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RISK VERSUS REWARD: THE INCREASING USE OF THIRD PARTY FUNDERS IN INTERNATIONAL ARBITRATION AND THE AWARDING OF SECURITY FOR COSTS

By
Kelsie Massini[*]

I. INTRODUCTION

Third party funding[1] is still a relatively new phenomenon in international arbitration. As none of the leading arbitral institutions currently have rules governing the practice of third party funding it raises both procedural and ethical issues.[2] While the prevalence and impact of third party funding in international arbitration continues to increase, scholars weigh the benefits of the participation of third party funders such as access to justice, risk management, and financial support against the risks of potential conflicts of interests possible confidentiality and privilege issues, and the inability to finance adverse costs.[3] The International Bar Association ("IBA") has recognized the role that third party funding is beginning to make in arbitration, and has incorporated guidelines for third party funding into its revised version of the Guidelines on Conflicts of Interest in International Arbitration.[4] In addition, arbitral tribunals are beginning to respond to the increasing role that third-party funders are playing in international arbitration. For example, in a recent International Centre for Settlement of Investment Disputes (hereinafter "ICSID") decision, *RSM Production Corporation v. Saint Lucia*,

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[1] "Third-party funding occurs when an unrelated third party provides monetary support to a party involved in a legal claim; in return, that third party receives a portion of the proceeds resulting from that claim--or nothing, if the claim is unsuccessful." Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1653-54 (Aug. 2013).

[2] *See* William W. Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, Legal Studies Research Paper No 42-2014, 1. *See also* Susanna Khouri, Kate Hurford & Clive Bowman, *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 TRANSNAT'L DISP. MGMT., Oct. 2011, at 9; Eds. Lawrence W. Newman & Richard D. Hill, The Leading Arbitrators' Guide to International Arbitration 217-21 (2014); Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment* Arbitration, Gratius Centre Working Paper N 2002/1, 7; M.J. Goldstein, *Should the Real Parties in Interest Have to Stand Up? Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration*, Transnat'l Disp. Mgmt., Oct. 2011.

[3] *See* Park & Rogers, *supra* note 2, at 1; *See also* Khouri et al, *supra* note 2, at 3-9.

[4] *See* INT'L BAR ASSOCIATION, GUIDELINES ON CONFLICTS OF INTEREST IN INTATIONAL ARBITRATION (2014) [hereinafter IBA GUIDELINES].

the tribunal ordered the first ICSID order for security for costs[5] and recognized the funding of the claimant by a third party in its reasoning.[6] Third-party funding is becoming increasingly popular in international arbitration[7] and jurisdictions and tribunals must decide on and create the proper procedures to regulate arbitral proceedings that involve third-party funders. The new IBA Guidelines for disclosure of third-party funding should be incorporated into leading arbitral institutions' existing rules because it is the best way to prevent potential conflicts of interest and ensure the independence of the arbitrator.[8] Incorporating the disclosure requirement of the IBA Guidelines would also grant tribunals the capability to take the existence of third party funders into account when determining security for costs. While such disclosures should not automatically trigger an order of security for costs, it should be a factor in determining whether such an order would be appropriate in an arbitral proceeding.

II. BACKGROUND

The debate surrounding the use of funding by third parties in international arbitration has lead to a discussion of both numerous benefits and risks presented by third-party funding. Some of the most commonly cited benefits of third party funding are an increased access to justice, financial management, and efficiency.[9] The most commonly cited risks are the increase in frivolous claims, conflicts of interest, inability to finance adverse costs, and waiving privilege.[10]

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[5] A security for costs request is a provisional measure that exists in international arbitration. In making a request for security for costs, a party is asking the tribunal to force the claimant to provide the money necessary to cover a possible award of legal fees upfront. The need for security costs is especially important in international arbitration, where the parties involved often have assets that are located in different jurisdictions. *See* Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 Am. Rev. Int'l Arb. 307, 310-14 (2000):

> Like asset attachment and injunction, orders for security to cover costs are interim measures taken before the tribunal has examined the substance of the parties that is conducive to a successful outcome of the proceedings. . ., preserving the parties' rights, preventing self-help, safeguarding the award's eventual implementation and generally keeping the peace.' (*Quoting* Cristoph Schreuer, *Commerntary on the ICSID Convention: Article 47*, 13(1) FOREIGN INVESTMENT L.J. 208, 212.)

