

A partial commentary of the *RSM Production Corporation v. Saint Lucia* decision on Security for Costs

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The decision on security for costs rendered in the *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 has given rise to much discussion and heated debate.<sup>2</sup> Interestingly, the debate is also held within the decision itself which contains all of three opinions: majority, assenting, and dissenting.<sup>3</sup>

Needless to say that these issues are not settled.

The debate encompasses two different questions which harbour varying degrees of controversy:

- 1) Can an ICSID tribunal order security for costs absent specific provisions in the ICSID Convention and the Arbitration rules?
- 2) Is the presence of a third party funder relevant and if so to what extent to that decision?

Despite the well-reasoned and vigorous dissent signed by Judge Edward Nottingham,<sup>4</sup> the arbitral community seems to have come to a view for quite some time: notwithstanding the black letter silence of the relevant bodies of law, orders of security for costs are permissible in exceptional circumstances.<sup>5</sup>

Notwithstanding, the majority opinion reflecting the views of the President of the Tribunal, Professor Siegfried H. Elsing, explains that the institutionalised existence of third party funders inherently changes the assessment a tribunal should make when considering security for costs:

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<sup>2</sup> See for example, Christopher Bogart, *RSM v St Lucia: Why the majority got it wrong on security for costs*, Global Arbitration Review issue of 11 September 2014, at <http://globalarbitrationreview.com/news/article/32964/rsm-v-st-lucia-why-majority-wrong-security-costs/> and Peter Griffin, *RSM v St Lucia: Why the tribunal is to be applauded for security for costs order*, Global Arbitration Review issue dated 26 September 2014, at <http://globalarbitrationreview.com/news/article/33012/rsm-v-st-lucia-why-tribunal-applauded-security-costs-order/>.

<sup>3</sup> *RSM Production Corporation v. Saint Lucia*, (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs of 13 August 2014. See <http://www.italaw.com/cases/2706> for a copy of the Decision prepared by Professor Siegfried H. Elsing (President), the Assenting Opinion signed by Dr Gavan Griffith QC (co-arbitrator) and the Dissenting Opinion by Judge Edward W. Nottingham.

<sup>4</sup> Decision on Saint Lucia's Request for Security for Costs of 13 August 2014, Dissenting Opinion.

<sup>5</sup> See *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008, para. 57; *Emilio Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, Decision on El Salvador's Application for Security for Costs of September 20, 2012, para. 45; *Victor Pey Casado, Fundación Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001, para. 88; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs of October 14, 2010, para 5.16.

*“The fact that Article 47 ICSID Convention and ICSID Arbitration Rule 39 do not expressly make reference to security for costs in particular – nor to any other particular measure – can easily be explained by the time at which the ICSID Convention was drafted. In 1965, issues such as third party funding and thus the shifting of financial risk away from the claiming party were not as frequent, if at all, as they are today. Hence the omission does not allow any negative inference.”*<sup>6</sup>

Hence, had the drafters of the ICSID Convention foreseen the growing importance of third party funding they would have certainly provided arbitrators with the ability to order security for costs because the shift of financial risk away from the claimant would warrant it.

To date, the strong disinclination of arbitrators to order security for costs – particularly in the ICSID environment – is well understood given its inherent defining philosophy targeted towards the protection of investors.<sup>7</sup> That being said, a strong reluctance has in fact been generally shared.<sup>8</sup>

The following proposition has been widely accepted in determining the necessity for an order for security for costs:

- The claimant’s lack of funds is not necessarily sufficient,<sup>9</sup> even more so when it is caused by the respondent.<sup>10</sup>
- A fundamental change in the situation of the claimant is generally required.<sup>11</sup>

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<sup>6</sup> Decision on Saint Lucia’s Request for Security for Costs of 13 August 2024, para 55.

<sup>7</sup> See Forward by Sir Elihu Lauterpacht CBE QC of Christoph H. Schreuer, “The ICSID Convention: A Commentary” (2001).

<sup>8</sup> See Yves Derains and Eric Schwartz, “A Guide to the ICC Rules of Arbitration” (2005), which explains that the drafter of the ICC Rules were reluctant to mention security for costs because they did not wish to encourage such applications which are generally refused in ICC arbitration, page 297. However, it is noteworthy that the LCIA have provided for security for costs orders in its recent amendment of the LCIA Rule 25.2.

<sup>9</sup> It has even been held that insolvency was not sufficient. See Case Report, Procedural Order No. 3 of July 4, 2008 in an ICC Arbitration with its seat in Berne between X S.A.R.L., Lebanon (Claimant), and Y A.G., Germany (Respondent), with Franz Kellerhals Acting as Sole Arbitrator, 28 ASA Bull 37 [Case Report]. (2010): “*Manifest insolvency may not be readily assumed. The opening of bankruptcy would not be sufficient grounds as long as the estate of the bankrupt party has sufficient realizable assets in order to finance the arbitration and to honor a future cost award issued against it*”, page 37, para. 19.

