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Third Party Funding in International Arbitration and its most current Development in Asia -Issue of Security for Costs and its main Cases*

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Ⅰ. Introduction

Third-party funding is a growing phenomenon with only several years of history in most jurisdictions. Third-party funding is a financing method in which an entity that is not a party to a particular dispute funds another party's legal fee or pays an order, award rendered against party.[1] Although it is still new, this has held the attention of the international arbitration communities.

On January, 10, 2017, the Civil Law(Amendment) Bill passed its second reading before the Parliament of Singapore. This legislation of Third-Party funding in international arbitration has been significant. However, more follow-up legalization is necessary. Past regulations on third-party funding in Singapore did not seem handle all the risks of existence of third-party funding. This research then analyzes whether new third-party funding laws should include that the arbitral tribunal to order the funder should abide by the arbitration agreement for costs, which the claimant must provide security for the respondent's fee. Indeed, the presence of third party funding agreements in arbitral proceedings will usually alert the respondent the impecunious situation of the claimant, and will raise concerns of issue of awarding adverse costs.

To address the risk of non-compliance with awarding costs, the respondent may require the arbitral tribunals to order that part of claimant should post security for costs as a condition to continue the arbitral proceedings. This will be able to promptly turn an application for security for costs.

This paper focuses on the implication of legalizing third-party funding in international arbitration. Major analysis lies in emerging issue of security for costs in arbitral proceedings after enactment of the bill concluding disclosure requirement as to existence of third-party funder. These cost assurance issues were raised in the RSM Corporation v. St. Lucia arbitral case, and a remarkable court decision was recently emerged in the Essar v. Norscot. Additionally, this paper will examine major Singapore civil law clauses which include evidence of applying security for costs in proceeding of international arbitration. Is seems it is inevitable to recognize third-party funding in international arbitration and its

1) 김세진, '국제 중재의 제 3자 펀딩 입법의 의의 및 시사점: 싱가포르·홍콩 입법 중심으로", 동아대학교 국제전문대학원 석사 학위논문, 2018, p. 70.

evolving phase in the legalization. Through reviewing and analyzing, these case, this paper is to discuss and suggest the next legislative process of utilizing third-party funding of international arbitration.

Ⅱ. Recent Legislation of Third-Party Funding in International Arbitration and Issues of Security for Costs.

1. Background of Third-Party Funding

Third-party funding in international and domestic disputes are a fast-growing trend and increases of third-party agreements, although it is with still new phenomenon in most jurisdiction. The third-party funding is where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed reimbursement. It has been prohibited because of Doctrine of champerty and maintenance in many countries.

Maintenance is the act of providing financial assistance to a party without taking interest in the outcome and champerty is providing financial assistance with the expectation of receiving a share of any money recovered in case the party wins.[2] In the recent, this doctrine has been abolished in a certain degree. From a funder's perspective, many of the advantages of international arbitration are the same as those that attract primary parties to international arbitration, for instance, the shorter proceedings, simplified evidentiary process, expertise of arbitrators, and enforceability of award by New York Convention. Additional factor of appeal include higher returns, because of generally higher the amounts in dispute, and greater the predictability. Depending on the claim amount and the costs, the funder may take between fifteen to fifty percent. United States and United Kingdom international arbitration, invests from $2 to $10 million in each business claims.

Furthermore, worldwide market turmoil has inspired finance part to seek investments that are not tied to or affected by the unpredictable financial market. Therefore, The last few years have seen a marked increase in funding, initially focused on investor-state-arbitration, but now spreading to various commercial international arbitration. Unlike litigation, the use of third party funding in private arbitration, with arbitrators appointed by party, has

2) Lisa Bench Nieuwveld & Victoria Shannon Sahani, Third-Party Funding in International Arbitration 14-15, 2nd ed. Wolters Kluwer, 2017 p.27.

incurred a variety of ethical and procedural issues.

However, recently Australia abolished torts of champerty and maintenance which had long been prohibiting third-party funding in litigation. Even though the doctrine of champerty and maintenance were abolished, third-party funders still confronted considerable challenges. Additionally, third-party agreement has not been legalized and not regulated in spite of an array of ethical issues.

2. Legislation in Asian Countries-Case in Singapore and Hong-Kong

For a long time, existence of third-party funding in international arbitration area has been resulted in the list of issues which has been much written as articles and papers. These have been almost regarding confidentiality, impartiality of arbitral tribunals, the attorney-client privilege, disclosure and access to justice.[3] In the recent, however, Singapore and Hong-Kong have prepared to legislate Third-party funding bills in international arbitration area.[4] On January 10, 2017, the Civil Law Amendment Bill passed in Singapore. And On March 1, 2017 the Bill was approved by President and was published in the Government Gazette. The Bill not only abolishes the Doctrine of champerty and maintenance, but also have the third-party funding to fund disputes resolution proceedings expressly lawful for the first time. To legalize the third-party funding in disputes resolution system is significant development, because that has historically been antipathetic since medieval England when the court was weak and needed protection from ethical problems.

