SECURITY FOR COSTS APPLICATIONS IN INVESTMENT ARBITRATIONS INVOLVING INSOLVENT INVESTORS

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ABSTRACT

Recent years have seen a significant increase in security for cost applications in investment arbitrations. These applications see states arguing that even if they prevailed on the merits and were to be awarded reimbursement of their costs for the arbitral proceedings, they would be unable to enforce such cost awards against the investor. The focus of this debate often turns around the fact that the investor has initiated its claim with the help of a third-party funder, and addresses what to make of this fact when considering whether the investor has to put up security for costs. Yet, the mere fact that an investor is funded does not automatically mean that it will be unable to satisfy an adverse cost award. Thus, the discussion about third-party funding, even if prevailing, is not necessarily determinative of whether security for costs should be granted. This article therefore goes one step further and assumes that an investor is insolvent for the assessment of security for costs applications. It is on this basis that insolvent investors, being the furthest along the spectrum of financial fitness, present the classic example of such cases. As such, examination of recent investor-state arbitration cases on security for costs applications from the vantage point of the involvement of insolvent investors provides useful insight into the key concerns and considerations at stake. Through such analysis, this article seeks to

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strip back the veil of third-party funding to directly address the deeper issue and to suggest a conceptual framework for assessing future applications.

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