



ABU DHABI GLOBAL MARKET  
سوق أبوظبي العالمي

# CONSULTATION PAPER NO. 6 OF 2018

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CONSULTATION PAPER NO. 6 OF 2018 – 7 NOVEMBER 2018

**LITIGATION FUNDING RULES**

## INTRODUCTION

### WHY ARE WE ISSUING THIS PAPER

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1. The Chief Justice of Abu Dhabi Global Market Courts ("**Courts**") has issued this Consultation Paper to invite public comment on the proposed litigation funding rules ("**Rules**") which are to apply to litigation funding agreements as defined in section 225(2) of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 ("**Regulations**"). A draft of the proposed Rules is **Annexure A** to this Paper.

### OVERVIEW

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2. Section 225 of the Regulations provides that an agreement "shall not be unenforceable by reason of its being a litigation funding agreement" if it meets conditions specified in the section or prescribed under it by the Chief Justice of the ADGM Courts. The Chief Justice has power to prescribe conditions about:
  - (a) funders; and
  - (b) funding agreements.
3. It is with the above in mind that the Rules have been prepared and are now provided for consultation. The Rules are likely to be of interest to potential funders, funded parties and other parties involved in proceedings within Abu Dhabi Global Market ("**ADGM**") where funding is, or is proposed to be, provided.

### HOW TO PROVIDE COMMENTS

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4. All comments should be in writing and sent to the email specified below. Please state the Consultation Paper number in the subject line. You may, if relevant, identify the organisation you represent in providing your comments. The Chief Justice reserves the right to publish, including on ADGM's and the Courts' website, any comments you provide, unless you expressly request otherwise at the time of making your comments. Comments supported by reasoning and evidence will be given more weight by the Chief Justice.
5. The deadline for providing comments is **6.00 pm (UAE) Wednesday, 5 December 2018**.
6. Once we receive your comments, we will consider whether any modifications are required to the proposed Rules. We will then proceed to publish the Rules. A notice will be posted on our website informing you when this happens.

### ADDRESS FOR COMMENTS:

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### BACKGROUND

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7. Third party funding has become a common component in financing litigation and arbitration proceedings in many leading civil and common law jurisdictions. The Rules have been prepared using as guidance the frameworks that are in place in other jurisdictions where third party funding is common practice. The Rules are geared towards providing parties with greater certainty in relation to the enforceability of funding arrangements which have been entered into in connection with proceedings in ADGM.
8. If it is to be deemed enforceable in ADGM under section 225 of the Regulations:
  - (a) the Funder must satisfy the requirements contained in Part 2 of the Rules; and
  - (b) the agreement must satisfy the requirements contained in Part 3 of the Rules.
9. If any of the requirements of section 225 or prescribed by the Chief Justice are not met, then the enforceability of the funding agreement in ADGM will fall to be determined in accordance with ordinary common law principles, including those that apply to champerty and maintenance.

### PART 1 INTRODUCTION

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10. Part 1 deals with the 'Application' (section 1), 'Interpretation' (section 2) and 'Short title, extent and commencement' (section 3) of the Rules.
11. While section 225 of the Regulations deals with "litigation funding agreements", it is intended that the Rules will apply to funding agreements used in connection with both court litigation and arbitration proceedings conducted in ADGM. It is considered that arbitration proceedings come within the scope of:
  - (a) section 225 of the Regulations (in particular, by reference to sections 225(2) and 225(8) of the Regulations); and
  - (b) the Rules (in particular, by reference to paragraph 1 (Application) and paragraph 2(1)(g) (definition of "proceedings")).

### PART 2 FUNDERS

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12. Part 2 deals with conditions about funders.
13. Paragraph 4(1)(a) provides that the Funder must carry on as a principal business the funding of proceedings to which the Funder is not a party. This is intended to strike the right balance in relation to the business activities of funders and permits funders to engage in activities other than the funding of proceedings provided that funding of proceedings constitutes a principal business activity.
14. Paragraph 4(1)(b) mandates that the Funder must have "qualifying assets" of not less than US\$5 million or the equivalent in foreign currency. The aim of this provision is to set a minimum financial threshold for the Funder to meet in order to provide confidence in the credit worthiness of the Funder involved in the proceedings and to reduce the risk of the Funder being unable to continue funding the claim part way through the proceedings.

**ISSUE FOR CONSIDERATION Q1:**

**SHOULD THIS BE A REQUIREMENT FOR FUNDERS?**

**IS US\$ 5 MILLION THE RIGHT LEVEL FOR THE REQUIREMENT OF “QUALIFYING ASSETS”?**

15. Paragraph 4(2) contains an expansive definition for “qualifying assets” which is intended to reflect the commercial reality of how funders hold assets. The definition of “qualifying assets” also seeks to provide for funding structures other than corporate funders to participate in funding proceedings in ADGM. Again, this is intended to reflect the reality of how funding is provided and the various structures that may be used.

