HARBOUR

20 May 2014

# Third Party Funding consultation paper – Singapore

Response

Harbour Litigation Funding Limited

## Introduction

We are grateful for the opportunity to provide you with feedback in relation to your consultation paper.

Before we respond to your specific questions, here by way of (what we hope is useful) context is some general information about TPF in the UK (where Harbour is based).

*Benefits of TPF*

In the UK, TPF is permitted under statute, case law and public policy. Champerty, the oft cited reason for limiting TPF was decriminalised in the UK in 1967 and has, as long as the funding party is not seeking to control the litigation, been judicially accepted since that date.

Following a key review of English commercial litigation led by Lord Justice Jackson in 2010 (Chapter 11 of which specifically dealt with and again endorsed TPF), there is widespread recognition that TPF offers important benefits including:

1. Access to justice by enabling parties in dispute (mainly claimants) to manage their exposure to costs; and

2. An opportunity to strategically partner with an entity (the funder) that is very experienced in dealing with disputes.

Indeed, in his key note lecture delivered on 8 May 2013, Lord Neuberger, the President of the Supreme Court of England & Wales, described TPF as "the life-blood of the justice system".

*Risks associated with TPF*

There are inevitably risks associated with TPF, including:

1. The capital adequacy of the funder;

2. The funder employing unfair contract terms;

3. Conflicts of interest; and

4. Confidentiality and privilege issues.

To address these risks, a Code of Conduct for UK funders has been approved by Lord Justice Jackson and Lord Neuberger (President of the Supreme Court) following recommendations made by a working party of which Harbour was part.

Launched in 2011 and published by the Civil Justice Council, the Code sets out the standards of best practice and behaviour for funders in the UK and provides transparency to claimants and their lawyers.

It requires funders to provide satisfactory answers to certain key questions before entering into relationships with claimants.

Under the Code, funders are required to give assurances to claimants that, among other things, the funder:

- will not try to take control of the litigation;
- has the money to pay for the costs of the funded case and all the cases in its portfolio (capital adequacy); and
- will not terminate funding, absent a material adverse development in the funded dispute.

The Civil Justice Council also established a regulatory body responsible for TPF and ensuring compliance with the Code. That body is called the Association of Litigation Funders ("ALF")

Harbour is a founding member and director of ALF and has both adopted the Code and undertaken to comply with it at all times.

In the First Annual Harbour Lecture delivered in 2013 by Lord Justice Neuberger in which he delivered an eloquent summary of the history and use of litigation funding he commented:

*"How litigation funding will develop in years to come is something that we will all watch keenly, because funding is the life-blood of the justice system"*

*"… the public policy rationale regarding maintenance and champerty has turned full circle. Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule of law. Now, it might be said, the exact reverse of the prohibition is justified for the same reason"*

http://www.harbourlitigationfunding.com/news/from-barretry-maintenance-champerty-lord-neubergers-lecture-at-harbour-litigation-funding-inaugural-keynote-address-

*Size of TPF industry*

Harbour is one of the world's largest funders, measured by the size of our investment funds. As we have mentioned, we are UK-based, funding cases both in the UK and 10 other jurisdictions (Canada, Hong Kong, United States, New Zealand, Australia, BVI, Nevis, Jersey, Ireland, Switzerland) in all of which funding has been endorsed by the judiciary there.

We recently successfully funded a case in Bermuda in which the use of funding was challenged by the defendant as an attempted mechanism to stay the proceedings or even have them struck out to which the judge responded as follows:

*"[Counsel for the Defendant] accepted that the strength of the traditional prohibitions on champertous agreements had been diluted almost to vanishing point in much of the common law world but invited this Court to adopt a traditional approach. No cogent reasons for swimming against the modern tide were advanced"*

*"… such funding arrangements should be encouraged rather than condemned. I see no reason why Bermuda's common law should adopt the antiquarian approach contended for by [the Defendant]"*

Although the TPF industry in the UK, and globally, has grown rapidly over the last decade, it is still small. A number of entities hold themselves out as funders of disputes, but only a handful are true funders with funds immediately available rather than being simply brokers of funding.

Credible funders, such as funder members of ALF, have access to funds directly under their control and oversee a portfolio of good cases that they are funding.

To put things into some perspective:

1. There are only 7 funder members of ALF, including Harbour.

2. Harbour funds between 12-18 cases a year, each with a minimum claim value of £3m. We are confident that the number of cases we fund each year is above average compared to other members of ALF, and other large, credible funders worldwide.

3. Looking solely at litigation in the UK (i.e. excluding arbitration), in 2013 nearly 1.5 million cases were issued in the UK courts. While a number of these cases would not meet a credible funder's minimum claim value threshold, many would (certainly in the 10s of 1000s).

4. We believe that the aggregate number of cases funded by Harbour and other credible funders represents a tiny fraction of all cases prosecuted worldwide.