People who make policies in Singapore realized that the court and arbitral tribunal could handle the cases and the third-party funding in disputes resolution proceedings has been needed for many reasons, such as expensive legal costs and access to justice for impecunious party. Since Singapore is a competitive jurisdiction in the community of international arbitration and the number of third party funding has been increasing, the lawmaking is virtually required and necessary.

The momentum and process for Singapore to enact third-party funding is as follows. In

3) William KIRTLEY & Korale WIETRZYKOWSKI, "Should An Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relyin upon Third-Party Funding?". Journal of International Arbitration 30, no. 1, 2013, pp. 10-30.

4) Eugene Tan, "Singapore: Spotlight On: Third Party Funding In Singapore And Hong Kong", (2017), Retrived 29 March, 2019, from http://www.mondaq.com/x/672342/Civil+Law/ /Soptlight+on.

Singapore, the leading case is *Re Vangrard Energy*. The Singapore High Court published that the shareholder or an insolvent company who made an agreement to fund the party to pursue its claims was not champertous.[5] With this releasement, Singapore have adopted to follow the "light touch" approach to regulation, after extensive consultations. Ministry of Law has contained its aim as giving

"precedence to party autonomy and flexibility, with disclosure of existence of third-party funding agreement as the central tenet," taking into account the "light touch" approach to regulation that has generally been adopted in jurisdiction where third-party funding is permitted.[6]

Singapore Amendment Civil Law is focusing on abolition of doctrine of Maintenance and Champerty, especially disclosure of existence of the third-party funding agreement before commencing arbitral proceeding or after advent of it. Disclosure of existence of third-party funding is to be resolving problems on aspects of transparency and ethical issues and impartiality of arbitral tribunals which is controversial for centuries. To briefly summarize Civil Law Amendment in Singapore, it is representatively state that abolition of doctrine of champerty and maintenance, disclosure requirements and control by the funder. This is just the beginning of the new phase for the third-party funding, and there are still many issues to be addressed.

In Hong-Kong, although third-party funding is not allowed in domestic litigation, it is expressly allowed in international arbitration. Hong-Kong passed new legislation called 'Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016' on June 2017. Rather than it totally abolished the torts of champerty and maintenance, this new law provides an exception for third-party funding in arbitration or mediation proceedings. Unlike in Singapore, no distinction is made in Hong-Kong between domestic and international arbitration, and the funding is now permitted in both domestic and international arbitration.

3. Necessity of Security for Costs following Disclosure - RSM Production Corporation v. St. Lucia Case

(1) Issue of Security for Costs following Disclosure of Third Party Funding

5) Re Vanguard Energy Pte Ltd [2015] SGHC 156
6) Public Consultation on the Draft Civil Law (Amendment) Bill 2016 ("Amendment Bill") Civil Law (Third-Party Funding) Regulation 2016, Government of Singapore, 30 June 2016 at [12] ("Consultation Paper")

Bill on legalization of third-party funding and its regulation is a necessary direction and approach in consideration of third-party funding's continuous increase of use. In order to be reasonable and successful, this regulation on third-party funding must be proportionate to the real risk in question.

Therefore, in some opinions, given disclosing third-party funding in arbitration like Singapore civil law included the arbitral tribunal could consider whether it is relevant to order that funder should abide by the arbitration agreement for costs, which the claimant must provide security for the respondent's fee. The presence of third party funding agreements in arbitral proceedings will usually alert the respondent the impecunious situation of the claimant, and raise concerns as to whether the claimant is surely capable of persuing the claim.[7)] To address the risk of non-compliance with awarding costs, the respondent may require the arbitral tribunals to order that part of claimant should post security for costs as a condition to continue the arbitral proceedings.[8)] This will naturally bring the issue of security for costs. If a claimant of the international arbitration is not able to pay an adverse cost award, major international arbitration region such as English and Common wealth countries have typically allowed the respondent to apply for security for costs. For posting security for costs, the most optimal method is that when making a funding agreement between funder and funded party, provision of security for costs is included in the agreement. Certain litigation and arbitration funders rapidly offer to provide security for costs.