[6] *See* RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10)

[7] *See* Park & Rogers, *supra* note 2, at 1.

[8] Trusz, *supra* note 1, at 1665.

[9] *See* Newman & Hill, *supra* note 2, at 214-15.

[10] *See Id.* at 217-21.

A. The Benefits of Third Party Funding

One of the most important benefits of third party funding in international arbitration is that it allows for increased access to justice. While arbitration is often seen as a less expensive option than litigation, this is not necessarily true in international arbitration.[11] International arbitration can often be extremely expensive and place a substantial burden on the parties due to the fees associated with the arbitration institution, legal fees, expert fees, and compensation of the arbitrators.[12] This increasingly high costs of international arbitration has been presented as one of the reasons for the increasing reliance of parties on third party funding.[13] The availability of third party funding allows parties who have meritorious claims, but limited financial resources the ability to seek adjudication when they would normally not be able to afford it.[14] Similar reasoning is seen in countries that have permitted third-party funding in litigation proceedings. For example, the High Court of Australia[15] has noted that access to justice is ". . . a fundamental human right which out to be readily available to all."[16] The High Court argued that rejecting third party funding would impede equal access, and that courts should not reject a funded party when that party would only have a theoretical chance of access to justice without the funding.[17] In fact, the High Court dispels concern by arguing that allowing third-party funding does not create new claims, but protects an individual's right to justice and recourse.[18] In Australia and England, third party funding

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[11] "In addition to legal fees, expert fees, and discovery costs associated with domestic litigation, parties in arbitration must pay an hourly rate to compensate the arbitrators, a registration fee to the administering institution, and institutional fees arising during the arbitration (such as time spent on the case by the secretariat or registrar). International arbitral tribunals additionally are given discretion to shift the costs of the arbitration or the legal fees of the winning party to the losing party. Further increasing the cost of arbitration." Trusz, *supra* note 1, at 1649.

[12] Trusz, *supra* note 1, at 1663.

[13] *Id*.

[14] *See* Newman & Hill, *supra* note 2, at 214. *See also* Brabandere & Lepeltak, *supra* note 2, at 7.

[15] *See* Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited [2006] HCA 41 ¶ 145.

[16] *See Id*.

[17] *Id*. at ¶144.

[18] *See* Id. at ¶ 202.

> By 'organising' persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved int hem 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 on way or the other, according to law.

has risen while public funding for civil claims has decreased drastically.[19] Third party funding can be especially beneficial in providing access to justice in cases where a claimant is up against a state party that possesses more funds and resources, or other instances of unequal resources between parties.[20] All persons with meritorious claims should have access to justice through arbitral proceedings.[21],

Third party funders, however, are not only utilized by weak parties with limited financial resources.[22] Third party funding can also be used by a company for risk management, especially as many parties are becoming increasingly concerned with the costs of arbitration.[23] Because international arbitration can be an expensive endeavor, even parties with adequate resources may choose third party funding as a way to manage the financial risks involved in pursuing a claim.[24]

Furthermore, there is an argument that third-party funding decreases the chance of a claimant bringing a frivolous claim.[25] Frivolous claims decline due to the amount of investigation a third party funder will usually perform in order to weigh the benefits and risks involved in funding an arbitral claim.[26] Investment companies are often drawn to funding international arbitration claims due to the high award amounts at stake.[27] Third parties funders will typically receive between 20-50% of the recovery award.[28] Perspective funders will weigh the possibility of success of a claim against their risk of loss.[29] This risk assessment at times can be even more comprehensible and accurate than similar calculations performed by a party before choosing to bring a claim.[30] Third party

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[19] Khouri et al, *supra* note 2, at 4.

[20] *See* Brabandere & Lepeltak, *supra* note 2, at 7. *See also* Eds. Bernardo M. Cremades & Antonias Dimolitsa, Third Party Funding in International Arbitration, International Camber of Commerce 52 (2013). (An inequality exists between state parties and other claimants where state parties usually have a higher risk tolerance and greater litigation resources. ". . . [T]he goal of fair and even-handed arbitral justice is often thwarted by cost, process and fair risk." Therefore, third party funding is desirable as it helps to even the playing field.)

[21] *Id*: "Open and equal access to arbitration for parties that want to make sue of it – not just in theory but also in practice – is a fundamental characteristic of any legal system."

