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To disclose or to not disclose – That is the question. Insight from: IBLJ/RDAI Round Table Regarding TPF Produces Interesting Insights Into the Question of Disclosure and Private Interviews

Lisa Bench Nieuwveld (Conway & Partners) · Tuesday, April 17th, 2012

A central concern the in the third party funding arena is: Whether or not parties who are funded by a third party funder should be obligated to disclose this funding relationship. Looking at a recent conference in which many key funders participated on sharing their perspectives, it appears that many funders preferred to keep their involvement confidential. (Summary of this event will be published at: M. Scherer, A. Goldsmith and C. Fléchet, Third Party Funding In International Arbitration In Europe: Part 1: Funders' Perspectives", International Business Law Journal / Revue de droit des affaires internationales, No. 2-2012). Although I did not attend this conference, I am grateful for permission from those involved to capture some of the ideas expressed there as well as some ideas from funders I interviewed personally – which follows. At the conference itself, the funders acknowledged that disclosure may be necessary in limited circumstances, such as to avoid potential conflict of interests with arbitrators or due to legal disclosure requirements. As with communication concerns, the funders will noted that they often rely on confidentiality agreements to protect against disclosing their existence and/or other related information.

One funder also pointed out the need to consider looking at the issue of disclosure at two different time periods. The first is at the early stage and most funding agreements contain a requirement that prohibits disclosure without the funder's consent. The second period is when the proceedings are already underway. Then the question of whether to disclose or not may be in the arbitral tribunals' hands. This then leads to the question of how far should the disclosure extend – to simply the funder's presence, etc or too all communications between the client and lawyer with the funder? A key distinction between funding in litigation cases versus arbitration cases is that the funding agreement may play a larger role (with its corresponding confidentiality provision) in arbitration than in litigation. With arbitration the likely reason to require disclosure may be limited to potential conflict of interests with an arbitrator.

Suggestions to handle the outstanding questions of should disclosure be required are varied. They include leaving it to the applicable arbitral institutions; although this does not address the situation for ad hoc arbitrations. Or one funder suggested simply looking to the legal situation in insurance law. Protection in some jurisdictions is already given on whether insurance coverage is available and to what extent; the public policy reasoning being that this may inappropriately impact the award. This captures the bottom line fear from the funders: disclosure adversely impacting the

outcome. As arbitrators – will it? Should it?

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