CHAPTER 4

The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective

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§4.01 ARBITRAL TRIBUNALS HAVE THE POWER: NOW WHAT?

In international arbitration, security for costs (*cautio iudicatum sovlvi*) has long played a fairly limited role. With third-party funding gaining traction in recent years, the international arbitration community has revisited the instrument. Both in theory and in practice, however, these discussions focused primarily on the implications of the non-applicant being funded by a third party. We take this development as a reason to revisit security for costs more generally.

What can be regarded as settled nowadays is that arbitral tribunals *have* the power to order security for costs. Some national arbitration laws[1] or institutional rules[2] explicitly vest the arbitral tribunal with this power. Absent such a provision (or an express agreement between the Parties), the power to order security for costs stems from the arbitral tribunal's broad powers under the applicable national arbitration

1. In particular s. 38(3) of the English Arbitration Act; s. 56(1)(a) of the Hong Kong Arbitration Ordinance; s. 12(1)(a) of the Singapore International Arbitration Act. Note that the provision was introduced to the English Arbitration Act in reaction to the famous *Ken-Ren* case.
2. *See* Art. 25.2 of the 2020 LCIA Rules, Art. 24 of the 2018 HKIAC Rules, Rule 27(j) of the 2016 SIAC Rules, Art. 38 of the 2017 SCC Rules, Art. 33(6) of the 2021 VIAC Rules; further Rule 53 of the 2022 ICSID Rules (entry into force on 1 July 2022).

laws[3] and/or the applicable institutional rules[4] to issue provisional and conservatory measures.[5]

What is a lot less clear still is under which circumstances arbitral tribunals should *exercise* that power and grant a security for costs application. International arbitration knows no uniform and universally accepted standard, save for a few recurring factors to consider and a general understanding that ordering security for costs must remain the exception. This leaves practitioners faced with a security for costs application with considerable uncertainty about just how rare of an exception security for costs should be, and especially how to approach such an application in practice.

Naturally, this chapter cannot overcome these difficulties as such, and practitioners will always need to carefully consider the rules applicable to their particular case. This chapter is, however, intended to provide practical guidance by outlining typical considerations and practical pitfalls. It is also a call for more procedural robustness on the part of arbitral tribunals. The observation from our practice, including within arbitral institutions, and reported cases is that arbitral practice has essentially turned a security for costs order into a unicorn. We argue that this result goes beyond the limits prescribed by legitimate policy concerns over its misuse, and that it should be addressed by arbitral tribunals fully embracing a careful and nuanced balancing of interests exercise. Security for costs should remain the exception, but not a unicorn.

Against the backdrop of the parties' competing interests at stake (section §4.02), we analyse the requirements for granting a security for costs application. In particular, we examine the various factors that may be considered in the balancing of interests exercise (section §4.03). Where an arbitral tribunal is satisfied that these requirements for granting an application are met, it needs to be mindful of several further practical modalities and implications (section §4.04). We conclude with a succinct summary and a brief outlook (section §4.05).

§4.02 BACKGROUND: THE PARTIES' COMPETING INTERESTS AT STAKE

Before delving into a more detailed analysis of the various factors that may play a role, we find it useful to outline the parties' competing interests at stake. These form the fundamental backdrop for the overarching balancing of interests exercise and mandate that security for costs remain the exception and not become the rule.

The applicant's legitimate interest is to safeguard the reimbursement of its costs. The claimant has a choice whether, having assessed the strengths and weaknesses of its case and other risk factors (including the other party's financial situation), it wishes to pursue a claim in the first place. The respondent has no comparable choice. It should

3. For instance, *see* Art. 183(1) of the Swiss PILA, s. 1041 of the German CCP and Arts 1468, 1506(3) of the French CCP.
4. In particular Art. 28(1) of the 2021 ICC Rules and J. Fry/S. Greenberg/F. Mazza, *The Secretariat's Guide to ICC Arbitration* (2012) para. 3-1036. Further Art. 25 of the 2018 DIS Rules, Art. 29 of the 2021 Swiss Rules, Art. 36 of the 2021 DIA Rules, Art. 38 of the 2020 FAI Rules.
5. Some also refer to the arbitral tribunal's general procedural powers.

not be faced with the unfair choice to either not properly defend itself in the arbitration and risk an adverse award or to defend itself in the arbitration with the knowledge that it will incur considerable costs which it will likely be unable to recover from the other side.[6]

The other party's legitimate interest is to have unhindered access to arbitral justice. A security for costs order bears the risk of stifling genuine claims and effectively depriving the other party of its right to proper legal protection.[7]

Of course, this effect can be desirable from the applicant's point of view and can motivate the applicant to misuse a security for costs application as a tool to delay or even put an end to the proceedings. The purpose of a security for costs order is certainly not to encourage such guerrilla tactics, but to re-establish a level playing field between the parties where appropriate.[8] The means to decide whether the circumstances exceptionally warrant a security for costs order is a careful balancing of interests exercise, taking into account all circumstances of a particular case.[9] The following section analyses the various factors that can play a role in this exercise.

§4.03 REQUISITES FOR ORDERING SECURITY FOR COSTS

Subject to specific provisions in the applicable rules, we suggest that the arbitral tribunal essentially adopt a two-step analysis borrowed from national procedural law that has also proven useful in arbitral practice. In Germany and Switzerland, for instance, courts will consider whether the applicant for interim relief has demonstrated a claim for the injunction (*Verfügungsanspruch*) and a reason for the injunction (*Verfügungsgrund*). The first requirement is usually unproblematic. The applicant must have a potential claim for reimbursement of costs. The real crux comes with the second requirement, at the heart of which lies the balancing of interests exercise. The applicant must establish sufficient grounds to exceptionally grant the security for costs application.

