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IBA Guidelines on Conflicts of Interest – how should we interpret the Third Party Funding disclosure principles?

In October 2014 the IBA Council adopted new guidelines on Conflicts of Interest in International Arbitration. These guidelines are available on the IBA website:

http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

The guidelines are a step forward in terms of providing guidance on when the presence of third party funding should require disclosure but uncertainties remain.

A key initial impression is that the disclosure obligation in General Standard 7 encompasses all directly economically interested parties. It seems to avoid any arbitrary distinction between different forms of capital that might be provided to fund cases. Litigation Funding as provided by companies like Calunius should be no different from Insurance, Loans or Equity, absent other factors. However, this broad principle may be very difficult for litigants to apply in practice and it is unclear how they will assess whether each economic interest in a case merits disclosure.

A second uncertainty arises from General Standard 7(a) which appears to make disclosure into an absolute requirement, irrespective of the relevance of the relationship with the arbitrator. We would suggest that 7(a) should be interpreted in conjunction with Standard 6(a) which would reflect funder practice of analysing the scale of a relationship they might have with an arbitrator's law firm, for example by assessing the scale of the activities of the firm.

Thus if the law firm is big and Calunius has taken advice from a lawyer in one office, or had that lawyer run a case Calunius has funded, that should not create a disclosure obligation with a lawyer in another office, assuming the pre-existing economic fee relationship was not substantial in the context of the law firm's overall business. This of course means it is more likely that there will be conflict issues with boutique firms where the partners sit as arbitrators as well as acting as counsel.

However, this is but one view and perhaps all we can do at present is to state that it is far from clear whether:

(a) Standard 6 gives the basis to define what is a "relationship" which is "relevant" to qualify a Standard 7 disclosure; or
(b) Standard 7 requires that any relationship with the arbitrator's law firm must be disclosed, even if it is a financially *de minimis* advisory relationship with a different lawyer.

Calunius Capital LLP, March 2015