Austrian Yearbook

on

International Arbitration 2020

The Editors

Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Irene Welser, Gerold Zeiler

The Authors

Georg Adler, Alexey Anischenko, Carmen Backsmann, Till Alexander Backsmann, Jonathan Barnett, Lisa Beisteiner, Miklós Boronkay, Katharina Brückner, Caroline Bühler, Petra Butler, Cecilia Carrara, Philippa Charles, Manuel Conthe, Giuditta Cordero-Moss, Roxanne de Jesus, Gigi D'Souza , Valeria Dubeshka, Philipp Duncker, Florian Ettmayer, Philip Exenberger, Sebastian Feiler, Josef Fröhlichsdorf, Arne Fuchs, Christina Geissler, Radu Giosan, Florian Haugender, Amelie Huber-Starlinger, Stephan Karall, Alexander Karl, Judith Knieper, Maciej Kochanowski, Olga Kuchmiienko, James Lawrence, Alice Meissner, Samuel Mimnagh, Irene Ng, Brian Oiwoh, Nadine Pfiffner, Nina Pichler, Nikolaus Pitkowitz, Anna Katharina Radschek, Lisa Richman, Howard Rosen, Mauro Rubino-Sammartano, Markus Schifferl, Christoph Siefarth, Alfred Siwy, Edna Sussman, Petri Taivalkoski, Oskar Toivonen, Natascha Tunkel, Elisabeth Vanas-Metzler, Robert Wachter, Irene Welser, Berhard Wychera, Martin Zahariev, Alexander Zojer

C.H.BECK

Wien 2020
MANZ'sche Verlags- und Universitätsbuchhandlung
Verlag C.H. Beck, München
Stämpfli Verlag, Bern

Overview

Alexander Karl is a senior associate in DORDA's Dispute Resolution team in Vienna. He is specializing in international commercial and insurance litigation, international arbitration and cross-border enforcement. He regularly advises and represents clients before civil courts and arbitral tribunals. Alexander Karl has vast experience in mass litigation proceedings, including the negotiation and implementation of settlement agreements with several thousand parties.

Alexander Karl studied Law at the University of Vienna (Mag. iur.) and has recently completed a postgraduate program in "Comparative and International Dispute Resolution" at Queen Mary University of London (LL.M.). Additionally, he undertook legal studies in international law at the London School of Economics and Political Science.

Alexander Karl regularly publishes on international arbitration and litigation.

Contact: DORDA Rechtsanwaelte GmbH
Universitaetsring 10
1010 Vienna, Austria
T: +43-1-533 47 95-18
F: +43-1-533 47 95-5018
E: alexander.karl@dorda.at
www.dorda.at

Security for Costs as a Default in Investment Arbitration: A Workable Protection for States when Third-Party Funders are involved?

Alexander Karl

I. Introduction

Succeeding states in investment arbitration proceedings have complained recently that they were often not able to collect costs orders in their favor from judgment-proof claimants. Panama, for example, was awarded costs twice, but was unable to collect any costs in one of those cases and only received 5 % of its awarded costs in the second case. For that reason, Panama proposed that the ICSID Administrative Council should request the ICSID Secretariat to conduct a survey with regard to costs awards in favor of responding states.[1]) The results of that survey were published in November 2017. According to the survey, losing claimants did not comply with costs orders directed against them in slightly over 35 % of the cases. In 53 % responding states were able to recover awarded costs, and the status of the remaining 12 % is unknown.[2]) Even though the number of non-compliance seems to have decreased in total,[3]) it still remains exceptionally high. In comparison, successful claimants who were awarded costs have been able to collect the costs awards in over 85 % of the cases. The status of the remaining cases is unclear.[4])

I would like to thank (in alphabetical order) Jonathan Barnett, Steven Friel, Brooke Guven, Catherine A. Rogers, and Mick Smith for their helpful insights.

[1]) Memorandum of June 12, 2016 from I. A. Zarak, Acting Minister of Economy and Finance of Panama, to Meg Kinnear, International Centre for Settlement of Investment Disputes ("ICSID") (*available at* http://res.cloudinary.com/lbresearch/image/upload/v1477064514/rop_memorandum_to_icsid_administrative_council_re_effective_protection_english_version_2_219116_1641.pdf, last visited August 11, 2019)

[2]) Survey for ICSID Member States on Compliance with ICSID Awards, pages 3,4 (*available at* https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf, last visited August 11, 2019); it has to be noted that ICSID only received answers from Member States in respect of 34 of the total 70 award and post-award decisions in which responding states were awarded costs.

[3]) Compared to the numbers shown in Judith Gill QC & Matthew Hodgson, *Costs awards – who pays?* (*available at* http://www.allenovery.com/publications/en-gb/Pages/%E2%80%98Costs-awards-%E2%80%93-who-pays%E2%80%99-%E2%80%93-Judith-Gill-QC-and-Matthew-Hodgson.aspx, last visited August 11, 2019).

[4]) Survey for ICSID Member States on Compliance with ICSID Awards; *supra*

Considering also the significant costs of investment arbitration proceedings (costs for claimants on average between USD 5 million[5]) and USD 6 million,[6]) costs for respondents on average between USD 4.1 million[7]) and USD 5.2 million;[8]) tribunal costs on average slightly below USD 1 million,[9]) it is understandable that states are not satisfied with the current situation.

Non-compliance of costs awards is even more problematic when third-party funders are involved on the side of claiming investors. The problem is that those funders usually "disappear" after their clients have lost the proceedings. Since the funders do not fall under a tribunal's jurisdiction,[10]) they cannot be ordered directly to comply with any adversary costs decision. As a result, in case of impecunious claimants, the winning states are left with unpaid costs awards in their favor. One well-renowned arbitrator said that for third-party funders this situation is leading to a "*gambler's Nirvana: Heads I win, and Tails I do not lose.*"[11]) Others called this an "*arbitral hit and run*".[12])

Two possible solutions have been discussed recently to deal with this situation:

First, it was suggested to have third-party funders submit to the tribunal's jurisdiction. This would then allow tribunals to issue costs orders directly against a third-party funder where necessary.[13])

Second, a proposal was made to take a more lenient approach when it comes to granting security for costs requests. It has been argued that whenever a third-party funder is involved such orders should be posted every time they are requested and that the additional costs incurred by claimant to provide the

---

note 2, at 4; it has to be noted that ICSID only received answers from Member States in respect of 41 of the total 114 award and post-award decisions in which claiming investors were awarded costs.

[5]) Franck, Arbitration Costs 203 (2019).

[6]) Jeffery Commission & Rahim Moloo, Procedural Issues in International Investment Arbitration 187, 190 (2018).

[7]) Franck, *supra* note 5, at 204.

[8]) Commission & Moloo, *supra* note 6, at 187, 190.

[9]) Commission & Moloo, *supra* note 6, at 188, 190; Franck, *supra* note 5, at 206.

[10]) Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure 364 (2016); International Council for Commercial Arbitration (ICCA), *Report of the ICCA–Queen Mary Task Force on Third-Party Funding in International Arbitration* 226 (2018) (*available at* https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf, last visited August 11, 2019) [hereinafter ICCA-Queen Mary Report].

[11]) *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Assenting Reasons of Gavan Griffith to Decision on Saint Lucia's Request for Security for Costs, August 12, 2015, para. 13.

[12]) Stavros L. Brekoulakis & Jonas von Goeler, *It's all about the Money: The Impact of Third-Party Funding on Costs Awards and Security for Costs in International Arbitration*, *in* Austrian Yearbook On International Arbitration 2017 12 (Klausegger et al. eds., 2017).

[13]) ICCA-Queen Mary Report, *supra* note 10, at 225, 226.

ordered security should be shifted in the end of the proceedings, together with other costs.[14])

This article is intended to examine the second proposal. It will first give a summary of the current practice of investment tribunals when it comes to security for costs under the ICSID Convention and ICSID Arbitration Rules as well as under the UNCITRAL Arbitration Rules. Then, it will provide an overview of current developments under these main sets of rules used in the international investment arbitration context. Finally, it will address the advantages and disadvantages of this proposal, discuss the requirements for making this proposal workable and will then conclude whether or not this approach can and should be applied in the near future.

For this article, the meaning of the terms "third-party funding" and "third-party funder" refers to non-recourse financing. This is a funding model dependent on the outcome of the proceedings, *i.e.* the funded claimant is not obliged to repay the funds spent by the funder if the claim is not successful. It is the most common form of funding,[15]) and – as can be seen from the 2018 International Arbitration Survey on "The Evolution of International Arbitration" – known to most participants in the international arbitration community.[16])

II. Overview of Current Legal Framework and Practice of Security of Costs in International Investment Arbitration

A. What is Security for Costs and Do Tribunals Have Power to Order Security For Costs

Security for costs is a form of provisional measure that safeguards parties' interests to recover the costs incurred to them in the proceedings. If one party successfully applied for such measure, the tribunal will order the other party to post a certain amount to *"cover the likely amounts that would be*

---

[14]) ICCA-Queen Mary Report, *supra* note 10, at 244 *et seq.*

[15]) Katia Yannaca-Small, Arbitration under International Investment Agreements: A Guide to the Key Issues 704, para. 26.16 (2nd ed. 2018).