This paper focuses on the implication of legalizing third-party funding in international arbitration. Major analysis lies in emerging issue of security for costs in arbitral proceedings after enactment of the bill concluding disclosure requirement as to existence of third-party funder. This new bill in Asia creates complex challenges for the international arbitration pertaining to the new phase to approach it. Although allowing security cost issue would be considered one of the peripheral technical interim measures in international arbitration and the issue still do not occurs frequently, the case such as RSM Production Corporation v. St. Lucia which arbitration tribunal expressly allowed security costs poses significant implication of most recent development in third party funding. This case suggests enhanced arbitral tribunal's power and acknowledgment in the procedure of third

7) Lisa Bench Nieuwveld & Victoria Shannon Sahani, Third-Party Funding in International Arbitration 14-15, 2nd ed. Wolters Kluwer, 2017, p. 23.
8) Gary B Born, International Commercial Arbitration 2495, 2nd ed, Kluwer Law International, 2014, p.47.

party funding in international arbitration.

Followings are leading third-party funding companies' advertisements for public. IMF Bentham is one of the major litigation funding companies based in Australia and it advertises the following:

IMF (Australia) Ltd is prepared to fund international commercial arbitration and investment treaty claims including those administered on an ad hoc basis and by the principal arbitral institutions (ICC, AAA/ICDR, LCIA, HKIAC, SIAC, ACICA and ICSID) with a claim value in excess of AUD$10 million. IMF offers . . . payment of any adverse costs and provision of security for costs.[9)]

In similar, Harbour's publicity advertises that:

Harbour is a leading UK funder of commercial litigation. Harbour provides non-recourse, risk-free funding, paid on an on-going basis, throughout the life of the case, for all, or any, of the following:... security for costs, including payments into court... Harbour will consider funding for any case with a claim value above ￡3 million.[10)]

Despite the advertisement, providing security for costs to their clients is not to be often generous due to disadvantages for funded party respectively.

Consequently, the next step after legislating disclosure on existence of Third-party funding is that awarding security for costs about request of the respondent is whether arbitral tribunal has the power to make it. In 2013, the ICSID case of *RSM v. St. Lucia* has recognized necessary for security for costs to third-party funder. Despite of it, whether arbitral tribunals' general power is considered to be sufficiently wide to include the power to require a party to provide security for costs was essential problems and debatable legal issues.[11)] National courts reserve the power to order third parties to bear procedural costs,

9) "Third-party funding: Snapshots from around the globe", (2012), Retrieved 8 April, 2019, from https://globalarbitrationreview.com/search?facet=true&page=3&per_page=10&query=third-party+funding+snapshots+from+around+the+globe&sort=Relevance&source=gar&utf8=%E2%9C%93.

10) Commercial Dispute Resolution, Q4, Issue 2, 16 (2010).

11) This is remarkably the case under Article 28 ICC Rules (2012).Numerous tribunals have acknowledged that the power to order security for costs is included in the powers to order interim measures under the ICC

but international arbitral tribunals lack jurisdiction to issue an order for costs against a third party funder because arbitration is intrinsically based on the two main parties' voluntary consent, not any other parties such as a third party.

(2) Recognition of security for costs to third-party funder RSM Production Corporation v. St. Lucia.

1) Brief Case

A recent investor-state arbitration case of ICSID, *RSM Production Corporation v. Saint Lucia* ("RSM case") covered the express awarding of security for costs where a claimant is funded by a third-party funder for paying the fee and expense.[12] While international community might have begun to believe that security costs would never be expressly granted by tribunal, this case was decided. This controversial arbitral award attracted a huge amount of commentary and criticism from the international arbitral community.[13]

The background dispute between parties had begun when St. Lucia granted RSM Production Corporation, the claimant, an oil exploration license. Afterward, the parties allegedly extended their agreement. However, when the claimant later strived to assert its right under that agreement about exploration of oil, the respondent alternatively had terminated that agreement by breaching it. Therefore, the claimant registered for commencement of investor-state arbitration to reimburse for damages against St. Lucia. In turn, the respondent insisted for an award of dismissal of claims and acknowledgment that the Respondent owed a declaration that the agreement between parties had either expired or could not be enforced. Landmark point of this case and the real dispute at issue were whether the requirement of the respondent that claimant should post the amount of

Rules, see e.g., 'Security for Costs' (2014) ICC Bulletin, p. 7 and the procedural orders published in the same volume. See also the UNCITRAL Arbitration Rules which encompass security for costs within the expression "provide means of preserving assets out of which a subsequent award may be satisfied" in Article 26(2) even though they do not expressly provide for such a measure. The same provision can be found in Article 17 of the UNCITRAL Model Law. See discussions in relation to the drafting of the Model Law, UNCITRAL, Report of the Working Group on Arbitration on the work of its thirty-seventh session, UN Doc. A/CN.9/523 and UN Doc. A/CN.9/WG.II/WP.108. For an overview of the countries which have adopted the UNCITRAL Model Law, see Jan Paulsson and Lise Bosman (eds), ICCA International Handbook on Commercial Arbitration (Kluwer Law International, Supplement 84, May 2015).

