Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

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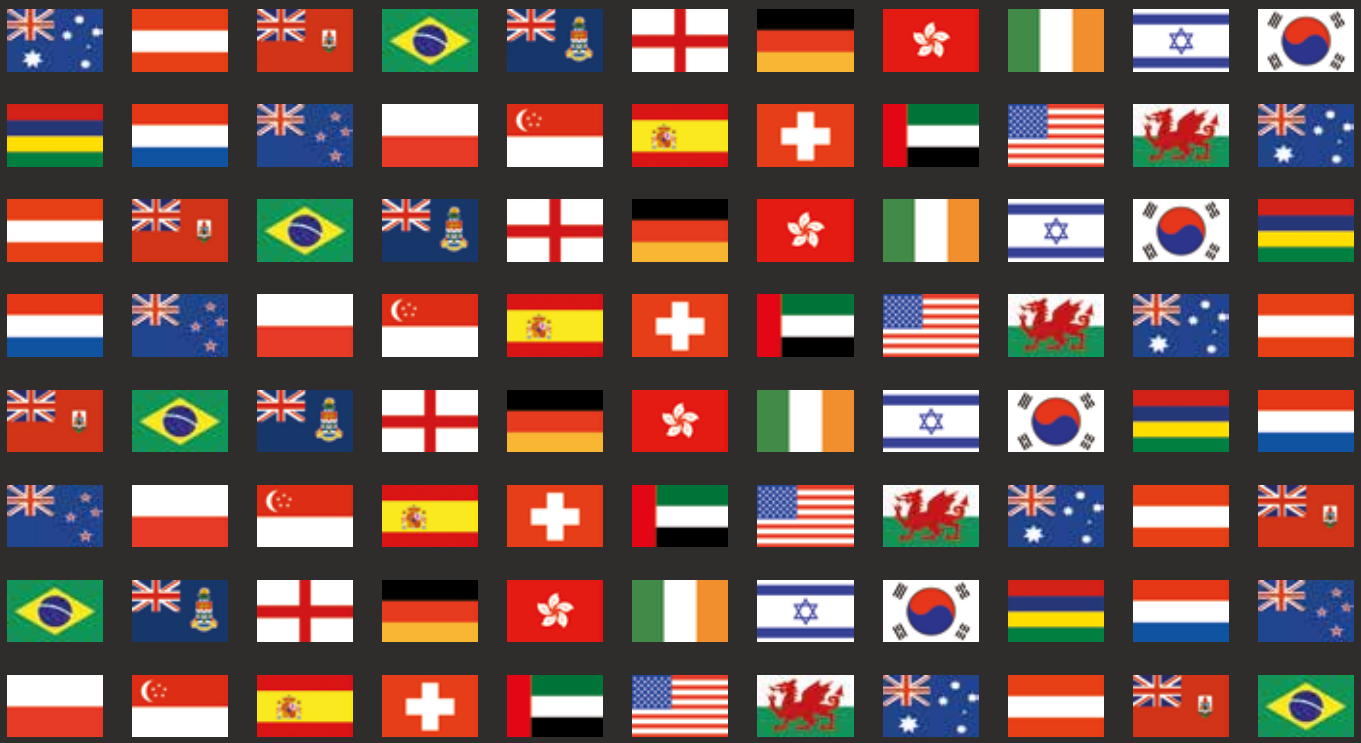