[16]) According to the 2018 International Arbitration Survey on "The Evolution of International Arbitration", conducted by the School of International Arbitration at Queen Mary University of London in partnership with White & Case LLP 24, 42 % of the responding individuals have already experienced this type of funding in arbitration proceedings and additional 56 % are aware of this type even though they have not seen it in practice (*available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf, last visited August 11, 2019) [hereinafter 2018 International Arbitration Survey].

awarded to the counter-party in the event that it prevails in the arbitration and is entitled to recover its legal costs".[17]) If ordered, security for costs is usually provided by payment into an escrow account or some other form of security arrangement, such as by bank guarantee.[18])

The relevant provisions for a tribunal's power to issue provisional measures are Art. 47 ICSID Convention and Rule 39 ICSID Arbitration Rules on the one hand, and Art. 26(2)(c) and Art. 42(1) UNCITRAL Arbitration Rules on the other hand. However, it is noteworthy that neither the ICSID Convention and the ICSID Arbitration Rules nor the UNCITRAL Arbitration Rules provide for explicit powers of investment tribunals to issue security for costs orders.[19])

Even in the absence of such clear provisions, it is generally accepted that investment tribunals can – based on their general power to grant provisional measures – issue security for costs orders under both the ICSID regime (security for costs is covered under *"any provisional measures"* in Art. 47 ICSID Convention) and the UNCITRAL Arbitration Rules (security for costs is encompassed by the words *"preserving assets out of which a subsequent award may be satisfied"* in Art. 26(2)(c)).[20]) Several investment arbitration tribunals have explicitly confirmed this power.[21])

---

[17]) Gary Born, International Commercial Arbitration 2495 (2nd ed. 2014).

[18]) Von Goeler, *supra* note 10, at 333; Alan Redfern & Sam O'Leary, *Why it is Time for International Arbitration to Embrace Security for Costs*, 32 Arb. Intl. 397, 399 (2016).

[19]) See, however, below at III.A. the comments on the proposed amendments to the ICSID Arbitration Rules.

[20]) Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, Vienna, September 10–14, 2017, UNCITRAL, para. 48 (*available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/V07/870/53/PDF/V0787053.pdf?OpenElement, last visited August 11, 2019); Christoph Schreuer et al., The Icsid Convention: A Commentary Art. 47, para. 98 (2nd ed. 2009); Yannaca-Small, *supra* note 15, at 656, para. 24.86; Miriam K. Harwood, Simon N. Batiford & Christina Trahanas *in* The Investment Treaty Arbitration Review 106 (Barton Legume d., 2nd ed.2017); von Goeler, *supra* note 10, at 335.

[21]) *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, para. 54; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No 2, February 13, 2016, para. 53; *Sergei Viktorovich Pugachev v. The Russian Federation*, Interim Award, July 7, 2017, para. 372; *RSM Production Corporation v. Saint Lucia*, *supra* note 14, Decision on Annulment, April 29, 2019, para. 179, where the *ad hoc* committee held that ordering a party to provide security for costs does not constitute a manifest excess of power.

B. Requirements for Security for Costs and Current Practice by Investment Tribunals

1. General Remarks and Practice

The generally accepted requirements for granting security for costs are (i) the existence of a right in need of protection,[22]) (ii) the presence of exceptional circumstances, *i.e.* where a degree of urgency was found to be present and where a measure was necessary to protect the right of the requesting party, which implies the existence of a risk of irreparable or substantial harm,[23]) and (iii) that such order would not **prejudge** the outcome of the case.[24])

Proof of *prima facie* jurisdiction, which is usually required to issue provisional measures under Art. 47 ICSID Convention, is of minor importance when it comes to security for costs requested by responding states. This was made perfectly clear by one arbitrator who said that

> *"Whilst under a BIT treaty claim an investor claimant may be required to establish prima facie jurisdiction to obtain an order for provisional measures, conceptionally it is inadmissible to apply any such requirement upon a respondent State party's application for security for costs orders."*[25])

In addition, also others found that *prima facie* jurisdiction is a *"negligible requirement"* when it comes to security for costs orders and that tribunals are empowered to grant security for costs even in cases where its jurisdiction is challenged.[26]) It was also held, in respect to interim measures in general, that the requirement of *prima facie* jurisdiction has not to be established whenever the responding party is requesting provisional relief and that in such cases jurisdiction is assumed.[27])

Also the requirement of a *prima facie* case on the merits is not required under the ICSID Convention.[28]) Nevertheless, some tribunals have examined

---

[22]) Schreuer, *supra* note 20, at Art. 47, para. 157; *RSM Production Corporation v. Saint Lucia*, *supra* note 21, at para. 58.

[23]) Schreuer, *supra* note 20, at Art. 47, para. 64; *RSM Production Corporation v. Saint Lucia*, *supra* note 21, at para. 58; *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama*, ICSID Case No. ARB/13/28, Decision on the Respondent's Request for Provisional Measures Relating to Security for Costs, January 21, 2016, para. 29; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No 3, November 25, 2015, para. 72.

[24]) Schreuer, *supra* note 20, at Art. 47, para. 157; *RSM Production Corporation v. Saint Lucia*, *supra* note 21, at para. 58.

[25]) *RSM Production Corporation v. Saint Lucia*, *supra* note 11, at para. 4.

[26]) Christine Sim, *Security for Costs in Investor–State Arbitration*, Arbitration International, 2017, 33, 427–495, at 479.

[27]) Yannaca-Small, *supra* note 15, at 661, para. 24–101.

[28]) *Id.*, at 24–106, 662.

this requirement to some degree. For example, the majority in *"RSM v. Saint Lucia"*, where respondent elaborated on its potential success, found that *"Respondent's position is at least plausible, i.e. a future claim for cost reimbursement is not evidently excluded"*.[29]) By holding that, the tribunal indirectly confirmed the existence of this requirement. Contrary to that, one member of the tribunal noted that *"there is no possibility that respondent applicant could ever be required to establish any showing as to its position on the merits"*.[30])

Under the UNCITRAL Arbitration Rules an applicant who seeks provisional relief is, in addition to the requirements noted above, obliged to prove that there *"is a reasonable possibility that the requesting party will succeed on the merits of the claim"*.[31]) Whether or not this requirement also applies in respect of security for costs is disputed. The tribunal in *"Guaracachi America, Inc. and Rurelec PLC v. Bolivia"*, for example, was faced with a security for costs request by a responding state and held that it was not necessary to examine whether this requirement is met since respondent failed to *"justify the extraordinary measure"*.[32]) However, it then went on by noting that given the risk of a prejudgment of the case *"determinations are therefore best avoided unless absolutely necessary to come to a decision on the request for interim measures, which is not the case here."*[33])

Especially the second generally accepted requirement, namely the existence of exceptional circumstances, was discussed in many decisions regarding security for costs orders. Tribunals have set the bar very high as to when this requirement can be deemed to be fulfilled. In one case, the tribunal held that it *"would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all"*.[34]) Other tribunals found that security for costs should only be granted in *"extreme and exceptional circumstances"*,[35]) *"for example, where abuse or serious misconduct has been evidenced"*,[36]) or that such *"circumstances should display a real risk that the*

[29]) *RSM Production Corporation v. Saint Lucia*, *supra* note 21, at para. 74.

[30]) *RSM Production Corporation v. Saint Lucia*, *supra* note 11, at para. 8.

[31]) Art. 26(3)(b) UNCITRAL Arbitration Rules.

[32]) *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No 14, March 11, 2013, para. 7.

[33]) *Id.* at para. 8.

[34]) *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, para. 57.

[35]) *Sergei Viktorovich Pugachev v. The Russian Federation*, *supra* note 21, at para. 377.

[36]) *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, September 20, 2012, para. 45.

Claimant will not comply with a potential order for costs because it is unable or unwilling to do so".[37])

In all these quoted proceedings, tribunals denied the existence of such exceptional circumstances and denied posting a security for costs order.

2. Situation where Third-Party Funders are Involved

Where a party receives outside funding, the question arises whether such involvement of a third-party funder alone amounts to "exceptional circumstances", which would – under the assumption that the other requirements are met – allow a tribunal to issue a security for costs order. Several tribunals dealt with this question in the past:

The most frequently discussed decision in this respect is *"RSM v. Saint Lucia*".[38]) In these proceedings, which related to an exclusive oil exploration license in Saint Lucia, claimant received funds from a third-party funder. Respondent requested the tribunal to issue a security for costs order. This request was based, *inter alia*, on (i) claimant's previous misconduct in earlier ICSID cases where it did not comply with costs awards and requests for payment advances against it,[39]) and (ii) the fact that claimant received funding in the proceedings at hand.[40]) The majority of the tribunal followed respondent's request and concluded that – because of claimant's earlier conduct in other proceedings and as claimants do not have sufficient financial resources – there was *"a material risk that Claimant would not reimburse Respondent for its incurred costs*".[41]) In addition, it held that this is also supported by the fact that claimant is funded as "*it is doubtful whether the third party will assume responsibility for honoring such an award*".[42]) This was the first decision ever where an investment arbitration tribunal granted security for costs.