**ISSUE FOR CONSIDERATION Q2:**

**DO YOU AGREE WITH THE DEFINITION OF “QUALIFYING ASSETS”?**

16. Paragraph 5 deals with potential conflicts of interest. Paragraph 5(1) prohibits a Funder involved in the proceedings being owned by a lawyer or a law firm either directly or indirectly. Paragraph 5(2) by way of exception allows an individual to have an interest in the Funder through an investment portfolio that is being managed by a third party stockbroker or other professional investment manager.

**PART 3 LITIGATION FUNDING AGREEMENTS**

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17. Part 3 deals with the content and other associated requirements in connection with litigation funding agreements.
18. Paragraph 6 mandates that the Funder must take reasonable steps to ensure that the Funded Party has received independent legal advice in relation to the litigation funding agreement. This section is cast in similar terms to clause 9.1 of the Code of Conduct for Litigation Funders, published by the Association of Litigation Funders in England and Wales.
19. Paragraph 7 sets out the minimum content requirements relating to the scope of funding. It mandates that the litigation funding agreement must deal with the scope of funding, the amount of funding and the Funder’s recovery in accordance with section 225(3)(e) of the Regulations.
20. Paragraph 8 deals with the content requirements concerning the Funder’s liability (if any) in relation to adverse costs (including adverse costs insurance). It also seeks to provide protection to the Funded Party against being obliged to pay any proceeds out of the litigation to the Funder unless and until the Funded Party has first recovered those proceeds.
21. Paragraph 9 deals with conflicts of interest. Paragraph 9(1)(a) prohibits the litigation funding agreement from containing any term that could induce the Funded Party’s lawyer or law firm to breach their professional duties. Paragraph 9(2) mandates that where there is more than one Funded Party, the litigation funding agreement must include appropriate conflict of interest provisions.
22. Paragraph 9(1)(b) needs to be read in the context of paragraph 10. It provides that, subject to paragraph 10, the litigation funding agreement must not contain any term that allows the Funder to influence the lawyer or law firm of the Funded Party to cede control or conduct of the dispute to the Funder. Paragraph 10 currently provides that that the litigation funding agreement must include provisions as to the Funder’s role in decisions about whether to settle the proceedings and on what terms. As paragraph 10 (in the context of paragraph 9(1)(b)) is permissive, it is important to identify any other matters which should be included in paragraph 10.

**ISSUE FOR CONSIDERATION Q3:**

**ARE THERE ANY OTHER MATTERS WHICH SHOULD BE INCLUDED IN SECTION 10 TO ALLOW FUNDERS TO HAVE A ROLE IN AN ASPECT OF THE PROCEEDINGS OTHER THAN SETTLEMENT?**

23. Paragraph 11 provides that the litigation funding agreement must specify the circumstances in which the Funder may terminate the agreement.
24. Paragraph 12 sets out the confidentiality obligations on the Funder and mandates the circumstances in which the Funder can have access to information which is subject to legal privilege or is confidential (with appropriate provisions to be included in the litigation funding agreement).
25. Paragraph 13 contains further provisions relating to the Funder's obligations in relation to dealings with lawyers which are geared towards managing potential conflicts of interest between a Funder and a lawyer or law firm.
26. Paragraph 14 mandates that the litigation funding agreement must require the Funder to notify the Funded Party expeditiously if the Funder foresees or reasonably believes that it will no longer meet any of the prescribed requirements for Funders.
27. Paragraph 15 mandates that the litigation funding agreement must include a jurisdiction clause allowing the Funded Party, subject to any arbitration agreement, to commence proceedings in the Courts in relation to any dispute arising from the litigation funding agreement. It also mandates that the litigation funding agreement must include a jurisdiction clause whereby the Funder agrees that, by funding the proceedings, it has submitted to the Court's jurisdiction for the purposes of disputes relating to costs as between the Funded Party and any other party to the proceedings. The effect of this provision is that:
  - (a) it provides the Funded Party with a measure of protection that a dispute under the litigation funding agreement can be referred to the Courts as the Funder has submitted to the Courts' jurisdiction
  - (b) if an arbitration clause is included in the litigation funding agreement, the jurisdiction clause would not prevent the Funder from invoking the right to refer the dispute to arbitration; and
  - (c) it also provides the successful opposing party with a measure of protection as to its costs position as the Funder has submitted to the Courts' jurisdiction for the purposes of disputes relating to costs as between the Funded Party and any other party to the proceedings.

**ISSUES FOR CONSIDERATION Q4:**

**IS THERE ANY REASON THAT THE LITIGATION FUNDING AGREEMENT SHOULD NOT HAVE TO INCLUDE SUCH A JURISDICTION CLAUSE?**

**IS THERE ANY REASON WHY A FUNDER SHOULD NOT ALSO SUBMIT TO THE JURISDICTION FOR THE PURPOSES OF A DISPUTE RELATING TO COSTS AS BETWEEN THE FUNDED PARTY AND ANY OTHER PARTY TO THE PROCEEDINGS?**