Report of the Third Party Funding in Arbitration Global Fourm (4th SCLA Global Forum)

Lead Reporter: Dr.Hermann Knott (drafted by Martin Winkler)

Additional Volume of the ***Jorunal of Swiss Chinese Law Review***
(ISSN:2673-3870), June 2020

INTRODUCTION OF SCLA

TIANZE ZHANG
COMMITTEE MEMBER AT SWISS CHINESE LAW ASSOCIATION

SCLA publishes the Journal of Swiss Chinese Law Review ,reflecting the up-to-date legal as-pects, e.g. relating to the COVID 19-pandemic. To sum up: SCLA membership provides excellent networking and business opportunities plus the chance to widen substantive knowledge and con-ceive new legal products.

The SCLA was founded in 2019and is headquartered in Geneva, Switzerland Geneva was deliberately chosen as a center for international organizations and a symbol of civil liberties (think about the various Geneva Conventions). Its vision is to be a forum and supporter of furthering the understanding and exchange between European and Asian countries. The two countries referred to in its name are a reference to the respective regions, thus not excluding, but inviting for lawyers, law firms, business enterprises and other organizations to join as members.

In line with its vision the SCLA promotes exchange between its members and with International organizations, represented by over 100 members 12 countries and regions(British Virgin Island, Canada, China, France, Germany, Hong Kong SAR, Italy, New Zealand, Nigeria, Portegual, Switzerland, United Kingdoms and United States), it acts as a Global Community, Global Voice and a Global Vision for European and Asian Lawyers. SCLA is applying for an observer status of United Nations Conference on Trade and Development (UNCTAD), and preparing its applica-tion for United Nations Commission on International Trade Law (UNCITAL).

THIRD-PARTY FUNDING IN TIMES OF CORONA: A CASE EXAMPLE

PHILLIP WIMALASENA (SWITZERLAND)
SENIOR ASSOCIATE AT SCHELLENBERG WITTMER

> *One may further ask who is bound by the obligation of confidentiality in our case? Is it the Parties, the counsel, the funder or all of them? And again, it depends on the applicable rules.*

An imaginary case lies in the fact that the Claimant is a Swiss restaurant chain offering organic Italian cuisine. The Respondent, an Italian family-owned agricul-tural company delivered organic fruit and vegetables from Lombardy to the Claimant on the basis of a long-term contract for supply. This contract contains an Arbitration clause according to which the Swiss Rules of International Arbitra-tion shall apply, the seat of the Arbitration shall be Zurich and the Arbitral tribu-nal shall be composed of three Arbitrators. Due to the Corona-pandemic the Re-spondent could not meet its delivery obligations anymore. The Claimant filed a Notice of Arbitration seeking damages for non-performance. Because of the lock-downs related to the Coronavirus, Claimant needs funds to finance the Arbitration proceedings and instructed its lawyers to contact a Third-Party Funder.

CONFIDENTIALITY

This case study gives rise to different issues. The first one is confidentiality. The concept of confidentiality in Arbitration proceedings is a rather complex issue. Often the Parties to Arbitra-tion proceedings are bound by such an obligation. It is however rather clear, that a Third-Party Funder in our case is not Party to the Arbitration proceedings. So, the question is whether case-related confidential information can be shared with a Third-Party Funder.

Then , according to Philip Wimalasena it depends on the applicable rules either on the Parties' agreement or - if there is none - on the applicable Arbitration Rules. The Swiss Rules do not - at least not expressly - prevent a Party from sharing its own documents or from disclosing the ex-istence of the Arbitration as such. One may further ask who is bound by the obligation of confi-dentiality in our case? Is it the Parties, the counsel, the funder or all of them? And again, it de-pends on the applicable rules.

That confidentiality clause should – if desired by ta future Claimant – (i) allow TPF and address the proper analysis of conflicts of interest (see item 4.4 below), and (ii) provide for an exemption with regard to disclosing information – on a confidential basis – to such TPF.

LEGAL PRIVILEGE

nother issue may be legal privilege. So, the question is whether the fact that a Party gives con-fidential case-related information to a Third-Party Funder could be interpreted as a waiver of at-torney-client privilege?T his fact may be very relevant in subsequent discovery-proceedings under common law procedural rules. Under Swiss law the position is that the mere fact that a Party shares confidential information with a Third Party does not amount to a waiver of attorney-client privilege.

In any event, it is advisable that the third-party funder and the funded party enter into a confidentiality agreement, thus ensuring that the disclosure of information to the funder does not cause the status of privilege or confidentiality protection to be lost.