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6. A. Redfern/S. O'Leary, *Why It Is Time for International Arbitration to Embrace Security for Costs*, 32:3 Arb Int'l (2016) 397, 398; W. Gu, *Security for Costs in International Commercial Arbitration*, 22:3 J Int'l Arb (2005) 167, 168; B. Nalbandian, *Security for Costs*, MPEiPro (April 2020) para. 3. In this regard, N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11:3 Am Rev Int'l Arb (2000) 307, 361 coined the phrase of preventing an '*arbitral hit and run*'.
7. N. Rubins, *supra* n. 6, at 362; T. Webster/M. Bühler, *Handbook of ICC Arbitration* (4th ed. 2018) at paras 28–50; *see also* Art. 4(2) of the 2016 CIArb Guidelines.
8. P. Karrer/M. Desax, *Security for Costs in International Arbitration. Why, When, and What If …*, *Liber Amicorum Böckstiegel* (2001) 339, 340 para. 7 ('*reestablish the balance*'); W. Gu, *supra* n. 6, at 169 ('*eliminates the unfairness*'); in the context of third-party funding ICC Commission Report, *Decisions on Costs in International Arbitration* (2015) para. 90 ('*put both parties on an equal footing in respect of any recovery of costs*').
9. Cf. The Chartered Institute of Arbitrators, *International Arbitration Guidelines: Applications for Security for Costs* (2016) 4; W. Gu, *supra* n. 6, at 186; N. Rubins, *supra* n. 6, at 313–314; C. Ford, *Kluwer Practical Insights on Security for Costs* (2021) at [III.1.g.]; A. Redfern/S. O'Leary, *supra* n. 6, at 411–412; N. Nalbandian, *supra* n. 6, at para. 4; K. Pörnbacher/S. Thiel, *Kostensicherheit im Schiedsverfahren*, SchiedsVZ (2010) 14, 18; ICCA-QMUL Taskforce, *Report on Third-Party Funding in International Arbitration* (2018) 168.

[A] Potential Claim for Reimbursement of Costs (*Verfügungsanspruch*)

The applicant must have a potential claim for reimbursement of costs (*fumus boni iuris*). The applicant may be the respondent or, in case of counterclaims, the claimant.

Under the first step (*Verfügungsanspruch*), the arbitral tribunal only needs to be satisfied that the applicant, if successful on the merits, could have a claim for reimbursement of costs. In line with the costs-follow-the-event approach prevailing in international arbitration, this will generally be the case. To the extent a party agreement or the applicable rules foresee that each party shall bear its own costs, or otherwise limit the costs eligible for reimbursement, a security for costs application must already be denied for lacking a claim to be secured.

The same applies where the arbitral tribunal finds that the applicant has failed to demonstrate even a prima facie case on the merits. In these cases, the applicant's claim for reimbursement is so unrealistic that it cannot be considered a potential claim for reimbursement of costs to begin with.[10] Importantly, the arbitral tribunal cannot, as a matter of principle, be required to delve into the merits of the case beyond such a prima facie assessment. A security for costs application is usually filed in the early stages of the proceedings when the arbitral tribunal does not yet have the benefit of a full evidentiary record to properly assess the outcome of the dispute. As a matter of principle, the arbitral tribunal will thus want to refrain from unduly prejudging the merits of the case. However, the opposite scenario, where the arbitral tribunal does find it probable that the applicant may prevail on the merits, can become relevant in the second step of the analysis.

By necessity, the claim for reimbursement of costs is a future and conditional claim. Taking into account the object and purpose of security for costs, a claim of this nature must suffice. To hold otherwise would deprive the instrument of its practical relevance, and be incompatible with the mandate of arbitration to grant the parties effective legal protection.

[B] Grounds Justifying Security for Costs (*Verfügungsgrund*)

The much more demanding step of the analysis is whether the applicant has established sufficient grounds to exceptionally grant the application. The security for costs order must be necessary to avoid that the applicant suffers irreparable harm.[11] Even when the applicable rules list certain criteria, the arbitral tribunal is left with broad discretion to decide whether (and how) to grant security for costs.[12] Arbitral tribunals

10. Note that B. Berger, *Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28:1 ASA Bull (2010) 7, 9 considers that the arbitral tribunal does not need to conduct even such a prima facie assessment of the outcome of the dispute in the context of the *Verfügungsanspruch*.
11. A. Redfern/S. O'Leary, *supra* n. 6, at 410; P. Karrer/M. Desax, *supra* n. 8, at 341 paras 9–10; B. Berger, *supra* n. 10, at 10; S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland*, 38:4 ASA Bull (2020) 842, 848.
12. Cf. Art. 38(2) of the 2017 SCC Rules and Rule 53 of the 2022 ICSID Rules. Highlighting the arbitral tribunal's broad discretion also N. Rubins, *supra* n. 6, at 368; J. Fry/S. Greenberg/F. Mazza, *supra* n. 4, at paras 3-1037 et seq.

seized with a security for costs application should fully embrace that discretion to carefully assess, based on an overarching balancing of interests exercise, the overall appropriateness of granting such relief based on the circumstances of their particular case.[13]

In the following, we will examine various factors that may play a role in this assessment – many already recurring in arbitral practice and some institutional rules, others with different nuances or neglected to date. Again, our analysis is two-fold: The non-applicant's financial situation must endanger the enforcement of an adverse costs award, and the applicant's interest in obtaining a security for costs must outweigh the other party's interest in unhindered access to arbitral justice.

[1] The Non-Applicant's Financial Situation Endangers the Enforcement of an Adverse Costs Award

The initial focus ties back to the purpose of any security for costs order, that is, to safeguard the applicant's position in relation to a potential costs award in its favour. Accordingly, the arbitral tribunal must first and foremost determine whether there is a serious risk that the non-applicant's financial situation endangers the enforcement of an adverse costs award.

[a] The Non-Applicant's Financial Situation

This question depends on the non-applicant's *ability* to comply with an adverse costs award, including the availability of assets for enforcement, and not its *willingness* to comply with an adverse costs award. The latter may be an additional factor to be taken into account in favour of the applicant, but it does not justify a security for costs order as such because the instrument is not intended to relieve the applicant from having to seek formal enforcement proceedings. For that reason, the location of the non-applicant's assets is usually also irrelevant.[14]

The applicant needs to demonstrate specific indications that the other party has insufficient financial means. This does not necessarily require that the non-applicant be on the verge of insolvency, but it could already be the case where it is an empty shell, or has hardly any attachable assets and low revenues.[15] At the same time, a

13. CIArb, *supra* n. 9, at 4; K. Pörnbacher/S. Thiel, *supra* n. 9, at 18; cf. also N. Rubins, *supra* n. 6, at 373–374: poor financial situation as a necessary, but by no means sufficient condition for a security for costs order.
14. Cf. s. 38(3)(a) of the English Arbitration Act, s. 56(2) of the Hong Kong Arbitration Ordinance and s. 12(4)(a) of the Singapore International Arbitration Act prohibiting that the application be granted only on the ground that the other party resides elsewhere.
15. Note that for domestic arbitrations in Switzerland, at least the wording of Art. 379 of the Swiss CCP limits the possibility of security for costs to instances where the claimant appears to be insolvent.

non-applicant in insolvency or under the threat of insolvency does not automatically have insufficient financial means to comply with an adverse costs award.[16]

In multi-party-arbitrations, the arbitral tribunal will need to assess whether the non-applicants are jointly and severally liable for the applicant's potential claim for reimbursement of costs. If this is the case, the arbitral tribunal must look at all of them combined. If this is not the case, the arbitral tribunal must look at each of the non-applicants individually.[17]

[b] Requirement of a Serious Deterioration?

