it is belt and braces! With an express power to order security for costs found in Section 23K of the International Arbitration Act 1974 (as amended), and by Section 16(1) the bringing into law of the UNCITRAL Model Law as that law was amended by UNCITRAL on 7 July 2006 (the relevant part of that amended law, namely Article 17(2) (c), and its effect are further discussed below). Section 23K provides:

"23K Security for costs

(1) An arbitral tribunal may, at any time before the award is issued by which a dispute that is arbitrated by the tribunal is finally decided, order a party to the arbitral proceedings to pay security for costs.

(2) However, the tribunal must not make such an order solely on the basis that:

(a) the party is not ordinarily resident in Australia; or

(b) the party is a corporation incorporated or an association formed under the law of a foreign country; or

(c) the party is a corporation or association the central management or control of which is exercised in a foreign country.

(3) The provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law."

(d) In passing it is worth noting the difference between Singapore and Australia, in that the *lex arbitri* of the former gives effect to the un-amended Model Law in the form adopted by UNCITRAL on 21 June 1985. Article 17 thereof provides as follows:

"Article 17. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

The provision is a typical UN treaty measure, to which a majority of delegates could subscribe. It is about as broad and non-specific as could be contrived, permitting all or nothing in accordance with the leaning or preferences of tribunals from any background.

(e) Full citation of further examples of *leges arbitri* providing for security for costs in similar form would be burdensome but there are other jurisdictions, which follow this model of express provision.

15. Secondly and less obviously conferring a power to order security for costs, are those provisions of *leges arbitri* empowering the ordering of interim measures, which though they do not expressly mention security for costs in terms, are framed and interpreted to include it. Examples of these should begin with the Model Law in its most recently amended form as given the force of law in places such as Australia and elsewhere.

(a) In the **Model Law** as amended by UNCITRAL on 7 July 2006 the much extended article 17 now provides:

"CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS
(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) <u>Provide a means of preserving assets out of which a subsequent award may be satisfied</u>; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute."

[Emphasis added]

(b) The article makes no express mention of an order for security for costs as an interim measure that might be ordered

but there can be no doubt that the highlighted power at 17(2)(c) includes the power to grant an order for security for costs – at least if in the seat where this version of the Model Law is given effect, there is a costs shifting rule or power in force.

(c) Authority for the proposition that Article 17(2)(c) includes a power to order security for costs can be found in the Report on Working Group on Arbitration and Conciliation on the Work of its Forty Seventh Session (see UNCITRAL 47th Session UN Doc A/CN.9.64, para 48 (2007)). The Working group was in fact considering Article 26 of the UNCITRAL Arbitration Rules on Interim Measures (see further below), which in the result, very closely follows Article 17 of the amended Model Law. Two passages of the report are instructive. At paragraph 16 when embarking on the discussion about revision of the Arbitration Rules, the Working Group Report notes as follows:

"IV. Revision of the UNCITRAL Arbitration Rules

16. The Working Group recalled the mandate given by the Commission at its thirty-ninth session (New York, 19 June-7 July 2006) and set out above (see above, paragraphs 3-6) which provided, inter alia, that ***any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit and drafting style and that it should respect the flexibility of the text rather than make it more complex****. The Working Group recalled as well its decision that harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the UNCITRAL Arbitration Model Law should not be automatic but rather considered only where appropriate (A/CN.9/614, para. 21)"*

[Emphasis added]

The highlighted text explains the background to the debate amongst the delegates (and the overarching approach and mandate to drafting) on the amendment to the Article 26 Interim Measures Rule and the interpretation of Article 17(2)(c) of the Model Law. As reported in paragraph 48 (and quoted next below) the outcome of the debate was in favour of not including more specific wording akin to "security for costs" because, in the view of the delegates, the power so to order was already encompassed by the words, "***preserving assets out of which a subsequent award may be satisfied."*** Thus it was reported:

48. A proposal was made that paragraph (2) (c) should be amended expressly to refer to security for costs through an addition of the words "or securing funds" after the word "assets". Opposition was expressed to that proposal as it could connote that the corresponding provision in the UNCITRAL Arbitration Model Law was insufficient to provide for security for costs. The Working Group agreed that security for costs was encompassed by the words "preserving assets out of which a subsequent award may be satisfied."

Consequently, Article 26(2)(c) of the 2010 UNCITRAL Rules (discussed below) is modeled on Article 17 of the 2006 version of the Model Law. It is submitted that this debate and its outcome is conclusive authority for the proposition that Article 17(2)(c) of the Model Law and Article 26(2)(c) of the UNCITRAL Arbitration Rules 2010 include a power to order security for costs; but also strongly persuasive that arbitration laws or rules using similar non-specific wording, when providing for interim measures, can safely be taken as conferring the power to order security for costs.