Disclosure of Third-Party Funding and conflicts of interest

The question arises whether the Arbitral Tribunal or the Respondent, provided they have knowledge of the funding agreement, may request that this agreement be disclosed in the Arbi-tration proceedings. As the funding agreement contains very sensitive information on the finan-cial situation of the funded Party (Claimant) and in particular how the Funder will be compensated, both the Claimant and the Funder will prefer to keep this arrangement confidential. With one Par-ty funded by a Third-Party fund this raises questions of conflicts of interest. For example, it may well be that there is a personal connection between the funder and the Arbitrator or the Funder and the Arbitrator's law firm. Or if the funder is a listed company the Arbitrator may hold shares in that company and thus have a financial interest in its success.

Dr. Philip Wimalasena briefly summarized the current approach to these issues: There appears to be a growing consensus in the Arbitration community that the Party being funded should dis-close this fact and the identity of the funder with a view to potential conflicts of interest. Although, currently, the Arbitration Rules do not foresee such an obligation this is at least the recommenda-tion in the ABA Guidelines on conflicts of interest in International Arbitration. What if the funded Party refuses to disclose that fact? Different Arbitral tribunals, in particular in investment dis-putes, have come to different conclusions, but there appears to be consensus that the general rules of document production shall apply meaning that the Party requesting the disclosure must show first of all that the documents are relevant for the case and secondly material to its out-come. Showing the relevance and materiality of the funding agreement to the case may prove difficult. Therefore, in practice it is very difficult to get access to the funding agreement.

As re-gards conflicts of interest specifically, Arbitral tribunals have denied production of documents requests if the identity of the funder is already known for example from press reports which would allow the Arbitral tribunal to assess whether there was a conflict of interest.

COMMENT FROM THE REPORTER

Barring avoiding conflicts of interest, whether Claimant uses TPF appears not to be relevant to the conduct of the arbitration proceedings. A proper procedure to resolve conflicts of interest could be the following – and for successfully conducting this proce-dure the Parties would need to be sure which rules (lex fori or special set of rules, e.g. IBA Guidelines on conflicts of interest in International Arbitration) : Claimant asks Funder and the Arbitral Tribunal or Secretariat of the Arbitral Institution under the rules of which the arbitration is conducted if it sees a conflict of interest, e.g. from prior or parallel relationship with arbitrator or his law firm. If there is any indication of a conflict, it will be disclosed in arbitration procedure. The disclosure for conflict purposes does not require the terms of the funding to be disclosed as well, unless the Arbitral Tribunal/Secretariat of the Arbitration Institution so decides on the grounds that it is necessary to resolve the potential conflict of interest. But then Claimant may withdraw from funding by the particular fund prior to such disclosure. All communication with regard to a conflict of interest needs to be shared with the other party in the arbitration in the interest of transparency and to avoid subsequent challenges of the arbitration award.

If, however, the costs of TPF could be the object of cost recovery claims by the Party having used the funding (see No. 10.2 below, English case of Essar v. Norscot), then of course the terms of the TPF need to be disclosed.

Joinder of the Third-Party Funder

A joinder would be in the interest of the other Party in order to prevent the funder from walking away following a

negative outcome which would jeopardize the other Party's cost claims. Different Arbitration Rules set forth different requirements for a joinder. In any case the Arbitral tribunal must have jurisdiction over the funder. That is a problem if the funder has not signed the Arbitration agreement. Unless the funder agrees to be bound by the Arbitration agreement, a joinder would not be an option.

SECURITY FOR COSTS

Requesting security for costs may be an option. A security for costs is intended to secure a Par-ty's claim for reimbursement of costs in the event that it is successful in the Arbitration. If the Defendant considers that it has good chances of winning the case, under a number of Arbitration Rules this means that the Claimant not only has to bear its own costs but also the costs of its opponent. So, if the Defendant has doubts that the Claimant has sufficient funds to pay the De-fendant's costs in the end, the Defendant may ask the Arbitral tribunal to order the Claimant to pay security for costs on a security account.

The requirements for security for costs differ under the various Arbitration Rules. Under the Swiss Rules a Party needs to show (1) that there is a reasonable chance that the requesting Party will be entitled to a reimbursement of costs and (2) that it will suffer harm that is not ade-quately reparable by a subsequent award unless the order is granted. The second criterion is typically considered met where a Party's financial situation deteriorated after it entered into the Arbitration agreement or if a Party is manifestly unable to pay.