12) Kelsie Massini, "Risk Versus Reward: The Increasing Use of Third-party Funders in International Arbitration and The Awarding of security for costs", Arbitration Law Review, Article 25, Vol. 7, 2015, p. 21-22.

13) Carlos Gonzalez-Bueno and Laura Lozano, "Third-party funding in international arbitration lessons from litigation?",(2017), Retrived 10 March, 2019, from http://arbitrationblog.kluwerarbitration.com/2014/12/15/third-party-funding-in-international-arbitration-lessons-from-litigation/

$750,000 as security for costs could be successful or not.[14] The Respondent not only requested to post security for costs to the Claimant but also to grant an order obligating the Claimant providing security for costs as a provisional measure by arbitral tribunals. A majority of the arbitral tribunal in this case ordered the claimant to post security for costs. On the other hands, one member of the tribunal powerfully dissented. Consequently, the tribunal made a decision that the claimant is ordered to post security for costs in the form of an irrevocable bank guarantee for USD 750,000 within 30 days of this decision.[15] The ICSID arbitral tribunal suggested three factors that should be satisfied before ordering security for costs or any other provisional measure[16]:

(1) that a right in need of protection exists and (2) that the circumstances require that the provisional measures (here, tribunal's order for security cost) be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party's right to be protected. (3) Moreover, the tribunal in recommending provisional measures must not prejudge the dispute on the merits.[17]

In the analysis of the decision from ICSID tribunal, it figured out that the right to be protected regarding St. Lucia was the right to claim reimbursement of legal costs.[18] The tribunals noted that this was a right of procedure and that the respondent without third-party funding, St. Lucia might have the right directly related to the provisional measures being requested.[19] Moreover, the Tribunal held that security for costs could be ordered in exceptional cases requiring the conditions, "(1) necessity of the measures to protect a certain right (2) urgent situation which does not leave room for waiting for the final award."[20] Before the RSM case was decided, the tribunals of all prior cases have never directly ordered security for costs. Therefore, investor-state arbitration case had an

14) Kelsie Massini, "Risk Versus Reward: The Increasing Use of Third-party Funders in International Arbitration and The Awarding of security for costs", Arbitration Law Review, Article 25, Vol. 7, 2015, p. 33.
15) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10) ¶90.
16) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10)at ¶24. The tribunal has authority for ordering security for costs under Article 47 of the ICSID convention, "Except as the parties otherwise agree, the Tribunal may, if it consider that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective the rights of either party"
17) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10) ¶58.
18) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10)¶63.
19) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10) ¶68.
20) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10)¶75.

important implication for awarding security for costs to the claimant with the third-party funder. Specifically the Tribunal found that exceptional circumstances did exist: the fact RSM Corporation in current was impecunious and it made impossible to satisfy a costs award.[21] This tribunal held that RSM Corporation was only able to commence this arbitration due to a third-party funder. To sum up, the Tribunals held that existence of third-party funding is unjustified to burden respondent with uncertainty regarding whether or not the undisclosed third-party funder being willing to pay potential costs award in the respondent's favor.[22]

Applied provisions of the evidence in the decision for posting security for costs were Article 47 of the ICSID Convention and the ICSID Arbitration Rule 39. Article 47 of the ICSID Convention provides:

Except as the parties otherwise agree, the Tribunal may, if considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

The ICSID Arbitration Rule 39(1) provides similarly to Article 47:

(1) At any time after the institute of the proceeding, a party may request that *provisional Measure* for the preservation of its right be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

2) Analysis of the case decision

RSM case was awarding security for costs to the Claimant with third-party funding for the first time unlike prior cases in ICSID investor-state arbitration tribunal where the tribunal consistently denied awarding security for costs.

The Respondent argued that the Claimant had failed to pay advance on costs, and in number of previous ICSID cases the Claimant had not honored costs awards, and most importantly "the proceedings are funded by a third party". Also, the Respondent argued that this third party would not be voluntarily liable for adverse costs, thereby enabling the

21) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10) ¶76.
22) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10) ¶83.

Claimant to subsequently engage in arbitral 'hit and run'. The Claimant contested that the Tribunal's jurisdictional power to order the security for costs and more importantly argued that an impecuniosity or difficult financial situation itself should not be sufficient to grant the order. However, the tribunal went on to decide that security for costs can be granted in exceptional circumstances in ICSID arbitration, such as here.