(d) **In India,** Section 17 of the Arbitration and Conciliation Act 1996 (amended

with effect from 23 October 2015 and now largely based on the Model Law with some variations) provides thus:

"17.

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36 apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) ***securing the amount in dispute in the arbitration;***

(c) the detention, preservation or inspection of any property or thing which is the subject-manner of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full infom1ation or evidence;

(d) interim injunction or the appointment of a receiver;

(e) ***such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient****.*

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it*.*

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court."

(e) This is as belt and braces as it can get without an express provision for the grant of security for costs using those exact words!

(f) First, it should be noted that until recently, costs shifting, if it ever occurred in India, was token and minimal; with successful litigants expecting to pay most if not all of their costs. In consequence, applications for security of costs were rare. Things have changed dramatically with the introduction by amendment of section 31–A of the Arbitration and Conciliation Act 1996, which introduces a statutory costs shifting rule into Indian seated arbitration, so that costs generally follow the event. That section, comprehensively provides as follows:

"31A.

(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, shall have the discretion to determine-

(a) whether costs are payable by one party to another;
(b) the amount of such costs; and
(c) when such costs are to be paid.

Explanation - For the purpose of

this sub-section, "costs" means reasonable costs relating to--

i. the fees and expenses of the arbitrators, Courts and witnesses;
ii. legal fees and expenses;
iii. any administration fees of the institution supervising the arbitration; and
iv. any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral Tribunal shall have regard to all the circumstances, including-

(a) the conduct of all the parties;
(b) whether a party has succeeded partly in the case;
(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and
(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay-

(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date"

[Emphasis added]

(g) Taken together, it would appear that these new provisions have the following effect in Indian-seated international arbitrations: The Tribunal now has the express power under section 17(1)(ii)(b) to secure the whole of the amount in dispute in the arbitration, which I would respectfully venture, must include the costs which a winning party is now, prima facie, statutorily entitled to recover, under section 31A.(2)(a). If that view is wrong the extremely wide residual or general power in Section 17(1)(ii)(e) could serve as a source of the power. If that was not enough, there is the final adjunctive conferral of the curial power to order security for costs on the Tribunal (also highlighted), which derives from Order XXV of the Indian Civil Procedure Code 1908 (as amended) under which an Indian Court may order security for costs.

(h) It would be rude in view of my invitation to speak on this topic and warm welcome here, not to proffer a view from an external standpoint, as to whether security for costs is statutorily provided for in the **Indonesian Arbitration Law.** However, I proffer a view on Indonesian law with particular trepidation and expressly inviting correction. That is because I have read conflicting commentary from Indonesian arbitration lawyers with some suggesting that tribunals are empowered to make an order for security for costs and others that they are not so empowered. I illustrate this conflict of views with citation of two views (without attribution) to save embarrassment, when the expert

Indonesian lawyers in the audience tell us what the position really is! First it has been stated:

"The BANI rules [which in Article 19 (5) use the same words as appear in the arbitration statute – vide infra] provide the tribunal with the power to make any interim awards or decisions which it deems appropriate to regulate the proceedings, including security attachments ***(such as security for costs, deposit of goods with the parties and the sale of perishable goods).*** *Equally, the parties to the arbitration agreement can agree that such interim measures are to be available."*

Secondly, answering the question *"what interim remedies are available from the Tribunal",* three Indonesian lawyers have very recently asserted:

"Indonesia does not recognise the concept of an interim remedy of security for costs."

(i) I understand that the *lex arbitri* is found in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law), which does not adopt the Model Law and replaced Dutch colonial legislation regulating alternative dispute resolution. As to interim measures, Article 32 of the Arbitration Law provides in the translation obtained (which may be deficient):

"32 …

(1) At the request of one of the parties, the arbitrator or arbitration tribunal ***may make a provisional award or other interlocutory decision*** *to regulate the manner of running the examination of the dispute,* ***including decreeing a security attachment,*** *ordering the deposit of goods with third parties, or the sale of perishable goods.*

(2) The period of implementation of the provisional award or other interlocutory decision contemplated in paragraph (1) shall not be counted into the period contemplated in Article 48."

(j) To a common lawyer there appears to be nothing in that provision of the law that would justify the certainty in the pronouncement in the first comment quoted above, that a Tribunal seated in Indonesia can make an order for security for costs. It is perhaps appropriate to say that as an arbitrator and having detected some controversy, I would wish to be advised by an expert in Indonesian law that the power to decree a security attachment is to the same effect and scope in Indonesia as, for example, the Model Law power to provide ***"a means of preserving assets out of which a subsequent award may be satisfied"*** or the Indian power to impose a measure, "***securing the amount in dispute in the arbitration"*** and that it does include power to make an order for security for costs. Perhaps those qualified to do so in the audience will provide that advice now!

