WOODSFORD
LITIGATION FUNDING

Response to Consultation on the Hong Kong Draft Code of Practice for Third Party Funding of Arbitration and Mediation

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1. Woodsford Litigation Funding Limited (Woodsford) welcomes the introduction of the Hong Kong Code of Practice for Third Party Funding of Arbitration and Mediation (the "Proposed Code") and the opportunity to comment on the same in draft. Woodsford's Response to certain parts of the Proposed Code, together with some background information about Woodsford, is set out below.

Woodsford

2. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading litigation and arbitration funder. 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 litigation funding in England and Wales. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of the ALF. Woodsford has offices in London, the United States and Singapore. Woodsford has funded in Hong Kong previously (where permitted) and continues to consider funding opportunities there. In recent times, as part of Woodsford's worldwide commitment to promoting access to justice for those that lack the means to achieve it, Woodsford has supported a litigant in Hong Kong seeking to avail itself of the 'access to justice' exception[1] to the prohibition in Hong Kong on champerty and maintenance.

3. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, the United States, Ireland, Australia, New Zealand and Israel, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales. Woodsford's Chairman, Yves Bonavero, has a track record of success at the highest level of international commerce. Yves was Group Chief Executive Officer at ED&F Man, after which he held key positions in a number of successful businesses, including hedge fund managers in Asia, commercial property investors in the UK, a start-up mortgage bank, which was successfully floated on the LSE in November 2000, and two major businesses in Poland. Yves is also a keen philanthropist and, through his charitable trust, has endowed the Bonavero Institute of Human Rights at Oxford University. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor

[1] Identified by the Hong Kong Court of Final Appeal in *Unruh v Seeberger (2007) 10 HKCFAR 31*.

and formerly partner at two major international law firms. Steven has been recognised by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having *"the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation"* and a *"strong commercial grip on the relevant legal provisions and financial aspects of cases."* For his work in international arbitration, the *Legal 500* ranked Steven as *"outstanding"*. Steven has also been recognised as one of the top 100 leading legal consultants and strategists of 2018. Charlie Morris, Woodsford's Chief Investment Officer for EMEA and the Asia Pacific region, including Hong Kong, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard.

4. Woodsford has an Investment Advisory Panel (IAP) that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Our IAP includes John Beechey, a past President of the International Court of Arbitration of the ICC, Fidelma Macken, 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.

5. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Hong Kong.

Woodsford's Response to the Consultation on the Proposed Code

The Funding Agreement

Independent Legal Advice

1. Paragraph 2.3(1) of the Proposed Code requires a funder to ensure that the funded party has received independent legal advice on a funding agreement before entering into it. We understand the rationale behind this provision; it is important not only for the funded party but also the funder to ensure that the funded party has fully understood its obligations and rights under a funding agreement. However, we submit that it should be a funded party's choice as to whether or not to obtain independent legal advice on a funding agreement, as it will not always be appropriate for it to obtain such advice. For example, a funded party which is capable of properly understanding the terms of a funding agreement itself without receiving independent legal advice, either because it is a sophisticated party or a repeat user of funding, may decide that seeking independent advice is not necessary or justified, particularly if such advice would require it to incur additional cost unnecessarily.

   We also submit that the limit of a funder's obligation in this regard should, if anything, be to ensure that the funded party has a reasonable opportunity to seek independent legal advice before entering into a funding agreement and, at most, to suggest that the funded party might wish to seek such advice.

   An analogous situation arises in respect of Contingency Fee Agreements (CFA) in England and Wales, where the Court has previously held that solicitors are not even under an obligation to

suggest that the client should obtain independent legal advice. In the English case of *Bolt Burdon Solicitors v Tariq & Ors* [2016] EWHC 811 (QB), the learned Judge concluded at [161]:

> "*As to the suggestion of a conflict of interest, it could be said of any contingency fee agreement, where the solicitors' remuneration is proportionate to the amount of recovery, that there is a conflict between the solicitors' wanting to obtain as their fee the largest possible percentage of the compensation recovered and the client's interest in achieving exactly the reverse. There was no obligation on Bolt Burdon to suggest that Mr Tariq should obtain independent legal advice in relation to the terms of the Agreement. He did not need to be told this. There was no reason why he could not have sought advice from the solicitor who had acted for him for 30 years in his business affairs. He was put under no pressure of time to sign the Agreement. Quite the reverse, he took two months to sign it and did so only when he was satisfied that his precise requirements in relation to disbursements had been met.*"

There is no reason, in our view, why this principle should not apply equally to third party funding agreements, which are also a type of "contingency fee agreement" in the sense that a funder will typically only receive a 'success' fee if the claim results in a recovery.

In conclusion, we consider that it would be unduly onerous to require a funded party to take independent legal advice before entering into a funding agreement (paragraphs 2.3(1) and 2.4 as currently drafted suggest that doing so is mandatory) and that it would be sufficient to provide that a funder should ensure that a funded party has had a reasonable opportunity to seek independent legal advice.

Address for Service in Hong Kong

2. Paragraph 2.3(2) requires a funder to provide an address for service in Hong Kong in the funding agreement. In our view, this is unnecessary and creates an issue for the many international third-party funders which would be otherwise eligible to operate in Hong Kong, but which do not have a physical presence there. If the intention in this regard is to offer a funded party an address for service on the funder within the jurisdiction, it should be noted that the parties involved in international arbitration seated in Hong Kong are often based outside of Hong Kong. In those circumstances, the funder providing an address for service within Hong Kong is unlikely to assist the funded party in any way. The mechanics of how counterparties to a funding agreement are to serve notice on one another should, in our view, be left for the parties to agree as a commercial matter based on their respective circumstances and geographical locations.

Termination of the Funding Agreement

3. Paragraph 2.16 requires the funding agreement to provide that the funded party may terminate the funding agreement if it reasonably believes that the third-party funder has committed a material breach of the Code or the funding agreement. We submit that there is good reason for the apparent imbalance in termination rights in third party funding agreements. For example, if mid-way through a case, a funded party seeks to terminate in reliance on such a provision,

the funder will likely suffer loss (as it would have funded a certain amount under the terms of the funding agreement up to the date of termination) and will have no means of recovering that loss other than by pursuing the funded party for wrongful termination of contract. In circumstances where funded parties are often impecunious or even insolvent, the right to pursue the funded party is often a hollow one. We would therefore submit that this paragraph should be removed from the Proposed Code entirely.

It is notable that no such termination provision exists in the ALF Code of Conduct (January 2018 edition) and, in our view, including such a provision in the Proposed Code would be unduly onerous on funders and could even have an unwanted chilling effect on the willingness of funders to fund certain parties in arbitral proceedings seated in Hong Kong. In turn, this may reduce the appeal of Hong Kong generally as a venue for international arbitration.

If, notwithstanding our position on this issue, the Proposed Code is to include a termination right for a funded party, we would urge the Department of Justice of Hong Kong to consider amending the wording of paragraph 2.16 of the Proposed Code to exclude remediable breaches (i.e. that the funder can, on notice from the funded party, seek to remedy), such that it might read: "*the funding agreement must provide that the funded party may terminate the funding agreement if the third-party funder has committed a material and irremediable breach of the Code or the funding agreement.*" [Emphasis added.]

30 October 2018