Gavan Griffith QC, who formed part of the majority, issued an assenting opinion, in which he clarified that while he concurred with the result of the decision, he has a different view on the funding issue. He criticized the inequality generated by third-party funders as they only *"share the rewards of success but, if security for costs orders are not made*, […] *risk no more than its spent costs in the event of failure*".[43]) Following that, he suggested that whenever a third-party funder is funding a claim, the burden of proof should shift to the claimant who then has to "*disclose all relevant factors and to make*

---

[37]) *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, *supra* note 23, at para. 76.

[38]) *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10.

[39]) *RSM Production Corporation v. Saint Lucia*, *supra* note 21, at para. 30.

[40]) *Id*. at para. 33.

[41]) *Id*. at paras. 81, 82.

[42]) *Id*. at para. 82.

[43]) *RSM Production Corporation v. Saint Lucia*, *supra* note 11, at para.12.

a case why security for costs orders should not be made".[44]) If funded claimants fail to prove such contrary reasons, tribunals should grant security for costs. This approach has been rejected by most tribunals and in literature.[45])

However, there was one exception. The second (and as of now last) decision where an investment arbitration tribunal granted security for costs is "*Manuel García Armas and others v. Venezuela*".[46]) Respondent's request was based on the facts that (i) the funding agreement between claimants and their funder did not provide for a coverage of potential adverse costs orders and that (ii) claimants have not proven their solvency. In its Procedural Order No. 9, dated June 20, 2018,[47]) the tribunal followed the approach taken by earlier tribunals and held that security for costs should only be ordered in exceptional circumstances. The presence of a third-party funder by itself was, according to the tribunal, not enough to prove that claimants are insolvent and was, thus, not sufficient to order security for costs. However, the tribunal gave substantial weight to the fact that adverse costs orders were not covered under the disclosed funding agreement and based on that – by reversing the burden of proof – ordered claimants to prove their solvency. In the end, the tribunal concluded that there was a risk that claimants could not satisfy adverse costs decisions and, therefore, granted security for costs.[48])

It can be concluded that security for costs orders have been granted only very sparingly.[49]) In respect of third-party funders, both tribunals and scholarly literature share the opinion that the mere existence of a third-party funder is not sufficient to fulfill the requirement of "exceptional circumstances". Such involvement is considered to be only one of many factors which have to

---

[44]) *Id*., at para. 18.

[45]) Von Goeler, *supra* note 10, at 338, 354; Redfern & O'Leary, *supra* note 18, at 407.

[46]) *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08.

[47]) *Id*., Procedural Order No. 9, June 20, 2018 (only available in Spanish language).

[48]) As Procedural Order No. 9 is only available in Spanish, author has relied on the following publicly available articles: Elvezio Santarelli & Monica Selvini, *Under what circumstances may a tribunal grant security for costs in investment treaty arbitration?* (*available at* http://www.wfw.com/wp-content/uploads/2018/09/Under-what-circumstances-may-a-tr-ibunal-grant-security-for-costs-in-investment-treaty-arbitration-Manuel-Garcia-Armas-v-Venezuela.pdf, last visited August 11, 2019); Alexander G Leventhal, *Towards an Exceptio Fundati? Assessing a (Potentially) Emerging Exception for Third Party Funding in Investment Treaty Decisions on Security for Costs in the Wake of Armas v. Venezuela* (*available at* http://arbitrationblog.kluwerarbitration.com/2018/09/18/assessing-a-potentially-emerging-exception-for-third-party-funding-in-investment-treaty-decisions-on-security-for-costs-in-the-wake-of-armas-v-venezuela/, last visited August 11, 2019).

[49]) Romesh Weeramantry & Montse Ferrer, Case Comment, *RSM Production Corporation v. Saint Lucia: Security for Costs – A New Frontier?* 30 ICSID Rev 1, 30, 32 (2015); Schreuer, *supra* note 20, at Art. 47, para. 98; Yannaca-Small, *supra* note 15, at 656, para. 24.85.

be taken into account.[50]) Rather, it is – in the opinion of most – for the applying party to convince the tribunal that there is a real risk that the opposing party will not comply with a costs award against it and that there was abusive conduct or bad faith on the opposing part.[51])

As, however, tribunals have held that even a "*lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not per se reasons or justifications sufficient to warrant security for costs*",[52]) it is very difficult for parties to prove the existence of those strict requirements and, therefore, almost impossible to successfully apply for such measure.

III. Current Developments Under ICSID and UNCITRAL

As noted above, neither the ICSID Convention and the ICSID Arbitration Rules nor the UNCITRAL Arbitration Rules explicitly provide for security for costs. This and the sometimes divergent decisions of investment tribunals have led to considerable uncertainty. Often raised questions are (i) whether a tribunal has the power to issue such orders, (ii) what events or facts amount to the high standard of exceptional circumstances (*e.g.* is third-party funding per se enough to fulfill this requirement) and (iii) whether – once it is established that a third-party funder is involved – the onus to prove the ability to comply with adverse costs decisions should be shifted to the opposing party. Both ICSID and UNCITRAL are currently undergoing a process to reform their rules in order to address *inter alia* these issues.

A. Proposed Amendments to the ICSID Rules

ICSID started its amendment process in October 2016. After having reviewed comments and suggestions received from Member States and the public, ICSID published its first Working Paper on August 2, 2018 ("WP 1").[53]) Considering further comments received in respect to WP 1, ICSID issued an

[50]) *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No 3, June 23, 2015, para. 123; *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, paras. 73–75, 78; see also ICCA-Queen Mary Report, *supra* note 10, at 221, which states that "*the existence of third-party funding is generally irrelevant to* […] *a determination of a request for security for costs* […]".

[51]) Brekoulakis & von Goeler, *supra* note 12, at 10.

[52]) *South American Silver Limited v. Bolivia*, *supra* note 50, at para. 63.

[53]) Proposals for Amendment of the ICSID Rules – Working Paper, August 2 2018 (*available at* https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf, last visited August 11, 2019).

updated Working Paper on 5 March 2019 ("WP 2")[54]) and, after that, a third Working Paper on 16 August 2019 (WP 3).[55]) The relevant proposed amended rule ("AR") for security for costs is AR 52 WP 3. It is noteworthy that security for costs got its own provision, detached from the provision covering provisional measures, treating it as a *"unique form of relief"*.[56]) In AR 52, two of the above-mentioned three often discussed issues arising out of the current uncertainties are explicitly addressed:

AR 52(1) now clarifies that tribunals do have the power to order security for costs. AR 52(3) formulates that tribunals should consider all relevant circumstances before exercising its power. Contrary to AR 51 WP 2, AR 52(4) WP 3 explicitly makes reference to third-party funding by stating that the *"Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3),* […]". However, this provision then goes on by clarifying that – in accordance with earlier decisions by investment tribunals – the mere existence of a third-party funder by itself is not sufficient for a security for costs order.

The last issue, however, on whether the onus should be shifted to claimant to demonstrate its solvency once it is clear that a third-party funder is involved was not dealt with. Therefore, it remains possible that tribunal's will follow the approach taken in *"Manuel García Armas and others v. Venezuela"* and shift the burden of proof to the party facing the request.

B. UNCITRAL Working Group III

The Commission requested Working Group III to work on a possible reform of the Investor-State Dispute Settlement ("ISDS") process. One of the issues addressed by Working Group III is security for costs. Acknowledging that security for costs have been only granted rarely in investment arbitration proceedings, the Working Group, in its session from 29 October to 2 November 2018, stated that it *"may wish to discuss policy and practical considerations on whether and under what circumstances ISDS tribunals should be allowed to order security for costs",* including considerations on the influence of third-party funding.[57]) In its session from 1 to 5 April 2019, the Working Group held

[54]) Proposals for Amendment of the ICSID Rules – Working Paper 2, March 2019 (*available at* https://icsid.worldbank.org/en/Documents/Vol_1.pdf, last visited August 11, 2019).

[55] Proposals for Amendment of the ICSID Rules – Working Paper 3, August 2019 (*available at* https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf, last visited September 30, 2019).

[56]) Proposals for Amendment of the ICSID Rules – Working Paper, *supra* note 53 at para. 514.

[57]) UNCITRAL Working Group III, Possible reform of investor-State dispute settlement (ISDS) – cost and duration, Note by the Secretariat, para. 37 (*available at*

that third-party funding has had an impact on security for costs and reiterated *"that it was desirable that reforms be developed"*.[58])

It remains to be seen how the Working Group will address this issue in the near future and whether it will be able to provide a solution which will remove the uncertainties under the current framework to make security for costs requests a more foreseeable and reliable tool in the future.