16. Thirdly, and even less certainly empowering arbitrators to make orders for security for costs, there are statutes and rules conferring a general discretionary power such as the original version of Art 17 of the Model Law (supra) and, as another example, Article 23 (1) of the old ICC Rules 1998, (which is in identical form to the current, 2012, ICC Rule in Article 28 discussed below) provided:

"Article 23 - Conservatory and Interim Measures

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate."

17. Learned commentators have suggested that this provision (and by implication statutes in similar form to the original Article 17 of the Model Law), providing that the Tribunal may...

> *"...order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute"*

...did indeed include the power to make an order for security for costs – see for example, *Lew, Mistelis and Kroll Comparative International Commercial Arbitration (The Hague Kluwer Law International 2003) 601* referring to ICC case 7489. It is however submitted that the march towards express empowerment or generic words connoting powers of protection for a respondent, which are more readily capable of being interpreted to include an order for security for costs, in other arbitration statutes and rules, has reinforced the acceptance of that conclusion by ICC arbitrators worldwide.

Jurisdiction found in different forms in arbitral rules

18. Having illustrated the three different legislative techniques in *leges arbitri* by which power to order security for costs might be conferred, it is sufficient under this heading to illustrate that although similar differences exist in prominent arbitral rules, they should not prevent pursuit of harmony.

19. It is sufficient to note without quoting them all, that numerous institutional and other rules provide expressly for the power to award security for costs. They include rules of local origin such as the SIAC Rules 2016 Rule 27 j., ACICA Rules 2016 Rule 33.2 (e), and rules which are employed in the region from elsewhere such as the LCIA Rules 2014 Art 25 (2) – which is in this particularly elaborate form:

> *"25.2 The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or cross -claimant in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration. In the event that a claiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or cross-claims or dismiss them by an award."*

20. Institutions or associations such as HKIAC by its Rules in Art 23.3 and the KLRCA Rules adopt the UNCITRAL model for interim measures from Article 26 (2) of the 2010 (revised immaterially for present purposes in 2013) UNCITRAL Arbitration Rules in this form:

> *"Article 26*
>
> *1. The arbitral tribunal may, at the request of a party, grant interim measures.*
>
> *2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party for example and without limitation, to:*
>
> *(a). Maintain or restore the status quo pending determination of the dispute;*
>
> *(b) Take action that would prevent, or refrain from taking action that is likely to cause,*
>
> *(i) current or imminent harm or*
>
> *(ii) prejudice to the arbitral process itself;*

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute."

21. We have already seen that this rule should be interpreted as empowering a Tribunal constituted under any of the Rules, which incorporate it, or adopt it as a model, to make an order for security for costs. Thus there is no reason why at this starting point of jurisdiction to make the order, there should be any disharmony in practices across the region, where these different forms of rule are in play.

22. The BANI rule in Indonesia has already been discussed because it follows the wording of the Arbitration Law of Indonesia referred to above. It is found in Article 19 paragraph 5 in these terms:

"5. Interlocutory Award

The Tribunal shall have the authority to make any provisional award or other interlocutory decision it may deem appropriate to regulate the manner of running the dispute, including decreeing a security attachment*, ordering the deposit of goods with third parties, or the sale of perishable goods. The Tribunal shall be entitled to require security for the costs of any such measures."*

The question is – do the highlighted words encompass the power to make an order for security for costs? I am respectfully going to venture the opinion that they do! By the time of delivery of this paper or during the course of its delivery I will have received that expert evidence I have craved and been informed by others better qualified than me, if that opinion is right or wrong.

23. Also extensively in use in the region are the ICC Rules and in my opinion it is these Rules and their historical interpretation by arbitrators of European origin and civilian background, which have contributed substantially to such disharmony in practice as can be identified in this area. The relevant current rule provides thus:

"Article 28: Conservatory and Interim Measures

1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, ***the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate****. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.*

2) Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof."

24. As already demonstrated under the previous heading, the very broad words of Article 28 and its predecessor, Article 23, do and did confer jurisdiction on ICC arbitrators to award security for costs. But at this juncture, it is important to record that it was a jurisdiction that was historically, in the words of Noah Rubin's seminal article *"In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration" 11 Am. Rev. Int'l Arb 307* 2000, the subject of *"cautious disapproval"* and the predecessor to the then-current rule Article 23 *"drew much from the French referee judge procedure".*

Summarising the history and approach of ICC tribunals in the year 2000, he wrote:

