Journal of International Arbitration

Wolters Kluwer
Law & Business

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by *Aspen Publishers, Inc.*
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0255-8106

This journal should be cited as (2013) 30 J. Int. Arb. 1

The *Journal of International Arbitration* is published six times per year.
Subscription prices for 2013 [Volume 30, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 943/USD 1124/GBP 620
Online subscription prices: EUR 781/USD 1041/GBP 574 (covers two concurrent users)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
For further information please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For Marketing Opportunities please contact marketing@kluwerlaw.com.

The Journal of International Arbitration is indexed/abstracted in the European Legal Journals Index.

Printed on acid-free paper

All correspondence should be addressed to:
Dr. Michael J. Moser
Journal of International Arbitration
c/o Hong Kong International Arbitration Centre
38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China
Tel: +852 3512 2398, Fax: +852 2877 0884, Email: editorjoia@kluwerlaw.com
For subscription queries please see copyright page overleaf.

ISSN 0255-8106 Mode of citation: 30 J.Int.Arb. 1

Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?

William Kirtley & Koralie Wietrzykowski*

The list of issues surrounding the recent advent of third-party funding in the arbitration arena is long, and much has been written about the impact of third-party funding on issues regarding confidentiality, impartiality, the attorney-client privilege, disclosure and access to justice. An additional topic from which much debate has sprung in relation to third-party funding is its impact on decisions to award security for costs, namely, whether its use should prompt arbitrators to grant security for costs. It is this issue that this article investigates. After an introduction on security for costs, this article sets forth the opposing views expressed by third-party funders, commentators and arbitrators in treaties, articles and conferences, on the impact of third-party funding where security for costs is requested. The most recent arbitral awards and national case law which may assist practitioners to reach a conclusion on this sensitive question are also detailed. This article concludes with the authors' view on the most appropriate approach towards security for costs in the presence of third-party funding.

1 INTRODUCTION

In advertisements found in litigation magazines aimed at legal practitioners, certain litigation funders such as Harbour Litigation Funding Ltd. (Harbour) and IMF (Australia) Ltd. (IMF), both major actors in the litigation funding industry, readily offer to provide security for costs to their clients as part of their funding package.[1]

---

* The authors of this article are William Kirtley, Counsel at the Paris-based international arbitration boutique Lazareff Le Bars and Koralie Wietrzykowski, LLM, LLB.

1 The financing of litigation by third parties used to be prohibited under the doctrine of maintenance in common law countries. Maintenance is defined as 'assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation'. *See Black's Law Dictionary* 973 (B.A. Garner eds., 8th ed., West Group 2004). However, third-party funding is now widely accepted in common law countries. *See, e.g.,* the Australian High Court Judgment *Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.*, [2006] HCA 41 (Aug. 30, 2006); Lord Justice R. Jackson, *Review of Civil Litigation Costs: Final Report of 21st December 2009* (The Stationery Office 2010); Title 9-A, Maine Revised Statute: Maine Consumer Credit Code, Annotated (2007), secs. 12-104. With respect to civil law countries, one French decision, *Société Foris A.G. v. S.A. Véolia Propreté* (anciennement dénommée S.A. Onyx), RG No. 05/01038, Court of Appeal of Versailles, 12e Ch. sect. 2, June 1, 2006, mentions a third-party funding agreement with an institution. The French court took no issue with the fact that the arbitration was funded by a specialized party. Third-party funding agreements with institutions are also common in Germany. *See, e.g.,*

Kirtley, William & Wietrzykowski, Koralie. 'Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?'. *Journal of International Arbitration* 30, no. 1 (2013): 17–30.

IMF advertises the following:

> IMF (Australia) Ltd is prepared to fund international commercial arbitration and investment treaty claims including those administered on an ad hoc basis and by the principal arbitral institutions (ICC, AAA/ICDR, LCIA, HKIAC, SIAC, ACICA and ICSID) with a claim value in excess of AUD$10 million. IMF offers . . . payment of any adverse costs and provision of security for costs.[2]

Similarly, Harbour's publicity advertises that:

> Harbour is a leading UK funder of commercial litigation. Harbour provides non-recourse, risk-free funding, paid on an on-going basis, throughout the life of the case, for all, or any, of the following: . . . security for costs, including payments into court . . . Harbour will consider funding for any case with a claim value above £3 million.[3]

However, litigation funders are often not so generous, and this may well raise issues for impecunious claimants having recourse to such a funding model.