Yet, the applicant cannot always rely on the other party's insufficient financial situation. Specifically, it would violate the *venire contra factum proprium* principle if the applicant could base its application on risks of which it knew or should have known and which it must thus be deemed to have assumed at the time of contract conclusion.[18] It is against this background that, in the reported cases, the success of a security for costs application often depended on whether or not the arbitral tribunal found a serious deterioration of the other party's financial situation.

We submit that the existence of such a serious deterioration strongly argues in favour of granting the security for costs application, but that it should not be postulated as a general requirement. This criterion cannot be applied schematically. In particular, arbitral tribunals should carefully consider to which extent the applicant can truly be deemed to have assumed certain risks at the time of contract conclusion, especially the type and size of the claim(s) now brought in the arbitration proceedings.

Some argue that the applicant has assumed the risk of not being able to collect on a costs award if it has entered into an agreement with a party that was already insolvent, a mere shell, or only holds assets in a jurisdiction that is not a signatory to the New York Convention or a comparable international treaty. It would have been upon the applicant to protect its interests by obtaining some form of guarantee at that point in time. Accordingly, the applicant can only succeed if it can demonstrate a

16. *X Holding in Bankruptcy (Switzerland) v. Y Co Ltd (Yemen)*, Procedural Order No. 4 dated 17 June 2003, 28:1 ASA Bull (2010) 23, 27 at para. 30 [ad hoc, Geneva]: Claimant in bankruptcy, but still holding liquid assets of more than CHF 100 million and even ready to put up a CHF 500,000 bank guarantee if the applicant had agreed to a reciprocal guarantee.

    In this regard, arbitral tribunals will also need to be mindful of special protections under the applicable national insolvency law, whereby the claim for reimbursement of costs incurred in proceedings conducted by the insolvency administrator are obligations of the estate and as such given priority over regular insolvency claims, cf. *ABC AG v. Mr X*, Procedural Order No. 14 dated 27 November 2002, 23:1 ASA Bull (2005) 108, 114 [ZCC, Zurich].

17. P. Karrer/M. Desax, *supra* n. 8, at 349 paras 46–50.

18. Cf. Art. 3(2) of the 2016 CIArb Guidelines ('*accepted business risk*'); further O. Sandrock, *The Cautio Judicatum Solvi in Arbitration Proceedings or the Duty of an Alien Claimant to Provide Security for the Costs of the Defendant*, 14:2 J Int'l Arb (1997) 17, 28. C. Sim, *Eight Key Points from the ICCA-QM Task Force's 2018 Third-Party Funding Report* (Kluwer Arbitration Blog 28 May 2018) http://arbitrationblog.kluwerarbitration.com/2018/05/28/8-key-points-icca-qm-task-forces-2018-third-party-funding-report/ (accessed 20 October 2022) rightly noted that the underlying reasoning of upholding the bargain struck between commercial parties does not translate to the investment context.

serious deterioration in circumstances.[19] In our view, this purported assumption of risk is incorrect in its absoluteness.

We agree that the location of the other party's assets is an example where the arbitral tribunal must require a serious deterioration of circumstances because it is otherwise for the applicant to take proper precautions. A security for costs order may thus be appropriate in response to, for example, an international embargo, exchange control legislation effectively prohibiting the transfer of recovered monies elsewhere, and extreme currency devaluations.[20]

We do not agree that the applicant can sweepingly be said to have accepted the other party's financial position. In principle, it may be the case that the parties accept the respective other party's general risk of insolvency when entering into the contract, and more specifically also the cost risks inherent to the conduct of arbitration proceedings when entering into the arbitration agreement. However, with the arbitration agreement also comes the possibility of a security for costs order. We fail to see why the former should necessarily trump the latter, and why security for costs should hence only be available in case the non-applicant's financial position seriously deteriorated after the conclusion of the arbitration agreement.[21]

Indeed, the specific procedural constellation in the arbitration will oftentimes not be foreseeable for either side, and the applicant may well find itself in a situation it could not reasonably anticipate at the time it entered into the arbitration agreement. Therefore, the arbitral tribunal should not reflexively turn to frequently used authorities that require a serious deterioration of the other party's financial situation. Instead, it should carefully consider to which extent the applicant can really be said to have assumed certain risks. In doing so, the arbitral tribunal should pay heed to the subject and nature of the parties' contractual relationship, in particular their respective obligations under the contract, and consider whether the applicant could reasonably anticipate the type and the size of the claim now brought against it.

If, for instance, the other party was only obliged to render certain services over a limited period of time and the applicant did not have to fear any material prejudice in the event of a defective performance by the other party, then the applicant had little reason to concern itself with the other party's financial situation at the time of contract conclusion. If the applicant declares the agreement terminated with retroactive effect due to an alleged fundamental breach of contract by the other party, and if the other party now claims its (sizeable) fees under the contract, should the applicant be denied the opportunity to obtain security for costs just because the other party's financial situation was poor from the start? We submit: Not *necessarily*.

19. P. Karrer/M. Desax, *supra* n. 8, at 346 para. 35; O. Sandrock, *supra* n. 18, at 28; ICCA-QMUL Taskforce, *supra* n. 9, 168; at least '*in principle*' also K. Pörnbacher/S. Thiel, *supra* n. 9, at 18; '*generally*' T. Webster/ M. Bühler, *supra* n. 7, at paras 28–49; '*usually*' N. Nalbandian, *supra* n. 6, at para. 51; considerably more flexible CIArb, *supra* n. 9, at 7 ('*may*').
20. P. Karrer/M. Desax, *supra* n. 8, at 347 paras 39–41; K. Pörnbacher/S. Thiel, *supra* n. 9, at 18.
21. Similarly, A. Redfern/S. O'Leary, *supra* n. 6, at 411 ('*logic is flawed*' and '*no reason to deem that a respondent has consented to pay the costs of defending an unmeritorious claim, without the benefit of security for those costs*').