How does Third-Party funding come into play? If the Claimant decided to be transparent about the funding agreement and in-forms the Arbitral tribunal that it is being funded by funder X. The Respondent may try to run the argument according to which the fact that the Claimant is funded shows that it has no money and that thus its application for security for costs should be granted. However, at least in Switzerland such an argument would likely not succeed mainly because there can be many reasons for a Party to resort to Third-Party funding for example cash flow-management.

However, the reporter argues that….. The obtaining of third-party funding is not necessarily an indication of lack of funds of the Claimants. There are good reasons of risk sharing (no responsi-bility for procedural costs) why third-party funding could be obtained(further detail….)

FRENCH PERSPECTIVE AND ICC-PRACTICE ON THIRD-PARTY FUNDING

CAROLINE DUCLERCQ (FRANCE)
PARTNER AT MEDICILAW

From French perspective, there is no legal regulation on Third-Party Funding under French do-mestic law. Since there is no legal prohibition, it is considered authorized. In International Arbitra-tion Parties use more and more Third-Party Funding for the following reasons: to finance the Arbitration proceedings, to reduce the risk of having to pay a high awarded to the Claimant or as counterclaims to the Respondent (TPF may not only relate to legal fees, but – particularly on the Defendant's side also to the risk related to the merits of the case, i.e. having to pay the amount awarded) or to benefit of the Third-Party Funder's expertise in the enforcement of the award. Although, there exists no legal regulation of Third-Party Funding in French law, in November 2015, the National Council of Bars passed a resolution recalling that the counsel should remain independent towards the Third-Party Funder. This has the following implications: the counsel should remain bound only by the client's instructions which is of particular importance since the Third-Party Funder may try to interfere with the proceedings and have a lead on the strategy. And the professional secrecy of lawyers only applies to the relation client/lawyer and not to the relation Third-Party Funder/lawyer.

ICC-PRACTICE

Regarding the ICC-Rules and Practice, it can be observed that there is no provision on Third-Party Funding in the ICC-Rules. However, the ICC Guidance Note for the disclosure of conflicts of interest by Arbitrators according to which the Arbitrators - when declaring their statement of independence and impartiality and assessing whether to make a disclosure - should consider relationships between Arbitrators, as well as relationships with any entity having a direct eco-nomic interest in the dispute. Thus, Arbitrators shall declare whether they have relationships with a Third-Party Fund. For the future, there is discussion within the ICC whether to provide for an obligation in the Rules for the Parties to disclose whether they use Third-Party Funding.

WHAT TO BE REGULATED IN THE FUTURE?

The question what are the main issues that shall be regulated? The first issue is conflicts of in-terest. Since Arbitrators shall submit a complete statement of independence and impartiality, the ICC informs them about all the Parties involved. The question then arises whether the Arbitrators need to be informed of the use of Third-Party Funding and the identity of the Fund. In order for the ICC to provide this information, the Parties shall be obliged to disclose the existence of Third-Party Funding and the identity of the fund before the constitution of the Arbitral tribunal. Only then, the Arbitrators can submit a complete disclosure. Disclosure after the constitution of the Arbitral tribunal involves the risk of having to recall an Arbitrator.

The second issue is who is the real party to the arbitration proceedings. In a recent case , the Respondent requested the arbitral tribunal to join a “Third-Party Fund” as a co-claimant.The arbitral tribunal refused to join the “Third-Party Fund” since it was not a party to the arbitration clause which could also not be extended to it.Therefore,it has no rights and obligations towards the respondent because the assignment of the claim in dispute by the claimant depends on the future decision of the Arbitral tribunal and the Third-Party Fund did not have any control on the proceedings. Therefore, different arbitral tribunals may reach a different conclusion where the assignment of the claim in dispute is effective before the initiation of the proceedings and where the “Third-Party Fund” may exercise complete control on the proceedings.

CHEN JIAN (CHINA)
Vice Secretary General, China Academy of Arbitration Law

CHINA AND CIETAC PERSPECTIVE OF THIRD-PARTY FUNDING

ISSUES UNDER PR CHINA ARBITRATION PRACTICE ESPECIALLY THE CIETAC GUIDELINES

Third-Party funding is not regulated in the PR China Arbitration law. Consequently, it is not pro-hibited. Under PR China Arbitration Practice Parties may practice Third-Party funding. The “import” of Third-Party funding from other countries has encouraged its proliferation. The issues under PR China Arbitration Practice are disclosure, privacy and maintaining justice. These issues are also addressed in the CIETAC Guidelines.

There are no legal provisions existed on what shall be disclosed in China. However, disclosure is an issue in the arbitration rules of the most important arbitration institutions in relation to possible conflicts of interest. In such case, the relevant factors should be disclosed,including the third-party funding.