Indeed, the presence of such funding will usually alert the respondent to the precarious financial situation of the claimant,[4] and raise concerns regarding the claimant's ability to meet an adverse costs award. This in turn will often prompt an application for security for costs. The moot point is therefore whether the presence of a third-party funding agreement with a professional funder should, or should not, incentivize arbitral tribunals to grant such security. In other words, should third-party funding agreements be added to the list of circumstances favouring an order for security for costs?

This is the topic that the current article examines. In responding to this question, the authors will first present, in section 2, an overview of security for costs and the circumstances that have generally been considered by arbitrators to be relevant when dealing with a request for security for costs. Section 3 details commentary and case law supporting the view that third-party funding should not be a relevant factor in deciding upon security for costs, while section 4 focuses on arguments supporting the contrary view. The authors conclude by setting forth their position on whether the presence of third-party funding should justify an award of security for costs.

---

http://portal.foris.de/ and http://anwaltverein.de/downloads/Depescheninhalte/bersicht-Proze.ssfinanzierer.pdf.

2 *Third-party funding: Snapshots from around the globe*, 7 Global Arb. Rev. 5 (2012).

3 Commercial Dispute Resolution, Q4, Issue 2, 16 (2010).

4 Although some wealthy companies use third-party funding to control their financial risks, this article deals with matters involving impecunious claimants, who lack sufficient financial resources to bring their claim. Most third-party funders fall into this latter category.

2 SECURITY FOR COSTS IN COMMON LAW AND CIVIL LAW JURISDICTIONS

An order that a litigant should provide security for costs is a typically English legal mechanism. It safeguards respondents against claimants' potential inability to meet an order for adverse costs at the end of the trial[5] or arbitration.[6] It is the subject of provisions in the English Civil Procedural Rules,[7] the English Arbitration Act 1996[8] and the London Court of International Arbitration Rules.[9]

As is often the case, this common law concept finds little resonance in civil law countries, where it is known as *cautio adjudicatum solvi*. The very name under which it is known illustrates its antiquated nature for continental lawyers. For instance, security for costs appeared in the French Napoleonic Code of the early nineteenth century,[10] but its use was limited to administrative matters and could be ordered only against foreign claimants.

Currently, as in many civil law countries, neither French domestic law nor French arbitration law contain provisions relating specifically to security for costs.[11] This absence reflects the fact that in France, unlike what frequently occurs in England, parties typically bear their own legal costs.[12]

This legal divide also applies in international arbitrations where tribunals with a civil law hue are more reluctant to grant security for costs,[13] despite the fact that the majority of arbitral tribunals tend to adopt a 'costs follow the event' approach in international arbitration. It is, however, commonly accepted that security for costs should only be granted with the 'greatest reluctance'.[14]

---

5 In England, the general rule is that 'costs follow the event', e.g., 'the unsuccessful party will be ordered to pay the cost of the successful party'. *See* Civil Procedure Rules, rule 44.3(2)(a).

6 The Tribunal must award costs on 'the general principle that costs should follow the event'. *See* Arbitration Act 1996, sec. 61(2).

7 Civil Procedural Rules, rule 25.12.

8 Arbitration Act 1996, sec. 38(3).

9 London Court of International Arbitration (LCIA) Rules, rule 25(2): 'The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate …'

10 Article 16 of the Napoleonic Code, 1804.

11 'French law does not make provision for the grant of security for costs. It is unclear whether considerations such as equality between the parties, access to justice, etc. may render security for costs orders unenforceable in domestic arbitrations. In international arbitrations, the general view is that arbitral tribunals may make security for costs orders although they are highly unusual in practice.' *See* T. Portwood, *Arbitration in 55 Jurisdictions Worldwide*, Global Arb. Rev. 171, para. 28 (2011).

12 Article 700 of the French Code de Procédure Civile grants judges the power to order the losing party to pay the successful party's legal representation costs. However, this power is rarely used in practice and the amounts recovered tend to be meagre.

13 B. Berger, *Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 ASA Bull. 7 (2010).

14 'It is generally admitted, however, that [the power to grant security for costs] must be used in a restrictive manner. In Switzerland, this is, in particular, the opinion of Jean-François Poudret &

The circumstances warranting a security for costs order is the subject of much debate in the international arbitration arena. Nevertheless, certain criteria have emerged, which are not set in stone and are used to varying degrees by arbitrators.