Notably, in RSM, the decisive factor for the tribunal's order of security for costs was that the Claimant had a proven history of not complying with costs awards rendered against it. Usually the main reason why the Claimant was requested to provide security for costs was that the party was in impecunious situation. The RSM Tribunal considered that the Claimant was impecunious and was funded by a third-party funder that could presumably not be made responsible for any adverse cost award.[23] Main point of this case is that Tribunal emphasized that it would be unjustified to burden Respondent with the risk emanating from the uncertainty as to whether the unknown party will be willing to comply with a potential cost award. Again, it should be noted the most critical factor for the Tribunal to grant the security for costs was the Claimant had a proven history of deteriorating with cost awards. The Tribunal took a stand that the Claimant's past conduct as sufficient evidence of bad faith. Also the Tribunal did not trust the third-party funder who was some billionaire and a serial ICSID litigant, known for dodging advance payments and cost awards.[24] From the decision, the Tribunal pointed out that the third-party funding could not alleviate the concerns that the Claimant will again default on payment, as the funder's responsibility for adverse costs was uncertain.[25]

In RSM, the Tribunal did nominate the Claimant as the party to post security for costs regarding arbitral proceedings. Indeed if the tribunal considered the Respondent's request for security for costs, and given the Tribunal's concern about the Claimant's past conduct, the tribunal had better order security for costs to the third-party funder of the Claimant in spite of exceeding arbitral tribunal authority. This leads to the another consideration that needs to be further analyzed: Can then the Tribunal directly order to post security for costs against third-party funder?

23) "ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration",(2018), Retrived June 20, 2019, from https://www.arbitration-icca.org /publications/Third-Party-Funding-Report.html

24) Jonas Von Goeler, "Third Party Funding in International Arbitration and its Impact on Procedure", 「Wolters Kluwer」, 2016, p,358.

25) *RSM production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10). at ¶354.

Ⅲ. Recent Landmark Case of Security for Costs of in International Arbitration

In the recent, Singapore has enacted a third party funding mechanism for international arbitration to reveal the existence of a third party's financing. In the 2017 SIAC (Singapore International Arbitration Center) Investment Arbitration Rules, the Article 35 provides that the "Tribunal may take into account any third-party funding arrangements in ordering in its Award that all or a part of the legal costs of a Party be paid by another Party." This in turn suggests necessity to discuss on legislation on providing security for costs and possibility of expansion of arbitral tribunal discretion. In addition, the recent cases of *Essar v. Norscot and Sandra Bailey & Glaxo Smith Kline UK Limited* are known as landmark cases as to expansion of arbitral discretion and decision to award security for costs against a third-party funder in excess of funder's commitment. Through reviewing *Essar v. Norscot* and Singapore's Act on third-party funding, this chapter is to infer possibility to endorse application security for costs by present arbitral tribunal authorities.

1. Essar v. Norcost

(1) Brief Essar v. Norcost Case

In 2007, Norscot Rig Management PVT Limited("Norscot") and Essar Oilfields Services Limited ("Essar") made a commencement of commercial relationship in the oil and gas industry. Norscot brought an action against Essar for a repudiatory breach of an oilfield operations management agreement between the parties dated 14th Aug, 2007 under the Arbitration Agreement incorporated the International Chamber of Commerce (ICC) Rules with a seat in England. Norscot was lack of fund for commencement of arbitration proceedings, and relied on financial supports from London based Woodsford Litigation Funding ("WLF") of $647,000 under the funding agreement. This agreement between Norscot and WLF had been made in 2011. It entitled WLF to either a fee of 300 per cent of the funding, approximately $1.94 million or 35 per cent of the recovery in the event that Norscot's claim succeeded. On 15th Sep. 2016, dissatisfied with that award, Essar Oilfieds Services Ltd (Hereafter refer to "Essar") appealed to English High Court by

application made under s. 68 of the Arbitration Act 1996 ("the Act") to set aside the fifth partial award of the sole arbitrator, Sir Philip Otton, made on 17th Dec. 2015 and as clarified on 3rd Mar, 2016.[26] The award was concerned that arbitrator of fifth partial award stated that Essar had set out to cripple Norscot financially by resolutely refusing to make payment and it had flouted its agreement to pay the crew wages. Due to it, given the history between parties, the arbitrator make a decision that 1.94 million in costs was recoverable in full against Essar. In relation to costs, the sole arbitrator noted that the principal sources of his jurisdiction were the English Arbitration Act 1996 including 59(1)(c) which stipulates cost of the arbitration, and the ICC Rule which includes Article 38(1) which provided that the award of third-party funding costs in arbitration proceedings was given a judicial endorsement. In addition, the arbitrator found that the Act and ICC Rules recognize him wide discretion as to what cost he could award to a successful party. Assent of this award has introduced a new regime on awarding costs in English-seated arbitral proceedings, in addition to inspiration to international arbitral communities.

