



Public Submission to the UNCITRAL draft provisions on third-party funding

1. Woodsford Litigation Funding Limited (Woodsford) welcomes the opportunity to make submissions to UNCITRAL in respect of the Secretariat's draft provisions on the regulation of third-party funding in Investor-State Dispute Settlement ("the Draft Regulations"). Woodsford's submissions together with some background information about Woodsford, are set out below.

Woodsford

2. Founded in 2010, Woodsford is one of the most well-established litigation and arbitration funders in the world. Headquartered in London, and with a presence in the United States, Australia, Canada, Israel and Singapore, Woodsford is a truly global funder.

Woodsford has funded numerous international arbitrations previously and continues to do so. Woodsford was the funder in the landmark commercial arbitration case ([Essar Oilfields Services Limited v Norscot Rig Management PVT Limited \[2016\] EWHC 2361 \(Comm\)](#)) where relative minnow Norscot Rig Management was pitted against the much larger Essar Oilfields in a dispute over \$12 million in unpaid costs that eventually resulted in a landmark ruling in relation to the recovery of third-party funding fees.

Woodsford is a founder member of the [Association of Litigation Funders](#) of England & Wales (the ALF), an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of third-party funding in England and Wales, and Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of the ALF. Woodsford was actively involved in drafting ALF's [Code of Conduct](#) (the Code), which sets out the standards by which all Funder Members of the ALF must abide, including in relation to their capital adequacy. In particular, the Code requires its members to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. The Code also sets out circumstances in which funders may be permitted to withdraw from a case, and outlines the way in which the roles of funders, litigants and their lawyers should be kept separate. The ALF also maintains complaints handling procedures. In the

seven years since ALF introduced its complaints procedure, Woodsford has never been the subject of an ALF complaint. Woodsford is also a founder member of the [International Legal Finance Association](#) (ILFA).

3. Woodsford's [executive team](#) blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, the United States, Canada, Australia, Ireland, Israel and Singapore, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales.
4. Woodsford's Chief Executive Officer, [Steven Friel](#), is a solicitor and formerly partner at two major international law firms. Steven was recognised by every annual edition of the *Legal 500* published in his last eight years of private practice. For his work in international arbitration, the *Legal 500* ranked Steven as "*outstanding*". Steven has also been recognised as one of the [top 100](#) leaders in legal finance of 2020. In the latest edition (2021) of Chambers & Partners' review of the global funding industry, Steven is praised for his "*hands-on approach and ability to work constructively on even the biggest and most complicated matters*." He has also recently [published a book](#) on the business of litigation funding.
5. Woodsford has an [Investment Advisory Panel](#) (IAP) that brings together senior figures from the world of both international arbitration and litigation, with direct experience spanning many areas of law. Our IAP includes [John Beechey CBE](#), a past President of the International Court of Arbitration of the ICC, [Fidelma Macken SC](#), the first female judge to be appointed to the Court of Justice of the European Union and [Shira A. Scheindlin](#), a former United States District Court Judge.
6. **Woodsford's Submissions in respect of the UNCITRAL Secretariat's draft provisions on the regulation of third-party funding in Investor-State Dispute Settlement**

Woodsford hereafter makes submissions to address concerns outlined in the Draft Regulations as follows:

- a) Regulation models
- b) Disclosure of third-party funding
- c) Security for costs and allocation of costs
- d) Code of conduct for third-party funders

Background

7. Woodsford respectfully disagrees with the Working Group's belief that further regulation of third-party funding is necessary. Various jurisdictions that have actively considered the question of how much (if any) regulation of third-party funding is necessary have often concluded not to implement such regulation. Singapore and Hong Kong introduced legislation in 2017, following considerable consultation, to permit third-party funding in respect of arbitration proceedings. As part of that process, the need (or otherwise) for government-led regulation was considered, but not adopted. As recently as last month (June 2021), Singapore further liberalised its third-party funding regime to permit funding of to cover certain proceedings in the Singapore International Commercial Court (SICC), domestic arbitration proceedings and related mediation proceedings. Referring to the 2017 legislation, the [Singapore Ministry of Law](#) stated, "*Funders and the business, legal and arbitration communities ... responded positively ... and businesses have shown increasing interest in additional options for financing litigation.*" In January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that "*the market for third-party litigation funding remains at a relatively early stage in its development in this jurisdiction and we are not aware of specific concerns about the activities of litigation funders*" and "*the last Government gave Parliament an assurance that it will keep third party litigation funding under review and this Government is ready to investigate matters further should the need arise.*" Since then, the UK government has not proposed or introduced any government-led regulatory regime in relation to third party litigation funding, which implies that the UK government considers, quite rightly in our view, that the "need" has not arisen.
8. Further, despite third party funding now being a well-established industry, there have been remarkably few disputes between funders and their funded counterparts or reported problems when compared to other financial industries. We would therefore urge caution when deciding whether or not to regulate an industry which has demonstrated no need for regulation.

Regulation models

9. In the present case, the motivation for the reform arises from *inter alia*, the concern that third-party funding increases "*the number of ISDS cases and frivolous claims*". By way of preliminary point and in response to such concern, Woodsford respectfully submits that the majority of third-party funding is provided on a non-recourse basis meaning that if the claim fails, the funder receives nothing and suffers a loss. Accordingly, the entire business model of third-party funding depends on identifying and backing meritorious cases while avoiding "*frivolous*" claims. In many cases, third-party funding

provides access to justice for those parties that do not have the financial resources to pursue a costly yet meritorious claim.