The primordial criterion is the claimant's lack of funds,[15] unless this is caused by the respondent.[16] This lack of funds must result from a fundamental change in the claimant's finances.[17] The claimant itself, or its assets, ceasing to be located in a country which is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has also been identified as a relevant factor.[18] Another set of circumstances justifying the grant of security is when the claimant purposely disposes of its assets in order to avoid meeting an adverse award.[19]

Sebastien Besson: "Un security for costs n'est à notre avis justifié que dans des cas très particuliers" (*Droit compare de l'arbitrage international*, Bruyant L.G.D.J., Schulthess, 2002, §610) . . . Arbitral precedents . . . show that security for costs should only be granted in exceptional circumstances and with the greatest reluctance (ASA Bull. 2005, at p. 112). As far as ICC arbitration is concerned, Y. Derains & E. Schwartz confirm that 'those drafting the 1998 Rules were reluctant to mention security for costs expressly because they did not wish to encourage the proliferation of such applications, which, apart from being rare, are generally disfavoured in ICC arbitration'. *See* ICC Case No. 13646, cited by M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 344–345, paras. 23–35 (Sweet & Maxwell Ltd. 2008).

15 The threshold for impecuniosity varies but is generally quite high. It has even been held that insolvency was not sufficient. *See* Case Report, Procedural Order No. 3 of July 4, 2008 in an ICC Arbitration with its seat in Berne between X S.A.R.L., Lebanon (Claimant), and Y A.G., *Germany (Respondent), with Franz Kellerhals Acting as Sole Arbitrator*, 28 ASA Bull. 37, para. 19 (2010) [hereinafter *Case Report*]: 'Manifest insolvency may not be readily assumed. The opening of bankruptcy would not be sufficient grounds as long as the estate of the bankrupt party has sufficient realizable assets in order to finance the arbitration and to honor a future cost award issued against it.'

16 Case Report, *supra* n. 15, at 37–45, para. 18: 'If there is no reasonable chance for the defendant to enforce a future cost award in its favor, an order for security for costs must be granted, unless the plaintiff would prove that its financial troubles are directly connected to a behavior of the defendant contrary to the principle of good faith.'

17 '[T]here must be a fundamental change of the situation since the basic agreement between the parties was entered into . . . If a party was already insolvent, or was a mere shell, or was, and still is, a resident of a country that is not a signatory to the New York Convention when the arbitration agreement was made, such circumstance would not be sufficient to warrant an order for security for costs. Actually, by entering into an agreement with such a party, the other party has assumed the risk of not being able to collect an award eventually rendered in its favor.' *See* P.A. Karrer & M. Desax, *Security for Costs in International Arbitration: Why, when and what if…, in* Law of International Business and Dispute Settlement in the twenty-first Century: Liber amicorum Karl-Heinz Böckstiegel 339–340, para. 42 (R. Briner, L.Y. Fortier, K.-P. Berger, & J. Bredow eds., 2001). However, unexpected insolvency might even be considered to be an assumed risk. *See A S.p.A. v. B A.G.*, Decision of the Arbitral Tribunal of the Geneva Chamber of Commerce of Sept. 25, 1997, 19 ASA Bull. 745 (2001), where the tribunal held that the claimant's insolvency was a normal commercial risk that the respondent should bear and refused to order security for costs.

18 *See* Karrer & Desax, *supra* n. 17, at 339–340, para. 42.

19 'The second circumstance in which an order for security for costs seems to me to be justified is when the claimant presents a request for arbitration after making all the necessary arrangements, for example by transferring all its assets, or even filing for bankruptcy, to ensure that an arbitral decision rendered against it will not actually be able to be enforced' (free translation). *See* A. Reiner, *Les mesures provisoires et conservatoires et l'arbitrage international notamment l'arbitrage CCI*, J.D.I. 4 893–94 (1998). 'The fact that a party is suffering financial difficulties or is the subject of bankruptcy proceedings is certainly not

A security for costs order requires a claimant to post a security equivalent to the respondent's likely costs. Should the order not be complied with, then the claim may be dismissed.[20] Arbitrators and judges must therefore undertake a delicate balancing exercise between claimants' right of access to justice and respondents' financial protection for their costs.[21]

The inherent danger of such orders is that a meritorious claim might be stifled, simply due to lack of funding. It is precisely the lack of funding, however, which will usually lead parties to have recourse to litigation funders.[22]

As set forth below, there are reasons both for and against an arbitral tribunal taking account of third-party funding in deciding upon security for costs.