> *"In practice, ICC arbitrators appear rarely to have honored requests for security for costs, despite widespread acceptance in theory that ICC arbitral tribunals possess the authority to award interim measures. New arbitration rules were drafted in 1997, and came into effect January 1, 1998. These Rules are designed in part to address the problematic security for costs lacuna in the previous regime. While the new regime does "not drastically transform the basic tenets of the ICC arbitral process," a clearer, more expansive Article 23, which permits arbitrators to order any interim or conservatory measure they deem appropriate, replaced Article 8(5). However, the clarifications introduced by the 1998 Rules are unlikely to fundamentally change the approach of ICC arbitrators in considering security requests. While Article 23 puts an end to any lingering jurisdictional doubts, it provides no additional guidance to arbitrators, who tend to be conservative and view security for costs as a primarily English device. The most authoritative commentators on the revisions admit that "it is doubtful that ICC Arbitral Tribunals, even though having the power, will frequently be persuaded to grant security for legal costs as the device is not familiar to many legal systems." Rather, the article was phrased broadly enough to prevent a repeat of Ken-Ren, where one of the English court's reasons for intervening was that Article 8(5) did not seem to give ICC tribunals the authority to take such measures by themselves. At the same time, drafters of the new Rules were careful to avoid explicitly naming security for costs among the provisional measures contemplated, "because they did not wish to encourage the proliferation of such applications, which, apart from being rare, are generally disfavored in ICC arbitrations."*

25. This attitude and approach continued in ICC arbitrations as epitomised by reports of cases such as *ICC Case 12035 Procedural Order of 6 June 2003 Parties: Mexican company v. Dutch, French and Mexican companies: Place of arbitration: New York, USA.* The reasoning of the tribunal is extracted at length because it forms the most extensive compendium in one place that the author has found of typical ICC tribunal reasons for refusing orders for security for costs.

26. The Respondents advanced four main contentions put thus:

    1. *The granting of security for costs "is necessary and proper because [Claimant] is insolvent and now relying entirely upon financing from a Mexican bank to maintain this arbitration. Indeed, it is still not clear whether [Claimant] has been able to retain replacement counsel (its third set of attorneys) to represent it in this arbitration."*
    2. *Moreover, "[i]t is already evident that [Claimant] will not have the funds necessary to satisfy an award of costs in Respondents' favor, and much less an award of damages on Respondent [No. I)'s counterclaim".*
    3. *Finally, despite repeated requests by both the Tribunal and the Respondents, Claimant 'has still never confirmed the exact nature or status of its insolvency".*
    4. *Accordingly, "[b)ecause of the particular history of this case to date, and because the Claimant ... is currently in some form of receivership, Respondents think it appropriate to have the maximum security feasible, to cover eventual arbitration costs, and legal fees and expenses, arising out from this increasingly complicated arbitration".*

    The Claimant responded thus:

    1. *Respondents' request for an interim measure is "totally unfounded", in particular in the light of the ICC practice "to avoid the application of interim*

measures to guarantee costs [i.e. the award dictated in ICC case number 7047 (1994), ASA Bull (1995), p. 31]".

2. *In particular, it should be noted that "Respondents have requested for an interim measure when they have not paid their corresponding costs".*

(...and generally contested the state of its insolvency.)

The Tribunal refused the application under the ICC Rule then in force, Article 23 (supra), holding inter alia (with emphasis added):

"3.2.1 General approach

36. *Whilst ICC arbitrators do not hesitate to find that they have the power to grant security for costs,* ***they are extremely reluctant to actually grant the remedy****. As a matter of principle,* ***the Tribunal agrees with the Claimant when it submits that the ICC arbitrators generally "avoid the application of interim measures to guarantee costs"****. This general approach is confirmed by leading commentators of the ICC practice (Craig/Park/Paulsson, cit., p. 467 concluding "that security for costs is not usually granted").*

37. *Indeed, the ICC arbitration system contains specific provisions for the financing of the arbitration costs by advances by the parties to be made in equal shares, which already "offers a certain guarantee against abusive and extravagant claims" (Craig/Park/ Paulsson, cit., pp. 468-469).*

38. ***Respondents have submitted no persuasive reasons for the Tribunal to depart from this restrictive general approach****. In the next paragraphs, the Tribunal will examine whether the particular circumstances of the case justify the granting,* ***on an exceptional basis****, of security for costs ...*

...

41. *As already suggested, the Tribunal shares* ***the generally accepted view that security for costs may be granted only under very exceptional circumstances****. In particular, the Tribunal finds that* ***arbitrators overcome their normal reluctance to grant security for costs only in cases where the Claimant's case is abusive or extravagant****. From this point of view, the Tribunal considers that* ***the party seeking security for costs has to establish that the claim (of the opposing party) appears prima facie unjustified or frivolous*** *(see for instance Francois Knoepfler, "Les decisions rendues par l'arbitre ala suite d'un examen 'Prima Facie'", ASA Bull 2002, p. 600).*

42. *In the present case, nothing in the record indicates, at this early stage of the proceeding at least, that Claimant's case is unjustified, abusive or frivolous ...*

...