IV. Security for Costs as a Default

As briefly discussed in the introduction, responding states often worry that they will not be able to recover their arbitration costs once they have prevailed in international investment arbitration proceedings because of a lack of financial resources on the claiming investor's side. This concern is even more understandable where third parties fund those claimants. This issue for responding states was highlighted by one participant of a roundtable discussion on third-party funding in international arbitration, co-hosted by the Columbia Center on Sustainable Investment and the ICCA-Queen Mary Task Force, who said that

> *"the biggest concern to states should be the costs of the arbitration, as there is no mechanism in place that prevents claimants from bringing outrageous claims that states are nonetheless forced to defend against, and third-party funders cannot be held liable for the costs of such arbitrations in case the claimant is impecunious"*.[59])

This problem was also addressed in the ICCA-Queen Mary Report, which provided for two possible solutions:

The first suggestion that has been made was to let third-party funders submit to a tribunal's jurisdiction.[60]) Background to this proposal is that arbitral tribunal's – in contrast to, for example, English courts[61]) – cannot render costs decision against a third-party funder directly as it is not part of the arbitration agreement and does, because of the absence of consent, not fall

---

https://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/WP_153.pdf, last visited August 11, 2019).

[58]) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, April 1–5, 2019), para. 25 (*available at* https://undocs.org/en/A/CN.9/970, last visited August 11, 2019).

[59]) Roundtable Discussion of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, October 17, 2017, 5 (*available at* http://ccsi.columbia.edu/files/2017/11/Third-Party-Funding-in-ISDS-Roundtable-Outcome-Document-FINAL-2.pdf, last visited August 11, 2019).

[60]) ICCA-Queen Mary Report, *supra* note 10, at 225 *et seq*.

[61]) *See e.g. Excalibur Ventures LLC v. Texas Keystone Inc* and others, [2013] EWHC 2767 (Comm); later confirmed by the English Court of Appeal in [2016] EWCA Civ 1144.

under a tribunal's jurisdiction.[62]) The proposed suggestion to make a funder submit to a tribunal's jurisdiction would allow tribunals to order third-party funders directly to pay adverse costs orders where the funded parties are unable to do so. This suggestion is out of the scope of this article and will, therefore, not be discussed. After having spoken to several third-party funders, it can be said that it seems highly unlikely that funders would be willing to undertake such deed under a tribunal's jurisdiction at the current stage. One funder has even called this proposition *"ill-conceived"* and *"ridiculous"*.[63])

The other suggestion raised – which will be analyzed below – is that security of costs should be posted every time it is requested if a third-party funder is involved. The costs incurred for providing security for costs (be it the additional costs of funding, ATE (after-the-event) insurance or a bank guarantee) should then be shifted in the end of the proceedings.[64])

This approach is also supported by others. One author, who is skeptical about third-party funding in general, said that (emphasis added)

> *"If TPF* [third-party funding] *is to be allowed in ISDS in some form, then ISDS arbitral rules should require mandatory, expansive disclosure of third-party funding agreements,* ***coupled with mandatory security for costs****."*[65])

This article will first highlight the possible advantages this second proposal (the "Proposal") could bring. It will then examine the challenges and the negative effects the Proposal would have and, in the end, will provide a conclusion on whether a systematic grant of security for costs would be a desirable solution for investment arbitration proceedings involving third-party funders.

A. Positive Effects of the Proposal

1. Prevention of Frivolous Claims

Before credible third-party funders decide to fund proceedings, they conduct rigorous due diligences of the cases presented to them. The primary focus of funders in the process lie on the merits of the claim, the economics of the investment and the enforceability of a possible decision in favor of the clients funded by them.[66]) According to many funders, they only invest in

---

[62]) Von Goeler, *supra* note 10, at 419; ICCA-Queen Mary Report, *supra* note 10, at 226.

[63]) Statement Mick Smith (interview notes on file with author).

[64]) ICCA-Queen Mary Report, *supra* note 10, at 225

[65]) Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. Rev. 2911, 2993 (2018).

[66]) ICCA-Queen Mary Report, *supra* note 10, at 25; Dr Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration* (Grotius Centre Working Paper Series, Grotius Centre Working Paper No. 2012/1) 5; for a more detailed list of factors important for funders see Brooke Guven & Lise Johnson, *The Policy*

around ten percent of proceedings for which funding is sought.[67]) This does certainly make sense from an economic perspective as a funder's "*investment is only as good as the litigant's chance of winning*".[68])

However, there have always been voices claiming that the existence of third-party funders may encourage frivolous claims. The reasons for such critiques are manifold:

a) Even the best due diligence does not guarantee that only meritorious claims are brought

Although the success rate of funded proceedings seems to be very high according to several funders, several cases have been made public recently where funded claimants lost the proceedings. One of those cases was *"Italba Corporation v. Oriental Republic of Uruguay"*,[69]) where claimant was funded by the Australian funder IMF Bentham through its US subsidiary.[70]) In its award dated 22 March 2019, the tribunal found that it did not have jurisdiction over Italba Corporation's claims,[71]) and ordered Italba – based on the "loser pays" principle – to pay Uruguay almost USD 6 million in costs.[72]) Another recent case where an adverse costs award was issued against funded claimants was *"David Aven et al. v. The Republic of Costa Rica"*.[73]) In these proceedings, the tribunal ordered claimants to pay to Costa Rica an amount close to USD 1.1 million for the expended portion of Costa Rica's advanced costs to ICSID.[74]) Claimants in these proceedings were funded by Vannin Capital, which disclosed a total loss of USD 6.6 million on this case.[75])

Thus, it can be seen that even some of the most reputable funders are not immune to reach wrong results in their analyses of a case and, as a result of that, fund unmeritorious and unsuccessful claims. Simply said: *"Funders can get it wrong."*[76])

Implications of Third-Party Funding in Investor-State Dispute Settlement, May 2019, 5, 6 (*available at* http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf, last visited August 11, 2019).

[67]) Statement by Steven Friel (interview notes on file with author); also ICCA-Queen Mary Report, *supra* note 10, at 205.

[68]) Yannaca-Small, *supra* note 15, at 26, para. 26.12.

[69]) *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9.

[70]) Sebastian Perry, *Funder's role in failed ICSID claim comes to light,* May 7, 2019 (*available at* https://globalarbitrationreview.com/article/1190881/funder%E2%80%99s-role-in-failed-icsid-claim-comes-to-light, last visited August 18, 2019).

[71]) *Italba Corporation v. Oriental Republic of Uruguay*, *supra* note 69, at para. 285.

[72]) *Id*., at paras. 291 *et seqq*.

[73]) *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3.

[74]) *Id*., at para. 768.

[75]) Perry, *supra* note 70.

[76]) Von Goeler, *supra* note 10, at 362.

b) Portfolio funding/Intentional risk-taking

Funders can also diversify their risk by funding many high value and often high risk claims (portfolio) based on the simple idea that one of the many cases in their portfolio will win and make up for the losses of the other cases. Thus, the costs for losing one case will be relatively low when compared with the wins of other proceedings in the same portfolio.[77]) It has been said that this model is increasing,[78]) or even becoming the norm.[79])

In this regard, the Burford Group, for example, stated that

> *"If we shy away from risk for fear of loss, as some litigation investors do, we will not maximise the potential performance of this portfolio".*[80])

Therefore, it is obvious that third-party funders are indeed sometimes willing to take on cases with less merit and bearing certain risks if the possible return is high enough.

c) Non-credible funders

As more and more funders enter the scene, also the number of so-called "less reputable" or "non-credible" funders has increased. The problem here, which has been brought up in the ICCA-Queen Mary Report, is that such non-credible funders may be willing to fund high-risk cases which have already been rejected by credible funders in return for potentially exceptionally high rewards.[81]) Besides that, such funders could maybe also fail to conduct due diligence analyses on the same high level as their renowned competitors.

One example – even though from English litigation proceedings – where the English courts found that a third-party funder failed to conduct proper due diligence was *"Excalibur Ventures LLC v. Texas Keystone Inc and others".*[82]) There, the English Court of Appeal agreed with the English High Court that the *"due diligence undertaken by the funders before agreeing to support this claim was inadequate"* and further held that it was *"cumulatively superficial, feeble and rushed".*[83])

---

[77]) Garcia, *supra* note 65, at 2921.

[78]) Guven & Johnson, *supra* note 66, at 8.

[79]) Garcia, *supra* note 65, at. 2921.

[80]) Burford Annual Report 2010 5 (*available at* https://www.burfordcapital.com/wp-content/uploads/2016/08/FY2010_Burford_Capital_Report.pdf, last visited August 11, 2019).

[81]) ICCA-Queen Mary Report, *supra* note 10, at 254; William W. Park & Catherine Rogers, Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force, October 12 2014, 3 (*available at* http:ssrn.com/abstract=2507461, last visited August 14, 2019).