3 FIRST VIEW: THIRD-PARTY FUNDING AGREEMENTS SHOULD NOT BE TAKEN INTO ACCOUNT WHEN ASSESSING AN APPLICATION FOR SECURITY FOR COSTS

There are three principal arguments as to why security for costs should not be taken into account when assessing an application for security for costs. First, as final awards on costs against unsuccessful claimants have ruled that third-party funding is not a factor in their assessment, it is therefore logical that third-party funding should not be a factor at the earlier stage of determining security for costs. Second, should third-party funding agreements become a factor, this would encourage respondents to systematically apply for security, thus delaying the procedure and increasing the risk of stifling genuine claims. Finally, claimants

---

sufficient, in itself, to form the basis of a request for security. However, that may not be the case where a party appears to have deliberately organized its insolvency while commencing what may prove to be lengthy and expensive arbitral proceedings against its co-contractor.' *See* P. Fouchard, E. Gaillard, B. Goldman, Fouchard, Gaillard & Goldman, *International Commercial Arbitration* 688, para. 1256 (E. Gaillard & J. Savage eds., Kluwer L. Intl. 1999).

20 Arbitration Act 1996, sec. 41(6).

21 '[I]t 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 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 an 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 the Claimants.' *See* ICC Award No. 10032 of Nov. 9, 1999 cited in P.A. Karrer & M. Desax, *supra* n.17, at 348, para. 42.

22 'The process of seeking third party funding varies from case to case and from funder to funder, but usually a claimant or a claimant's lawyer approaches the funder. Claimants and their lawyers may also be introduced to a funder by an intermediary or broker.' *See* S. Khouri & K. Herford, *Third Party Funding in International Arbitration: Balancing Risks and Benefits,* Prac. L. Co. 37 (July 2012).

benefiting from third-party funding would be in a worse position than parties using other funding arrangements, which is inequitable.

These issues are addressed in turn below.

3.1 Relevant arbitral case law

In the ICSID arbitration, *Ron Fuchs v. Republic of Georgia*,[23] a German company, Allianz Litigation, funded Mr Fuchs.[24] In this case and its sister case, *Ioannis Kardassopoulos v. Republic of Georgia*,[25] the tribunal indicated 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'.[26]

This view was confirmed in *RSM Production Corp. v. Grenada*,[27] which stated:

> as for the Applicant's submission that the Committee should not order costs where those costs have allegedly been met by 'an undisclosed third party,' the Committee concurs with the Tribunal in *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* [that such an arrangement should not be taken into account when considering the amount to be recovered by the claimants for their costs].

These decisions, not to take third-party funding into account when determining costs, have been approved by leading arbitrators, such as Professor Van den Berg.[28]

Although these awards concern the ruling on costs in the final award, it is logical that if third-party funding should not be taken into account when determining costs, then it should also not be taken into account when ruling upon security for costs. Making third-party funding part of the equation when determining costs at the final stage of arbitral proceedings would obviously be detrimental to the funded party, by reducing the amount it recovers. Since arbitral tribunals have refused to do so, it is arguably inconsistent for them to do the contrary at an earlier stage of the proceedings, in response to a request for security for costs.

Indeed, taking into account third-party funding at this earlier stage could be even more detrimental to the claimant, as it might simply stifle its claim altogether.

---

[23] *Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award of Mar. 3, 2010.

[24] P.M. Barrett, *Trapped in Tbilisi*, Bloomberg Week Mag. (Feb. 24, 2011).

[25] *Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia, supra* n. 23.

[26] *Ibid*., para. 691.

[27] *RSM Production Corp. v. Grenada* (ICSID Case No. ARB/05/14), Annulment Proceedings, Order of the Committee Discontinuing the Proceeding and Decision on Costs, Apr. 28, 2011, 18–19, para. 68.

[28] S. Perry, *Third-party Funding: an Arbitrator's Perspective*, Global Arb. Rev. (Nov. 23, 2011).

3.2 Risk of stifling a meritorious claim

Should tribunals, reassured by the presence of a wealthy third-party funder, order a claimant with few financial resources to provide security for costs, such a decision would result in the claim being stifled if the funder refused to cover these costs. In addition, a financially strained claimant might be unwilling to increase the percentage of the amounts recovered to the funder, as would normally be required since additional financing would be necessary for the claim.[29]

Furthermore, the risk of stifling a genuine claim is typically higher when there is a third-party funding agreement in place. Given that funders conduct their own due diligence on the merits of the case, it is arguable that the claims they fund are more likely than not to be genuine, with a high probability of success on the merits.[30]

In the *Hamester*[31] ICSID case, for instance, where the claimant relied on external funding, the tribunal refused to grant security for costs, emphasizing the risk of stifling a claim inherent in such orders:

