



Legal update — April 2019

# Commercial litigation Litigation Funding Rules in the ADGM



## On 7 November 2018 the Abu Dhabi Global Market Courts (ADGM) released a consultation paper entitled Consultation Paper No. 6 of 2018 - Proposed Litigation Funding Rules (the Consultation Paper) setting out the proposed rules for litigation funding to be put in place in the ADGM (the Proposed Rules).

After receiving positive feedback on the Proposed Rules from numerous key stakeholders, on 16 April 2019, the ADGM issued their Litigation Funding Rules 2019 (the Rules). The Rules have immediate effect.

The issue of the Rules are a significant, and welcomed, development for the UAE. Litigation funding has been used in the UK for many years and is an established system used by those that wish to pursue litigation. We have seen the benefits of litigation funding first hand and have significant experience in advising clients on obtaining litigation funding both in the UK and internationally, including in the UAE. Due to the numerous benefits of litigation funding, the market has rapidly expanded with an increase in the use of litigation funding globally. In connection with this, the UAE has seen increased interest in litigation funding over recent years, which has prompted the implementation of the Rules.

The Rules have been designed to create greater certainty within the UAE for funders and parties regarding the enforceability of funding arrangements in proceedings including the criteria for such arrangements.

### The benefits of litigation funding

Some of the benefits of litigation funding include:

- Enabling a claimant to pursue a case which they may not be able to progress due to finite financial resources, thereby ensuring access to justice.

- Funders can provide a second opinion and sense check on litigation risk at an early stage in a dispute.
- Funders will usually meet the majority of up-front costs, which would otherwise need to be met by the claimant.
- The availability of after the event (ATE) insurance, arranged and funded by litigation funders, can remove adverse costs risk to a claimant, which again would have to be met by the claimant.
- Establishing equality of arms between parties, particularly against well resources defendants.
- The possibility of early settlement given that defendants will appreciate that in order to obtain funding from a reputable funder, the funder will have obtained a favourable opinion on the merits of the claim from reputable Leading Counsel. This will have a bearing on the assessment of litigation risk defending the claim.

### The Rules

The Rules helpfully formalise the approach to funding for both funders and the parties requiring funding as well as standardising the procedure in respect of funding being obtained as part of litigation proceedings.

The Rules, in particular Part 1 of the Rules, require the funding agreements to be deemed to be enforceable in accordance with section 225 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the Regulations). Section 225 clarifies the type of agreement that can be classified as a funding agreement (the Agreement). The Agreement must be that a person, known as the Funder, agrees to fund the litigation which is being pursued by another person, the Funded Person. For the Agreement to be valid the following conditions must be applicable:

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1. *The funder must be a person, or a person of a description, prescribed by the Chief Justice;*
2. *The agreement must be in writing;*
3. *The agreement must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the Chief Justice;*
4. *The agreement must comply with such requirements (if any) as may be so prescribed;*
5. *The sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure on funding the provision of services; and*
6. *That amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Chief Justice in relation to proceedings of the description to which the agreement relates.*

*(ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015)*

If an Agreement is entered into by a Funded Person then they must notify the other parties involved in the litigation of the Agreement. The notice must be given before proceedings have been commenced or as soon as possible after they have been commenced. If the Agreement is entered into after the proceedings have been commenced then within 7 days of the Agreement being entered into the Funded Person must notify the other parties. The required notification of funding under the Rules will create transparency regarding the funding of litigation within the UAE and is likely to encourage the possibility of early settlement given Funders' requirements when agreeing to fund litigation, for example, obtaining a favourable opinion on merits of the claim.

Should all of the above criteria be met and the Funded Person is successful then the Court will have the discretion to make a costs order which could also include provision for payment of any costs that may be due and payable under the Agreement.

In terms of the other parts of the Rules, Part 2 is applicable to the Funder, which includes some restrictions, for example, that they must have qualifying assets of not less than USD 5 million and they are in no way to be owned, either directly or indirectly, by a law

firm or individual lawyer to avoid a potential conflict of interest.

Part 3 is applicable to the Agreement itself and is a set of further requirements to which the Agreement needs to adhere in order to qualify as a funding agreement.

The Funder should also make reasonable measures to ensure that the Funded Person has taken independent legal advice in respect of the Agreement and advice in relation to the consequences of the Agreement once it has been signed by all parties.

### **How will this change litigation in the UAE?**

As well as formalising the approach to funding within the UAE, the introduction of the Rules will also allow for more certainty for the Funded Person as the Funders would need to meet certain criteria, which provides for increased security that the funding would be highly likely to remain in place throughout the proceedings. This is more beneficial to those parties that are involved in protracted litigation with high costs.

In respect of the number of disputes that will be bought in the ADGM, these are likely to increase following the issue of the Rules as litigation funding becomes a more common and accepted form of funding in the jurisdiction. The uptake of funding following the implementation of the Rules will also increase claims being commenced by parties who ordinarily would not be able to fund the litigation themselves.

Should you wish to discuss the Rules or the funding options that are available to parties litigating in the ADGM jurisdiction please get in touch.

### **April 2019 © Trowers & Hamblins**

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