[82]) Excalibur Ventures LLC v. Texas Keystone Inc and others, [2016] EWCA Civ 1144.

[83]) *Id.*, at para. 30.

To summarize the three concerns above: If security for costs were to be granted whenever they are requested, this could have positive effects with respect to the first two categories mentioned above. So-called non-credible funders would have to conduct their due diligences of cases presented to them more thoroughly as they would otherwise run risk of losing even more of their capital. In addition, because of the increase in capital, which comes with posting security for costs, funders in general, could become more reluctant to take high-risk cases into their portfolios. Both of these factors could lead to a decrease in the filing of frivolous claims.

2. Establishment of a Balance between Interests of States and Investors

Funding agreements usually contain an explicit provision on security for costs. There are several options how this is stipulated in the agreement. However, under the most common provision the funder and the funded party agree on a maximum amount, which is available in case security for costs have to be posted.[84]) In return for the funder's obligation to pay security for costs where ordered, the funded party is usually obliged to hand over a larger share of the proceeds of the proceedings. Thus, providing security for costs – even if through third-party funders – can put a significant financial burden on claimants.

The application of the Proposal would establish a balance between the involved participants in the arbitration and, therefore, would ensure to level the playing field between the parties involved.[85]) Responding states, on the one hand, would get the security they wanted. By obtaining security for costs from claimants, respondents would eliminate the risk of not being able to recover their likely costs if they prevail in the proceedings. Claimants, on the other hand, would be able to recover both their reasonable legal costs as well as the reasonable costs for posting security for costs. In case of success, claimants would thus *"be made financially whole"*.[86])

Von Goeler noted in this respect that

> *"Holding the party seeking security for costs liable for the claimant's costs of providing security is also desirable from a policy perspective, as it provides a legally fair and financially risk neutral solution to granting security for costs."*[87])

[84]) Statement Mick Smith (interview notes on file with author).
[85]) Redfern & O'Leary, *supra* note 18, at 412.
[86]) ICCA-Queen Mary Report, *supra* note 10, at 225.
[87]) Von Goeler, *supra* note 10, at 361.

This was also confirmed in the ICCA-Queen Mary Report, which further noted that

> *"By granting security payment on the premise that the respondent must contribute towards the cost of the security should the claimant prevail on the merits, the tribunal can restore the financial balance between the parties, both of which continue to run risks in relation to the money posted."*[88])

3. Foreseeability from the Outset

Another advantage the Proposal would bring is that it would provide the parties with foreseeability on whether tribunals will order security for costs if requested. Such foreseeability is especially important for third-party funders. Under the current system in investment arbitration, in which security for costs are granted rarely, both claimants and funders are, of course, aware of the possibility of a security for costs order directed against the claimant and in most cases also contractually provide for this eventuality in the funding agreement. However, from a realistic standpoint, they do not expect such order to actually get issued by the tribunal. The reason for that is that the high burden of exceptional circumstances required by investment tribunals almost never exists. If tribunals were to apply the Proposal in practice, it would provide for greater foreseeability for funders. If third-party funders knew that the parties funded by them would most likely be ordered to provide security for the likely costs of responding states, they could take this into their considerations when they are faced with the decision on whether or not to fund a potential case.[89]) As a result, this would allow those funders to assess their potential return more accurately.

4. Less Costs and Time to be Spent on Security for Costs Proceedings

The current procedure on security for costs is tedious and, in almost all cases, remarkably costly:

First, a state needs to prepare and file an application with the tribunal, in which it has to point out why the strict requirements for security for costs are met in the case at hand. This first step alone can take up some time and resources by the engaged law firm as well as the applying party itself, and, eventually, lead to significant costs. Following that initial request, in order to comply with the parties' right to be heard, tribunals give them the opportunity to file (at least one round of) written submissions and even conduct oral hearings on the question of whether a requested provisional measure such as

[88]) ICCA-Queen Mary Report, *supra* note 10, at 183.
[89]) Redfern & O'Leary, *supra* note 18, at 413.

security for costs should be granted.[90]) Thus, under the present practice, proceedings on applications for security for costs can often be time-consuming and expensive. The Proposal would definitely lead to a significant reduction of costs and time, as it would only require respondents to apply for security for costs, without the need to make lengthy statements on the existence of possible exceptional circumstances. The only thing respondent would have to argue and – if not to be disclosed mandatorily – prove is that claimant receives outside funding. Further submission and hearings would be dispensable.

Another positive side-effect of the Proposal is that responding states would probably become more reluctant to request security for costs in the first place if they faced the risk of bearing the (often very significant) costs incurred by the claimant for providing this security. For that reason, the Proposal could also lead to a reduction of frivolous applications for security for costs where the sole purpose is to delay the proceedings and/or drive up costs.

B. Challenges and Disadvantages of the Proposal

Even though the Proposal sounds clean in theory, there are several challenges that have to be met in order to make it feasible. Furthermore, there are also disadvantages that would occur if the Proposal was to be applied in practice.

1. Application of a "Cost Shifting" Approach

The concept of cost shifting is of significant importance in any debate on security for costs.[91]) This is particularly true when it comes to the Proposal. When explaining the Proposal, the ICCA-Queen Mary Report stated that (emphasis added)

> *"the costs of that security (i.e., the cost of funding, the cost of ATE insurance premiums, or the cost for a bank guarantee) would be* ***shifted at the end of the case, along with other costs****".*[92])

Thus, in order for the Proposal to be workable in practice, it is necessary that tribunals apply an approach that provides for cost shifting when allocating costs. There are two possible ways how this requirement could be met. First, it would be fulfilled if there was a uniform approach according to which all investment tribunals were to shift costs when rendering their costs decision. The second possibility would be the adoption of a new provision explicitly providing for such cost allocation when the requirements for the application of the Proposal are present.

[90]) Schreuer, *supra* note 20, at Art. 47, para. 12.
[91]) Redfern & O'Leary, *supra* note 18, at 403.
[92]) ICCA-Queen Mary Report, *supra* note 10, at 225.

In order to see whether any of those two options realistically is or could be applied, this article will give an overview of (i) the critiques raised by several commentators in respect of allocation of costs, (ii) the various approaches that have been applied by investment tribunals to apportion costs, (iii) the current practice as well as (iv) recent developments. This will then allow a conclusion on whether the requirement of the application of cost shifting is already fulfilled or at least is likely to be fulfilled in the future.

In contrast to most jurisdictions worldwide, where courts mainly follow the "costs-follow-the-event" approach,[93]) Art. 61(2) ICSID Convention gives investment tribunals wide discretion when it comes to the apportionment of costs.[94]) In practice, tribunals have not applied a uniform approach,[95]) making the actual costs decision unforeseeable for parties. Therefore, it is often criticized that cost allocation in investment treaty arbitration is *"arbitrary and unpredictable"* and that *"the state of the field is largely unknown and often confusing"*.[96]) This is also true under the UNCITRAL Arbitration Rules. Even though Art. 42(1) UNCITRAL Arbitration Rules states that in general *"costs of the arbitration shall in principle be borne by the unsuccessful party or parties"*, the next sentence empowers tribunals to deviate from this approach if it finds that *"apportionment is reasonable, taking into account the circumstances of the case"*. For this reason, many tribunals acknowledged that they have a broad discretion to allocate costs.[97])

Investment arbitration tribunals applied the following three approaches:

First, tribunals have apportioned costs based on "pay your own way" (also called "American Rule"). This approach has been the preferred way for allocation of costs in ICSID proceedings for a long time.[98]) Following this principle, investment tribunals order parties to bear their own costs without taking into account the outcome of the arbitration, plus half of the tribunal and administrative costs.[99]) According to one author, under this principle cost shifting is only possible in extreme cases of bad faith.[100]) The main objectives behind that approach are (i) to not sanction losing parties who have conducted proceedings in good faith as legal outcomes are uncertain, and (ii) to not deter economically weak parties from pursuing or defending their rights.[101])

---

[93]) Noah D. Rubins, *The Allocation of Costs and Attorney's Fees in Investor-State Arbitration*, 18 ICSID Review 1, 109, 109 (2003).

[94]) Schreuer, *supra* note 20, at Art. 61, para. 42.

[95]) *Id*. at Art. 61, para. 19.

[96]) Franck, *supra* note 5, at 189.

[97]) David D. Caron & Lee M. Caplan, The Uncitral Arbitration Rules: A Commentary 866 (2nd ed. 2013).

[98]) *See* statistics below.

[99]) Commission, Moloo, *supra* note 6, at 197, para. 10.44.

[100]) Franck, *supra* note 5, at 192.

[101]) *Id*.; John Y. Gotanda, *Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitrations*, 28 ICSID Review 2, 420, 424 (2013).