In the first, to award the costs as an arbitrator, he made application of English Arbitration Acts. 59(1).

Section 59 of the act provides:

(1) Reference in this Part to the costs of the arbitration are to:
  (a) The arbitrators' fee and expense, and
  (b) The fee and expenses of any arbitral institution concerned, and
  (C) The legal or *other costs of the parties*.
(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration.

Secondly, the principal sources of an arbitrator's jurisdiction was ICC Rule 38(1).

ICC Rule 38(1) includes:

(1) The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the

26) Essar Oilfields Service Ltd. v. Norscot Rig Management Pvt Limited, Case No. CL-2016-000188, 2016.

scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the *reasonable legal and other costs incurred by the parties for the arbitration.*

Additionally, it was essential for the arbitrator that his discretion could expand as to what costs he could award to the successful party by applying the Act and ICC Rules.

(2) Rationale for the decision in court.

On 15th Sep. 2016, dissatisfied with that award, Essar appealed to English High Court by application made under s. 68 of the Act to set aside the fifth partial award.

The fundamental issue in Essar's appeal was whether the arbitrator's finding that the additional third-party funding costs were recoverable as "other costs of the parties" expressly stipulating in the Act 59 as above suggested. In addition, arbitral awards by the sole arbitrator was a serious irregularity under s. 68(2)(b).

For the references, the s.68(2) provided:

Challenging the award: serious irregularity:

2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant

(b) the tribunal exceeding its powers.

The appeal Court made a decision against Essar's arguments considering the following factors.

1. **The court agreed with the Arbitrator on the conduct of Essar suffering to Norscot for making third-party funder funding to bring an action as follows:**

"*As a consequence(of the conduct), Norscot had no alternative but was forced to enter into the litigation funding......Essar was undoubtedly aware that Norscot's costs could not be financed from its own resources...probably hoped that this financial imbalance would*

force the claimant to abandon its claims.... a blatant attempt to drive Norscot from the judgment seat'".

In accordance with Arbitral award, the court assented that Norscot had no choice but to make a funding agreement with WLS due to financial situation crippled by Essar of a breach of their agreement.

2. **The Article of ICC Rules and English Arbitration Act on costs as above:** The Court considered ICC Rules on the award of costs (reasonable legal and other costs incurred by the parties for the arbitration), and section. 59(1)(c) of the Act (the legal or other costs of the parties) and agreed.

3. **Key issue of irregularity:** The Court considered the provisions of section 68(2)(b) of the English Arbitration Act on whether there was serious irregularity by the Arbitrator in making his award. In the final court decision, the court stated that there was no serious irregularity within the meaning of s. 68, although the Arbitrator was wrong in his construction of "other costs". This court decision take an implication about expansion of arbitral tribunals' discretion.

Optimistic exercise of discretion: It mentioned as follows :

"*The arbitrator's exercise of his discretion here to award Norscot the costs of its third-party funding, while, of course itself not under challenge, is nonetheless a telling example of the good sense of reading "other costs" in this way. This was a case, perhaps unusual, where the arbitrator ruled in detailed and robust terms that Essar drove Norscot into this expensive litigation because of its own reprehensive conduct going far beyond technical breaches of contract, in order to vindicate its rights. Further, as the tribunal found, Norscot had no option, but to obtain this funding from this third-party funder. As a matter of justice, it would seem very odd and certainly unfortunate if the arbitrator was not entitled under section 59(1)(c) to include the costs of obtaining third-party funding as part of "other costs" where they were so directly and immediately caused by the losing party…I unhesitatingly conclude that the arbitrator's interpretation of "other costs" was correct, in that it extended in principle to the costs of obtaining third party legal funding. Whether then to award it is a matter of discretion.*"

After this decision and a duty to disclose of third-party funding in Singapore, costs in arbitral proceedings that may be awarded by an arbitrator could spread out to be reviewed and broadened through the legislative process and judicial activism to encompass other ancillary and incidental costs such as third-party funding costs.

2. Legislation of Amendment of Civil Law and SIAC Rules in Singapore: Next step of the third-party funding issues in international arbitration

(1) After legislating disclosure of existence of the third party funding

Singapore's Parliament recently passed the Civil Law 2016 which allows third-party funding in the international arbitration area and related proceedings(the Court). This legislation makes Singapore's position in arbitration "a premier international commercial disputes resolution hub and key arbitral seat"[27] Since the third-party funding in international arbitration was passed, the first arbitral case involved funding agreement have shown up in July 2017. This case involved a global leading third-party finance firm, Burford Capital located in London.