In relation to the privacy issue, It is not an important issue since it is for the funders to keep confidential information closed, which they had received from one of the Parties.

DISCUSSION

During the discussion, a participant took the view that the issue of regulation of Third-Party fund-ing depends on whether one is in common law jurisdiction or in a civil law jurisdiction. In common law jurisdictions Third-Party funding is prohibited and therefore an express provision allowing it required. To the contrary, in civil law jurisdictions Third-Party funding is not prohibited. Therefore, no express allowance is insofar required. It has been observed that China follows the civil law tradition and as there exists no express prohibition. Third-Party funding is allowed.

Another participant explained the Indian perspective. Under Indian law, Third-Party funding is not allowed in litigation and arbitration. A further participant observed that the Irish Supreme Court invalidated an award because of Third-Party funding.

THIRD-PARTY FUNDING IN SWITZERLAND

LUCIEN WILLIAM VALLONI (SWITZERLAND)
PARTNER AT FRORIEP

THE LEGALITY OF LITIGATION FUNDING UNDER SWISS LAW ACCORDING TO THE DECISION OF THE FEDERAL SUPREME COURT OF SWITZERLAND (BGE 131 (2004) I 223)

When accepting litigation funding in its 2004 decision theThe Federal Supreme Court of Swit-zerland Swiss Federal Tribunal was considering several issues. The first was independence of the lawyer. The Federal Supreme Court of Switzerland considered that even if under the funding agreement he is obliged to inform the funder fully and promptly on all aspects of the case, the independence of the lawyer is not affected. According to the Federal Supreme Court of Switzerland , the independence of the lawyer is also given even if he may not settle the case without the funder's prior approval under the funding agreement.(footnote required) The next issue was the lawyer's duty of confidentiality. According to the Federal Supreme Court of Swit-zerland the lawyer may share confidential information on the case with the funder provided his client gives him permission to do so. In this context the Federal Supreme Court of Switzer-land highlighted that litigation funding may also benefit the client since the funder also assesses the prospects and risks of litigation. There is also a duty for the lawyer to inform his client about litigation funding possibilities. Third, the Federal Supreme Court of Switzerland also ad-dressed conflicts of interest issues. Lawyers have a contractual and a statutory duty to avoid conflicts of interest. Insofar the Federal Supreme Court of Switzerland considered that the client's interest and the Third-Party funder's interest are aligned because both are interested in obtaining the best possible result.

However, a conflict of interest may arise if the funding agree-ment is not clear when a settlement may be accepted or not. Therefore, this issue must be clear-ly addressed in the funding agreement. Furthermore, the Federal Supreme Court of Switzer-land considered that a conflict of interest does not arise from the mere fact that the funder and the lawyer want to work together at a long-term. However, the lawyer is under an obligation to put the client's interest first and foremost. Then, the Swiss Federal Tribunal stated that a double representation i.e. the lawyer represents the client and the funder, is prohibited. According to the Federal Supreme Court of Switzerland some clauses may be inadmissible in funding agree-ments. Such clauses may be an excessive share of proceeds of the litigation for the funder and an unclear separation of the roles of the lawyer and the funder.

SUCCESS-RELATED REMUNERATION FOR LAWYERS UNDER SWISS LAW

The Swiss Federal Lawyers Act prohibits a full success fee. However, as so-called pactum de palmario is permissible i.e. a mixture of an hourly fee and a success fee. According to the Fed-eral Supreme Court of Switzerland the requirements for such a pactum de palmario are as fol-lows: The lawyer is required to collect at a minimum a fee that fully covers all his costs plus a modest profit. The success fee should not exceed the double amount of the minimum permissible fee. And a pactum de palmario is only permitted at the beginning or at the end of a mandate.

NO DUTY OF THE PARTIES TO DISCLOSE LITIGATION FUNDING

The Parties are under no obligation to disclose the fact that they use Litigation funding since the court can decide the case without that information.

DIFFERENT SITUATION IN ARBITRATION PROCEEDINGS

However, in Arbitration proceedings there is at least a tendency that the Parties need to inform the tribunal that they use Third-Party funding because this information may be relevant for the decision by the Arbitral tribunal when deciding on a security-for-cost application.

ATTORNEY-CLIENT PRIVILEGE ALSO EXTENDS TO LEGAL DOCUMENTS SENT TO THE LITIGATION FUNDER

Finally, the Attorney-client privilege also extends to legal documents sent to the litigation funder. Therefore, there are no disclosure obligations insofar.