[22] Khouri et al, *supra* note 2, at 4.

[23] *Id*.

[24] *Id*.

[25] *See* Brabandere & Lepeltak, *supra* note 2, at 7.

[26] *See Id*.

[27] Newman & Hill, *supra* note 2, at 209.

[28] *Id*.

[29] *See* Brabandere & Lepeltak, *supra* note 2, at 7.

funders also have teams made up of experience litigators, investors, and risk managers to determine whether a claim is viable and a good investment.[31] These teams of experts and careful consideration most likely prevent third parties from funding frivolous or non-meritorious claims.[32] Based on these assessments, few claims that ask for third party funding are granted funds by third party investors.[33] Therefore, third party funding may help to decrease the number of frivolous and unmeritorious claims that are submitted to international arbitration.[34]

B. The Risks of Third Party Funding

On the other hand, however, others believe that third party funding actually presents a risk of increasing frivolous claims in international arbitration.[35] There is no direct evidence that third party funding leads to an increase in frivolous claims, but it does present the risk of increasing the overall number of claims brought in international arbitration.[36] An increase in international claims may lead to a strain on the international arbitral tribunals and could also have financial consequences on States as it may allow for

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[30] Newman & Hill, *supra* note 2, at 211.

[31] *See Id*:

> These risk factors include: the prospects of success (including jurisdictional obstacles, the merits and defences); possible counter-claims; the terms of the relationship between the parties including contracts, the arbitration agreement and/or investment treaty and all relevant laws; the arbitral institutional and the likely or actual composition of the tribunal; the seat of the arbitration; the quantum of the claim; the opponent's known attitude towards the voluntary settlement of arbitral awards and its capacity to pay; the projected time until recovery; and the risks associated with enforcing an award (including, when considering enforcement under the New York Convention, whether the opponent has sufficient assets in a signatory state).

[32] *See* Brabandere & Lepeltak, *supra* note 2, at 7.

[33] *See Id*.

[34] *See Id.*

[35] *See* Newman & Hill, *supra* note 2, at 217: "Whilst there is no conclusive evidence that the third party funding of claims promotes frivolous litigation, at least one study indicates that third party funding does lead to an increase in litigation and court caseloads. (*citing* D. Abrams and D. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 Journal of Business Law 1075 (2013).)

[36] *See Id*.

more high award claims to be brought against state parties.[37] A similar risk presented is that third party funding may lead to arbitration proceedings being treated as business ventures which some find distasteful or unethical as the justice system should not be the place for business ventures.[38] Allowing individuals , whose sole interest is profit , to fund arbitration claims may lead to a commodification of the arbitral and legal process.[39] As the claimant knows that he must ultimately split any successful award with the third party funder as agreed upon in the funding agreement,[40] this may lead to use all methods necessary in order to increase the amount of an award or settlement compared to the amount he may have been willing to take in the absence of the third party funder.[41]

Third party funding may also give rise to potential conflicts of interest.[42] One of the risks that is most adverse to the fundamental ideas of arbitration is the potential conflict of interest of an arbitrator.[43] While international arbitration does not necessarily create a higher risk of a conflict of interest than any other proceeding, absent mandatory disclosure there is a higher risk that these conflicts will go unnoticed.[44] Because a single third party funder could be involved in multiple arbitration proceedings there is a risk that an individual arbitrators could be appointed to multiple different arbitration proceedings

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[37] In increase in arbitration claims could also have a financial impact on States, as funding to parties bringing claims against State parties in international investment arbitration could bring an increase in claims brought against State parties where there are normally high damages awarded. *See* Brabandere & Lepeltak, *supra* note 2, at 8.

[38] Newman & Hill, *supra* note 2, at 217.

[39] *See Id*. at 217-18: "Detractors [of third party funding] base these suspicions on [the fact] that there is something distasteful, some say unethical, about a third-party that has no involvement in a legal dispute being allowed to profit from it." (*Quoting* M. Herman, *Fear of Third Party Litigation Funding is Groundless*, Times Online, 25 Oct. 2007, <http://www.thetimes.co.uk/tto/law/article2210239.ece>.)