48. *Specifically, the Tribunal considers that* ***the party seeking security for costs should establish, on a prima facie basis, that the opposing party is organizing its own insolvency*** *(see for instance Knoepfler, cit., p. 600) or that it deliberately provoked its insolvency in* ***order to avoid the financial risks related to an arbitral proceeding*** *(Poudret/Besson, cit., p. 554), or for any other fraudulent reason ...*

...

3.2.5 The Claimant interest in having access to justice

50. *Finally, the Tribunal finds that ordering security for cost involves the inherent risk that it may result in precluding access to justice by claimants who are in a precarious economic situation.* ***Consistent with arbitral practice in this respect, the Tribunal has to balance, on the one side, the Respondents' interest in avoiding costly arbitration proceedings without sufficient security that they will be reimbursed for their expenses in case of success, and, on the other side, the Claimant's interest in having access to arbitral justice*** *(see*

the decision of the sole arbitrator in the Zurich Chamber of Commerce case no. 415 of 20 November 2001, reported in ASA Bulletin, 2002, p, 467, 471).

51. *In the* ***absence of any prima facie evidence that the Claimant's case is unjustified or frivolous or that the Claimant has been organizing its insolvency in view of this arbitration or has otherwise acted abusively****, the Tribunal finds that in the present case the Respondents' interest does not prevail over the Claimant's interest in having access to justice.*
52. *Claimant has filed for reorganization proceedings in Mexico.* ***This is a business risk that Respondents have to bear and nothing on record shows that Claimant has acted in bad faith.***
53. *Moreover, it is* ***doubtful whether granting an order for security for costs under these circumstances would comply with the paramount principle of equal treatment of the parties****. In this respect, the Tribunal notes that in this arbitration Respondents have counterclaims for almost two-thirds of the total amount in dispute and that it is therefore very difficult to draw a clear line between their legal costs to defend against the Claimant's claims and their legal costs to substantiate their own counterclaims.*
54. *In conclusion, after having carefully reviewed the parties' arguments and analyzed their respective positions, the Tribunal dismisses Respondents' request for security for costs"*

27. In investment arbitration ICSID tribunals are empowered by Article 47 of the Convention and Rule 39 of The Arbitration Rules as follows:

"Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, ***recommend any provisional measures which should be taken to preserve the respective rights of either party.***

Rule 39

Provisional Measures

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

28. In *RSM Production Production Corporation v Saint Lucia ICSID case No Arb/12/10 – Decision on Saint Lucia's Request for Security for Costs of 13 August 2014,* a courageous ICSID tribunal ordered, for the

first time, a Claimant to provide security for costs. In line with previous cases *(Maffezini v Spain Procedural Order No 2 of 28 October 1999 paras 18, 24-25, Pey Casado v Chile Decision on Provisional measures of 25 September 2001 para 80-81 – and other cases),* where the relief had been refused, the Tribunal required a showing of exceptional circumstances holding at paragraph 86 that:

> *"Those circumstances are, in summary, the proven history where Claimant did not comply with cost orders and awards due to its inability or unwillingness, the fact that it admittedly does not have sufficient financial resources itself and the (also admitted) fact that it is funded by an unknown third party which, as the Tribunal sees reasons to believe might not warrant compliance with a possible costs award rendered in favor of Respondent."*

29. In passing, it may be noted that this passage raises another consideration in the grant of security for costs namely that of third party funding (TPF). That is a subject, which has generated much consideration in relation to the issue of security for costs and there is an International Council for Commercial Arbitration and Queen Mary College London Task Force in existence which has issued a draft report on TPF and its impact on applications for security for costs. At page 17 of the draft report of November last year, the authors state:

> ***"Security for costs application in Investment Arbitration***
>
> *It is not for this committee to lay down a test for awarding security for costs. However,* ***if the test in investment arbitration is that the applicant must show that there are extreme circumstances that warrant a security for costs order, then such extreme circumstances may involve an element of abuse or bad faith****. That might be the case, for example, in situations where the claimant company was deliberately created as a mere procedural shell to collect money if the case is won, and frustrate the respondent's costs claim if the case is lost. By contrast, mere recourse to third-party funding by a claimant that has become impecunious cannot readily be characterized as carrying an element of abuse, and cannot of itself be taken as a reason for Tribunals to award security for costs."*
>
> [Emphasis added]

30. The committee's questioning of what the test in investment arbitrations is for the grant of security under the convention and rule cited, and the earlier decisions in which applications were refused, all point to a grant of security in ICSID cases only where it is necessary and in exceptional circumstances (even extreme circumstances may be required). These circumstances might include a track record of failure to comply with costs orders or funding contributions, stripping or concealment of assets to avoid a costs order being effective, where abuse or serious misconduct has been evidenced or where a third party funding arrangement is in place (although this was considered unexceptional in the case next referred to).

