ETHICAL ISSUES IN THIRD PARTY FUNDING

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“A number of factors contribute to increased interest in potential conflicts of interest due to the involvement of third-party funders. One frequently noted factor is that a number of leading arbitrators have taken positions within, or ad hoc consultant roles with, some funders. Other factors include the increasing number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, related links among elite law firms and some leading arbitrators, and what might fairly be characterized as general calls for increased transparency, including with respect to potential arbitrator conflicts.”
• The existence of third-party funding or insurance in an international arbitral dispute can create the potential for an arbitrator conflict of interest with the funder or insurer;

• Knowledge of the existence and identity of a third-party funder or insurer in international arbitral disputes is essential for arbitrators to assess and make necessary disclosures of potential conflicts of interest;

• Disclosure of potential conflicts is important to avoid potential challenges to an arbitral award and to preserve the overall integrity of international arbitration;
• Third-party funding may be provided through a variety of structures such that it is difficult to isolate a single definition of third-party funding;

• Avoiding conflicts of interest is in the best interest of all parties and arbitrators, and is important for the legitimacy of international arbitration and the assured enforceability of arbitral awards; and

• Disclosure should strike an appropriate balance between providing adequate information for arbitrators, parties, institutions, and appointing authorities to assess potential conflicts of interest, and reducing the potential for unnecessary delay, frivolous challenges to arbitrators, or unfounded applications for disclosure of financial information and funding agreements.
• Referral fees or kickbacks from funders to lawyers;

• Skewed legal advice - influenced by the extraneous temptation of securing a one-off fast buck of fee income in a weak case, falsely presented as meritorious; or, conversely, over-timorous advice on merits to a client given in fear of losing the case and with it a lucrative relationship with a funder;

• Advice to clients on the funding contract itself (particularly the funder’s price or share defined by reference to a range of factors including litigation and non-enforcement risks) being influenced by commercial considerations and self-interest – there is an obvious case for regulation requiring independent advice on the funding agreement from a lawyer other than the one retained to prosecute the claim in arbitration;
• Surrender of control of the arbitration to the funder – particularly in relation to settlement offers, which might amount to champerty and maintenance in some jurisdictions;

• Dangerous liaisons with third party funding brokers – who is the broker acting for and how is he/she remunerated, who by, and in what event?

• Risks and dangers of divulging privileged or confidential information of a client, inherent in hawking a case around potential funders and brokers when seeking funding.
CONTROL OF ETHICS - OPTIONS

• Statutory Regulation (primary and sub-ordinate) of all parties;
• Professional Disciplinary Regulation and Guidance;
• Non-statutory Codes of Conduct for Funders;
• Arbitration institutional guidance and codes for arbitrators;
• Complete Self-regulation;
• Effective Sanctions and the Sword of Damocles.
A mixed bag:

• Statutory amendment to allow TPF and provide minimum requirements of residence and capital (SGD5m) for Funders;

• Sword of Damocles power reserved to Minister to regulate Funders and Funded Parties by further regulation;

• Professional Conduct Rules requiring (but only Singapore registered lawyers) to disclose TPF and identity of Funder;

• Makes it a professional disciplinary offence for a lawyer to have a financial interest in Funder or take any commission.
Options Chosen: Singapore (cont)

- Law Society Guidance to Singapore Registered Lawyers on maintaining confidentiality and privilege, managing conflicts of interest, decision making, disclosure of TPF including requiring interrogation of client if TPF suspected;
- Singapore Institute of Arbitrators Guidelines for Third Party funders, requiring: independent legal advice; observance of confidentiality and privilege; clear form of TPF contracts; facilitating disclosure; clarity on its liability for costs, management of conflicts and no interference with lawyer’s control and performance of his duty;
- SIAC practice note (PN – 01/17 31 March 2017) on arbitrator conduct in cases involving external funding; directed towards ensuring impartiality and independence and the pre-requisite of disclosure of the existence of TPF in the reference.
- The **Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017** adds a new part 10A to the Arbitration Ordinance Cap 609, which allows TPF, provides for an authorized (by the Secretary for Justice) body to issue, amend or revoke a code of practice, after a stipulated form and period of consultation, which code, pursuant to Section 98 Q (1) will set out practices and standards required of Funders;
- By section 98U, the legislation requires disclosure of the TPF arrangement **by the funded party** within certain time limits;
- But by section 98S and 98W provides that breach of the code or failure by a party to disclose TPF does not, of itself, render any person liable to any judicial or other proceedings but, may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal;
- The draft code is similar in effect and requirements to the SIArb Guidelines but not identical; and it may be amended by subordinate measures – another Sword of Damocles – behave or else!
WHEN IT COMES TO TPF IN ARBITRATION – IS PRESERVATION OF ETHICAL STANDARDS IN SAFE HANDS?

OR IN TOO MANY OF THE WRONG HANDS – LET US NOW DISCUSS!