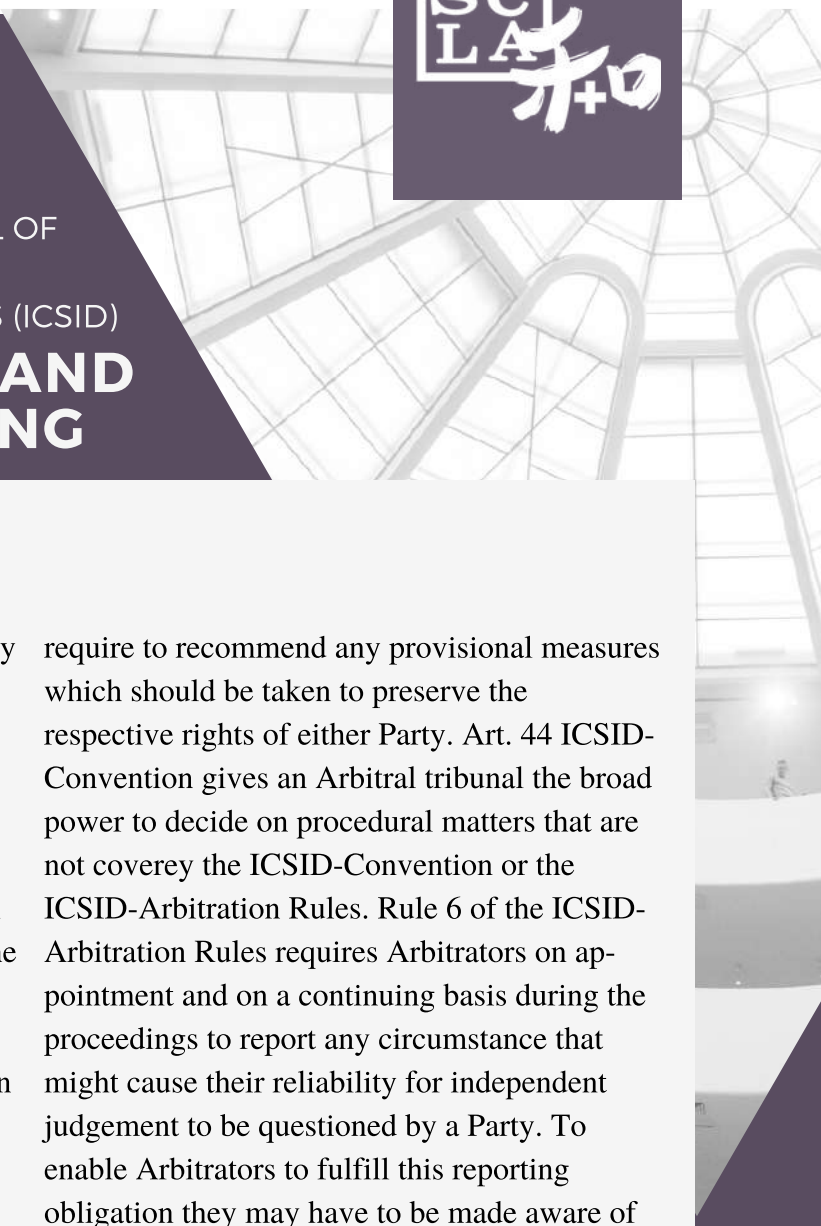
DISCUSSION

Tianze Zhang asked about the legal situation in Germany in relation to pactum de palmario. A participant explained that there is a strict prohibition of success fees under German law. However, this restriction only applies to lawyers not to Third-Party funders. For them there are no re-strictions. Dr. Lucien W Valloni added that the situation is similar under Swiss law. Then Tianze Zhang asked a participant from Portugal where there is no Third-Party funding at all as he explained whether an award may be enforced in Portugal or whether it would be invalidated because of Third-Party funding. The participant from Portugal explained that there exists no Supreme court decision on that matter and took the view that a Portuguese court would not have a basis to invalidate an award.

Comments from the Reporter: Under German law, success fees are not prohibited, but allowed under certain circumstances, i.e. the person pursuing its legal interest would not raise the claims unless the lawyer agreed to a success fee. That principle does not only allow success fee if a person is represented who otherwise could not afford paying an attorney. Success fees are also permitted in case e.g. a businessperson is not prepared to invest money into the ordinary law-yers' fee but is only prepared to pay the fees out of the amount recovered from the Respondent.