31. The normal restrictive reaction of ICSID tribunals to security for costs orders has been seen and reaffirmed recently in *Euro Gas and Belmont Resources Inc v Slovak Republic (ICSID case No Arb/14/14 Procedural Order No. 3 of 23 June 2015 paras 119-123)* where, refusing an application even where a third party funding arrangement was in place, the Tribunal robustly distinguished *RSM v Saint Lucia* in this way:

> *"As regularly held by ICSID arbitral tribunals, security for costs may only be granted in exceptional circumstances, for example where abuse or serious misconduct has been evidenced. It is true that in RSM v Saint Lucia, an ICSID tribunal ordered security for costs. However, the underlying facts in that arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of*

not complying with cost orders. As underlined by the arbitral tribunal, these circumstances were considered cumulatively. Yet, no such exceptional circumstances have been evidenced in the instant case. The Claimants have not defaulted on their payment obligations in the present proceeding or in other arbitration proceedings. The Tribunal is of the view that financial difficulties and third-party funding - which has become a common practice - do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs."

32. Thus an even more restrictive approach than the ICC approach is followed under the ICSID Arbitration Rules for reasons, which are perhaps particularly driven by the context of the state investment disputes that they govern. It is for this reason that despite the decision in *RSM v Saint Lucia,* I cannot imagine that practices with regard to orders for security for costs in this field of arbitration will become any more liberal.

CRITERIA AND CONSIDERATIONS FOR AND AGAINST THE GRANT OF AN ORDER FOR SECURITY FOR COSTS

33. So what are these valid criteria that might all be listed and given due weight in international commercial arbitration, according to the circumstances of each case, according to the system of law, *lex arbitri* or rule under which the reference is proceeding?

34. I will start again with the UNCITRAL product.

35. Article 17 A of the Model Law with its 2006 amendments is in these terms:

Article 17 A. Conditions for granting interim measures

*(1) The party requesting an interim measure under article **17(2)**(a), (b) and **(c) shall satisfy the arbitral tribunal that:***

*(a) **Harm not adequately reparable by an award of damages is likely to result if** the measure is **not ordered**, and **such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed** if the measure is granted; and*

*(b) **There is a reasonable possibility that the requesting party will succeed on the merits of the claim.** The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

36. Article 26(3) of the UNCITRAL Arbitration Rules is in precisely the same form. Thus there are the three highlighted requirements in a reference proceeding under either or both of the law or rules. In the case of an application for security for costs, the focus is obviously on the capacity of the claimant to pay costs if it fails in its claim – it is all about the money – and if the claimant who is the respondent to the application is not likely to have the means to pay costs; an award of damages will not improve the situation.

37. The second and third conditions operate in tandem. If the applicant respondent does not have a reasonable chance of prevailing, then an order against an impecunious claimant with a good case, which is thereby stifled, would be visiting harm upon it that substantially outweighs the harm visited upon a respondent to a claim, which does not have a reasonable chance of getting the costs order it fears it will not be able to enforce. It serves to articulate those obvious propositions because it demonstrates the real danger, inherent in using these criteria, that a tribunal will be drawn unconsciously into a deeper assessment of the merits of the case for

the purposes of weighing the comparative risks of harm prematurely. That would be done on an imperfect base of evidence and submissions and to the detriment of the fairness and integrity of the arbitral process and the appearance of such. Tribunals must be astute therefore to confine themselves rigidly to doing no more than determining as a threshold requirement whether there is a reasonable possibility the requesting party will prevail or not – and making it plain in its award or ruling that it has done no more.

38. In an article by Nael G Bunni, *"Interim Measures in International Commercial Arbitration…"* (The Hague Kluwer Law International 2009 600-601, reference is made to an extract from an ICC arbitration no 10032 which illustrates an ICC tribunal's view of when it would be appropriate to order security for costs thus:

"…it would be appropriate for the tribunal to exercise its discretion to make an order for security for costs

(i) if the Respondent, which has requested that such an order be addressed to the Claimants, can show:

(a) that the factual situation at the present time is substantially different from that which existed at the time the parties entered into their arbitration convention, and

(b) that the present situation is of such a nature as to render it highly unfair to require it to conduct the arbitration proceedings without the benefit of such security;

(ii) unless the Claimants, which oppose the making of an order for security for costs, can show:

(a) that the making of such order for security for costs would in effect deny their right of access to arbitration for reasons not attributable to them, and

(b) that, after having weighed the parties respective interests considering both the subject matter of the dispute and the circumstances giving rise to the request for an order for security for costs, the making of such order would appear to be highly unfair to Claimants.