<sup>10</sup> Case Report, supra n. 9: “*If there is no reasonable chance for the defendant to enforce a future cost award in its favor, an order for security for costs must be granted, unless the plaintiff would prove that its financial troubles are directly connected to a behavior of the defendant contrary to the principle of good faith.*”, at 37-45, para. 18.

<sup>11</sup> Pierre A. Karrer and Marcus Desax, *Security for Costs in International Arbitration: Why, when and what if...*, in *Law of International Business and Dispute Settlement in the 21st Century: Liber amicorum Karl-Heinz Böckstiegel*: “[T]here must be a fundamental change of the situation since the basic agreement between the parties was entered into . . . If a party was already insolvent, or was a mere shell, or was, and still is, a resident of a country that is not a signatory to the New York Convention when the arbitration agreement was made, such circumstance would not be sufficient to warrant an order for security for costs. Actually, by entering into an agreement with such a party, the other party has assumed the risk of not being able to collect an award eventually rendered in its favor” at pages 345-346, paras. 33-35.

For example:

- The claimant itself, or its assets, have ceased to be located in a country which is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>12</sup> or
- When the claimant purposely disposes of its assets in order to avoid meeting an adverse award.<sup>13</sup>

Finally, the existence of a third party funder has been regarded as an irrelevant factual element to determine the amount of recovery due to a claimant for its costs.<sup>14</sup>

Although, it is not contained within this accepted proposition, it is difficult to criticise the majority opinion for finding that the claimant's past conduct did give rise to considerable concerns which may very well be regarded as "exceptional circumstances".<sup>15</sup>

However, the majority opinion continues to add that:

*"third party funding further supports the Tribunal's concern that Claimant will not comply with a cost award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honouring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor."*<sup>16</sup>  
(Emphasis added)

The existence of third party funding simply evidences that a claimant either has chosen to rely on financing to pursue its claim or that it had no other option. No more, no less. What if a claimant has taken a bank loan or mortgaged an asset? What inferences should one draw then? So many different scenarios could flow from that simple fact that such a broad statement, in its essence, evidences a misunderstanding of what has become a very sophisticated industry.

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<sup>12</sup> See Karrer and Desax, *supra* n. 11, at 345-346, paras. 33-35.

<sup>13</sup> Andrea Reiner, *Les mesures provisoires et conservatoires et l'arbitrage international notamment l'arbitrage CCI*, J.D.I. at page 893, para. 94 (1998) "The second circumstance in which an order for security for costs seems to me to be justified is when the claimant presents a request for arbitration after making all the necessary arrangements, for example by transferring all its assets, or even filing for bankruptcy, to ensure that an arbitral decision rendered against it will not actually be able to be enforced" (free translation) cited in William Kirtley and Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?* *Journal of International Arbitration* 30, no. 1 (2013) page 19, footnote 19.

<sup>14</sup> See Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award of 3 March 2010, para. 691 and RSM Production Corp. v. Grenada (ICSID Case No. ARB/05/14), Annulment Proceedings, Order of the Committee Discontinuing the Proceedings and Decision of Costs, 28 April 2011, 18 to 19, para. 68.

<sup>15</sup> Decision on Saint Lucia's Request for Security for Costs of 13 August 2014, para 87.

<sup>16</sup> Decision on Saint Lucia's Request for Security for Costs of 13 August 2014, para 83.

In this context, our attention is thereafter naturally drawn towards the most controversial statement articulated in the assenting opinion which concludes that the presence of a third party funder should trigger an automatic reversal of the burden of proof allowing a tribunal to order security for costs if the claimant does not prove its ability and willingness to pay adverse costs in case the Tribunal find for the respondent.<sup>17</sup>

A careful review of the majority and assenting opinion therefore indicate a misunderstanding and a surprisingly aggressive attack of third party funding:

*“Such a business plan for a related or professional funder is to embrace the gambler’s Nirvana: Heads I win and Tails I do not lose.*

*The founders of the Convention could not have foreseen in any way the emergence of a new industry of mercantile adventurers as professional BIT claims funders. It is no reach to find that, as strangers to the BIT entitlement, such funders also should remain at the same real risk level for costs as the nominal claimant. In this regard, the integrity of the BIT regimes is apt to be recalibrated in the case of a third party funder, related or unrelated, to mandate that its real exposure to cost orders which may go one way to it on success should flow the other direction on failure.”<sup>18</sup>*

The following demonstration is not yet another impassioned outcry in defence of claimants or third party funders, although by definition partial, but an opportunity to decipher the underlying reasoning and to shed some (more) light on the reality of third party funding.