[40] The relationship between a party to the arbitral proceedings and their third party funder is controlled by a funding agreement. This funding agreement is a contract entered into between the party and the funder once the funder has decided to financial contribute to parties participation in the proceedings. This funding agreement specifies the amount of control that the third party funder plays in the arbitration, whether or not the funder agrees to pay adverse costs and provide security for costs, and may contain a confidentiality clause that does not allow disclosure of the existence of a funding agreement. Trusz, *supra* note 1, at 1654-55.

[41] *See* Brabandere & Lepeltak, *supra* note 2, at 8: "[T]he existence of a third party funding agreement can prolong the settlement of the dispute and may 'artificially inflate' the scope of the dispute, because the investor knows that in case of success, it will need to hand over parts of the award to the funder."

[42] Note that while third party funders are not considered to be formal parties, depending on the funding agreement between the third party and the claimant, they will play either a more active or less active role in certain aspects of the arbitration proceedings. *See* Park & Rogers, *supra* note 2, at 7.

[43] *See Id.*

[44] *See* Brabandere & Lepeltak, *supra* note 2, at 16.

funded by the same third party.[45] This risk is substantially increased due to the fact that many tribunals and jurisdictions do not require mandatory disclosure of third party funding agreements, and so often the tribunal may not even know that third party funding exists, let alone the identity of the funder.[46] While some institutions such as the ICCA have guidelines that require an arbitrator to disclose multiple appointments by a single party, the arbitrator would be unable to follow these requirements unless a third party funder or claimant voluntarily disclosed the existence of the funding agreement.[47] As challenges to arbitrators on the grounds of impartiality and independence are fairly common in international arbitration, it is important to disclosure the existence of third party funding that may cause a conflict at the beginning of proceedings in order to prevent a possible challenge late in the proceedings or after an award has already been issued.[48]

III. 2014 IBA Guidelines on Conflicts of Interest in International Arbitration

The International Bar Association (IBA) recently revised its Guidelines on Conflicts of Interest in International Arbitration[49] (hereinafter "Guidelines") to acknowledge the existence of third party funding of arbitration proceedings.[50] General Standard 6(b) states that: "any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in. . . the award to be rendered in the arbitration, may be considered to bear the identity of such party."[51] The explanation to General Standard 6 makes clear that this passage is referring to the participation of third party funders:

> Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be

[45] *See* Park & Rogers, *supra* note 2, at 7.

[46] *Id.*

[47] *Id.* at 1.

[48] Trusz, *supra* note 1, at 1667.

[49] *See* Anke C. Sessler, *The 2014 IBA Guidelines on Conflicts of Interest in International Aribtration*, 6 Jan. 2015: "While they are not binding, the Guidelines are intended as an expression of best practices in international arbitration and offer a set of standards seeking to enhance legal certainty and preserve the integrity, transparency and fairness of arbitral proceedings."

[50] The IBA's Guideline's were originally issued in 2004. The 2004 version did not address the issue of third party funders. In 2012 the IBA Arbitration Committee initiated a review of the Guidelines which was conducted by the Conflicts of Interest Subcommittee. The IBA adopted the revised Guidelines on October 23, 2014. *See* IBA GUIDELINES, *supra* note 4.

[51] IBA Guidelines, *supra* note 4, at General Standard 6(b).

> 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 arbitration.[52]

The Guidelines also identify a duty of the parties to disclose any direct or indirect relationship that exists between the arbitrator and the third party funder.[53] The changes that have been made to the Guidelines do not represent a fundamental shift in the view of the IBA, but rather are simply an evolution of the previous 2004 guidelines to include third party funders as they become and increasing presence in international arbitration disputes.[54]

These revisions help to address some of the key critiques of third party funding, especially in regards to potential conflicts of interest. Prior to the revision of these rules, there existed no obligation for a party to disclose the existence of third party funding.[55] Absent a rule, disclosure of third party funding is considered voluntary and is regulated by the funding agreement that exists between the claimant and the third party funders, most of which contain a confidentiality clause that would prevent disclosure.[56] While the Guidelines do not require that all the details of the funding agreement between a party and funder be disclosed, it does require that a party disclose the existence of third party

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[52] IBA Guidelines, *supra* note 4, at General Standard 6(b).

[53] *See* IBA Guidelines, *supra* note 4, at General Standard 7(a):

> A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, . . . between the arbitrator and any person or entity with a direct economic interest in . . . the award to be rendered in arbitration. The party shall do so on its own initiative at the earliest opportunity.