> The Claimant's letters [which stated that the Claimant's company no longer trades and is effectively reliant on others to fund the current dispute proceeding before ICSID] prompted the Respondent's request for provisional measures, filed on April 17, 2009, concerning security for costs under ICSID Arbitration Rule 39(1) and Article 47 of the ICSID Convention. In the Respondent's view, the letters indicated that the Claimant would be unable to satisfy a potential award of costs and requested the Tribunal to recommend that the Claimant post, within fourteen days, a letter of credit for US$ 2 million as security.
>
> The Tribunal ruled on the Respondent's request for provisional measures in Procedural Order No. 3 issued on June 24, 2009, upon ICSID's receipt of the Claimant's advance payment shortly before the Hearing. It ruled that there was a serious risk that an order for security for costs would stifle the Claimant's claims . . . An order for security for costs would not serve its purpose without cancelling or postponing the Hearing, which was neither requested nor practicable at that stage of the proceeding.[32]

Another issue that might be aggravated if tribunals were routinely to take third-party funding into account is highlighted in *Hamester*: respondents' readiness to rely on third-party funding, as a ground to apply for security for costs will inevitably delay the proceedings.

---

[29] 'The funder's fee may also increase over time to reflect additional costs and risk being incurred'. *See* Khouri & Herford, *supra* n. 22, at 37.

[30] Prof. A. J. van den Berg noted in a November 2011 conference in Miami that litigation funding also provides another filter for frivolous claims, since a funder will not finance a case unless it has a prospect of success. *See* Perry, *supra* n. 28.

[31] *Gustav F.W. Hamester GmbH & Co. K.G. v. Republic of Ghana* (ICSID Case No. ARB/07/24) Arbitral Award of June 18, 2010.

[32] *Ibid.*, para. 15.

3.3 Delaying arbitral proceedings

Although security in *Hamester* was refused, the application for security nevertheless had a negative impact by creating counter-productive work for all parties involved. Practitioners are already well aware of this issue as illustrated by the following comments, presented in a roundtable on third-party funding in early 2012:[33]

> 'I'm quite reluctant to disclose [a third party funding agreement]', Walter Remmerswaal admitted. 'Not because I have anything to hide, but because I see a lot of frivolous defences, especially in arbitration. . . . Knowing the existence of funding can lead to the other side abusively raising all kinds of arguments aimed at drawing out the case', he claimed. 'So why, if I am not influencing the case, would I disclose my funding role and risk that a defence lawyer jumps on it and says—as happened in [the ICSID case] Fuchs and Kardassopoulos v. Georgia—that the fact of funding means we cannot claim costs?' Disclosure distracts attention from the main issues in the case and leads to satellite arguments that are expensive and detrimental to the proceedings, he argued.[34]

Clarifying that third-party funding is not a relevant factor might rein in litigious respondents, thus protecting parties from lengthier procedures, increased legal costs and an unnecessary burden for arbitrators. Otherwise, third-party funding may become a snare for claimants and not the springboard it should be: on the one hand, losing respondents will argue that claimants should not recover their costs because third-party funding has meant that the claimants have not themselves incurred any such costs, but, on the other hand, apply for security for costs because of third-party funding. Third-party funding would then lose much of its appeal to aggrieved parties, and a discrepancy would appear in the different treatment, in relation to security for costs, between claimants relying on third-party funding and those using other funding models.

3.4 Funded claimants would be worse off than those using other forms of financing

It does not appear that other means of borrowing, such as bank loans, conditional fee agreements or contingency fee agreements have been taken into account when determining security for costs.[35] Since litigation funding is fundamentally no different from an insurance or loan agreement, it would arguably not be

---

[33] A roundtable on third-party funding was organized by Global Arbitration Review and Fulbrook Management and held at Debevoise and Plimpton's office in London, with funders, arbitrators and external counsels.

[34] *Ibid*.

[35] Conditional fees agreements are, for the time being, still valid in England, although they will be ruled out by the Jackson reform in some areas. 'Damages-based fees', which are similar to the US contingency fees, where the lawyer receives a share of the damages awarded to their clients, will be introduced. *See* Lord Justice R. Jackson, *Review of Civil Litigation Costs: Final Report of Dec. 21, 2009*

appropriate for claimants using third-party funding to be treated differently from an insured party or a party borrowing funds in a more traditional fashion. For example, a Swiss arbitrator granted security for costs, without making any reference to the fact that the party was borrowing to fund its case, and simply emphasized the claimant's insolvency as a justification.[36] In the English arbitration *DDT Trucks of North America Ltd and others v. DDT Holdings Ltd*,[37] in relation to a different interim measure, namely, an extension of time, the judge took into account the fact that there was a conditional fee agreement, but to the claimant's advantage. The respondent applied for an extension of time to challenge an arbitral award. The judge ruled that if he were to grant the provisional measure, the claimants would have to conclude further conditional fee agreements, and that it would thus prejudice the claimants.