Following the Amendment Civil Law in Singapore, the third-party funder was disclosed before commencing arbitral proceedings. Although this legislation is evaluated as a positive development in respect of the funding of arbitration, there are a variety of ethical issues such as awarding costs. As mentioned, after disclosure of the existence of third-party funding in arbitral proceedings, a respondent without a funder could be concerned about problems in arbitral proceedings because of impecuniousness of a claimant. Within the international arbitration community, presence of the third-party funder can often serve as a red flag which is signaling to respondent that claimant is in financially precarious situation and may not be able to meet an adverse costs.[28]

(2) Aspect of security for cost in international arbitration in Singapore.

When considering the relevant conditions of the ICC Rules and English Arbitration Act

27) Singapore Parliamentary Debates, Official Report vol. 94(Ms indrabee Rajah, Senior Minister of State for Law), 10 January 2017.

28) William KIRTLEY & Korale WIETRZYKOWSKI, "Should An Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relyin upon Third-Party Funding?". Journal of International Arbitration 30, no. 1, 2013, p.18.

1996 which are similar to SIAC Rules 2016, the case of Essar v. Norscot will be regarded as highly persuasive in Singapore. The new SIAC Rules, published in June 2016, confer far reaching powers in terms of awarding costs on the arbitral tribunal.

SIAC 2016 Rule 37 expressly states :

"The Tribunal shall have the authority to order in its Award that all or a part of the legal or other costs of a party be paid by another party"

Also, related to arbitral tribunals' expansion of discretion for awarding security for costs, SIAC Investment Arbitration Rules implies it. The SIAC draft Investment Arbitration Rules, and currently under its consultation strives to address this issue by suggesting the following provision,

For ease of references, this rules provides:

The Tribunal shall have the authority to order in its award that all or a part of the legal or other costs of a party be paid by another party of, where appropriate, any third-party funder. Moreover, Singapore is likely to be the key jurisdiction in the world of awarding security for costs in international arbitration, because of the Singapore Civil Law Amendment 2016 and the case of Frantonios Marine Services Pte Ltd and Another v. Kay Swee Tuan[2008]

Firstly, in the case of Frantonios Marine Services Pte Ltd and Another v. Kay Swee Tuan[2008] 4 SLR(R)224 has been the The High court of Singapore has suggested that it would not hesitate to make an order for security for costs to deter 'interested parties....trying their luck by fielding unmeritorious or dubious claim using impecunious corporation as a shield which may then leave the defendant who ultimately emerges victorious with unpaid costs;[29]

The details are as follows.

29) Alastair Henderson, Emmanuel Chua and Herbert Smith Freehills, Litgation Funding, Singapore, Gettnig, (2019), Retrieved February 15, 2019, from http://gettingtheddealthrough.comarea/94/litigatiorfunding/.

This case makes implications that there is an excellent opportunity to award security for costs to a third-party funder when appointing Singapore as the arbitral seat (jurisdiction).

Secondly, A Guidance Note of Singapore Civil Law Amendment 2016 is not only to legalize third-party funding in international arbitration but also to imply the possibility of security for costs by a third-party funder in arbitral proceedings and funding agreements.

This guidance note prescribes the "scope of funding provided and a funder's liability for adverse costs orders" to be included in terms of a funding agreement .

"31. In particular, you should advise your client on the funder's liability under the funding agreement to:

(a) meet any liability for adverse costs;
(b) provide security for costs
(c) pay any premium to obtain costs insurance; and
(d) meet any other financial liability."[30]

What the Guidance Note means is that a third-party funder should inform a client (funded party) to be able to guarantee security for costs. When making a funding agreement between a funder and a funded party, if a funder advises the client on providing security for costs, an arbitral tribunal will not need to award security for costs.

To sum up, these are evidences that Singapore will be more developed as a leading arbitral jurisdiction. Moreover, the Singapore Civil Law Amendment 2016 and SIAC Rules are reflecting and resolving issues of the global arbitral communities related to third-party funding in international arbitration such as disclosure and security for costs.

30) "Singapore International Arbitration Centre and the Singapore Institute of Arbitrators, The Law Society of Singapore Guidance Note 10.1.1 Third-Party Funding",(2016), Retrived 5 March, 2019, from http://www.lawsociety.org.sg/eJus_news/pdf/Council_Guidance_Third_Party_Funding.pdf

Ⅳ. Implication of Security for Costs in International Arbitration – Focused on Tribunal's Discretion.

The assumption that a funded party is usually impecunious can sometimes miscomprehend the current state of third-party funding. Third party funding is increasingly used by large, solvent companies that simply wish to share risk in their financial situation. As third-party funding becomes increasingly a tool of choice, not of necessity, some of the world's largest companies are more frequently using third-party funding.