ANTONIO R. PARRA(UNITED STATES)
FORMER DEPUTY SECRETARY-GENERAL OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

ICSID-ARBITRATION AND THIRD-PARTY FUNDING



Mr. Antonio R. Parra began his presentation by defining the term ICSID-Arbitration and outlining the relevant issues. He is currently a consultant with the World Bank and worked before for 15 years with ICSID, lastly as Deputy Secretary General: For the purpose of his presentation ICSID-Arbitration shall mean Arbitration conducted under the auspices of the International Centre for Settlement of Investment Disputes in accordance with the ICSID-Convention. The issues that have arisen in connection with Third-Party funding are disclosure of funding and security for costs.

RELEVANT PROVISIONS OF THE ICSID-CONVENTION

To explain this, he highlighted some provisions of the ICSID-Convention. These are Articles 14 and 40 ICSID-Convention according to which ICSID-Arbitrators must be persons upon which one can rely to exercise independent judgment. Under Articles 57 and 58 ICSID-Convention an Arbi-trator may be removed from the Arbitral tribunal on account of any fact indicating a manifest lack of reliability or independent judgment. Further provisions are Articles 47 and 44 ICSID-Convention. Art. 47 ICSID-Convention authorizes an ICSID-Arbitral tribunal if it considers that the circumstances so require to recommend any provisional measures which should be taken to preserve the respective rights of either Party. Art. 44 ICSID-Convention gives an Arbitral tribunal the broad power to decide on procedural matters that are not coverey the ICSID-Convention or the ICSID-Arbitration Rules. Rule 6 of the ICSID-Arbitration Rules requires Arbitrators on ap-pointment and on a continuing basis during the proceedings to report any circumstance that might cause their reliability for independent judgement to be questioned by a Party. To enable Arbitrators to fulfill this reporting obligation they may have to be made aware of the presence in the case of a Third-Party funder. In the cases the Parties have been ordered to disclose the presence and identity of Third-Party funders.

SECURITY FOR COSTS

Regarding security for costs, it is now common in ICSID-Arbitration for parties expecting to pre-vail on the merits and to be granted reimbursement for their legal costs, to apply for provisional measures under Art. 47 of the ICSID-Convention directing the opponent to provide security for these costs. This was first done so in the ***Mafezini v. Spain*** , a case in

which the ICSID-Arbitral tribunal took the view that evesn if Art. 47 ICSID-Convention is worded in a way that the tribunal may only recommend provisional measures such measures are mandatory. However, in the Maf-ezini case the tribunal rejected the application for provisional measures in part because it consid-ered that provisional measures could not be granted under Art. 47 ICSID-Convention in respect of rights that were merely hypothetical; the hypothesis being that the applicant would prevail on the award on costs. In the subsequent cases the tribunals took the view that security for costs may be ordered in exceptional cases. However, in none of the subsequent cases have the tribu-nals considered that the existence of Third-Party Funding in itself awarded the grant of an order for security for costs. There are only two ICSID Arbitration - as defined above -cases where se-curity for costs has been ordered. In the first case (RSM Production Corporation v. Saint Lucia) such order was based on a history of non-compliance with cost orders in other ICSID cases by the respondent. In the second case (Dirk Herzig as insolvency administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan) it was critical for the tribunal's conclusion that it should order security for costs that the funding agreement explicitly excluded the possibil-ity that the funder could be held liable for hypothetical cost awards against the insolvent claimant.

PROPOSED AMENDMENTS OF THE ICSID-ARBITRATION RULES

Under the proposed amendments of the ICSIDArbitration Rules Parties would be obliged throughout the arbitration proceedings to disclose the name of any Third-Party funder. There is no express provision under the current rules. . Arbitrators would from the outset and during the proceedings be obliged to declare any professional or other relationships with the Third-Party funders This is not explicitly required now. The second proposed amendment addresses securi-ty for costs and would make the power of the arbitral tribunal to order security for costs a stand-alone authority separate from the ICSID-framework for provisional measures. A further aspect is that the tribunal may discontinue the proceedings in the event of non-compliance with an order to provide security for costs.

DISCUSSION

Tianze Zhang asked whether there was a doctrine of binding precedent in ICSID-Arbitration.Mr. Antonio R. Parra explained that there existed no such a doctrine. However, the previous deci-sions may have persuasive authority. Despite the different outcomes of the cases on security for costs these decisions are consistent in that they have emphasized that security for costs may only be ordered exceptionally.

