

Constraints and Ethics: Pathways for Regulating (and Restricting?) Alternative Funding

Leon Kopecký

3 November 2017

International Disputes: A Favored Area for Alternative Funding

- Less Regulation
- Costs/Amounts Involved
- Private and Confidential Processes
- Legal Community views it Favorably

Alternative Funding Regulation Survey

Queen Mary University survey conducted in 2015:

- Respondents generally agreed on **mandatory disclosure** of existence and identity of third-party funders, but not on full disclosure of funding agreement
- **71%** of respondents deem third-party funding **requires regulation**
- **58%** think regulation should be implemented **through soft law**
- **29%** think it should be implemented **through collective self-regulation** (codes of conduct)
- **6%** think regulation should be implemented **through internal by-laws** by each third-party funder
- **8%** or respondents think regulation should be implemented **otherwise** (hard law / domestic legislation / multilateral treaties)

Alternative Funding and Ethics: A Call for Regulation

- **Communication:** Confidentiality, Privilege, and Professional Secrecy
 - ➔ How to regulate **Attorney-Client-Funder** relationship?
- **Disclosure of Funder** to Opposing Party and Arbitral Tribunal
 - ➔ Preventing **Conflict of Interests** of Tribunal members
- **Public Policy:** Interplay Applicable Law and Alternative Funding
 - ➔ Parallel **Court Proceedings** or Post-award Challenges

Alternative Funding and Ethics: A Call for Regulation

- **Control and Ownership of Claim** by Funder
 - **Legal Control**: claim existence depends on Funder?
 - **Factual Control**: legal arguments decided by Funder?

- **Equality of Arms** between Parties (esp. Investor-State Arbitration)
 - **Concern re Security for Costs**: would tribunals automatically order security for costs on existence of Funder?
 - **TPF not a factor** in tribunal cost assessments (cf. *RSM Production Corporation v Saint Lucia*; *South American Silver v Bolivia*)

A Look at National Regulation

- **Brazil** 1996: Arbitration Act **does not prohibit** Alternative Funding
- **Switzerland** 2004: Supreme Court **struck down a law preventing** AF
- **UK** 2005: Court of Appeal **relaxed restrictions** on AF
2011: Self-regulating **code of conduct** for lit/arb Funders
- **India** Contingency fees prohibited and **legislation silent** on AF
- **USA** State by state legislation (e.g.: AF is **permitted in New York**)
- **Germany** 1999: AF permitted for **specialist alternative funders**
2006: Constitutional Court allowed lawyers to act as funders
(prohibition of conditional and **contingency fees relaxed**)

A Look at National Regulation

- **Austria** 2013: Supreme Court decision **approved TPF litigation**
- **Hong Kong** 2017: Legislative Council Law **expressly allows AF**
for arbitrations seated in HK; work done in HK for arbitrations
residing abroad; and mediation
- **Singapore** 2017: Civil Law Act Amendments **legalize AF in arbitration,**
(previously prohibited)
- **France** 2017: Paris Bar Council Regulation **in favor of TPF**
'positive development for access to justice in international arbitration'

Possible Setbacks to Regulation

- **Increase in Costs?**
- **Regulation Overlap: Disharmonized Regulation?**
 - **Geographical** Overlap: Multiple jurisdictions with incompatible regulation involved in the same proceedings
 - **Substantive** Overlap: e.g. with regulation on Conflict of Interests in Arbitration (2014 IBA Guidelines)
- **Multilateral Regulation**
 - Harmonization?
 - Soft Law or Hard Law?

Thank you!

schönherr