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GETTING THE DEAL THROUGH

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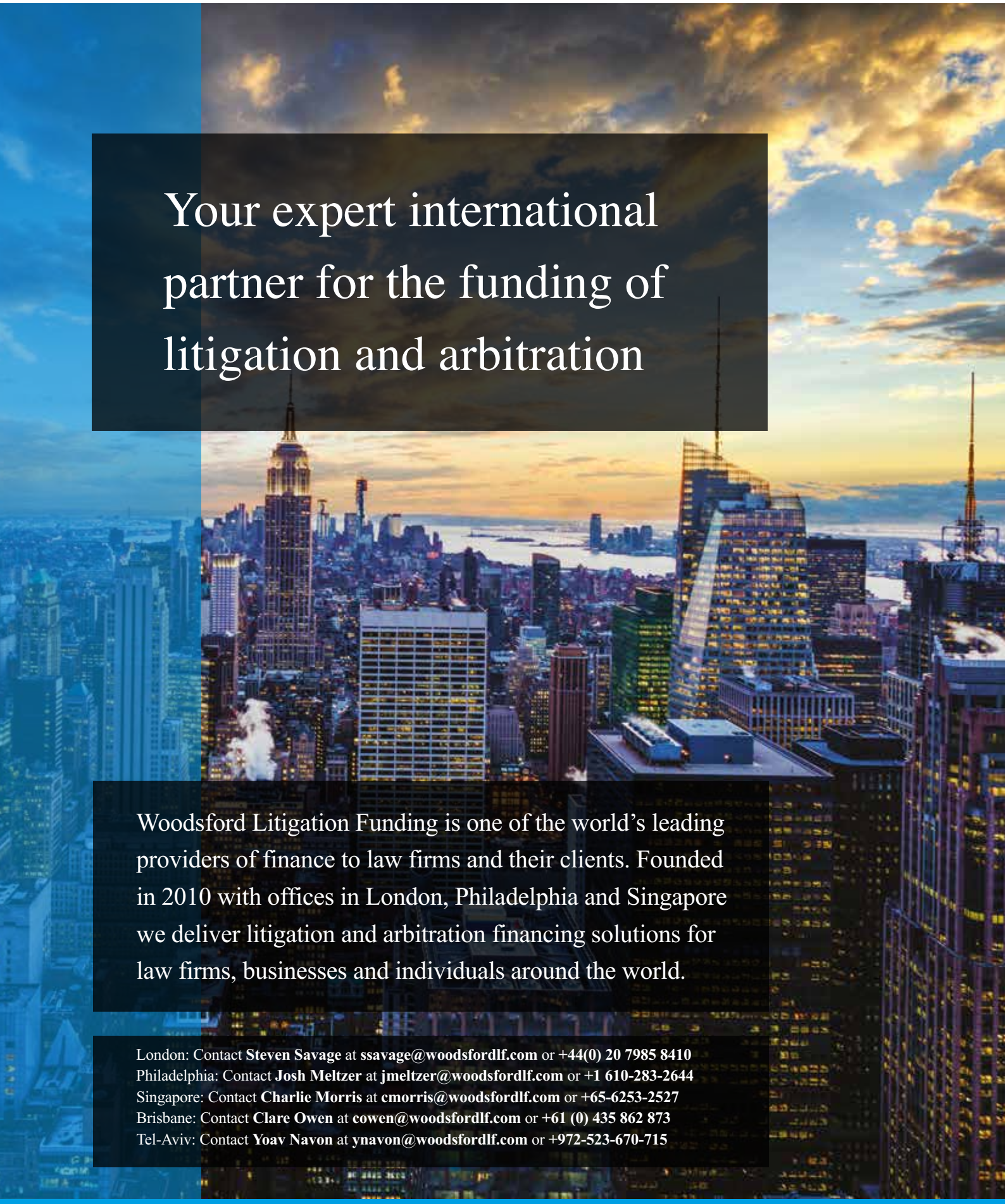

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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International arbitration

Zachary D Krug, Charlie Morris and Helena Eatock
Woodsford Litigation Funding

Third-party funding in international arbitration

While international arbitration spans multiple types of claims, overlapping jurisdictions and legal regimes, there are some commonalities to consider it an appropriate subject for a brief addendum within this guidebook's framework. A practitioner considering a transaction involving third-party funding of international arbitration will need to consider multiple potentially relevant jurisdictions. For example, one might need to consider the applicable arbitral rules (if any), the law of the seat of the arbitration, the governing law of the underlying agreements, any applicable international treaties, the law of the jurisdiction in which the award will be enforced, and, potentially, the law of the parties' counsels' home jurisdictions. Accordingly, this addendum is necessarily limited and endeavours to highlight some of the issues and approaches that are common in the context of third-party funding and international arbitration.