Another even more acute and illustrative example is the following hypothetical case: With the objective to jointly bid in a tender for a large project, the parties entered into a heads of terms agreement and a letter of intent. If successful in the tender, and only then, the parties intended to form a joint venture for the execution of the project. If unsuccessful in the tender or if one of the parties changed its mind in the preparation of the tender and did not wish to continue with the joint bid, each of the parties could go its separate way. The parties ultimately did not prevail in the tender. The other party, an investment vehicle with very limited assets of its own, accuses the applicant of having breached the terms of the agreements. In the arbitration proceedings, it raises a claim in the millions for loss of profits that it allegedly would have made over many years once the joint venture was established. Should the applicant be denied the opportunity to obtain security for costs just because it entered into a heads of terms agreement and a letter of intent with an investment vehicle? We submit: The arbitral tribunal should take a closer look and duly consider the actual circumstances. Among others, the arbitral tribunal should bear in mind that both agreements – and hence the parties' (financial) exposure to each other – were strictly limited in time and purpose.

[c] In Particular: Third-Party Funding

In recent years, the implications of third-party funding for a security for costs application have been the subject of debate among scholars and in arbitral practice. The emerging consensus appears to be that the existence of third-party funding as such does not suffice to justify security for costs. Indeed, where the other side is funded by a third party, this may well prompt the applicant to take a closer look and encourage a security for costs application on its part. However, it cannot relieve the applicant from establishing the requisites for granting the application. The mere existence of third-party funding also does not justify a less onerous burden of proof or even a rebuttable presumption for the other party's impecuniosity.[22]

This does not mean that the existence of a third-party funding arrangement would not need to be taken into account at all when assessing the other party's ability to comply with an adverse costs award. In cases where the third-party funder is under an obligation to cover adverse costs and where it is also not entitled to freely terminate the funding agreement and be relieved of its obligations, a financially strong funder actually argues against ordering security for costs. Yet, the opposite constellation does not automatically warrant the opposite conclusion. The reason is that financially stable

22. In detail ICCA-QMUL Taskforce, *supra* n. 9, 163–183; further 2017 SIAC Practice Note on External Funding, para. 9; S. Bachmann, *supra* n. 11, at 856–857; W. Kirtly/K. Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?*, 30:1 J Int'l Arb (2013) 17, 30. With a focus on investment cases also B. Gustafsson, *Article 38 of the SCC Rules: An Analysis of Security for Costs in TPF Arbitration*, 1 Swedish Arb Yb (2019) 137, 143–153. Disagreeing A. Redfern/S. O'Leary, *supra* n. 6, at 412: strong prima facie basis for acceding to an application; more cautious in the latest edition G. Born, *International Commercial Arbitration* (3rd ed. 2021) 2681 compared to G. Born, *International Commercial Arbitration* (2nd ed. 2014) 2496: only '*often*' a strong prima facie case; further T. Webster/M. Bühler, *supra* n. 7, at paras 28–53 ('*likelihood … presumably much higher*').

parties also increasingly use third-party funding as a means to preserve their liquidity and reduce the risks associated with a litigious enforcement of their claims.[23]

In order to put the applicant in a position to properly assess the implications of the other party being funded, the arbitral tribunal can order the funded party to disclose the relevant terms by producing the pertinent sections of the funding agreement or an affidavit from the funder.[24] If the funded party fails to comply with this order, the arbitral tribunal can make the adverse inference that the involvement of the funder does not argue against the security for costs order. Again: The arbitral tribunal cannot automatically infer that the financial situation of the funded party endangers the enforcement of an adverse costs award.

[2] The Applicant Prevails in the Balancing of Interests Exercise

The applicant's interest in obtaining a security for costs must also outweigh the other party's interest in unhindered access to arbitral justice. The various factors discussed in this section are neither conclusive nor relevant in each and every case.

[a] The Parties' Respective Prospects of Success on the Merits

First, the arbitral tribunal may consider the parties' respective prospects of success on the merits of the case.[25] The lesser the other party's prospects of success on the merits, the more readily the applicant's interest in obtaining security can prevail. Conversely, the greater the uncertainties regarding the outcome on the merits, the more the applicant needs to establish other grounds justifying its application.[26]

Any such assessment would be without prejudice to the arbitral tribunal's final decision, and thus not lead to a prejudgment of the merits in the strict sense of the word because it would be based solely on the submissions and evidence on record at the time, and thus remain of a preliminary and summary nature. Nonetheless, the arbitral tribunal will oftentimes be hesitant to disclose any indication of its position at such an early stage of the proceedings.

However, especially in cases tantamount to frivolous claims and in cases with grossly overvalued claims, arbitral tribunals should demonstrate more procedural robustness and take a hands-on approach that affords the applicant's interests sufficient protection. In egregious cases where the non-applicant's claim would be utterly excessive or outright '*abusive or extravagant*', the advance on costs alone may

23. *See only* ICCA-QMUL Taskforce, *supra* n. 9, 180 ('*increasingly a tool of choice, not of necessity*').
24. ICCA-QMUL Taskforce, *supra* n. 9, 181; further ICC Commission Report, *Decisions on Costs in International Arbitration* (2015) para. 89.
25. This criterion is explicitly mentioned in Art. 38(2)(i) of the 2017 SCC Rules. *See also* Art. 2 of the 2016 CIArb Guidelines.
26. K. Pörnbacher/S. Thiel, *supra* n. 9, at 20; similar in approach also CIArb, *supra* n. 9, at 6; N. Rubins, *supra* n. 6, at 369; J. Waincymer, *Procedure and Evidence in International Arbitration* (2012) 649.

sometimes suffice to prevent such claims from being brought into arbitration.[27] At the same time, institutional rules increasingly offer special tools to deal with frivolous claims, in particular allowing for the early dismissal or expeditious determination of such claims.[28] This suggests that, in a significant enough number of cases, the advance on costs alone does not suffice as a safeguard. While such tools, and the relevant provisions and guidelines thereon, have no direct bearing on a security for costs application, we submit that the arbitral tribunal may take guidance from their spirit when assessing a security for costs application. Similarly to the aforementioned tools, the instrument of security for costs can be used to adequately safeguard the applicant's interest, while being less onerous in terms of its legal consequences on the other party than an early dismissal or expeditious determination.[29]

This applies all the more with respect to (likely) grossly overvalued claims. We submit that the arbitral tribunal is well advised to seriously consider a security for costs order where it has strong indications that the amount claimed is far off from any reasonable ballpark figure. Admittedly, the arbitral tribunal will expose itself to a certain extent when relying on such considerations, but sometimes only a courageous choice can ensure an effective and fair process for both parties. As a side effect – not as the objective – such a pragmatic decision at the beginning of the proceedings could also benefit the overall efficiency of the arbitration. It would be a helpful hint for the claimant, who could either pursue the claim as is and reinforce its efforts to properly substantiate the quantum, or adjust the claim as necessary and all involved could conduct the remainder of the proceedings in a manner that is proportionate to the real amount in dispute.