Second, tribunals allocated costs based on the "costs-follow-the-event" principle, which is also referred to as "loser pays", "full adjusted costs order" or "English Rule".[102]) Under this approach, a tribunal orders the losing party to reimburse to the winning party all its reasonable costs incurred for the arbitration. The reasons behind this approach are to compensate winning parties and put them in the position they would have been if the wrong had not occurred and to prevent frivolous actions or punishing parties for acting in bad faith.[103]) The landmark case in international investment arbitration in respect of the English rule seems to be *"International Thunderbird Gaming Corporation v. Mexico"*, where the tribunal, against the prevalent practice at that time, found that it is "*debated whether 'the loser pays' (or 'costs follow the event') rule should be applied in international investment arbitration"*, but that *"it appears to the Tribunal that the same rules should apply to international investment arbitration as apply in other international arbitration proceedings*",[104]) thereby arguing in favor of the costs-follow-the-event principle.

The third approach taken by tribunals is the issuance of partially adjusted costs orders (also referred to as partial cost shifting) depending on the parties' relative success or other factors.[105])

Several empirical studies analysed awards rendered by investment arbitration tribunals to see whether there is a trend that is followed by tribunals when allocating costs:

- *Lucy Reed* analysed all publicly available costs decisions rendered by ICSID tribunals between January 2004 and January 2010. Her conclusion was that in around 64 % of the examined cases tribunals apportioned costs based on the American rule. In the remaining 36 %, tribunals shifted costs fully or in part.[106])
- *Susan Franck* has recently published her analyses of 272 awards finally resolving investment treaty claims, which were made publicly available by 2012.[107]) Her research shows that tribunals followed the pay-your own way approach in 57.4 % of the cases, whereas it shifted costs in the remaining 42.6 %.[108])
- *Michelle Bradfield* and *Guglielmo Verdirame* analysed ICSID and UNCITRAL awards issued between 2010 and 2013. They found that there *"is significantly more cost-shifting in the UNCITRAL cases than*

---

[102]) Franck, *supra* note 5, at 191.

[103]) Lucy Reed, *Allocation of Costs in International Arbitration*, 26 ICSID Review 1, 76, 79 (2011); Gotanda, *supra* note 101, at 425.

[104]) *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, January 26, 2006, para. 214.

[105]) Franck, *supra* note 5, at 191.

[106]) Reed, *supra* note 103, at 79.

[107]) Franck, *supra* note 5, at 215.

[108]) *Id*. at 215.

in the ICSID cases".[109]) In 60,8 % of the ICSID awards examined tribunals applied the pay-your own way approach, whereas full or partial cost shifting was applied in the remaining 39,2 %.[110]) In comparison, in 68.8 % of the UNCITRAL awards tribunals shifted costs in full or in part, whereas the American Rule was applied in the remaining awards.[111])

These statistics confirm the critiques mentioned above. However, even though there is no uniform approach when it comes to the apportionment of costs, a recent study by *Commission* and *Moloo* shows that more and more investment tribunals issued decisions applying the principle of cost shifting in the recent past. *Commission* and *Moloo* reviewed 125 ICSID Convention and ICSID Additional Facility awards rendered between ICSID's fiscal years 2011 and 2017 as well as 59 UNCITRAL awards rendered between 2010 and 2017. Their findings show that in 44 % of the ICSID awards tribunals ordered parties to bear their own costs, whereas in 56 % of the cases they rendered adjusted costs orders. In regard of the UNCITRAL awards, the results are similar to the findings of *Bradfield* and *Verdirame* above. They concluded that in 32 % of the UNCITRAL awards analyses parties were required to bear their own costs, in the remaining 68 % of the awards tribunals issued adjusted costs orders.[112])

Compared to the numbers provided by *Reed*, *Franck* as well as *Bradfield* and *Verdirame*, the recent figures by *Commission* and *Moloo* allow two important conclusions: First, UNCITRAL tribunals tend to apportion costs based on the cost shifting approach (68 %). Second, also ICSID tribunals – for the first time – seem to apply the principle of cost shifting more often than they apply the American Rule. Thus, it can be summarized that there is now a trend towards cost shifting in investment arbitration proceedings. This was also confirmed by several other commentators.[113])

ICSID's latest WP 3[114]) addresses the issue of cost allocation in AR 51. AR 51(1) WP 3 lists circumstances investment tribunals should consider when allocating costs. AR 51(1)(a) WP 3 now explicitly mentions that tribunals should consider all relevant circumstances including *"the outcome of the proceeding or any part of it"*.[115]) However, as the explanations in WP 2 clarify,

---

[109]) Michelle Bradfield & Guglielmo Verdirame, *Costs in Investment Treaty Arbitration*, *in* Litigating International Disputes 411, 434 (Chiara Giorgetti ed., 2014).

[110]) *Id.*

[111]) *Id.*

[112]) Commission & Moloo, *supra* note 6, at 199.

[113]) Redfern & O'Leary, *supra* note 18, at 505, n. 30; Sim, *supra* note 26, at 459; ICCA-Queen Mary Report, *supra* note 10, at 222.

[114]) Proposals for Amendment of the ICSID Rules – Working Paper 3, *supra* note 55.

[115]) *Id.*

this provision is not supposed to replace the discretion of tribunals under Art. 61(2) ICSID Convention. The comments provide that (emphasis added)

> *"AR 50 concerns the allocation of costs of the proceeding in accordance with Art. 61(2) of the Convention. Art. 61(2) grants the Tribunal discretion to allocate costs* […]. *The* ***flexibility granted by the Convention best suits the complex fact situations that arise in investment arbitration*** *and could affect a determination on costs allocation."*[116])

and that

> *"****Mandatory cost shifting*** […] ***does not conform with the full discretion accorded to Tribunals under Art. 61(2) of the Convention****."*[117])

Given the clear position by the ICSID Secretariat that mandatory cost shifting (be it full or partial cost shifting) – which is required to make the Proposal workable – is not compatible with the discretion granted to tribunals in Art. 61(2) ICSID Convention and considering the still varying and non-uniform approaches on cost allocation taken by investment tribunals in both ICSID and UNCITRAL proceedings, it seems unrealistic that investment tribunals will change their current (inconsistent) practice in the near future.

Also a necessary change under the ICSID framework and the UNCITRAL Arbitration Rules towards a mandatory approach in favor of adjusted costs orders seems not to be happening anytime soon and also special provisions to shift costs where security for costs are posted seem unlikely at this time. Therefore, the requirement of cost shifting seems to be a large barrier against the functioning of the Proposal.

2. Asymmetry in favor of Impecunious Claimants

If the Proposal were to be applied in the future, it would lead to a significant asymmetry in favor of impecunious claimants compared to solvent claimants that decide to use their own money. One should not forget that even if investors are able to pay their fees (lawyers, institutional fees, experts, etc) out of their own pockets, this also comes at a cost.[118]) If it was not for the arbitration, those investors could have used their money elsewhere, be it by making additional investments (and, thereby, having the chance to make profits), be it by hiring new employees (and, for example, thereby, being able to take on more business) or otherwise. Under the Proposal, such costs are, in general, not recoverable.

---

[116]) Proposals for Amendment of the ICSID Rules – Working Paper 2, *supra* note 54 at para. 339.

[117]) *Id*., at 228, para. 342.

[118]) I want to thank Mick Smith for this observation (interview notes on file with author).

Insolvent claimants or claimants who are simply not willing to use their own funds, on the other hand, would not run risks of losing profits etc. if the Proposal was to be followed by tribunals. Solvent investors, who decide to engage a third-party funder, because they believe their money can be used better elsewhere, would still have the opportunity to invest their money or hire new employees and, through that, earn additional profits or expand their business. Regarding the additional costs incurred to them for providing the ordered security for costs, those investors as well as insolvent investors would have the certainty that, in case of prevailing in the arbitration, they would be made whole by the losing party for all such costs.

This unfairness can certainly not be a desired result of the Proposal and, therefore, also the asymmetry in favor of funded parties is a valid argument against the application of the Proposal.

3. Establishment of a Reasonability Test

It is generally acknowledged that third-party funding does not have an impact on the determination of the recoverable amount.[119]) The relevant provisions for the purposes of this article are Art. 61(2) ICSID Convention, Art. 28(2) ICSID Arbitration Rules and Art. 40(2)(e) UNCITRAL Arbitration Rules. Under these rules, the requirements for the recoverability of costs are that such costs are (i) incurred by a party in relation to the arbitration proceedings and (ii) reasonable.

In contrary to the discussion on the (non-) recoverability of success fees,[120]) it is clear that the costs which were necessary to post ordered security for costs are indeed "*incurred by a party in relation to the arbitration*". The main reason being that the provision of security for costs is necessary to keep the proceedings going as tribunals could otherwise suspend or even discontinue the proceedings when the ordered party fails to comply with the order in time.[121])

---

[119]) Von Goeler, *supra* note 10, at 396, 397; *Ionnis Kardassoppolos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, March 3, 2010, para. 691, where the tribunal held that it "*knows 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*"; *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, April 28, 2011, para. 68, where the ad hoc committee explicitly confirmed the tribunal's finding in Kardassoppolos v. Georgia.

