



SINGAPORE INSTITUTE OF ARBITRATORS

NOTES TO ACCOMPANY REVISED SIARB GUIDELINES FOR THIRD PARTY FUNDERS

1. The Working Group thanks all those who provided comments during the consultation period. The comments received were extremely helpful, and each was carefully considered. The majority of comments led to refinements to the Guidelines. We set out below a brief summary of comments which were considered, but which did not lead to any amendments to the Guidelines.
2. In relation to clause 6.1.4, it was suggested that "*the ban on a Funder's gaining control of a claim unless permitted to do so in the Funding Agreement is not balanced by a positive duty on a Funder to take what the English Courts referred to [in the recent case of *Excalibur Ventures v Texas Keystone & Ors*¹] as 'rigorous steps short of champerty' "*

Clause 6.1.4 was amended by the Working Group to read that a Funder "*shall not seek to influence the Funded Party's legal practitioner to cede control or conduct of the dispute to the Funder except where and to the extent expressly permitted by the Funding Contract.*" The Working Group considers that clause 6.1.4 does not operate as a ban on Funders rigorously monitoring a claim (as one would expect them to do as prudent investors, and as the *Excalibur* case endorsed). Clause 6.1.4 rather suggests that Funders should not seek to influence the Funded Party's legal practitioner to **cede control or conduct** of the dispute to the Funder - save where, and to the extent, expressly provided for in the Funding Contract.

3. Some comments suggested that the Guidelines should be amended to propose obligations upon the Funded Party, or its legal practitioner. The

¹ [2016] EWCA Civ 1144

Guidelines are intended to apply to Third Party Funders, rather than other parties involved in funded claims, so these comments could not be taken on board. The Working Party notes that the Law Society of Singapore has issued guidelines directed at legal practitioners relating to third party funding.

4. It was suggested that the Guidelines should provide that, where information or documents are provided to a Funder by a Funded Party, their legal practitioner, or a party interested in funding, then such disclosure will not amount to a waiver of privilege, and/or that it should not be open to a respondent in an SI Arb arbitration to argue that the Funded Party has thereby waived privilege in such information and/or documentation and/or that the documents or information should be disclosed to a respondent on that basis. The Working Group was unable to include such a rule within the Guidelines, as the Guidelines - in their intent and effect - are guidance rather than "law-making". Parties are free to specify when sharing information with a Funder (either themselves or through their legal practitioner) that no privilege has been waived in relation to the information disclosed, should they consider this to be of assistance.

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