See also IBA Guidelines, *supra* note 4, at Explanation to General Standard 7:

> The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

[54] Khaled Moyeed, Clare Montgomery & Neal Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interests*.

[55] Paula Hodges & Christian Leathley, *Publication of New IBA Guidelines on Conflict of Interests in International Arbitration – the key changes*, 4 Dec. 2014.

[56] *See* Brabandere & Lepeltak, *supra* note 2, at 16.

funding both to the tribunal and to the other party.[57] Such disclosures help to limit the possibility of potential conflicts of interest in regards to the arbitrator by allowing the opposing party to challenge the appointment if they do not believe an arbitrator can be fair and impartial.[58] Furthermore, disclosure may also provide an opportunity for the parties to better asses their claims and the dispute as a whole.[59] The disclosure of a third party funder may affect how an opposing party wishes to proceed in arbitration.[60] For example, once notified of the existence of a third party, an opposing party may be more willing to settle, instead of proceeding with the case, because the opposing party may view the third party funder as raising the probability of success for the other side.[61]

The disclosure of third party funding is also necessary for tribunals to be able to determine whether an order of security for costs is appropriate such as in cases where a tribunal believes that a party does not have the financial capabilities of paying an award for costs on its own.[62] The revisions made to the Guidelines will help tribunals in this decision because it allows the tribunal to consider a third party as a influence since the third party "bears the identity" of the party in which they have an economic interest.[63] This revision also may cause the third party funder to fall under the jurisdiction of the tribunal and to be considered as a party to the action.[64] Thus, it is possible that this revision in the Guidelines will increase the possibility of the opposing party requesting an order for security for costs and that an award be enforced against the third party funder.[65] This increase in requests for security of costs will most likely arise from the opposing party's knowledge that the claimant did not posses the financial means necessary to bring the claim, and therefore might be so lacking in financial resources that they do not have the funds necessary to pay an award for legal fees or adverse costs if their claim is unsuccessful.[66] By disclosing the existence of third party funding at the beginning of

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[57] *See* Hodges & Leathley, *supra* note 55.

[58] *See* Cremades & Dimolitsa, *supra* note 20, at 96: "[S]uch disclosure is also arguably necessary to avoid possible conflicts of interest and to ensure that the arbitrators' impartiality and independence are maintained." *See also* Brabandere & Lepeltak, *supra* note 2, at 16-17: "A compelling legal argument in favour of disclosure is the need to maintain the independence and impartiality of international arbitrators, which is generally considered to be a fundamental principle of arbitral procedure."

[59] *See* Hodges & Leathley, *supra* note 55.

[60] *Id.*

[61] *Id.*

[62] *See* Cremades & Dimolitsa, *supra* note 20, at 96.

[63] IBA Guidelines, *supra* note 4, at General Standard 6(b).

[64] Hodges & Leathley, *supra* note 55.

[65] *Id.*

arbitration proceedings, the respondent will be able to better analyze if it is appropriate to request an order for security for costs from the tribunal.[67] The issue of security for costs in international arbitration proceedings involving third party funding was highlighted by a recent ICSID[68] decision, *RSM Production Corporation v. Saint Lucia*.[69]

IV. SECURITY FOR COSTS AND *RSM PRODUCTION CORPORATION V. SAINT LUCIA*

A recent ICSID case, *RSM Production Corporation v. Saint Lucia,* dealt with the ordering of security for costs[70] where a claimant is backed by a third party funder. RSM Production Corporation, the Claimant, filed a request for arbitration with ICSID on March 29, 2012 in accordance with the existing arbitration agreement between the two parties, RSM Production Corporation and Saint Lucia.[71] The original arbitration agreement arose out of Saint Lucia granting an exclusive oil exploration license in an area off its cost to RSM production Corporation.[72] Allegedly RSM's exploration was prevented due to border disputes between the respondent and Martinique, Barbados, and St. Vincent.[73]

The Claimant insisted to its right under the Agreement that after the boundary issues were resolved, it should be able to begin exploration.[74] The Claimant asked the tribunal to either declare the Agreement in force and valid, or to award damages based on

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[66] *See* Cremades & Dimolitsa*, supra* note 20, at 96-7.: "In such cases, it is unlikely that the prevailing party will recover its costs from the losing party that obtained funding. It is equally unlikely that the prevailing party will be able to turn to the third-party funder to recover its costs. Some funding agreements specifically provide that the funder is not liable for adverse costs."