Prime among these commonalities is the tremendous uptake of third-party funding in international arbitration in recent times, regardless of claim type or venue. This is hardly surprising because international arbitration generally involves complex commercial disputes with sophisticated counsel at premier international law firms. The resulting fee burden can be substantial. Moreover, many international arbitrations involve claimants who are capital constrained (often as a direct result of a respondent's conduct) and would not be in a position to have their claims heard in the absence of third-party funding.

Anecdotally, our experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding. What little public data is available tends to confirm this trend, for example, in connection with the rules concerning third-party funding recently proposed by the International Centre for Settlement of Investment Disputes (ICSID), the Centre noted an 'increased resort' to third-party funding and at least 20 recent ICSID cases involving third-party funding.

Growing recognition of the use of funding in international arbitration

Concomitant with the increased use and availability of funding generally, there has been a gradual easing of the traditional doctrines of champerty and maintenance, which typically exist in common law (rather than civil law) jurisdictions. As is well covered in the country-specific chapters of this guide, this trend is occurring rapidly in a number of jurisdictions globally. For arbitration, this is potentially significant given that the law of the arbitral seat is most likely to govern whether or not a claimant is permitted to avail itself of funding.

Indeed, certain jurisdictions, most notably Singapore and Hong Kong, have recently introduced legislation to expressly allow third-party funding of international arbitration. In 2017, Singapore's parliament passed the Civil Law Amendment Act and the Civil Law (Third-Party Funding) Regulations 2017, which effectively abolish the common law torts of champerty and maintenance, and permit third-party funding in respect of international arbitration and associated proceedings (eg, enforcement and mediation proceedings). In addition to the legislative provisions, the Singapore Institute of Arbitrators has introduced a set of guidelines for third-party funding, with which funders will be expected to comply. It is also anticipated that the key arbitral institutions, such as SIAC, will amend their rules to accommodate the new legislative provisions (indeed, SIAC has already addressed third-party funding in the first edition of its investment arbitration rules).

In 2013, Hong Kong's Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitration seated in Hong Kong. This culminated in October 2016 with a recommendation to allow it. Following approval of the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2017, the Arbitration Ordinance was amended to provide, in summary, that the doctrines of champerty and maintenance no longer apply to third-party funding of arbitration or related court or mediation proceedings. Interestingly, unlike in Singapore, no distinction is made in Hong Kong between domestic and international arbitration; funding will be permitted in both. While, at the time of writing, the statutory provisions have not yet taken effect, their implementation is expected in the coming months. The legislation also anticipates the introduction of a code of practice, which will regulate a funder's conduct in respect of any given arbitration.

Some jurisdictions have been more hesitant when it comes to the current legacy of champerty and maintenance restrictions. In May 2017, delivering the judgment for *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2017] IESC 27, the Supreme Court of Ireland ruled the common law prohibitions on maintenance and champerty remain in force in Ireland, thereby restricting the availability of third-party funding. While the *Persona* decision did not itself address international arbitration, the Court's decision would have implications for an arbitration seated in Ireland or if an arbitral award were to be enforced in Ireland.

By contrast, in civil law jurisdictions – which did not inherit the common law's restrictions on maintenance and champerty, and have long permitted the alienation of litigation rights in some form – there has been predictably little discussion of the permissibility of funding whether in arbitration or litigation. That will likely soon change, given the substantial use of arbitration in many civil law countries (eg, in Latin America). In this vein, the Brazil-Canada Chamber of Commerce (CAM-CCBC), a leading arbitration centre in Brazil, became the first arbitral centre in the region to affirmatively address the use of third-party funding, issuing guidelines regarding the disclosure of funding arrangements.

In 2018, the long-anticipated International Council of Commercial Arbitration (ICCA)-Queen Mary Task Force on Third-Party Funding issued its final Report on 'Third-Party Funding in International Arbitration', ICCA Report No. 4 (April 2018). Expansive in scope, the report covers a range of important topics on third-party funding from numerous angles, and serves as a useful resource for consideration of the relevant issues and current precedents from both international and domestic sources. Further, the Task Force issued a set of principles and best practices, which attempted to distil the overall conclusions of the committee.