Claimants using third-party funding would be equally prejudiced by having to renegotiate the funder's fee due to an order for security for costs and should arguably be treated no differently for using a different form of funding.

In conclusion, strong arguments support the proposition that third-party funding agreements should not be taken into account when awarding security for costs. However, to the authors' knowledge, no publicly available decision has, as yet, settled this question, and commentators continue to posit that third-party agreements are relevant when assessing security for costs requests.

4 SECOND VIEW: THIRD-PARTY FUNDING SHOULD BE TAKEN INTO ACCOUNT WHEN ASSESSING AN APPLICATION FOR SECURITY FOR COSTS

There are also sound reasons for arguing that third-party funding should be taken into account when assessing an application for security for costs, and the authors are aware of at least two unpublished decisions to this effect.

(The Stationery Office 2010) and J. Hyde, *No Win, No Fee Climb Down: A Case of Double Standards*, L. Socy. Gaz. (May 24, 2012). According to Oxford University Press, the Law Society Gazette is abbreviated as 'LS Gaz' (http://www.oup.co.uk/academic/authors/lawspecific/listofabbreviations/).

[36] 'Respondent further alleges that Claimant is not able to pay the costs of the proceedings and that it is therefore forced to obtain funds from external sources, thereby creating new debts . . . Claimant's interest in having access to arbitral justice must be weighed against Respondent's interest in avoiding costly arbitration proceedings with no sufficient security that it would be reimbursed for its expenses in case of success. The Sole Arbitrator is of the opinion that where a party has gone through bankruptcy proceedings that were suspended due to lack of assets, the other party's interest in security for costs prevails over the first party's interest in unimpeded access to arbitral justice. Consequently, Respondent's request for an order for security for expenses should be granted.' *See ZCC Award No. 415, Order of Nov. 20, 2001*, 20 ASA Bull. 467, 471, para. C, 16 (2000).

[37] *DDT Trucks of North America Ltd & others v. DDT Holdings Ltd*, [2007] EWHC 1542 (Comm) (June 29, 2007).

First, the existence of a third-party funding agreement, as part of a claimant's abusive scheme, arguably justifies a security for costs order. In addition, arbitrators and commentators have opined that the presence of a specialized third-party funder might lead to the grant of security for costs orders, even when it is not part of a claimant's vexatious claim. Lastly, at least one decision supports the view that third-party funders should be ready to advance the funds for security for costs. These issues will be addressed in turn below.

4.1 Third-party funding may warrant security for costs if part of a 'hit and run' scheme

Some commentators have described a specific situation, namely, 'the arbitral hit and run', where the existence of third-party funding is likely to warrant a security for costs order. As indicated by Jean Kalicki:

> [Security for costs is more likely to be awarded where] the claimant's arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called 'arbitral hit and run', and described by arbitrators and commentators alike as particularly compelling grounds for security for costs.[38]

Noah Rubins has similarly noted that '[t]he danger of abuse by plaintiffs becomes greater when the complaining party is an empty shell, either by accident or design, its arbitral costs covered by an unrelated but wealthy third party',[39] and that '[f]or sake of clarity, financing by a third party might well be considered as a separate factor, given particular weight in light of the potential for abuse such an arrangement indicates'.[40]

In this scenario, where the claimant is using third-party funding abusively, ordering security for costs is justified to protect the respondent from a spurious claim. Here, the claimant's bad faith mirrors the bad faith of the respondents who apply for security for solely strategic reasons.

Arbitrators have, however, also expressed their readiness to take into account, outside of the 'arbitral hit and run' scenario, the involvement of the third-party funding industry, when considering an application for security.

---

38 J.E. Kalicki, *Security for Costs in International Arbitration*, 3 Transnatl. Dispute Mgt. (2006).

39 N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial*, 11 American Rev. Intl. Arb. 361 (2000).

40 *Ibid.*, 375.