THIRD-PARTY FUNDING AND FINANCIAL ASSISTANCE IN INVESTMENT ARBITRATION

KOOROSH H. AMELI (NETHERLANDS)
AMELI INTERNATIONAL ARBITRATION

After presenting different official definitions of Third-Party funding and financial assistance Mr. Koorosh H. Ameli discussed whether these definitions cover respondent's defenses and counter-claims and lawyers' contingency fees. Mr. Korosh Ameli is an arbitrator and legal consultant based in The Hague. He was particularly involved in the US-Iran arbitration cases.

DISCLOSURE REQUIREMENT

He then turned to the presentation of rules concerning Third-Party Funding and financial assis-tance. These are the Permanent Court of Arbitration Financial Assistance Fund Terms of Refer-ence 1994. The contribution of these rules is however highly limited. A disclosure requirement is provided for in the UNCITRAL Arbitration Rules 2010, the IBA Guidelines on Conflict of Interest in International Arbitration and Art. 8.26 of the EU-Canada CETA(Note). There is no regulation of the operation of Third-Party Funding except for some national law rules such as Singapore, Hong Kong, and Abu Dhabi.

SECURITY FOR COSTS

Under the framework of interim measures under UNCITRAL Rules which also apply to security for costs the criteria for granting such order are: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially out-weighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim and (c) an urgency requirement. The recent case of Tennant Energy v. Canada deals with these criteria.

THIRD-PARTY FUNDING IN INTERNATIONAL COMMERCIAL ARBITRATION

JERN-FEI NG(UNITED KINGDOM)
ESSEX COURT CHAMBERS

Mr. Jern-Fei Ng QC was the next speaker. He is a QC with Essex Court Chambers in London. He addressed three topics from the perspective of English law and similar common law jurisdictions: (1) a brief history of the common law doctrine of champerty and maintenance illustrated by the decision of the Singapore Court of Appeal in Otech Pakistan Pvt Ltd v Clough Engineering Ltd , (2) recovery of Third-Party funding costs illustrated by the decision of the English Commercial Court in Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd and (3) disclosure of Third-Party funding.

A BRIEF HISTORY OF THE COMMON LAW DOCTRINE OF CHAMPERTY AND MAINTENANCE

As a result of the prohibition of the champerty and maintenance doctrine under common law Third-Party funding is either prohibited entirely or to a certain extent in a number of jurisdictions. In 2006 the Singapore Court of Appeal dealt with that doctrine in the case of Otech Pakistan Pvt Ltd v Clough Engineering Ltd. The question in that case was whether that doctrine applied to Arbitration as well. The Singapore Court of Appeal answered in the affirmative holding that the public policy reasons underlying that doctrine which are designed to avoid the intermeddling in the litigation affairs of others applied to Arbitration in as much as litigation primarily in order to protect the purity of justice and second to protect vulnerable litigants.

However, in 2007, the Hong Kong Court of Final Appeal took a different view: the policy considerations underpinning the prohibition of champerty and maintenance in court-based litigation was to be distinguished from Arbitration which is a private method of dispute resolution. That was before the recent legislative amendments in Hong Kong and Singapore permitting Third-Party funding in arbitration and mediation. And the Hong Kong Court of Final Appeal went on that the policy considerations underlying the prohibition of champerty and maintenance needed to be bal-anced against the policy considerations which argue in favor of Third-Party funding which are access to justice. Nowadays, Third-Party funding is not only allowed but also encouraged in Sin-gapore and Hong Kong. In Hong Kong it is the Hong Kong Code of Practice for Third Party Fund-ing in Arbitration which came into force on February 1, 2019. In Singapore the Civil Law Act and the Civil Law (Third-Party Funding) Regulations

2017 introduced legality of third-party funding in international arbitration.