As in the previous analysis, English have ruled in the litigation context that costs can be awarded against third party-funders if they have obtained a sufficient degree of economic interest and control on the given claim. It implicates a considerable rationale that a funder who benefits financially of the claimant wins should not just walk away without any responsibility for the costs if the claimant loses. However, in arbitration context, due to the voluntary consent nature of the arbitration, third party funder is not normally a main party to the arbitration agreement. Considering the relationship between third party funder and funded party it would not be easy to directly order against third-party funder. Most third party funders would argue that they do not possess same degree of control over the arbitration claim, and it would not be fair to hold third- party funder directly liable for the costs. However, it should be noted that considerable number of commenters point out that it would be fair for funders to be liable for the security cost, because investment might turn out to be highly profitable when the claim succeeds. One example is Hong Kong Law Reform Commission which launched from 2013 until 2017, supported that Tribunals should be given the power to make third-party funders directly liable for adverse costs awards in appropriate circumstances. This seems to derive from Hong Kong courts have discretion to order costs to a party, including attorney fees under loser pays principle, and have discretion to a non-party to the claim if the party is a party to the cost proceedings.

In conclusion, this issue is still on-going to be clear in all jurisdictions, due to the nature of arbitration. It can then depend on whether there was funder's voluntary consent

for the security costs in funding agreement. Although the tribunal should not exceed its lack of jurisdiction directly against funder by ordering cost and it can order the costs in only exceptional situation, there is increasing trend of ordering security costs by tribunals. Note that these arbitration tribunals do not show any sign of contempt for existence of third-party funding itself. As third-party funding in international arbitration keeps growing, tribunals have to decide upon security for costs requests. The fact that a party has entered into a funding agreement is no sufficient reason to order for security for costs. Next step would be to formulate guidelines on how to determine criteria against which an application for security for costs is measured. As the number of lucrative litigation funding companies and specialized third-party funding firms that want to share risk increase it would not be unfair for respondent to proceed without any security in the claimant's funding agreement.

Ⅴ. Conclusion

This paper explores that necessity of formulating guidelines on how to determine criteria against which an application for security for costs is measured on third-party funding in international commercial arbitration. Third-party funding is where someone who is not involved in arbitration provides funds to a party of the arbitration in exchange for an agreed reimbursement. Third-party funding is rapidly growing industry which Korean companies and government should be aware of its upcoming impact when they are involved in international trade and service disputes. Using unique cases of international commercial arbitrations with third-party funding, we find that it is necessary that introduction on development in security for costs issue as well as disclosure issue in major cases. On January 10, 2017, the Civil Law Amendment Bill passed in Singapore and on June 2017 an 'Arbitration and Mediation Legislation (Third Party Funding) Bill' in Hong-Kong have the third-party to fund in international arbitration and other disputes resolution expressly approved. This arbitral tribunal's expanding discretion over critical interim measure of security cost is in issue. In Essar v. Norscot (2016), the arbitrator found that the additional third-party funding costs were recoverable as "other costs of the parties". In here, the decision shows issue of tribunal's power over costs measure could spread out to be reviewed and broadened through the legislative process. A recent investor-state arbitration case of ICSID, RSM Production Corporation v. Saint Lucia

covered the express awarding of security for costs where a claimant is funded by a third-party funder. These cases show solid acknowledgement of the third party funding and it looks inevitable that the volume of third-party funding industry will grow more as time goes on. These situations reveal that Korean government and trade industry need to be aware the development and mechanism of the current third-party funding.

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ABSTRACT

Third Party Funding in International Arbitration and Its Most Current Development in Asia: Issue of Security for Costs and Its Main Cases

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Third-party funding in international and domestic disputes is a fast-growing trend and it is increasingly used by large, solvent companies that simply wish to share risk in their finance. On January 10, 2017, the Civil Law Amendment Bill was passed in Singapore and on June 2017 an “Arbitration and Mediation Legislation (Third Party Funding) Bill” in Hong-Kong had a third-party funding to finance the international arbitration and other dispute resolutions expressly approved. This arbitral tribunal’s expanding discretion over critical interim measure of security cost was in issue. In Essar v. Norscot (2016), the arbitrator found that the additional third-party funding costs were recoverable as “other costs of the parties.” In here, the decision showed the issue of a tribunal’s power over cost measures could spread out to be reviewed and broadened through the legislative process. A recent investor-state arbitration case of ICSID, RSM Production Corporation v. Saint Lucia, covered the express awarding of security for costs where a claimant was funded by a third-party funder. It seems inevitable that the volume of third-party funding industry will grow more as time goes on. The next step would be to formulate guidelines on how to determine criteria against which an application for security for costs is measured.

Key Words : third-party funding, international arbitration, security for costs, RSM Production Corporation v. Saint Lucia, Essar v. Norscot