

ADGM LITIGATION FUNDING RULES

INTRODUCTION

On 16 April 2019, the Litigation Funding Rules (the "Rules") of the Abu Dhabi Global Markets Courts ("ADGM Courts") came into effect. The Rules were issued by the Chief Justice of the ADGM Courts pursuant to Article 225 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the "Regulations").

The Rules are the first in the MENA region to provide a comprehensive framework for third party litigation funding, regulating both funders and litigation funding agreements ("LFA") related to proceedings before the ADGM Courts.

Purpose of the Rules

The Rules are aimed at (a) providing greater certainty to both litigants and litigation funders that their LFA will be enforceable before the ADGM Courts while (b) striking a balance between the interests of both litigants and litigation funders. The Rules also apply to arbitration proceedings in the ADGM.

If the requirements in the Rules are met, an LFA would be enforceable before the ADGM Courts. If such requirements are not met, the enforceability of the LFA will be determined by the ADGM Courts in accordance with English common law principles of champerty and maintenance which have historically prohibited third party litigation funding. While the English Courts have, in recent times, moved away from a strict application of these principles there is a risk that an LFA that fails to comply with the Rules might be held to be non-enforceable by the ADGM Courts.

Therefore, it is in the interests of both third party litigation funders and litigants to comply with the Rules. The Rules are based on international best standards and some of the key requirements are noted below.

Requirements for a Litigation Funder

Prospective funders must:

- (i) have as their principal business the funding of proceedings to which the funder is not a party; and
- (ii) have qualifying assets of not less than US\$5 million or the equivalent amount in foreign currency.

These requirements provide a minimum financial threshold for prospective litigation funders with the aim of increasing confidence in the credit worthiness of the litigation funder and their ability to fund the claim until the end.

Litigation funding is a billion dollar industry and is on the rise across the world as it provides litigants with an alternative source to finance their claims in return for the funder taking a pre-agreed share of the outcome of the claim.

Clifford Chance assisted the ADGM Courts in drafting the Rules, which are tailored to the specific needs of the ADGM Courts following an extensive review of the litigation funding framework in several jurisdictions, including Australia, Singapore, Hong Kong, England & Wales and the United States of America.

These requirements apply on a continuing basis and the litigation funder is required to notify the funded party expeditiously if the funder foresees or reasonably believes that it will no longer be able to meet the requirements.

Mandatory Provisions of Litigation Funding Agreements

Apart from regulating litigation funders, the Rules regulate the content of LFAs by stipulating minimum criteria for an LFA to be enforceable. LFAs must be in writing and include as a minimum:

- (1) the scope, amount and timing of funding;
- (2) the funder's recovery including the timing and manner of recovery;
- (3) whether the funder is liable for adverse costs/adverse costs insurance;
- (4) the funder's involvement in potential settlements;
- (5) the circumstances in which the funder can terminate the LFA¹; and
- (6) confidentiality obligations on litigation funders, including a duty to preserve legal privilege where applicable.

The funder must also take reasonable steps to ensure that the funded party has received independent legal advice on the LFA. Funders may satisfy this requirement through written confirmation from the funded party that it has taken such advice.

The LFA must also state that the litigation funder submits to the jurisdiction of the ADGM Courts for the purposes of disputes relating to costs between the funded party and any other party to the ADGM Court proceedings. This provides some protection to both funded parties and opposing parties in the proceedings that costs disputes with the litigation funder can be referred to the ADGM Courts.

Conflicts of Interest

The Rules also contain various provisions around conflicts of interest. For example, the Rules prohibit conflicts of interest (including financial conflicts) between the lawyer representing both the funded party and the litigation funder, which is a common requirement in many jurisdictions.

In addition, LFAs must not have terms which could induce the funded party's lawyer to breach their professional duties or allow the funder to influence the funded party's lawyer such that the funder takes control of the dispute.

LFAs which include more than one funded party must contain provisions by which conflicts of interests are managed between the funder, each funded party and the respective lawyers.

Notifying Other Parties

Under the Regulations, a litigant who enters into an LFA must put every other party to the proceedings on written notice of the fact that an LFA has been entered into. Parties would have to apply to the ADGM Courts if they seek further details as to the funder or the LFA.

The Rules provide greater certainty to parties that LFAs will be enforceable before the ADGM Courts if the minimum requirements on funders and funding agreements are met.

¹ The Rules note that the funder cannot terminate the LFA for any other reason.

By way of comparison, the Dubai International Finance Centre Courts (DIFC Courts) require litigants to notify other parties of the fact that an LFA has been entered into and also the identity of the funder.

Comment

The Rules strike the right balance between not being overly prescriptive on funders and LFAs while still ensuring certain minimum standards to protect litigants and provide access to justice. It is hoped that the Rules will further boost the prospects of litigation funding in the ADGM Courts and the litigation funding market in the region.

The Rules provide a balanced framework with protections for both funders and litigants that should attract international parties to the ADGM Courts.

CONTACTS



James Abbott
Partner

T +971 4503 2608
E james.abbott
@cliffordchance.com



Paul Coates
Partner

T +971 4503 2684
E paul.coates
@cliffordchance.com



Arun Visweswaran
Senior Associate

T +971 4503 2748
E arun.visweswaran
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Level 15, Burj Daman, Dubai International Financial Centre, P.O. Box 9380, Dubai, United Arab Emirates

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