[120]) *See e.g.* 2018 International Arbitration Survey, supra note 16, at 26, where 52 % of the 1,000 people asked said that contingency or success fees should not be recoverable, whereas 48 % said it should be recoverable.

[121]) *See e.g. RSM Production Corporation v. Saint Lucia*, *supra* note 38, Decision on Saint Lucia's Request for Suspension or Discontinuation of proceedings, April 8, 2015, paras. 36, 53–66, where the tribunal by relying on Art. 44(2) ICSID Convention held that it has the power to sanction non-compliance of security for costs orders and

However, in order to be recoverable, the costs for providing security for costs need to be reasonable. It is for the funded claimant to prove that the costs incurred are reasonable,[122]) and for the tribunal to determine whether or not that is the case.[123]) This issue is of major importance as the funded party's costs for providing security for costs would most often be a multiple of the amount actually posted by the funder, *e.g.* by the funder requesting a higher percentage of the funded party's proceeds.[124]) It would not be legitimate to make responding states pay for any costs without considering the requirement of reasonability.

There are well-established reasonability tests when it comes to counsel fees. Tribunals have often relied on a test proposed by Judge Howard Holtzmann in proceedings before the Iran–United States Claims Tribunal.[125]) In his separate opinion, Judge Holtzmann established an often used *"classic test for reasonability"* for counsel fees. In summary, the main criteria he set out were that (i) the reasonability test should be objective,[126]) (ii) the primary focus should be on *"the time spent and complexity of the case"*,[127]) (iii) hourly rates have to be taken into account *("The range of typical hourly billing rates is generally known"),*[128]) and that (iv) the acceptance to pay a bill by a businessman is *"a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves* […]."[129])

The problem concerning ISDS disputes is that no such established test exists in respect to reasonability of costs incurred for providing security for

---

vacated the proceeding for six months and gave respondent the opportunity to apply for a final award once this time limit has elapsed; See, however, *RSM Production Corporation v. Saint Lucia, supra* note 21, Decision on Annulment, April 29, 2019, paras. 187–200, where the *ad hoc* committee confirmed that a tribunal's power to stay and discontinue the proceedings in case of non-compliance with a security for costs order, but found that it "*does not see any basis for a power in the Tribunal to dismiss the case with prejudice*" and, therefore, partially annulled the award; see also Proposals for Amendment of the ICSID Rules – Working Paper 2, *supra* note 54, at AR 51(5) WP 2.

[122]) ICCA-Queen Mary Report, *supra* note 10, at 183.

[123]) Peter Binder, Analytical Commentary to the Uncitral Arbitration Rules 379 (2013).

[124]) Jean-Christophe Honlet, *Recent decisions on third-party funding in investment arbitration*, 30 ICSID Review 3, 699, 712 (2015).

[125]) *INA Corporation v. The Government of the Islamic Republic of Iran*, Case No. 161.

[126]) *Id*., Separate opinion of Judge Holtzmann, where he noted that *"A test of reasonableness is not, however, an invitation to mere subjectivity*", cited in Nigel Blackaby et al., Redfern And Hunter on International Arbitration 536 (6th ed. 2015), and Kabir Dugall & Gerrit Niehoff, *The Conflicting Landscape Relating to Costs in Investor-State Arbitration*, 5 Indian Journal of Arbitration Law 2, 164, 171–172 (2016).

[127]) *Id*.

[128]) *Id*.

[129]) *Id*.

costs in investment arbitration proceedings. The question, therefore, is what criteria investment tribunals should apply in order to assess whether those costs are reasonable.

An interesting case where the reasonability of a third-party funder's success fee was discussed is *"Essar v. Norscot"*.[130]) In this ICC arbitration seated in London, the sole arbitrator held respondent liable also for funded claimant's costs, including the full costs for the success fee owed to its funder under the funding agreement (which provided for repayment of 300 per cent of the sum advanced by the funder or 35 per cent of the sum recovered, whichever was higher).[131]) Essar, who was the respondent in the ICC arbitration, challenged the award before the English courts. The English High Court confirmed the findings of the tribunal.

In its reasoning, the tribunal highlighted that

> *"The requirement that the cost be reasonable serves as an important check and balance in protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders."*[132])

First, it held that the "*funding costs reflect standard market rates and terms*".[133]) Second, the sole arbitrator found that *"there was no credible alternative source of funding"*.[134]) Third, according to the tribunal, Essar "*deliberately caused, or substantially contributed to"* Norscot's impecuniosity.[135])

Following the approaches above and the situation of third-party funding in general, in order for the Proposal to work, investment arbitration tribunals should consider the following objective criteria in order to assess whether the additional costs for providing security for costs are reasonable:

As a first step, the tribunal should ask itself whether the additional costs incurred for providing the ordered costs reflect standard market rates.[136]) Once this is confirmed by the tribunal, it should determine whether the funded claimant could have received better conditions elsewhere.[137]) In addition, investment tribunals should take into account whether it was necessary for claimant to get funded (*e.g.* because of impecuniosity) or whether claimant was only unwilling to spend its own money on the arbitration as a means of allocating corporate resources and risks. In the latter case where claimant had enough funds on its own to provide security for costs, but simply decided to use

---

[130]) *Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited*, [2016] EWHC 2361 (Comm).

[131]) *Id*., at para. 22, where the English High Court referred to the tribunal's award.

[132]) *Id*., at para. 66, where the English High Court referred to the tribunal's award.

[133]) *Id*., at paras. 22, and 28 where the English High Court referred to the tribunal's award.

[134]) *Id*., at para. 24.

[135]) *Id*., at para. 27.

[136]) Tribunals would most likely refer this issue to an expert.

[137]) Also here, tribunals would most likely have to refer this question to an expert.

its capital elsewhere and to get access to the funder's expertise and resources, a recoverability of those additional costs could be considered as unfair towards responding states.[138]) Lastly, a tribunal should take into account whether the conduct of the responding state forced claimant into funding.

4. Extent of Disclosure

The existence of third-party funding is usually not revealed in investment arbitration proceedings.[139]) Funders normally demand from their clients not to be disclosed *"unless the client is compelled to do so under applicable legal disclosure obligation or unless particular circumstances justify disclosure"*.[140]) However, in order to make the Proposal feasible, disclosure of certain circumstances and facts concerning the funding relationship between third-party funder and funded party is necessary. The following paragraphs will provide an overview of the current frameworks and practice on disclosure and will then give guidance on what facts or circumstances need to be revealed.

Neither under the current ICSID framework nor under the UNCITRAL Arbitration Rules mandatory obligations to disclose the involvement of a third-party funder exist. This gave rise to a number of comments arguing in favor of an extensive disclosure obligation. Mostly, such demands were justified by the need of transparency and preservation of the independence and impartiality of arbitrators, *i.e.* to prevent conflicts of interest.[141]) In its new proposed amendments to the ICSID Arbitration Rules, ICSID addresses this issue in AR 14 of WP 3 by providing for a mandatory notice of the fact of funding and the name of the funder, which has to be filed *"upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration"*.[142]) The (sole) rationale behind AR 14 "*is to avoid con-*

---

[138]) But *cf.* Daniel Hemming and Geraldine Elliot, *Essar v. Norscot: the landmark decision third party funding has been waiting for?*, November 10, 2016, where it was said that where funding fees are to be allowed as recoverable, any uplifts under standard market terms will be reasonably incurred and in a reasonable amount, even where claimant would have been able to fund the proceedings on its own but decided to manage risk by obtaining third-party funding (*available at* https://www.rpc.co.uk/perspectives/commercial-disputes/essar-v-norscot-the-landmark-decision-third-party-funding-has-been-waiting-for/, last visited August 14, 2019).

[139]) Park & Rogers, *supra* note 81, at 2.

[140]) Maxi Scherer, Aren Goldsmith & Camille Fléchet, *Third Party Funding in International Arbitration in Europe: Part 1-Funders' Perspectives*, 2 INT'L BUS. L. J. 207, 217 (2013).

[141]) Rachel Denae Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. REV. 2935, 2944 (2018); Derrick Yeoh, *Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?*, 33 Journal of International Arbitration 1, 115, 122 (2016).

[142]) Proposals for Amendment of the ICSID Rules – Working Paper 3, *supra* note 55 at A14(1)(3).

flicts of interest between arbitrators and third-party funders by requiring disclosure of the existence of third-party funding and the name of the funder".[143]) The disclosure of the terms of the funding agreement was intentionally not included in the proposed amendments as the revelation of those terms is not necessary for issues concerning conflicts of interests.[144]) UNCITRAL Working group III has also decided to develop reforms of third-party funding, including issues on disclosure.[145]) It will be seen how UNCITRAL will address this issue.