The assenting and to some extent the majority opinions, seem to have been based on the following system of belief:

- 1) Funders do not carefully assess, review and consider the claims they fund; they gamble.
- 2) Come what may, funders do not lose. They are always winners.
- 3) Had the founders of the Convention foreseen the emergence of third party funding, they would have required automatic orders for security for costs in funded cases.

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<sup>17</sup> Decision on Saint Lucia’s Request for Security for Costs of 13 August 2014, Assenting opinion, para 18.

<sup>18</sup> Decision on Saint Lucia’s Request for Security for Costs of 13 August 2014, Assenting opinion, paras 13 to 14.

- 4) Because of the nature of their business, funders should take a larger risk than that of the possibility of losing the entire investment in arbitral proceedings when the average total costs are of USD8 million.<sup>19</sup>

A couple of facts should be carefully considered before any conclusions are drawn on the topic:

- 1) Professional funders simply do not fund spurious claims. They make careful and researched investment decisions with the help of the most sophisticated and experienced practitioners. Gamblers would not last long in this industry. Similarly, lawyers that accept contingency fees only do so when they have as much comfort as possible that they hold a winning hand. That being said, not all funders are professional funders. Claimants and their counsel should carefully select those with which they decide to share a common interest in the success of a case. The Association of Litigation Funders is a good place to start ones' investigation.<sup>20</sup>
- 2) Approximately 50% of funded claimants are in a financial position to pay for the costs of arbitration themselves only they have made a business decision not to freeze their liquid capital in lengthy and expensive proceedings but to allocate that cash to what they do best, make more cash. We are noting growing interest from this category of claimants and are sometimes even asked to consider bundled portfolios of claims. The days where litigation funding was only a tool to help Davids fight Goliaths, are behind us now. Goliaths have also awakened to the advantages of de-risking and allocating their cash to profit making centres.
- 3) Immobilising large sums of money for a considerable period of time comes at a price. Security for costs increases the price of third party funding for the claimant. All arbitration and litigation practitioners have heard about the time value of money. This important fact which is discussed at great length when investigating the quantum value of a claim, should not be forgotten when considering security for costs. If security for costs is requested, by either claimant or respondent, (1) they should be ordered to remunerate that immobilisation at an appropriate rate should the request have been abusive and (2) to immediately reimburse the claimant for the costs of defending an application for security for costs if it is rejected. One of the greatest criticism formulated against international arbitration is precisely the issue of its great cost and length. More and more natural users of international arbitration are returning to traditional state courts for those reasons. Handing respondents a further means of systematically delaying proceedings can only further endanger the future of international arbitration. No respectable practitioners will disagree that they will use all procedural tools in order to protect the

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<sup>19</sup> OECD, *Government Perspective on Investor-State Dispute Settlement: A Progress Report*, Freedom of Investment Roundtable. 14 December 2012, OECD, Investment Division, Directorate for Financial and Enterprise Affairs, Paris, France, page 8, at: <http://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf>.

<sup>20</sup> For more information on the association see <http://associationoflitigationfunders.com/>.

position of their client. Sometimes these include delaying tactics and the costs of these delaying tactics should be borne by those utilising them abusively.

- 4) Sophisticated funders offer After the Event Insurance (ATE insurance) which provides an indemnity for the opponent's costs in the event that a claimant's case is lost at a hearing or discontinued with the funder's approval. These insurances naturally come at a premium which is borne by the claimant.<sup>21</sup>

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Imposing systematic and unremunerated security for costs order when a funder, bank loan, or mortgage are needed by 50% of claimants, will inevitably hinder the access to justice for many potentially deserving claimants. It is noteworthy to be reminded that investment treaty dispute resolution mechanisms were designed to protect those that needed protection, the investors, not the contracting states. In numerous occasions, investors have found themselves in dire financial positions precisely because of the acts of the host state, had their assets seized and confiscated by those host states. The proposition that these investors should systematically be asked to pay security for costs if they have managed to obtain third party financial support, thereby increasing substantially the cost of that financing to pursue redress is somewhat contradictory.<sup>22</sup>

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<sup>21</sup> For example, Vannin Capital offers ATE insurance when appropriate in its funding package.

<sup>22</sup> The fact that the ICSID panel has come to the conclusion that the assenting opinion did not give rise to any concerns of bias does not in any way indicate that the assenting opinion was correct or appropriately reasoned, see a commentary of the decision that was not made public at [http://globalarbitrationreview.com/news/article/33100/griffith-not-biased-against-funders-rules-panel/?utm\\_medium=email&utm\\_source=Law+Business+Research&utm\\_campaign=4923671\\_GAR+Briefing&dm\\_i=1KSF,2XJ4N,9U1DV3,AL2FV,1](http://globalarbitrationreview.com/news/article/33100/griffith-not-biased-against-funders-rules-panel/?utm_medium=email&utm_source=Law+Business+Research&utm_campaign=4923671_GAR+Briefing&dm_i=1KSF,2XJ4N,9U1DV3,AL2FV,1).