[b] The Parties' Conduct

Second, the arbitral tribunal can take into account the parties' respective conduct.[30]

Where the arbitral tribunal is prima facie satisfied that the applicant contributed to the other party's poor financial position, the applicant is highly unlikely to succeed with its security for costs application.[31] By contrast, where the applicant has not yet paid its share of the advance on costs, it is in breach of its contractual duties, but the

27. Stronger J. Lew/L. Mistelis/S. Kröll, *Comparative International Commercial Arbitration* (2003) 601–602 ('*is considered to be a sufficient safeguard*').
28. *See*, for example, Art. 22(1) of the 2021 ICC Rules and the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration in force as from 1 January 2021, paras 109–114 (expeditious determination); Art. 39(2)(i) of the 2017 SCC Rules (summary procedure); Art. 22.1(viii) of the 2020 LCIA Rules (early determination); Art. 43.1(a) of the 2018 HKIAC Rules (early determination procedure); Rule 29 of the 2016 SIAC Rules (early dismissal); Rule 41 of the 2022 ICSID Rules.
29. Sceptical in this regard and emphasizing the purpose to redress the risk of non-enforceability K. Pörnbacher/S. Thiel, *supra* n. 9, at 19.
30. This criterion is explicitly mentioned in Rule 53(3)(c) of the 2022 ICSID Rules.
31. CIArb, *supra* n. 9, at 10; C. Ford, *supra* n. 9, at [III.2.b.ii.]; P. Karrer/M. Desax, *supra* n. 8, at 348 para. 44; N. Rubins, *supra* n. 6, at 362; depending on the prima face strength of the parties' respective cases on the merits also T. Webster/M. Bühler, *supra* n. 7, at paras 28–49. From arbitral practice recently *Unionmatex v. Turkmenistan* (ICSID Case No. ARB/18/35), Decision on Security for Costs dated 27 January 2020, paras 77–78 (dissenting opinion).

arbitral tribunal should normally not penalize this breach by simply dismissing the application.[32]

As regards the other party's conduct, the arbitral tribunal should factor in any specific indications that the other party has made '*bad faith manoeuvres*'[33] designed to frustrate the enforcement of an adverse costs award. This includes (i) the assignment of the claims to a special purpose vehicle, which is not necessarily impecunious but has comparatively few assets, (ii) the significant disposal of assets, and (iii) the relocation of its domicile in a jurisdiction substantially complicating the enforcement of the costs award.[34] The closer in time to the commencement of the arbitral proceedings the other party takes these actions, the more reason the arbitral tribunal has to suspect foul play and the more of an explanation the other party will need to provide to rebut this suspicion. Where the arbitral tribunal is satisfied that foul play was involved, it should grant the security for costs application even if it were to consider, based on its preliminary assessment, that the other party and not the applicant will prevail on the merits. In these circumstances, the other party is simply not in need of any protection.[35] In addition, the arbitral tribunal can consider granting the security for costs application where the applicant demonstrates that the other party has a notable history of resisting compliance with costs decisions rendered in other proceedings.[36] All of these examples attest to the non-applicant's unwillingness to comply with an adverse costs award.[37]

[c] Consequences of Failure to Comply with Security for Costs Order

Third, the arbitral tribunal should be mindful of what consequences the non-applicant's failure to comply with the security for costs order would entail under the applicable rules, and should already factor in the severity of these consequences in the balancing of interests exercise.

Notably, section 41(6) of the English Arbitration Act and section 56(4) of the Hong Kong Arbitration Ordinance allow the arbitral tribunal to make an award *dismissing* the claim if the claimant has failed to comply with the security for costs

32. Similar *X Sarl (Lebanon) v. Y AG (Germany)*, ICC Case No. 15218, Procedural Order No. 3 dated 4 July 2008, 28:1 ASA Bull (2010) 37, 44 at para. 31 [Berne]. Disagreeing *Westacre (UK) v. Jugoimport (Yugoslavia)*, ICC Case No. 7047, 13:3 ASA Bull (1995) 301; CIArb, *supra* n. 9, at 11 ('*may*' be considered).
33. B. Berger, *supra* n. 10, at 12; S. Bachmann, *supra* n. 11, at 850.
34. CIArb, *supra* n. 9, at 10; N. Rubins, *supra* n. 6, at 374–375, W. Gu, *supra* n. 6, at 196 with fn. 180; S. Bachmann, *supra* n. 11, at 850; K. Pörnbacher/S. Thiel, *supra* n. 9, at 19–20. From arbitral practice, for example, *X SA (Panama) v. A, B, C and D AS (Czech Republic)*, Procedural Order No. 6 dated 25 July 2003, 28:1 ASA Bull (2010) 28, 34 at para. 21 [CCIA-TI]: assignment.
35. In agreement K. Pörnbacher/S. Thiel, *supra* n. 9, at 20.
36. *See RSM v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on St. Lucia's Request for Security for Costs dated 13 August 2014, para. 86, where the majority granted the application based cumulatively on Claimant's failure to comply with cost orders and awards in previous treaty and annulment proceedings, its lack of sufficient financial resources and the existence of a third-party funder which might not comply with an adverse costs award.
37. This criterion of unwillingness is explicitly mentioned in Rule 53(3)(b) of the 2022 ICSID Rules.

order without showing sufficient cause.[38] Similarly, Article 24(2) of the 2020 LCIA Rules and Article 38(3) of the 2017 SCC Rules allow the arbitral tribunal to either stay or dismiss the claims. A dismissal of the claims by award has res judicata effect. In our view, such a sweeping consequence has to find a legal basis in the applicable arbitration law and/or the applicable rules.

Where no such legal basis for a dismissal exists, the arbitral tribunal may rely on its either express or inherent procedural power to order the (partial) stay of the proceedings, which may ultimately also be discontinued.[39] Alternatively, some consider that the arbitral tribunal could (partially) dismiss the claims as currently inadmissible or treat the failure to comply with the security for costs order as a fictitious withdrawal of the claims.[40] In both of these cases, the claimant could refile its claims.[41] This consequence can create undue benefits for the claimant, but in our view, these undue benefits cannot overcome the lack of a legal basis for the drastic res judicata effect.[42] In any event, the arbitral tribunal should decide on the consequences of a non-compliance with much care and due regard to the applicable law. In particular, the arbitral tribunal should err on the side of caution and opt for the milder consequence if it is uncertain about the extent of its powers.