[67] *See Id.* at 97.

[68] The International Center for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1966. It was established through the World Bank in hopes of further promoting international investment. However, it is an independent institution. The ICSID is used as a forum for investor-State dispute settlement through arbitration. ICSID also uses conciliation and fact-finding as forms of dispute settlement. ICSID is the leading institution for international investment arbitration. *See* About the International Centre for Settlement of Investment Disputes, The World Bank <http://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx.>

[69] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) ¶27.

[70] *See supra* note 50 (explanatory parenthetical).

[71] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) ¶4.

[72] *Id*. at ¶17.

[73] *Id*. at ¶18.

[74] *Id*. at ¶23.

a violation of the agreement.[75] The Respondent, Santa Lucia, in turn, requested the dismissal of claims and acknowledgment that the Respondent owed no duty to the Claimant as the agreement expired and was no longer valid.[76] The Respondent also requested that the tribunal grant an order obligating the Claimant to provide security for costs as a provisional measure.[77]

The tribunal held that the Claimant was required to provide security for costs stating, "Claimant is ordered to post security for costs in the form of an irrevocable bank guarantee for USD 750,000 within 30 days of this decision."[78] The Tribunal identified three factors that must be satisfied before ordering security for costs or any other provisional measure:

> (1) that a right in need of protection exists and (2) that the circumstances require that the provisional measures be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party's right to be protected. (3) Moreover, the tribunal in recommending provisional measures must not prejudge the dispute on the merits.[79]

The Tribunal found that the right being protected in regards to Saint Lucia was the right to claim reimbursement of legal costs.[80] The Tribunal held that this was a procedural right and that the right was directly related to the relief and provisional measure being requested by Saint Lucia.[81] The Tribunal also noted that according to precedent, security for costs could only be ordered in exceptional cases[82] requiring: "(1) necessity of the

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[75] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) ¶23 ("Claimant requests an award declaring that the Agreement is still in force, prohibiting Respondent to negotiate with or grant to third parties any exploration rights in the same area or, in the alternative, an award declaring that Respondent terminated the Agreement in breach of the same and obliging Respondent to reimburse Claimant for all damages incurred in reliance upon the agreement.").

[76] *Id*.

[77] *Id*. at ¶24. The tribunal has authority to order Security for Costs under Article 47 of the ICSID convention, "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 the (?) rights of either party."

[78] *Id*. at ¶90.

[79] *Id*. at ¶58.

[80] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) ¶63.

[81] *Id*. at ¶68.

[82] *Id*. at ¶75. *See* Phoenix Action, Ltd. v. Czech Republic (ICSID Cse No. ARB/06/5), Decision on Provisional Measures of April 6, 2007, para. 32; Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005, para. 38; Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case

measure to protect a certain right and (2) urgency which leaves no room for waiting for the final award."[83] Unlike in all prior cases where the tribunal denied security for costs, here, the Tribunal found that exceptional circumstances did exist such as the fact that RSM currently did not posses the funds necessary to satisfy a costs award.[84] The Tribunal also pointed to past ICSID and other arbitral tribunal proceedings where the Claimant failed to pay awards made against them[85] and specifically noted the fact that RSM was only able to bring the claim due to a third party funder.[86] The Tribunal found that with the existence of a third party funder it was, "unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor.[87] The Tribunal also noted that the matter was urgent and they were unwilling to wait until the final award due to the Claimant's history of not reimbursing opposing parties in prior proceedings.[88] After weighing all the factors, the Tribunal concluded that security for costs were appropriate under the circumstances.[89]

While the existence of third party funding was not voluntarily disclosed at the beginning of proceedings, but rather admitted to after being raised by Respondent[90], the

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No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, para. 175; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007, para. 59; Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Crynberg and RSM Production Corporation v. Grenada (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs of October 14, 2010, para. 5.17; Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador, Decision on El Salvador's Application for Security for Costs of September 20, 2012, para. 44; Burimi S.R.L. and Ealgle Games SH.A. v. Republic of Albania (ICSID Case No. ARB/11/18), Procedural Order No. 2 of May 3, 2012, para. 34.

[83] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) ¶75.