That facet of arbitral theory highlighted earlier in this paper, which is adhered to in ICC arbitrations, namely that parties are expected to carry through the risks attendant upon dealing with their counterparty, to the dispute resolution process, unless the factual situation at the time of the application for security is *"substantially* [and unforeseeably in some commentators' view] *different"* to the situation (of risk) at the time of contracting, can clearly be seen as the starting point for the tribunal in this case.

39. How might all of the relevant criteria be distilled or reduced to a test or approach, which is simple in expression even if difficult in application. I will leave you with three reductions. The first is found in the article to which I have referred above, by Alastair Henderson, provided by an international arbitrator of repute (whose anonymity is properly preserved) in a case in which Mr Henderson appeared as counsel. That arbitrator put the test or approach in this way:

" …the crux of the matter is to balance the Claimant's right of access to arbitration versus the respondent's justified need for security in relation to risks it had not assumed"

Secondly, that expression of the test accords well with paragraph 50 of the Tribunal's reasons in *ICC Case 12035 Procedural Order of 6 June 2003 Parties: Mexican company v. Dutch, French and Mexican companies: Place of arbitration: New York, USA* where it stated as already cited (supra paragraph 26):

"Consistent with arbitral practice in this respect, the Tribunal has to balance, on the one side, the Respondents' interest in avoiding costly arbitration proceedings without sufficient security that they will be reimbursed for their expenses in case of success, and, on the other side, the Claimant's interest in having access to arbitral justice"

40. The third is provided by Professor Jeffrey Waincymer and taken from his excellent and comprehensive text, Procedure and Evidence in International Arbitration at page 647. Whilst recognising that a more nuanced analysis may be necessary, he advances the criterion for the grant of an order for security for costs as:

> *".....a serious risk of inability to pay an adverse costs award coupled with a serious risk that the claim will fail on its merits."*

CONCLUSION

41. I would suggest that the time has come when parochial and protectionist (of a system of law or arbitral philosophy) motivations as described by Noah Rubin (op. cit. supra), can and should be put aside in favour of an approach more open and embracing of all properly and reasonably deduced considerations, touching (per Weixia Gu) this one of the *"most neglected and misunderstood form of interim relief"* from across the whole field of international commercial arbitration. That is not to say that ICC arbitrators of a European civilian background or ICSID arbitrators with a US background were or are wrong in every restrictive consideration or criterion that they adopted when rejecting applications for security for costs as they commonly did and do. It is important to recognise that they will have been right to entertain certain considerations in the refusal of orders for security and that those considerations should hold sway in appropriate cases. Similarly, just because an arbitration law or rules expressly confer the power to order for security for costs, it should not be the knee jerk reaction of a tribunal to order it, wherever there is a sniff of impecuniosity. The type and context of the arbitration is critical; but their differences do not mean that a uniform approach may not be adopted. A uniform approach does not demand uniform treatment of, or weight given to every influencing factor.

42. The objective in striving for uniformity in practice, which I am advocating, should be to embrace all valid influencing criteria and give them appropriate weight according to the nature of the arbitration and the circumstances of the case, so as to achieve fair and effective dispute resolution. I believe it is possible – even if difficult in certain types of arbitration where attitudes are particularly entrenched – to achieve uniformity of approach. I offer for arbitrators' and practitioners' consideration, the latest *Chartered Institute of Arbitrators Practice Guideline on Applications for Security for Costs 2015*, as a means to achieve that desired uniformity of approach. It is publicly available at this link:

> http://www.ciarb.org/docs/defaultsource/ciarbdocuments/guidane-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015securityforcosts.pdf?sfvrsn=16.

43. Careful scrutiny of its detail reveals that, in its drafting, it takes account of the wide range of influencing factors, attitudes and approaches across the systems of law and arbitration as briefly illustrated above.

44. By way of description for those not familiar with CIArb guidelines, it comprises six Articles with commentary and explanation of each. It has a preamble, which, with the commentaries, demonstrates that its authors have paid careful attention to all of the differences across the arbitration world, referred to in this paper. It refers to another near-contemporaneous guideline on Interim Measures generally which should be read in conjunction with it. I have picked out a few extractions to illustrate the width of its sources of influence and its utility.

45. Article 1 sets out general principles and the factors arbitrators should take into account, prospects of success, ability to meet an award of costs and fairness in all the circumstances – with a catch-all for any other considerations the arbitrators *"may consider relevant to the particular situation of the parties and the circumstances of the arbitration."*

46. Article 2, dealing with prospects of success, begins with that vital injunction *"[t]aking great care not to prejudge or predetermine the merits of the case itself arbitrators should consider whether on a preliminary view of the relative merits of the case, there may be a need for security."* The guidelines also stress the need to make it apparent to the parties that there has been no prejudice or predetermination; and that this consideration will not in most cases be determinative of the application.