Disclosure and conflicts of interest

A topic of substantial discussion in the international arbitration community has been the potential for conflicts to arise in funded cases, and whether disclosure of the fact that a party is funded and, if so, the identity of the funder is necessary to prevent such conflicts. While the same discussion has arisen in the context of litigation, the issue is perhaps more acute in the context of international arbitration, because the

parties have a role in appointing arbitrators, and there is a relatively small bar of practitioners who act as both arbitrators and advocates, who themselves may be involved in funded matters. See generally chapter 4 of the ICCA Report.

After some healthy debate, a consensus has begun to emerge that the disclosure of a party's funded status and the identity of the funder (but not of the terms of the funding arrangement) in an arbitration may be beneficial so as to avoid potential conflicts. Accordingly, in the last several years, a number of jurisdictions, arbitral institutions and organisations have offered specific rules of guidance on this matter.

ICSID proposed rules

In August 2018, ICSID published a set of proposed changes designed to modernise its rules, offering states and investors an improved range of dispute settlement mechanisms. Proposed Rule 21 would make it compulsory for parties to disclose the existence of funding at any stage in the proceedings. Importantly, disclosure is limited to existence of funding and the identity of the funder. Interestingly – and somewhat controversially – the proposed rules define funding for disclosure purposes to include donation and grant-originated funding.

International Chamber of Commerce (ICC)

The ICC addressed the issue of potential conflicts in its 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (October 2017, paragraph 24), which noted, inter alia, that 'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.'

SIAC

The SIAC's newly released Investment Arbitration Rules (IARs) specifically allow arbitral tribunals to order disclosure of the existence of third-party funding and the identity of such funder (IAR 24(l)).

Hong Kong International Arbitration Centre (HKIAC)

The HKIAC has recently proposed Rules amendments, at article 44.1, which echo the requirement in section 98U of the Arbitration Ordinance in Hong Kong, stating that if a funding agreement is made, the funded party must give written notice of:

- the fact that a funding agreement has been made; and
- the name of the third-party funder.

China International Economic and Trade Commission (CIETC)

The CIETC mandates disclosure of third-party funding pursuant to article 27 of its International Arbitration Investment Rules (2017). Specifically, the Rule provides that 'as soon as a third-party funding arrangement is concluded' the funded party 'shall notify in writing' and 'without delay' the tribunal and other parties. Such disclosure must provide the 'existence and nature' of the funding arrangement and the identity of the funder. Moreover, the Rules provide the tribunal shall have the power to order further disclosure as appropriate.

CAM-CCBC

CAM-CCBC Administrative Resolution No. 18 (2016) 'recommends' the parties disclose the use of funding 'at the earliest opportunity'.

ICCA-Queen Mary Task Force Principles

The Task Force Principles state that a party 'should' voluntarily disclose the existence of funding, and that arbitral institutions have the authority to request disclosure.

International Bar Association (IBA)

The IBA was the first organisation to take a position on funding, when it published the I*BA Guidelines on Conflicts of Interest in International Arbitration* in 2014. The IBA Guidelines state that parties shall disclose 'any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.'

Nevertheless, such disclosure obligations should be narrowly limited to their intended purpose of avoiding conflicts, rather than an opportunity for distraction, delay or satellite litigation regarding, for example, disclosure of the terms of a funding agreement or waiver of privilege or confidentiality. As ICSID's comments to the proposed Rule make clear, its proposed disclosure requirement 'does not create a general duty to disclose the terms of funding or the agreement itself' as 'this more elaborate information is not required to achieve the objective of preventing conflicts of interest.'

Confidentiality and privilege

Another issue that has frequently arisen in domestic litigation in various jurisdictions around the world is whether a claimant's sharing of confidential or privileged information with a funder might raise issues of waiver. Parties to arbitrations are similarly mindful of the issue.