[84] *Id*. at ¶76.

[85] *Id*. at ¶76 ("Thus, unless this Tribunal requires advance payment of ICSID administration fees and expenses, it is a reasonable inference, based on RSM's conduct in the Annulment Proceeding and the Treaty Proceeding, and its impecuniousness here, that those fees and expenses will never be paid.")

[86] *Id*. at ¶76 ("The third party funding exacerbates the concern engendered by RSM's conduct. . . . It places an unfunded RSM and the third party funder(s) in the inequitable position of benefitting from any award in their favor yet avoiding responsibility for a contrary award." *See also* Id. at ¶83: "[T]he admitted third party funding further supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award.")

[87] *Id*. at ¶83.

[88] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) ¶85.

[89] *Id*. at ¶87 ("[T]he Tribunal, after carefully balancing Respondent's interest with Claimant's right to access to justice, is confident that the described circumstances constitute sufficient grounds and exceptional circumstances as required by ICSID jurisprudence for ordering Claimant to provide security for costs.")

[90] *Id*. at ¶33 (*citing* the transcript of the First Session of October 4, 2013, page 116 line 10.)

role the existence of the third party funding played in the tribunal's analysis is still very important as it recognizes that the existence of third party funding can be a factor considered when determining whether to order security for costs. In his assenting opinion, arbitrator Gavan Griffith believed that the Tribunal should have placed even more weight on the knowledge of the third party funding.[91] Arbitrator Griffith argued that once third party funding is disclosed, security for costs should automatically be considered and it is then up to the claimant to provide factors as to why an order for security for costs would not be appropriate in that case.[92] The prior history of RSM in ICSID proceedings did not factor into Griffith's decision, but rather he relied solely on the issue of third-party funding.[93]

This decision represents and important shift from prior ICSID decisions regarding allocation of costs in the presence of third party funding. For example, in *Ionnis Kardassopoulos and Ron Fuchs v. Republic of Georgia*,[94] Georgia argued that it should not have to pay the Claimant's costs since the claimant was funded by a third party and therefore the costs should not be recoverable.[95] The Tribunal held that the existence of third party funding did not bear any consideration when determining whether the Claimant's costs were recoverable.[96] The Tribunal cited to the *Ionnis Kardassopoulos* reasoning in many subsequent ICSID cases, continuously holding that third party funding should not be taken into consideration when determining recovery.[97] However, the

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[91] RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) at Assenting Reasons of Gavan Griffith ¶8.

[92] *Id*. at Assenting Reasons of Gavan Griffith ¶16 ("For these brief reasons, my position is that, unless there are particular reasons militating to the contrary, exceptional circumstances may be found to justify security of costs orders arising under BIT claims as against a third party funder, related or unrelated, which does not proffer adequate security for adverse cost orders. An example of contrary circumstances might be to establish that the funded claimant has independent capacity to meet costs orders.")

[93] *Id*. at Assenting Reasons of Gavan Griffith ¶17

[94] Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia, ICSID Case No. ARB/05/18 & ARF/07/15, Award, 3 March 2010. These claims were brought under the Energy Charter Treaty and the bilateral investment treaties entered into between the Republic of Georgia, Greece, and Isreal. It dealt with an investment dispute between Georgia and Ioannis Kardassopoulos and Ron Fuchs in regards to the interests they held in the investment of a development of an oil pipeline. The claimants, Kardassopoulos and Fuchs requested that the court grant award them their costs of the proceedings and legal representation. The Republic of Georgia argued that the claimants, if they succeeded in their argument, should not be granted these costs since they were funded in part by a third party. The court held that the claimants should be able to recover for costs.

[95] *Id*. at ¶ 680.

[96] *Id*.

