

**THE IMPACT OF THIRD PARTY FUNDING ON APPLICATIONS FOR
SECURITY FOR COSTS**

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STRIKING A BALANCE

“Claimant’s interest in having access to arbitral justice must be weighed against Respondent’s interest in avoiding costly arbitration proceedings with no sufficient security that it would be reimbursed for its expenses in case of success”

(Zurich Chamber of Commerce Arbitration, Award of 20 November 2001, para. 16)

CRITERIA

- The financial situation of the claimant as a whole ('Inability to pay')
- The existence of a third-party funding agreement is only one of many factors that can inform arbitrators about the claimant's financial standing:

“where there is an application against the allegedly impecunious claimant for security for costs ... it's open to the claimant to disclose that he has funding as a way of saying 'I'm not impecunious'.” (Hwang)

- Does the funding agreement cover adverse costs?
- Is there a discretionary right of termination in the funding agreement?

COMMERCIAL ARBITRATION

- Inability to meet a potential adverse costs award is insufficient. This must also be the result of a material change of circumstances

- ICC Case (Procedural Order of 3 August 2012)
 - ◆ “[the funding agreement] rules out any payment of costs awarded to the Respondents and [the funder] is effectively empowered to terminate the Agreement at any time, entirely at its discretion”
 - ◆ Funding agreement held to constitute a significant change of circumstances
 - ◆ No requirement of misconduct or bad faith by the claimant
 - ◆ BUT: Bar on discretionary right to terminate in ALF Code of Conduct
 - ◆ BUT: Claimant was impecunious from the start

INVESTMENT ARBITRATION

- Tribunals grant security for costs requests only in extreme circumstances, such as where the claimant has acted in bad faith or in abuse of process
- San Sebastian Gold Mines v El Salvador (2012): Application rejected
- Guaracachi v Bolivia (2013): Application rejected
- RSM v St Lucia (2014): Application granted (by majority)
- Eurogas v Slovakia (2015): Application rejected
- South American Silver v Bolivia (2016): Application rejected

CONCLUSIONS

- The existence of a funding agreement is not, of itself, sufficient reason to order security for costs
- Claimants should consider disclosing parts of the funding agreement (e.g. if it covers adverse costs)
- In commercial arbitration, a tribunal should primarily consider whether recourse to litigation funding and the alleged change of circumstances that goes with it were *commercially unforeseeable* for the requesting party
- In investment arbitration, tribunals require the party seeking security to provide evidence of extreme circumstances before security for costs can be granted, such as serious misconduct or bad faith