How do these consequences tie in with the balancing of interests exercise? Where the arbitral tribunal can and potentially will dismiss the claims with res judicata effect, the harsh consequence for the non-applicant mandates that a security for costs order remains the absolute exception. Where the arbitral tribunal can and potentially will discontinue the proceedings but the non-applicant would at least be able to refile its claims, the arbitral tribunal might be slightly more inclined to grant an application. Conversely, where the arbitral tribunal will stay the proceedings, the non-applicant is less in need of protection and the arbitral tribunal can more readily grant the security for costs application.[43]

38. Note that s. 41(5) of the English Arbitration Act interposes a peremptory order and that the dismissal only comes into play once the claimant has failed to comply not only with the first time limit under the security for costs order but also the subsequent time limit under this peremptory order. The Hong Kong Arbitration Act does not require such an interim step.
39. Expressly Art. 34(7) of the 2021 VIAC Rules; Rule 53(6) of the 2022 ICSID Rules. Cf. also S. Bachmann, *supra* n. 11, at 849 (stay or termination); N. Rubins, *supra* n. 6, at 315; C. Ford, *supra* n. 9 at [III.3.] (stay until provision of security); M. O'Reilly, *Order for Security for Costs: From the Arbitrator's Perspective,* 61:4 J Int'l Arb, Med and Disp Man (1995) 247, 250 (stay).
40. In detail from a German perspective K. Pörnbacher/S. Thiel, *supra* n. 9, at 14–16.
41. The follow-up question of what effect this order has on the running of the statutory limitation period will again depend on the applicable law.
42. In favour of a dismissal with prejudice: P. Karrer/M. Desax, *supra* n. 8, at 352 para. 59; W. Gu, *supra* n. 6, at 167, 200; probably also N. Nalbandian, *supra* n. 6, at paras 28, 48. Note that in *RSM v. St. Lucia* (ICSID Case No. ARB/12/10), Decision on Annulment dated 29 April 2019, paras 183–201, the annulment committee partially annulled the award, ruling that the arbitral tribunal had manifestly exceeded its powers when sanctioning the non-compliance with its security for costs order not just by suspending and eventually discontinuing the proceedings, but by dismissing the claims with prejudice.
43. Similar K. Pörnbacher/S. Thiel, *supra* n. 9, at 21.

Some authors seem to suggest that where the financial situation of the other party is so poor that it is unable to provide the security for costs, the arbitral tribunal should not grant the application to begin with.[44] The absurd consequence of this position would be that the applicant would be deprived of any possibility to safeguard its interests when it needs such protection the most. This result is hardly tolerable. Accordingly, an inability to pay the security for costs cannot, against the will of the applicant, lead to a sub-exception and the unsecured continuance of the arbitral proceedings, at least not in the setting of commercial arbitrations.[45] In Germany, for example, a party's impecuniosity renders the arbitration agreement inoperable and allows the other party to pursue its claims before the competent state courts;[46] this may then also be the 'way out' in case the other party is unable to comply with the security for costs order.

[d] Further Weighing of Consequences for Each Side

Finally, the arbitral tribunal should consider and weigh the consequences of its decision more generally, in particular the prejudice each side would suffer depending on whether the application is granted or not.

The greater the applicant is in need of protection, the more it is dependent on the security for costs order being granted. Where the applicant has other means available to ensure enforcement of its potential claim for reimbursement of costs, the arbitral tribunal can be more hesitant to grant the application. Specific examples include

44. S. Camilleri, *Between Rags and Riches: Rethinking Security for Costs in International Commercial Arbitration*, 37 Arb Int'l (2021) 851, 852. In the recent *Unionmatex* case (*supra* n. 31), the arbitral tribunal had, by majority decision, first granted a security for costs application in the amount of USD 3 million, only to rescind its order a few months later. The majority stated from the beginning that it would reconsider the order if the investor furnished sufficient evidence that it was financially incapable of posting security. According to reports, the arbitral tribunal later found that it would indeed be commercially impossible for the insolvency administrator to secure a bank guarantee in that amount, or, due to the terms of the funding agreement, even an ATE insurance policy for USD 1.5 million. In circumstances where the actions of the State allegedly caused the company's insolvency to begin with, the arbitral tribunal held that maintaining the security for costs order would amount to a denial of access to justice and rescinded the order (again by majority decision). *See* C. Sandersen, *ICSID Panel Rescinds Security for Costs Order* (12 June 2020) https://globalarbitrationreview.com/icsid-panel-rescinds-security-costs-order (accessed 20 October 2022).
45. Similar CIArb, *supra* n. 9, at 11–12 ('*may not of itself lead to a refusal*'). In investment arbitration cases, deferring the claimant to the competent state court is not foreseen and would run counter to the very idea of adjudicating the dispute with the host state in a fully neutral forum. Essentially depriving the investor of this forum may indeed not be adequate.
46. German Federal Court of Justice, Judgment of 14 September 2000 – III ZR 33/00 – NJW 2000, 3720–3722. Cf. also Art. II(3) of the 1958 New York Convention ('*incapable of being performed*'). Not accepting a party's impecuniosity as grounds for releasing it from the arbitration agreement the English Court of Appeal in *Paczy v. Haendler & Natermann GmbH*, IX Yb Comm Arb (1984) 445, 447. Disagreeing with the German approach also S. Wilske/T. Fox, *New York Convention Commentary* (R. Wolff, 2012) Art. II NYC para. 315. In detail M. Cardoso, *Impecunious Parties in International Commercial Arbitration,* 36:1 Arb Int'l (2020) 123–146.

another claim that the applicant can use for setoff,[47] or other rights the applicant can exercise against the other party's assets to satisfy its potential claim for reimbursement.[48]

Similarly, the arbitral tribunal might also consider the impacts of the proceedings on the applicant's financial situation. Arguably, where the applicant is dragged into proceedings of a magnitude which it could hardly anticipate when entering into the contractual relationship and which will likely have a dire or even crippling impact on its financial situation and could even determine its future operations, it might in very exceptional cases be appropriate to grant an application with the primary objective of facilitating the enforcement of an adverse costs award. However, the arbitral tribunal should not lightly meddle with the enforcement of any decision it may render because its mandate to render an enforceable award does *not* extend to interfering with the actual enforcement of its decision. Accordingly, the arbitral tribunal should only grant the application where the overall balancing of interests exercise so warrants. In the context of this overall assessment, the impacts of the proceedings on the applicant's financial situation may exceptionally also be a relevant factor.[49]