Arbitration is commonly a confidential process between the parties to the arbitration. However, the emerging consensus is that the sharing of information with a funder pursuant to a non-disclosure agreement will not result in waiver. That said, an arbitral tribunal often has wide discretion to determine the scope of material admitted into the proceedings and application of privilege is generally determined by resort to the relevant law of the seat of the arbitration (or potentially the substantive law of the dispute).

The rules of the major arbitral institutions do not yet, for the most part, address this issue expressly. However, the HKIAC has, in its recent rules consultation, given an indication of how arbitral instructions may do so. Article 45.3(3) of the HKIAC's proposed new rules, which is based on section 98 of the Arbitration Ordinance, expressly permits the sharing of confidential information to a person for the purposes of having, or seeking, third-party funding of arbitration.

Similarly, the recent Task Force Principles provide that although the existence of funding is not itself privileged, the underlying provisions of a funding agreement may be privileged and should only be ordered disclosed in 'exceptional circumstances'. Moreover, the Task Force Principles note the disclosure of information between a party and a funder should not be a basis for privilege waiver. Further, as the comments to ICSID's proposed rules note, parties should be able to seek appropriate confidentiality protections on privilege in the context of disclosure.

Ultimately, while we predict that concerns over waiver will fade, those contemplating funding should still ensure that all communications with funders are made pursuant to non-disclosure agreements.

Third-party funding and costs in international arbitration

Another important issue is the impact of third-party funding, if any, in the allocation of costs and related costs orders.

While arbitral panels generally have wide discretion in the allocation of costs, the principle of 'costs shifting' (ie, the loser pays the winner's costs) is prevalent in arbitration in numerous jurisdictions. In general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs. See, for example, *Kardassopoulos and Fuchs v the Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010); *RSM Production Corporation v Grenada* (ICSID Case No. ARB/05/14), Decision on Costs (28 April 2011).

Significantly, particularly in circumstances involving improper conduct on the part of the respondent, a funded claimant may be able to recover not only the costs of the arbitration but also the premium or success fee paid to the funder. For example, in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), the English High Court, which had supervisory jurisdiction, reviewed the decision made in an ICC arbitration seated in London to award the claimant (Norscot) not only its legal costs of the arbitration, but also the cost of paying the funder, Woodsford, the funding 'success fee' on the basis that the respondent had caused the claimant's impecuniosity and effectively 'forced' it to seek funding. The respondent challenged the award on the basis that the arbitrator erred in concluding that he had jurisdiction to award such costs as 'other costs', but the English High Court upheld the award.

A further important issue is the relevance, if any, of third-party funding in connection with a tribunal's consideration of security for costs applications. While each jurisdiction or tribunal has different rules that apply to such applications, in general, unless a tribunal establishes a likelihood that costs could, in principle, be awarded against an unsuccessful claimant, it cannot make a decision on security for costs applications. Moreover, a tribunal will often lack the jurisdiction to make an order for security for costs against a funder that is not party to the arbitration agreement.

Respondents that seek security for costs application sometimes argue that the fact that a party has sought funding is evidence of impecuniosity or will render it less likely to be able to satisfy an award of costs in the event the claim fails. But third-party funding is frequently used by parties who are solvent and, in any event, such funding is generally provided on a non-recourse basis and therefore does not compromise a party's financial position if the claim is lost. As such, there is a growing consensus, particularly in investor-state arbitration, that the mere fact that a party has obtained third-party funding is not, by itself, a reason to justify a security for costs order. See, for example, *EuroGas Inc and Belmont Resources Inc v Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015); see also *South American Silver Limited v the Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10 (11 January 2016); *Guaracachi America Inc and Rurelec v Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013).

However, in two 'exceptional' matters, the existence of third-party funding has been an important – but not the sole – factor in the ultimate decision to order security for costs. In *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10), the tribunal made an order for security for costs, apparently on the basis of the claimant's poor conduct during the course of the arbitration (including, for example, repeated failures to comply with the tribunal's orders). See also *Manuel García Armas et al v Venezuela* (PCA Case No. 2016-08), Procedural Order No. 9 (20 June 2018). There is reason to suggest that *RSM* and *García Armas* may be relatively isolated cases.

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