47. Article 3 deals with the ability to meet an award of costs and the availability of the necessary funds, but of particular interest is recognition of the ground for refusing security in many ICC cases on assumption of commercial risk. In Article 3.2 it is provided, with emphases added, *"[i]f the arbitrators conclude that, for either or both of these reasons,* [impecuniosity and unavailability of funds] *there is a real risk that the applicant will have difficulty enforcing a costs award, then these factors favour an order for security,* ***unless these factors were considered and accepted as part of the business risk at the inception of the parties' relationship.****"* The following guidance and particularly the footnote references make clear the extent to which all influencing traditions and approaches were weighed in the drafting of these guidelines. The commentary on this article at paragraph c), which deals with exceptions, embraces the same exceptions to that canon of approach seen in ICC awards; namely, deliberate organisation of affairs to thwart awards, putting assets beyond reach, and giving false information. Paragraph e) enjoins arbitrators to consider who is the real beneficiary of the claim and obviously implies consideration of third party funding arrangements as one consideration in the exercise of the discretion.

48. Article 4 – "***is it fair to require security***" – enjoins the arbitrators to consider whether it would be fair in all the circumstances to make an order. Particular attention is directed to whether awarding security would stifle a legitimate claim. Most importantly, the guidance directs consideration of how it has come about that the claimant might not be able to meet an order for costs and if the respondent applicant has caused or contributed to that status by its conduct; in which event, that would be a factor operating against the grant of security.

49. Thus there is hope and a way forward towards uniformity in this area of practice.

Upcoming Events

ICCA 2018 Sydney
Super Early Bird Registration Now Open

A Super Early Bird registration rate is now available for ICCA 2018 in Sydney. Registration can be completed online via the Congress website and the Super Early Bird rate is available until midnight AEDT 31 March 2017.

Super Early Bird registration rate is also available for the New Zealand follow-on event. Details can be found on the AMINZ-ICCA Queenstown website http://icca2018sydney.com/registration.php

News & Events

Past Events

1. 2016 Presidential Lecture and CIArb Members Night

Time : Friday, 25th November 2016
Venue : Auditorium, Kuala Lumpur Regional Centre For Arbitration, Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.

2. RAIF Conference 2016

"Building the Future of Arbitration through Innovation"

Time : 25 November 2016
Venue : Intercontinental Hotel, Sydney

The Conference discussed about the promotion, growth and practice in the region, and innovation ideas exchange between members. The event also held the RAIF Council Meeting.

3. SIAC Rules 2016 Roadshow : User's Guide to the SIAC Rules 2016

Time : 16 November 2016
Venue : Raffles Jakarta (Dian Ballroom A. Level 11)
Host : SIAC

On 1 August 2016, the sixth edition of the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules 2016) came into effect. The conference programme provided practical insights and first-hand perspectives from experienced users of SIAC arbitration and those closest to the drafting process. The audience were in-house counsel, practitioners and other arbitration users, and the attendance was around 100 delegates.

3. Arbitration Seminars and TV show in Bandar Lampung, Lampung Province, Indonesia

Time : 10 November 2016
Venue : Bandar Lampung University, Whizz Hotel and Radar Lampung TV

The arbitration as the dispute resolution, especially in BANI as the venue of arbitration proceedings, was introduced and disseminated to the students, academicians, business and law practitioners in Lampung Provinces. The speakers from BANI successfully conducted the presentations. The talkshow programme was also broadcasted by Radar Lampung TV in the evening of the same day.

4. APRAG Conference 2016

"Rise of International Commercial Arbitration and Developments in Investment Treaty Arbitration "

Time : 6 - 8 October 2016
Venue : Sofitel Nusa Dua Beach Resort, Nusa Dua, Bali
Host : Badan Arbitrase Nasional Indonesia (BANI Arbitration Center)

Witnessed by the Deputy Secretary General of ASEAN, Dr. AKP. Mochtan, Chairman of BANI, Mr Husseyn Umar SH. FCBArb. FCIArb., and other government officers, the Vice-Chief Justice of Indonesia Supreme Court on Judicial Matters, Dr. H.M. Syarifuddin, SH. MH., was striking the Balinese gong as the blessing symbol of the opening of the conference, 8 October 2016.

The first session of APRAG Conference was chaired by Mr Michael Pryles, discussing the topic of Diversity and Unification of Arbitration Practices in Asia. The presentators were Ms. Yoshimi Ohara, Mr. Michael Hwang, Mr. Michael Lee, Mr. Lee Yeoung Seok, Ms. Kim Rooney, Mr. Philip Yang and Prof. Anselmo Reyes.