However, even in the absence of an explicit provision ordering disclosure of facts relating to third-party funding under the present frameworks, some tribunals have held that they have an inherent power to do so.[146]) Furthermore, the general rules on evidence under both the ICSID Arbitration Rules as well as the UNCITRAL Arbitration Rules provide tribunals with a power to order parties to produce documents such as the funding agreement.[147]) The latter was also confirmed in the comments on AR 14 WP 3:

> *"To the extent that the agreement or information in the agreement is relevant to an issue in dispute, this is addressed by other rules. In particular, a Tribunal has power to order production of necessary documents or evidence at any stage of a proceeding."*[148])

There are only very few decisions dealing with disclosure of third-party funding. In *"EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic"*[149]) as well as in *"South American Silver v. Bolivia"*[150]) the tribunal ordered disclosure of the funder's identity. The tribunal in *"Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan"* took it one step further and ordered claimants to disclose not only the identity of the third-party funder but also the terms of the funding agreement, notably without distinguishing between the different parts of the agreement.[151]) The tribunal based its decision mainly on two grounds, namely (i) *"ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a*

---

[143]) Proposals for Amendment of the ICSID Rules – Working Paper 2, *supra* note 54 at para. 128.

[144]) *Id*., at para. 139.

[145]) Report of Working Group III, *supra* note 58, at paras. 20, 25.

[146]) *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6 Procedural Order No 3, June 12, 2015, para. 6.

[147]) Rule 34(2)(a) ICSID Arbitration Rules, Art. 41(2) UNCITRAL Arbitration Rules.

[148]) Proposals for Amendment of the ICSID Rules – Working Paper 3, *supra* note 55, at para. 56.

[149]) *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, supra* note 50, at paras. 144, 145.

[150]) *South American Silver Limited v. Bolivia, supra* note 50, at para. 79.

[151]) *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, *supra* note 146, at para. 8.

third-party funder",[152]) and (ii) the indication by respondent to request security for costs.[153]) In addition, the tribunal clarified that its decision was also supported by the facts that claimants did not deny the existence of a funder and that claimants allegedly failed to comply with an earlier costs order rendered against it.[154])

Disclosure of certain information is essential for the Proposal to work. First, it is necessary for a tribunal to become aware of a funder's existence. Without that, a tribunal faced with a security for costs request would not be aware that the conditions for the Proposal (involvement of a funder) are met and would, thus, not grant such request right away but would rather undergo the current practice of determining whether the strict requirements for granting security for costs are fulfilled. To force such disclosure, tribunals have to make use of their power to order disclosure as early as possible, no later than after receipt of an indication by respondent to consider a request for security for costs.

Second, the question arises whether and, if so, what terms of the funding agreement have to be disclosed. In general, the details about funding should not be disclosed *"unless there is a specific reason for disclosure, usually related to an issue such as security for costs"*.[155]) Such specific reason is given under the Proposal. In order for the tribunal to be able to include the additional costs incurred by claimant to provide security for costs in its costs decision, tribunals need to be aware of the relevant commercial provisions. However, from a practical perspective, it should not be for tribunals to order such disclosure. As it is in the interest of the funded claimants to get reimbursed for those additional costs, it should be for them to reveal these terms on their own volition.

The problem with the disclosure of the full agreement – as was ordered by the tribunal in *"Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan"*[156]) – is that privileged, or otherwise sensitive information may be revealed.[157]) It is, therefore, recommended to only require disclose of the relevant passage of the agreement. The remaining parts of the agreement that are not relevant for the tribunal's evaluation of costs may be redacted. This was allowed, for example, in *"Khan Resources v. Government of Mongolia"*.[158]) In these proceedings, the tribunal held that the redacted copy of a success fee

[152]) *Id*., at para. 9.

[153]) *Id*., at para. 10.

[154]) *Id*., at para. 11.

[155]) Yannaca-Small, *supra* note 15, at 722, para. 25.59.

[156]) *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, *supra* note 146.

[157]) Von Goeler, *supra* note 10, at 400.

[158]) *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, PCA Case No. 2011-09.

agreement with its counsel submitted by claimant provided *"sufficient detail and evidence of the success fee arrangement"*.[159])

5. Differences in the Scope of Funding

Funding agreements are usually the result of negotiations between the funder and the funded party.[160]) Therefore, funding agreements differ in various aspects, *e.g.* in respect of *"the extent of funding commitment, return structure, rights and obligations of the parties and termination rights"*.[161]) Especially the difference in the scope of funding raises problems in respect of the Proposal.

Funded claimants do not always seek or receive so-called "full funding", *i.e.* a commitment by the funder to fund all costs of the arbitration until the end of the proceedings or even throughout the enforcement stage. Sometimes, funded parties and third-party funders agree on a limited scope of funding. In such situations, funders may agree to only pay (i) a certain total amount agreed to by the funder and the funded party, (ii) legal fees of the funded party's counsel, (iii) advance payments to the institution to cover the fees and expenses of the arbitrators as well as the services and expenses of the institution, or only pay (iv) expert costs and other costs of evidentiary means.[162])

In a case where a funder agreed to provide only partial funding without undertaking an obligation to provide security for costs, the Proposal can lead to an unjust result.[163]) A party which receives only a small amount (compared to the total costs of the arbitration proceedings) from a third-party funder would still be forced to comply with a security for costs order issued against it. Where the already involved third-party funder is not willing or able to provide the additional capital, the funded party may not be able to comply with an order requiring the posting of security for costs, be it because it does not have sufficient funds on its own, be it because it cannot find another third-party funder which is willing to provide the required amount, or be it because it is not able to obtain a loan from a bank, a bank guarantee or an ATE insurance. Where this is true, the application of the Proposal would lead to a significant disadvantage for partially funded claimants compared to non-funded claimants:

Whereas partially funded claimants would be required to post security for costs without any examination of the circumstances at hand and, as a result, would be faced with a possible stay and, eventually, with a dismissal of the proceedings in the event of a non-compliance with the order issued against it,

[159]) *Id.*, at paras. 445–447.

[160]) ICCA-Queen Mary Report, *supra* note 10, at 32.

[161]) *Id.*

[162]) Von Goeler, *supra* note 10, at 28.

[163]) I want to thank Jonathan Barnett for this observation (interview notes on file with author).

tribunals would conduct a meticulous determination of whether the strict requirements for granting security for costs are fulfilled where claimants without receipt of funding are involved, which is, as seen above, hardly possible under the current practice. This unsatisfying result is certainly not compatible with the purpose of the Proposal which is to strike a balance between all parties involved in an investment arbitration, but not to disadvantage certain (partially funded) claimants.

The Proposal should, therefore, not be applicable to all cases where third-party funders are involved, but should rather be limited to situations where a party receives full funding (including security for costs) or where the third-party funders provide only partial funding but contractually agree to post security for costs, if ordered, in the funding agreement.

This inevitably leads to an extended requirement of disclosure, namely in relation to those terms of the funding agreement which deal with security for costs. In contrary to the additional costs incurred for posting security of costs, the disclosure of the funding terms on whether the third-party funder is obliged to pay for security for costs is not necessarily in the interest of the funded claimant and, thus, needs to be ordered by the tribunal. As regards timing, this should be done together with the tribunal's order to disclose whether a third-party funder is involved (see IV.B.4 above).

V. Concluding Remarks

The Proposal by the ICCA-Queen Mary Task Force to establish security for costs as a default in investment arbitration proceedings where investor claimants receive outside funding would bring about many positives. The application of the Proposal could aid in achieving the goal of protecting states from cumbersome situations where reimbursement of the costs of the arbitration proceedings is uncertain. One of the main advantages of the implementation being that it could level the playing field by striking a balance between the interests of the participants involved. Responding states, on the one hand, would get the safeguards and security they wanted and claimants, on the other hand, would get fully reimbursed for the additional costs needed to provide security for costs. Furthermore, it would lead to a time- and money-saving procedure by making additional submissions and hearings on security for costs redundant.

However, as was also shown in this article, it seems unlikely that the Proposal can be applied under the current practice of investment tribunals as well as under the present legal frameworks in the near future. Whereas some challenges, like the current uncertainty on the scope of the required disclosure of a funding agreement or the establishment of a not yet existent test of reasonability of costs incurred for providing security for costs, could certainly be solved, there are other issues where this is not the case. First, the necessary

requirement of mandatory cost shifting represents a major hurdle as neither a uniform approach by tribunals exists when deciding on costs nor is ICSID intending to insert a provision providing for mandatory cost shifting as this is not compatible with the discretion tribunals are granted. It will be seen whether UNCITRAL will address this issue differently in their current reformation process. Second, the proposal would lead to an asymmetry in favor of impecunious claimants or solvent claimants that decide to use outside funding, as financially stable claimants who decide to spend their own money would not be reimbursed for possible missed business opportunities and profits.

In any event, the Proposal could not be applied in all cases involving third-party funding, but would need to be limited to situations where funding agreements provide either for full funding or at least for a contractual obligation of the funder to make resources available for paying security for costs, if ordered, to hinder unwanted disadvantages.

Therefore, even if the Proposal sounds desirable and clean from a theoretical perspective, there are too many issues that make the Proposal unworkable and unadvisable, at least at this point in time.