[97] *See* RSM Production Corporation and Grenada, ICSID Case No. ARB/05/14, Annulment Proceedings, Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011; ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Proceeding, 11 July, 2011.

tribunal in *RSM* did not follow the reasoning from *Ionnis Kardassopoulos*. It is important to note that these prior ICSID decisions dealt with final awards for costs, whereas *RSM Production* deals with an order for security for costs. In the *Ron Fuchs v. Republic of Georgia* case, the respondents were arguing that the claimants should not be awarded costs due to the fact that they were funded by a third party and did not take on the burden of funding the proceedings themselves.[98] The change in analysis, however, is important because prior to this ruling, some pointed to the prior ICSID rulings as relevant arbitral case law supporting the argument that third-party funding should not be taken into account when deciding security for costs, "[a]lthough 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."[99] It could be argued that considerations of third-party funding when calculating the final costs would ultimately reduce the amount rendered to the funded party and therefore could be detrimental and establish a system in which the funded party is treated differently when compared to other parties.[100] Taking the existence of third party funding into account even earlier in the stage of the proceedings and awarding security for costs on those grounds could be even more detrimental and stop a meritorious claim from proceeding.[101] This argument, however, ultimately does not stand, as the switch in analysis by the tribunal shows that the rationale and considerations for awarding security for costs versus final awards for costs are different.

Security for costs should be granted in proceedings involving third party funding where the tribunal believes they are necessary in order to prevent a claimant and third party funder from benefiting from the success of a potential award while at the same time bearing no risk of paying adverse costs. Third party funding is vital as it allows claimants access to justice, but the justice owed to the Respondent should not be overlooked.[102] One risk is that an increased ordering of security for costs by tribunals where third party funding is present will lead to even less voluntary disclosure of third party funding.[103] For this reason, disclosure of third party funding at the beginning of arbitral proceedings should be mandatory similar to the guidelines set out in the previously discussed revised 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

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[98] Ioannis Kardassopoulos, *supra* note 94, at ¶ 680.

[99] William Kirtley & Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?*, 30 J. INT'L ARB. 17, 21 (2013).

[100] *Id.*

[101] *Id.*

[102] *See* Newman & Hill, *supra* note 2, at 214; *see also* Brabandere & Lepeltak, *supra* note 2, at 7.

[103] Carlos Gonzalez-Bueno, *Third Party Funding Again Under the Spotlight*.

V. Conclusion

International arbitral institutions should adopt new rules requiring the disclosure of third party funding agreements and allow tribunals to use the existence of such agreements as one of the factors to be weighed when determining whether or not to order security for costs. International arbitral institutions should require disclosure of the existence of third party funding in an international arbitral proceeding. This would be a major step as currently none of the leading institutions have rules that mandate party disclosure if they are being funded by a third party.[104] If the international arbitration community continues on a voluntary disclosure system for third party funding, many parties may choose to keep the third party funding a secret due to strategic reasons or possible adverse outcomes.[105] The disclosure of third party funding, however, is the best way to try and prevent potential conflicts of interest and ensure the independence of the arbitrator.[106] The disclosure is also necessary for tribunals to be able to consider the existence of third party funding as a factor in determining whether a tribunal should order security for costs.

Tribunals should use the existence of a third party funder as a factor in determining security for costs, but the existence of third party funding should not automatically trigger and order of security for costs. In cases where the claimant is backed by a third party funder, the tribunal must balance the right of a respondent to protect their potential right to costs against the claimants right to access justice.[107] Tribunals should continue with the common tradition that security for costs should be granted with the "greatest reluctance." even in cases involving third party funding.[108] A great increase in orders for security for costs may carry the risk of opposing parties automatically applying for security for costs as a strategy to draw out proceedings.[109] It also risks stifling meritorious claims if tribunals automatically grant security for costs and the third party funder does not agree to pay on the part of the claimant.[110] While security for costs is not always appropriate in the case of third party funding, however, it is appropriate to prevent the 'arbitral hit-and-run' where a respondent would likely not receive reimbursement of their costs due to them since the third party funder would not be liable for any awards if the claimant lost.

Third party funding is a relatively new practice in international arbitration, but it is one that is increasing in prevalence The benefits of third party funding by allowing

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[104] Khouri et al, *supra* note 2, at 9.

[105] Trusz, *supra* note 1, at 1672.

[106] *Id*. at 1665.

[107] Kirtley & Wietrzykowski, *supra* note 99, at 19.

[108] *Id*. at 21.

[109] *Id*. at 22.

[110] *Id*. at 22.

claimants greater access to justice far outweigh any fear of an increase in frivolous claims. However, international arbitral tribunals must continue to create guidelines to deal with the potential risks related with third party funding. By applying a similar guidelines in all arbitral proceedings, third party funders would be able tor rely on that certainty when factoring whether or not to fund a claim. If a third party funder can benefit from an arbitral proceeding, than they should also have to bear some risk in the proceeding as well.