Woodsford submits that as a result of the above, any increase in cases that results directly from third-party funding must be an increase in meritorious cases and in many instances, cases brought by parties that would have been denied access to justice but for the availability of third-party funding. As such, any limit on the availability of third-party funding would inevitably have a chilling effect on access to justice of the less well-resourced and would seemingly be in direct conflict with Goal 16 of the UN's own 17 Sustainable Development Goals.

The draft regulations plainly acknowledge this benefit of third-party funding and expressly seek to preserve this through the drafting of Draft Provision 3 of the Draft Regulations, the "*Access to justice model*". However, the wording of the draft regulation and the very requirement for a claimant to demonstrate that it is not in a position to pursue its claim without third-party funding creates considerable room for interpretation and argument and risks severely disadvantaging less well-resourced claimants. It is Woodsford's respectful submission that any regulation based upon claimants satisfying prescribed requirements in order to access third-party funding would be unworkable and would ultimately serve only to increase both the time and cost of parties finding a resolution by creating an additional preliminary issue that would need to be determined prior to any substantive proceedings and create the potential for satellite litigation.

The provisions in the Draft Regulations around security for costs suffer from the same defect. How for example would a party show that the "*respondent State was responsible for its impecuniosity*" if that impecuniosity arises as a result of the matters alleged (and possibly denied) in the substantive case.

In addition to the above, in considering the necessity for regulation, it is important to note that Woodsford, and our peers in the professional litigation funding community, including our fellow members of the ALF and ILFA, are often staffed by lawyers and accountants, who themselves are the subject of professional obligations. Such funders are in the business of funding commercial, high-value disputes, in which the parties are sophisticated users of legal services, employ expert legal counsel (who have their own professional obligations), and which take place in a highly scrutinised environment (i.e. before judges or arbitral tribunals). The public policy considerations that might apply to low value dispute resolution for unsophisticated consumers, who may not have access to expert legal advice, including whether there is a need for regulation, should not, in our view, apply to the sophisticated commercial market to which the draft regulations would apply.

10. For the reasons above, we do not consider that any kind of further regulation of third-party funders, is warranted or necessary and that both the *Prohibition models* and the *Restriction models* are solutions in search of a problem.

11. Rather than introducing a regulatory regime for third-party funding, the focus should be on ensuring that the professionals who advise the users of third-party funding comply with the duties they owe to their clients. For example, we consider that lawyers should be professionally obliged to advise their clients on the various funding options available (including third-party funding, but also other options such as after the event insurance) and assist clients by engaging with only the most reputable funders in the market. In England and Wales, inadequate advice by a party's solicitors about litigation funding would not only be a breach of the [SRA Code of Professional Conduct](#), but may also be grounds for a claim in professional negligence. Clients must be provided with the information they need to make informed decisions about financing their arbitration and lawyers should be under a duty to properly advise their clients in respect of the options available to them.

12. Notwithstanding the contents of this response, if Working Group III is minded to recommend introducing a regulatory regime for third-party funders (or similar), we would suggest that such a regime should be very 'light-touch' to ensure that any steps taken do not have a 'chilling effect' on litigation funders' desire to fund cases. Overly-onerous regulatory requirements may have the unintended consequence of fettering access to justice. There is already evidence in Australia, following the recent introduction of a licensing regime, that increased regulation leads to a decrease in competition and an increase in the price of funding, which is ultimately to the detriment of claimants.

Disclosure of third-party funding

13. In principal, we do not believe that disclosure of third-party funding should be mandatory. How a party to a dispute finances itself is a private matter which the claimant ought not, in our view, be obliged to share with its opponent. If a corporate claimant were to take a recourse loan from a

bank in order to assist its cashflow (including by assisting with the funding of its disputes), it would not be required to disclose that loan to its opponent so why should non-recourse finance from a third-party funder be treated differently?

14. While Woodsford does not deny the potential for conflicts of interest, a funder would likely (and should) decline to fund any arbitration where such a conflict is likely to arise. For example, Woodsford would not fund an arbitration in which John Beechey, a member of Woodsford's IAP, was an arbitrator if there was a risk of conflict, as it would be contrary to our interests to do so. Similarly, arbitrators are capable of identifying (and are likely to identify) any potential conflicts of this kind and can decline to act as arbitrator where appropriate to do so.
15. That being said, if the disclosure of third-party funding does become mandatory, it should in any event be limited, in our view, to (a) the fact that the party to the arbitration is funded and, if considered necessary by the relevant tribunal, (b) the identity and contact details of the funder. Under no circumstances should the details of the terms of the particular funding arrangement be disclosable, as they may reveal privileged information, such as the lawyers' or the funder's assessment of the merits, and likelihood of success, of the claim.
16. Mandatory disclosure may also give rise to unnecessary satellite disputes (and attempts by parties, e.g. defendants, to defeat litigation through the tactic of attacking the funding arrangement rather than focusing on the dispute in hand. Such satellite disputes would likely drive up the costs of arbitration and distract from the core dispute between the parties.

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