GAR Live Frankfurt

3rd June 2015

'The strong presumption is that a party which uses third party funding should be required to put up security for costs'

When doing a GAR Live debate there is a strong presumption that that speakers will use humour. This is the guidance Alexi and David and their colleagues give to speakers. Make it funny they say. Entertain the crowd, use some jokes. This is the normal way of things.

But this year is different. This time GAR have given us the joke already, and not a very good one. And they've asked Tim and me to explain this bad English joke to a German audience. Not an easy task then, explaining that famous English sense of humour. One that translates not so well to civil law Europe.

So, let's be clear first of all. I don't find the joke funny either. I simply don't get it.

A month ago I had the pleasure of sharing the GAR Live London panel with Gavan Griffith who does appear to get the joke. In fact if pressed, I think he would claim ownership, so perhaps it's an Australian joke, rather than English.

In London Gavan mounted a defence of his reasoning in the RSM v St Lucia case, from a very lonely parapet and asked if other arbitrators might want to join him. It's fair to say nobody rushed to stand beside him.

I suggested that if we adopted Gavan's RSM rhetoric towards Third Party Funders describing them as "mercantile adventurers" then we would find ourselves stuck in the 19th Century. A time when English Court of Appeal judge Lord Justice Knight-Bruce referred to litigation funding as "huckstering in litigious discord". I feared that this language, and with it the presumption presented today, might reflect an underlying systemic bias which would put international arbitration in a very dangerous place.

Later on, the more I reflected the more I found myself confused by these 19th Century language failings of logic and fairness. So I did some research and it seems that the middle of the 19th Century was a hotbed for this sort of thing, judges and authors alike. They were all at it. At much the same time as Lord Justice Knight Bruce was taking the Court of Appeal to Cloud-Cuckoo-Land, Lewis Carroll had Alice in Wonderland, tied up in logical knots before the Court of the King and Queen of Hearts.

All of which led me to consider how an impecunious Alice would have fared in an Arbitration in Wonderland operating under today's presumption, and with apologies to Lewis Carroll, let me share a previously unpublished prior draft of chapter 7 from his great book:

Chapter 7: A Mad Arbitration Tea Party

There was a table set out under a clock and March Hare QC and President Hatter were having tea at it: the third arbitrator Professor Dormouse was sitting between them fast asleep, and the other two were resting on him.

The Claimant Alice was sitting in front of them.

"You don't look like you can afford to lose", said President Hatter, who was the chairman of the tribunal. "You are not the same as the Queen of Wolkenkuckucksheim. She has lots of money. She can afford to lose".

"But that's not fair. She took all my money", said Alice starting to cry. "And anyway I'm going to win".

"But what if you don't?" asked March Hare QC. "The Queen will have been so inconvenienced. We shall stop this case now or the Queen will chop my head off."

"But what if I had money?" pleaded Alice.

"People with more money have more rights," said Arbitrator Dormouse who seemed to be talking in his sleep.

"Yes, the rules are different for the rich. Because they have money, they need not show money", said the President, talking over Professor Dormouse. "Can you show me your money?"

"The Duchess will lend me the money to pay for my case," said Alice.

"Mmmm, but will she share in your winnings?" asked March Hare.

Before Alice could answer, the clock struck quarter past three. Professor Dormouse jumped up from his sleep, screaming, "merchants in quarrels, litigation derivatives, gambler's nirvana!" And then he lay down again just as quickly, and continued to snore gently.

President Hatter became agitated "If you share your winnings, you should pay security to us now!" he exclaimed. "Because this is the rule."

"And what if I don't share the winnings with the Duchess?" wondered Alice.

"Well then you need pay no security," said the President.

Alice felt dreadfully puzzled. President Hatter's remarks seemed to have no meaning in it, and yet it was certainly in English. "I don't quite understand," she said as politely as she could.

And with that Professor Dormouse finally awoke: "Have you guessed the riddle yet?" he asked.

"No, I give it up," Alice replied: "what's the answer?"

"I haven't the slightest idea," said President Hatter.

"Nor I," said Hare QC.

"Well then, allow me" said Professor Dormouse who explained all:

"You have no money but the Queen does not,

so you must pay now and she need not.

If you cannot pay then that is that.

And, if the Duchess can pay then you need not,

unless the Queen pay the Duchess,

in which case then pay you must.

Alles klar?"

It's a shame this great version of the story never made it to print. In fact art continues to imitate reality in Chapter 8 when the Queen attempts to disqualify her appointed arbitrator, Professor Dormouse, because he keeps falling asleep. But that story is for another day…

So now let us leave Wonderland, with Alice is trapped in a perma-hell of injustice. Which of course would never happen in the real world. Because the presumption is flawed.

To summarise then, the presumption must be false. As Alice's predicament demonstrates no fair and equitable legal system could tolerate such an arbitrary presumption, weak or strong.

We can easily see it's a falsehood if we subject the argument to the mathematician's test of *reductio ad absurdum,* or put another way, assume it to be true and then see what crazy consequences follow:

Let's boil it down to the following;

> Assume today's presumption to be correct – the presence of TPF implies there should be security for costs - then there are two possible consequences, either:

1. The definition of TPF includes all capital providers, and all litigants (claimants and defendants). This would at least be fair but so impractical as to destroy due process. Arbitral tribunals are not set up to conduct a case by case analysis of the balance sheet of every litigant and how they are paying, ranging from the poor (Alice) to the deep-pocketed, (Queen of Wolkenkuckucksheim, or dare I say it large businesses such Enel or Siemens). This would equate to a gross and illegitimate piercing of the corporate veil. Thus it reduces to absurdity;

   Or

2. The definition applies only to TPF (i.e. non-recourse funding to claimants in return for a direct share in the proceeds) in which case it makes an arbitrary distinction between forms of capital and violates principles of natural fairness. Again this reduces to absurdity, well shown by the treatment of Alice's loan arrangement with the Duchess. Only if she agrees to share the proceeds of the arbitration must she pay security for costs, but not if it is a simple loan.

And there I must rest my case.