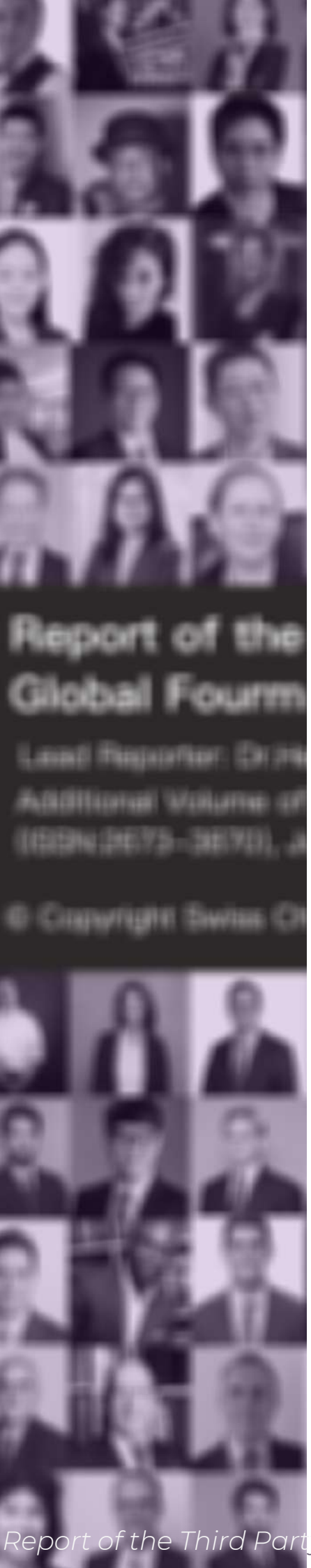
RECOVERY OF THIRD-PARTY FUNDING COSTS

In the more recent decision of the English Commercial Court in the case of Essar Oilfields Ser-vices Ltd v Norscot Rig Management Pvt Ltd of 2016 the funded claimant prevailed and sought recovery of Third-Party funding costs as costs of Arbitration. The sole Arbitrator held that under the ICC-Rules recovery of Third-Party funding costs was permitted since they allow to award legal and other costs. The unsuccessful party sought to challenge the Arbitral award on the ground that the Arbitrator had committed a serious procedural irregularity. And so, the case came before the English Commercial Court which denied a serious procedural irregularity be-cause the only thing the Arbitrator did was to construe the wording related to 'other costs' in the sense of Sec. 59 (1)(c) of the English Arbitration Act of 1996. In an obiter dictum the English Commercial Court held that the wording of other costs was sufficiently broad as to cover Third-Party funding costs.

However, Mr. Jern-Fei Ng QC explained that this does not mean that from the English law per-spective Third-Party funding costs will always be recoverable. This depends on the wording used in the Rules of Arbitration of the relevant Arbitration institution and whether the Arbitral tribunal will decide to allow the recovery of Third-Party funding costs. It is important insofar to note that in Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd the sole Arbitrator in its deci-sion to allow the recovery of Third-Party funding costs relied on the unique circumstances which existed for the funded claimant Norscot: Because of Defendant Essar's exploitative behavior prior to and during the arbitration, Norscot had no alternative but to enter into the litigation funding at a cost of 300% of the sum advanced by the funder or 35% of the sum recovered, whichever was higher. In the view of the Arbitrator these rates reflected standard market rates and terms for such financing. In this context the Arbitrator observed that Essar had intended to ruin Norscot financially. The case was an example of a fight between David (Norscot) and Goliath. In light of that situation, the case was not typical a standard one, and general permission allowing Third Party Funding cannot be derived from that case. Essar's behavior simply forced Norscot to seek Third Party Funding, simply to survive the period of pursuing and enforcing its claims. was i.e. the funded claimant as a result of the actions of the defendant was in a state in which it was necessary to obtain Third-Party funding.

DISCLOSURE OF THIRD-PARTY FUNDING

In the report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitra-tion which was published in April 2018 the view was expressed that the fact of Third-Party funding ought to be disclosed in International Arbitration not just to avoid conflicts of interest arising between the Arbitrator and the Third-Party funder, but also to put the non-funded party on notice that there is a risk that if the funded party would eventually succeed it may well try to recover the Third-Party funding costs as part of the costs of Arbitration which increases the cost-exposure of the non-funded party.



FURTHER DISCUSSION

Recently, Hong Kong adopted legislative amendments not only to provide for the legality of Third-Party Funding in arbitration, but also to regulate it by imposing capital adequacy require-ments; processes and procedures required for disclosing conflicts of interest; and terms that must be included in the funding agreement regarding termination, control and liability for costs, including adverse costs.

By contrast, in England there are no statutory rules for Third-Party funding in Arbitration. Howev-er, a voluntary self-regulation in form of a Code of Conduct for Litigation Funders was introduced in 2011. This self-regulation only concerns litigation proceedings.

Against this background the question was discussed what are the pros and cons of a self-regulation as opposed to a statutory regulation of Third-Party funding? Basically, a need for flex-ibility on the one hand opposes the desire for having secure and clear rules in place on the other hand.

CLOSING REMARKS

After the discussion had concluded on behalf of the SLCA Mr. Tianze Zhang expressed his grate-fulness to the speakers who had so well prepared their contributions. He also was grateful to all attendants who participated in the various sessions with excellent discussion points. The video of the Forum as well as the slides will be available shortly after the Forum.

HERMANN KNOTT
MARTIN WINKLER
ANDERSEN TAX LEGAL
MEMBER OF SCLA