4.2 Third-party funding: arbitrators' views

During the roundtable on third-party funding cited above, certain distinguished arbitrators submitted that the presence of a professional third-party funder is particularly relevant to security for costs requests. The following positions, for instance, have been expressed by David Howell, Stephen Bond and Hamid Gharavi:

> From an arbitrator's perspective, the existence of a funding arrangement 'is not necessarily important' to many of the issues to be tried, said David Howell. But he said an application by one side for adverse costs or security of costs is a specific example of an occasion 'when it may impinge directly on the tribunal's decision'. While tribunals in the UK have no power to make a costs order that directly binds a third party that is not part of the arbitration agreement, as a practical matter, if a party is funded, the funder will have 'to stump up for the amount ordered', he explained.
>
> Bond explained that whether funders undertake to pay security for costs on behalf of the client, might have an impact on arbitrators' ruling on such issues. Hamid Gharavi thought that it is for the unfunded party's counsel to raise the question of whether the other side is funded, if it may be of relevance to the tribunal. 'I would say as an arbitrator that it's none of our business, unless it touches upon specific questions such as . . . security for costs'.[41]

Such an approach has the benefit of preventing third-party funders from 'having their cake and eating it', as highlighted by Mr. Howell:

> [I]t is a concern that funders may look to take the benefit of an arbitration without being subject to the risk of the costs. '… the existence of a third party funder may be very relevant in the context of an application for security for costs', replied Howell.[42]

The security, although ordered against the claimant,[43] would ultimately be taken out of the third-party funds.[44] If a *cautio adjudicatum solvi* is a part of the funding agreement, then the funder will provide it to its clients. If security is not part of the funding agreement, it is arguable that the chances of a funder's refusal to advance further money are low, since it has already agreed to fund the arbitration and would not wish to undermine its investment. Thus, a certain balance would be struck: payment of a potential adverse cost award is guaranteed while access to justice is preserved.

---

41 A. Ross, *The Dynamics of Third Party Funding*, 7 Global Arb. Rev. 12 (2012).

42 *Ibid*.

43 Third-party funders are not party to the arbitration agreement and as such arbitral tribunals cannot make an order against them, unless the agreement is extended to the funder. Involvement of the funder in the negotiation of the agreement is a ground for extension. However, this is highly unlikely in practice since funders tend to enter the scene only once disagreement has sprung up between the parties. Another possibility would be the acquisition of the claim by the third party funder.

44 This additional funding will, however, be subject to an agreement with the claimant and, presumably, an added fee, unless security was part of the original funding agreement.

4.3 Additional commentaries

Arbitrators and commentators worldwide have also expressed the view that third-party funding should be taken into account at the security of costs stage as it may demonstrate the claimant's potential inability to satisfy an adverse costs award:

> The following instances are recognized as special circumstances justifying a *cautio judicatum solvi*: . . . the claimant is too poor to finance the advance deposit for the fees of the arbitrators out of his own pocket, but must avail himself of the financial aid of a third person.[45]

Gary Born has also posited that there is a 'strong prima facie case' for security for costs in such circumstances:

> Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists.[46]

Alastair Henderson has similarly noted:

> Additional factors such as [the presence of a third party funding agreement] may persuade a tribunal that an order for security for costs is justified in the particular case, however exceptional it might normally be.[47]

In addition, Maxi Scherer has opined that 'disclosure of third-party funding agreements is arguably necessary to assess whether the funded party should be subject to an order for security for costs'.[48]

The above views are justified in light of the fact that, as lack of funds is a crucial criterion when deciding on a security for costs order, any circumstance that might inform arbitrators about the claimant's finances should be considered.

4.4 Arbitral case law

As previously indicated, there is no publicly available decision on whether the involvement of a sophisticated funder such as IMF or Harbour should be taken into account when ruling upon security for costs. However, at least one award mentions the participation of financiers in the context of security for costs, ruling that the right to arbitral justice need only be guaranteed if this financier is willing to provide security:

---

45 O. Sandrock, *The Cautio Judicatum Solvi in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant*, 14 J. Intl. Arb. 34 (1997).

46 G. Born, *International Commercial Arbitration* (Kluwer L. Intl. 2009).

47 A. Henderson, *Security for Costs in Arbitration in Singapore,* 7 Asian Intl. Arb. J. 54, 73–74 (2011), but with no cases to support this view.

48 M. Scherer, *Third party funding in Arbitration: Out in the Open?* Com. Dispute Res. News (2012).

> If a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred. If those third parties are not willing to provide such security, it would be finally up to the insolvent party's creditors to decide how to proceed with the claim in dispute.[49]

This view reflects those of the arbitrators at the roundtable cited previously. Since the third-party funder enables the conduct of a claim which might unfairly impoverish the respondent, but does not bear the potential risk of an adverse cost award in the case, its financial participation should be required when possible via further negotiations or current agreement with its clients.