In addition, the arbitral tribunal should consider the subject of the dispute before it. It is likely inappropriate to grant the application where the applicant is really the claimant because of the nature of the claim, or where the applicant has raised a counterclaim which it intends to pursue and which essentially involves the same facts and issues as the other party's claim.[50]

Conversely, the arbitral tribunal should also take into account the extent and severity of the consequences a security for costs order will inflict on the non-applicant. A disproportionate prejudice will unduly curtail the non-applicant's access to arbitral justice. In this regard, the duration of the proceedings may play a role. A security for costs order will be less onerous in expedited proceedings than in an arbitration expected to last for several years. Moreover, the arbitral tribunal can, at least to a certain extent, alleviate the burden on the non-applicant by exploring different forms of security with the parties and leaving the choice between various options to the non-applicant. While payment to an escrow account may be particularly burdensome to cash-flow-sensitive parties, others may find it less troublesome than obtaining a bank guarantee or the like in a jurisdiction far away from its place of business.[51] Finally, the amount of security and its due date also contribute to the level of stress a security for costs order will put on the non-applicant.[52]

47. The claim to be used for setoff does not necessarily have to be due already, and be undisputed or legally binding. However, the arbitral tribunal should take into account the nature of the claim when determining the practical viability of a setoff as a means of protection.
48. C. Ford, *supra* n. 9, at [III.1.g.].
49. More generous S. Camilleri, *supra* n. 44, at 860–861.
50. CIArb, *supra* n. 9, at 5; C. Ford, *supra* n. 9, at [III.2.b.ii.]; *Parties not Indicated*, Procedural Order No. 4 dated April 2009, 28:1 ASA Bull (2010) 59, 70 at paras 169–172 [ICC, Geneva].
51. On possible forms of security and other modalities *see* below section §4.04[A].
52. K. Pörnbacher/S. Thiel, *supra* n. 9, at 21 highlighting the possibility to order security for costs in stages.

§4.04 GRANTING THE APPLICATION: FURTHER PRACTICAL CONSIDERATIONS

Where an arbitral tribunal is satisfied that the requirements for granting an application are met, it needs to be mindful of several further practical modalities and implications.

[A] Practical Modalities of a Security for Costs Order

As regards the further practical modalities of a security for costs order, the arbitral tribunal enjoys a broad discretion allowing it to account for the particularities of any given case.[53]

For one, the arbitral tribunal needs to decide on the proper form of its decision. Subject to specific provisions in the applicable institutional rules, arbitral tribunals can typically decide on a security for costs application in the form of a reasoned order.[54] Accordingly, the security for costs order will not have any final effect, and can easily be modified in the further course of the proceedings if so required. It is also not subject to an institutional scrutiny mechanism as foreseen, for instance, under the ICC Rules for draft awards.

The arbitral tribunal further needs to decide on the permissible form(s) of the security. The most common forms are payment to an escrow account administered by the arbitral institution, an irrevocable on-demand bank guarantee or a standby letter of credit.[55] Usually, the party ordered to provide the security may choose – within the limits set out by the security for costs order, which in turn should consider reasonable requests from the applicant[56] – the form of security because it is in the best position to assess which form of security has the least impact on its business dealings. The applicant, in turn, will generally not have any legitimate interest in one form of security being chosen over the other. Where payment to an escrow account is one of the options, the order should include a time limit by which the non-applicant shall indicate its choice for this form of security so that the administering body can set up the escrow account in time (e.g., one week before the time limit for providing the security as such). Especially in case of a bank guarantee, the arbitral tribunal should also be mindful that it might be very difficult for the non-applicant to obtain a bank guarantee with unlimited duration. Accordingly, it should allow for bank guarantees being provided

53. *See only* CIArb, *supra* n. 9, at 13–14.
54. For Switzerland explicitly B. Berger, *supra* n. 10, at 10.
55. However, arbitral tribunals should be open to exploring other forms of security in order to minimize the burden on the party ordered to provide security for costs. Where applicable, counsel for the non-applicant should clearly outline potential alternatives when commenting on the security for costs application. Cf. CIArb, *supra* n. 9, at 14 also mentioning parent company guarantee, bond, liens on property, insurance coverage, or assignment of a financial instrument; ICCA-QMUL Taskforce, *supra* n. 9, at 182–183 mentioning a club letter of guarantee or an insurer's bond.
56. For example, the arbitral tribunal should specify in case of a bank guarantee which types of banks (place of business, international ratings, etc.) are acceptable.

on an extend-or-pay basis.[57] Finally, the arbitral tribunal will need to consider whether to explicitly foresee a cross-indemnity and demand a security also from the applicant for this purpose.[58]

With respect to the amount of the security, the arbitral tribunal needs to anticipate the quantum of its costs decision, and estimate the costs of arbitration for which the applicant will be able to claim reimbursement if it prevails on the merits. In this context, the arbitral tribunal will also need to factor in considerations of procedural equality. If, for example, the other party engages specialized counsel in several jurisdictions, it may well be appropriate for the applicant to take a similar approach so as to be on equal footing. In any event, the applicant is well advised to assist the arbitral tribunal in its assessment by properly substantiating its quantification of the amount sought (indication of approximate costs for the upcoming procedural steps, and for the legal costs potentially also the expected number of hours and the hourly rate).[59] The arbitral tribunal can opt to order security for costs in stages and increase the amount of security as the proceedings evolve.[60] When doing so, however, the arbitral tribunal should strive to ensure that, from the start, the party ordered to provide security for costs has a fair picture of the total amount of security it will likely be asked to put up in the course of the proceedings. Security for costs is normally ordered for costs incurred going forward.[61] Nonetheless, the arbitral tribunal can consider extending the security to exceptionally also encompass costs incurred prior to its security for costs order.

In cases where the applicant has – again, in breach of its obligations – declined to pay its share of the advance on costs until it is afforded security for its costs, the other party could be requested to substitute this share for the proceedings to continue.[62] Depending on the procedural calendar, the arbitral tribunal may wish to move the proceedings forward straight away, and to account for this possibility by allowing the non-applicant to reduce the amount of security if and to the extent it pays the applicant's share of the advance on costs.

