



HARBOUR

LITIGATION FUNDING

Public Consultation

Draft Practice Direction No. X of 2017 on Third Party Funding

Response from Harbour Litigation Funding Limited

We are grateful for the opportunity to provide you with feedback in relation to your Draft Practice Direction No. X of 2017 on Third Party Funding (the “**Draft PD**”).

Having 15 years’ experience funding litigation in 13 jurisdictions and arbitrations under 4 different arbitral rules enables us to offer practical feedback, including possible suggestions which can help bolster public confidence in third party funding.

In general, we welcome the proposals set out in the Draft as a very positive development for dispute resolution in Dubai and the Middle East.

We make the following comments about the current Draft PD below and adopt the definitions therein:

Regulation of funders

The importance of ensuring that only legitimate funders with adequate capital fund, is key in ensuring Funded Parties are protected. The Draft PD does not currently place any requirements upon who can be a funder to proceedings in the DIFC, and what their conduct in providing funding to Funded Parties should be. We suggest that the Draft PD adopts several key requirements in order to achieve this:

1. A Funder must retain a minimum capital amount of funds at all times, for example AED25m, while it is funding any Proceedings.
2. A Funder shall undertake to the Funded Party not to control the litigation and/or settlement negotiations which are the subject of the Proceedings.
3. An LFA must be in writing.
4. The Court should have a discretionary power to order the Funder to provide information in relation to its funding (including evidence of compliance with the minimum capital threshold above) at any time during Proceedings where a LFA has been entered into.

If a Funder fails to comply with these requirements, the Court should have the power to make an order for costs directly against a Funder.

Associated Law Firm obligations

It is also important that a Funded Party’s legal representative (i.e. the Associated Law Firm/Lawyer) ensures that it will act in its client’s best interests where the client has entered into, or wishes to enter into, an LFA.

We would suggest that the Draft PD includes a requirement on the Associated Law Firm/Lawyer to act in its client's best interest, acknowledging the Funded Party's obligations under the LFA and assisting the Funded Party in meeting these obligations.

Disclosure of the LFA

The Draft PD requires the existence of an LFA to be disclosed in every scenario. There will be occasions where a Funded Party should disclose that they have entered into an LFA, but it may not necessarily be required in every scenario. Our experience is that banks, blue-chip and multi-national companies and other 'asset rich' persons who use funding as a hedging tool are reluctant to have such confidential arrangements disclosed. In contrast, a Funded Party who is insolvent or who the Defendant believes has limited assets will want the fact that it has entered into an LFA to be disclosed.

The issue is most prevalent in security for cost applications and notification of an LFA is more relevant where the Defendant raises this issue. If security for costs is not an issue, then we would submit that there should be no requirement for the Funded Party to notify the Court and other parties of the fact it has entered into an LFA.

Where notification of an LFA is given, we agree that a copy of the LFA should not be disclosed in its entirety. In particular, we consider that commercially sensitive information such as the amount of funding to be provided and the 'return' due to the Funder should not be disclosed to a third party. Receipt of this information by a Respondent can give them a tactical advantage.

We therefore suggest amending paragraph 4 of the Draft PD so that the Court can, at its discretion, order disclosure of the LFA or any part of it.

Funded Party

The definition of a 'Funding Party' is fairly narrow and could be broadened. The party to the Proceedings may not be party that is funded. It is suggested that the definition could be broadened to include a 'related entity' such as a parent, subsidiaries and other group related companies.

Funder

We would suggest that the definition of funder should also include the words 'who contributes to or forbears payment in return for the share of the proceeds of the claim' in order to cover contingency fee lawyers

We hope our comments are of assistance. Please do not hesitate to contact us if any clarification or further information would be helpful.

16 February 2017