Thus, there is strong support for the view that third-party funding agreements, specifically those involving deep-pocketed and sophisticated funders, might more likely than not lead arbitrators to grant a security for costs order. However, no publicly available case has confirmed this view, to date, leaving the question of the impact of third-party funding agreement on security for costs wide open.

5 CONCLUSION

Justice Kirby, in *Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.*, an Australian case which acknowledges third-party funding as a legitimate way to fund claims, stated that '[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'.[50]

If litigation funders do not invent the rights of the claimants, then it may be argued that they should not create rights for defendants, whose right to obtain security for costs should be independent from the claimant's funding arrangements.

However, as detailed in this article, commentators and arbitrators have expressed the view that the presence of third-party funders should impact on their decision to grant security for costs. One reason for arbitrators to adopt this approach is that, unlike judges in some jurisdictions, they are powerless to make orders against third-party funders, should the unsuccessful claimant be unable to pay for the respondent's costs.

Indeed, the view that third-party funders' participation should be required in relation to costs has been acknowledged and recognized in English courts, outside of the international arbitration arena. Third-party funders' contributions were

---

[49] Case Report, *supra* n. 15, at 37–45, para. 21.

[50] *Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.*, *supra* n. 1, at para. 202.

ordered in *Arkin v. Borchard Lines and others*[51] and *Merchantbridge & Co. Ltd. and another v. Safron General Partner 1 Ltd.*[52] to honour adverse costs awards. Given that arbitrators lack such a power, their only leverage to ensure that the third-party funder will be made to contribute is at the security for costs stage. When a third-party funder has agreed in advance to cover security for costs, and if, prima facie, there is an equal chance for each party to succeed, ordering security seems a pragmatic solution to the access to justice/respondent's costs predicament arbitrators face. This is a complex area, and there is no easy solution for arbitrators: the obvious advantage that judges have at the final award stage, is that their decision takes place after a full investigation of the matter has been made, when the risk of stifling a claim has disappeared.

In the authors' opinion, given the sensitivity of the issue at stake in relation to security for costs, namely, access to arbitral justice, and the importance of maintaining the celerity of arbitral proceedings, the number of circumstances which might justify an application for security should be strictly limited. Adopting a blanket approach, whereby security for costs was systematically ordered in the presence of third-party funding, would unfairly penalize claimants with meritorious claims, but who had relied upon third-party funding rather than alternative forms of financing a claim. It would also unfairly reward respondents who had no realistic chance of being awarded costs at the end of the arbitration, but were requesting security for costs on a purely tactical basis.

While it seems appropriate for third-party funding to be considered as an element when assessing the claimant's ability to pay, it would be unfair to single out the presence of third-party funding as a sufficient condition for granting security for costs.

In the authors' opinion, third-party funding should not impact the arbitral tribunal's decision on security for costs unless a respondent can show that third-party funding is being used abusively. However, only time will tell if arbitral tribunals adopt this line of reasoning.

---

51 *Arkin v. Borchard Lines Ltd. & others*, [2005] EWCA (Civ) 655 (May 26, 2005).

52 *Merchantbridge & Co. Ltd. & another v. Safron General Partner 1 Ltd.*, [2011] EWHC 1524 (Comm) (June 15, 2011).

Author Guide

[A] Aim of the Journal

Since its 1984 launch, the Journal of International Arbitration has established itself as a thought provoking, ground breaking journal aimed at the specific requirements of those involved in international arbitration. Each issue contains in depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, State controlled entities, and States. The new Notes and Current Developments sections contain concise and critical commentary on new developments. The journal's worldwide coverage and bimonthly circulation give it even more immediacy as a forum for original thinking, penetrating analysis and lively discussion of international arbitration issues from around the globe.

[B] Contact Details

Manuscripts as well as questions should be submitted to the Editor at EditorJOIA@kluwerlaw.com.

[C] Submission Guidelines

[1] Final versions of manuscripts should be sent electronically via email, in Word format; they must not have been published or submitted for publication elsewhere.
[2] The front page should include the author's name and email address, as well as an article title.
[3] The article should contain an abstract of about 200 words.
[4] Heading levels should be clearly indicated.
[5] The first footnote should include a brief biographical note with the author's current affiliation.
[6] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
[7] For guidance on style, see the House Style Guide available on this website: http://www.kluwerlaw.com/ContactUs/

[D] Review Process

[1] After review by the Editor, manuscripts may be returned to authors with suggestions related to substance and/or style.
[2] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

[E] Publication Process

[1] For accepted articles, authors will be expected to execute a Consent to Publish form.
[2] Each author of an accepted article will receive a free hard copy of the journal issue in which the article is published, plus an electronic version of the article.