[B] Further Implications of a Security for Costs Order for the Proceedings

Turning from the practical modalities of the security for costs order as such to its implications for the arbitral proceedings more generally, three considerations are worth highlighting:

57. In further detail with drafting proposal P. Karrer/M. Desax, *supra* n. 8, at 350–351 paras 55–56.
58. *See* Art. 25.2 of the 2020 LCIA Rules.
59. C. Ford, *supra* n. 9, at [III.1.d.]. In particular, it may be helpful for the applicant to disclose the legal costs it incurred up to the date of the application as a benchmark.
60. Cf. CIArb, *supra* n. 9, at 15; J. Waincymer, *supra* n. 26, at 652.
61. ICC Bulletin (Special Supplement), *Procedural Decisions in ICC Arbitration: Security for Costs* (2014) 7; T. Webster/M. Bühler, *supra* n. 7, at paras 28–51; C. Ford, *supra* n. 9, at [III.1.].
62. *See*, for example, Art. 37(5) of the 2021 ICC Rules.

(1) A security for costs application is likely made early on and ideally still prior to the first case management conference, allowing the arbitral tribunal to take the application into account when determining the procedural timetable. The arbitral tribunal should foresee reasonably short time limits for any comments on the application, and should strive to render a swift decision. This applies all the more in case of expedited proceedings.

(2) The arbitral tribunal may, prior to rendering the decision on the security for costs application as such, be asked to require further information from the non-applicant based on its broad procedural powers to establish the facts of the case. In principle, it is upon the applicant alone to substantiate its application and furnish sufficient proof for its allegations. However, the arbitral tribunal may in certain circumstances find that the non-applicant bears a secondary burden of proof in relation to information solely within its possession. Specifically, the arbitral tribunal may find a need to order the non-applicant to provide information (including supporting documentation) on its financial situation where such information is neither public nor otherwise available to the applicant, and where the applicant has established, on a prima facie basis, that the non-applicant lacks sufficient financial means. If the non-applicant should fail to provide such information, the arbitral tribunal could make an adverse inference in favour of the applicant's interest to obtain a security for costs.

(3) The arbitral tribunal has to tie up any loose ends in relation to the security for costs order when rendering its final award. This includes a decision on the allocation of the parties' legal costs incurred in connection with the security for costs application (unless already done in the order as such). It may also include a decision to release the security to the successful party or to both parties in specific proportions, as the case may be. The decision to release the security will normally not need to be reflected in the operative section and may not even need to be included in the award at all. In our experience, however, it can be useful to include instructions in the body of the award.[63]

63. *See also* CIArb, *supra* n. 9, at 16. Where the security was paid to an escrow account administered by the ICC, for example, these instructions (including a time limit for the applicant to request that the security be paid out to its account, failing which the security can be repaid to the other party) allow the Secretariat to proceed accordingly and to close the account without undue delay, cf. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration in force as from 1 January 2021, para. 252. Where the security was provided in the form of a bank guarantee, the terms of the bank guarantee will likely foresee that the applicant needs to present the final award and a written confirmation that the other party has not paid the awarded costs.

B. Berger, *supra* n. 10, at 13 with reference to *X SARL (Lebanon) v. Y AG (Germany)*, Final Award of 20 April 2009, 28:1 ASA Bull (2010) 46, 47 at (4.) [ICC, Berne] suggests that in order to exclude any risk of the unsuccessful non-applicant having to pay the same amount twice, the arbitral tribunal should order that the security be set off against the applicant's cost claim. Whether the arbitral tribunal can order such a setoff on its own motion will depend on the

In cases where the applicant is (partially) unsuccessful, the arbitral tribunal may additionally be required, if so requested, to decide on the costs the non-applicant incurred for providing the security. Subject to the applicable rules, these costs should be considered as reasonable other costs incurred for the arbitration proceedings.[64]

§4.05 WHERE TO? MAKE IT THE EXCEPTION, NOT A UNICORN

Where does that leave us? The instrument of security for costs is rightly conceptualized as the exception. It is a deviation from the principle that each party bears its own costs until the arbitral tribunal renders its costs decision. As such, it should only be granted where special circumstances leave the applicant in particular need of protection and justify burdening the other party with a security for costs order. It goes without saying that the instrument should not be misused for tactical manoeuvres, and that arbitral tribunals should be vigilant in this regard. After all, the integrity of the proceedings is of paramount importance. However, we question whether arbitral practice has not shown too much reluctance in the past and effectively turned the exception into a unicorn.

An arbitral tribunal faced with a security for costs application should not content itself with falling back on the mantra of security for costs being an exception that is to be used '*rarely and restrictively*'.[65] Instead, arbitral tribunals are encouraged to take a closer and indeed a wider look at such applications, and to show procedural robustness where appropriate in the circumstances. Taking a normative approach to carefully assess the circumstances of its particular case and to balance the parties' competing interests allows the arbitral tribunal to determine whether it is exceptionally appropriate to order security for costs. In this regard, the various but non-conclusive factors discussed in this contribution may warrant consideration – in one direction or the other. As arbitral practice evolves, future security for costs applications and decisions

applicable law. Alternatively, the arbitral tribunal could order the applicant to release the security concurrently against the other party's payment of the costs award. In our view, however, the arbitral tribunal should generally be hesitant to include such orders on its own motion because it could end up unduly complicating matters. Double recovery is a commonplace risk, and the other party will likely have sufficient other means available under national procedural law to defend itself against such attempts.

64. By contrast, to the extent that the non-applicant wishes to claim other losses it suffered as a consequence of providing the security, it would need to resort to a claim for damages. Arbitral tribunals should allow the non-applicant to introduce such a claim within a reasonable time period after the provision of the security as a subsidiary request for relief, upon which the arbitral tribunal is only requested to decide in the event that the applicant is (partially) unsuccessful on the merits and in the proportion that the security is thus released to the non-applicant.

65. ICC Bulletin (Special Supplement), *Procedural Decisions in ICC Arbitration: Security for Costs* (2014) 7.

will ideally be approached with a broader view and appreciation instead of the often too narrow Maslow's hammer approach of the past.[66]

66. Addressing the phenomenon of Maslow's hammer in the context of international arbitration generally, Ms. Claudia Salomon (President of the ICC Court of International Arbitration) in her recent keynote speech *Maslow's Hammer: An Over-Reliance on Familiar* Tools, available at https://iccwbo.org/content/uploads/sites/3/2022/03/tel-aviv-arbitration-week-keynote-claudia-salomon-140322-1.pdf (accessed 20 October 2022). Ms. Salomon called upon arbitration practitioners to remain open to thinking about how to improve, to explore new ideas and tools, and find new answers instead of falling back on the 'we've always done it this way' bias.