In our view, therefore, concerns about the size and growth of the TPF industry should be considered against the above background. TPF represents an important costs-management option for claimants with good claims, and while we support adherence by funders to key principles/a code of conduct in order to ensure protection and transparency for disputing parties, we would urge caution in implementing excessive and unnecessary regulation that could have the effect of stifling the growth of an important but small industry before it is properly established.

## 1. Should TPF be permitted for international and domestic arbitration proceedings?

In short, we firmly believe it should. If Singapore wishes to maintain its position as an arbitration hub, it cannot in our view afford to sustain a prohibition against the use of an important option that is increasingly available to, and used by, claimants in other jurisdictions.

The last few years have seen an increase in applications for Harbour's funding for arbitration proceedings, both domestic (UK) and international. The cost and complexity of high-value arbitration cases makes TPF an attractive option for significantly capitalised claimants, and an important (in fact we would argue essential) option for impecunious claimants.

Our funding:

- provides an impecunious claimant with a good claim, access to justice. It corrects any imbalance between the claimant and a stronger wealthier respondent which is typically represented by a leading global law firm; and

- provides a significantly capitalised claimant with the ability to remove a good arbitration claim from its balance sheet; to partially or fully de-risk the financial risk inherent in the case. TPF thereby free up the not inconsiderable costs (a survey recently published in GAR, indicated that the average cost of bringing a bit claim is c$3.5 million. This is a considerable sum by any measure). Even the most sophisticated businesses, while sophisticated in their field, are not experts in litigation and arbitration and they welcome the opportunity to partner with a provider of funds who brings not just funding but experience to the table

For example, at Harbour we comprise very experienced dispute resolution lawyers including senior barristers and a retired UK High Court Judge. This experience adds real value to the successful pursuit of arbitration proceedings by all types of claimant.

We are currently funding arbitration proceedings ranging from breach of contract, to breach of Investment Treaty or the Energy Charter Treaty. These proceedings are conducted under the auspices of several major international institutions and rule making bodies, including ICC, LCIA, ICSID and UNCITRAL.

The private, and often confidential, nature of arbitration proceedings means that statistics concerning the extent of TPF of such proceedings are scarce. However, as we have already mentioned, our experience is that TPF of arbitration proceedings is increasing and will continue to increase, driven in large part by:

- increased awareness amongst impecunious claimants that an important solution (TPF) is available to them in order that they can bring good claims against well-resourced respondents;

- increased awareness and experience of TPF amongst lawyers, leading to them more frequently advising clients about it as an option, and in some instances actively seeking out new clients with good claims that could not be brought without TPF; and

- increased use of TPF by significantly capitalised corporates, who are used to the availability and use of speciality corporate finance for virtually every corporate activity, and who are beginning to understand that TPF is just another form of corporate finance focused on claims as assets.

For these reasons, we believe that Singapore should permit the use of TPF for arbitration proceedings.

**2. Should TPF be made available to (a) court-based commercial litigation; (b) insolvency proceedings; and (c) claims for damages in respect of personal injury, professional negligence, product liability and damage to real property?**

In response to this question, we echo our views above in relation to TPF of arbitration proceedings. Those views apply equally to all the types of proceedings listed here.

We note that in the section in your paper that precedes this question, reference is made to a concern that by allowing widespread TPF of such proceedings, litigation

(by implication unmeritorious litigation) will increase. We do not believe that concern is valid, given that funders only make money if the claims they fund are successful and would soon be out of business if they kept funding losing cases, losing not only the monies they spent on own side costs but having to pay adverse costs (where they have agreed to do so) as well..

Harbour and other credible funders have strict assessment criteria they apply to each case they are asked to fund.

As far as Harbour is concerned, we carefully consider:

1. The financial position of the defendant/respondent and its ability to pay the damages claimed;

2. The legal merits of the case, which is a measure of two things: (i) why (based upon what is currently known about the case) the legal team managing the case believe it will be a successful case and (ii) if it is successful, what amount of damages the claimant will realistically recover;

3. The economics of the case, which is a measure of the ratio of the amount of funding required and the amount of damages that the claimant will realistically recover; and

4. The experience of the claimant's legal team in managing claims of the type for which funding is sought.

While this assessment process is by no means a guarantee of success, it allows us to filter out bad cases and seek to fulfil our aim of only funding those cases with good prospects of success. We receive over 40 applications for funding each month and yet we fund between 12-18 cases each year. Therefore, we and other credible funders actually play an important role in preventing a number of unmeritorious cases from proceeding.

In addition, it should be borne in mind that in deciding to fund a case a credible funder takes the following risks:

1. That it will have to take a complete write-off of all costs incurred on the case if that case is unsuccessful. TPF is non-recourse meaning the funder only gets paid on success. The inherent uncertainty of disputes is precisely why credible funders adopt careful and thorough case-assessment processes; and

2. That it will have to pay the other side's costs, in jurisdictions which adopt a "loser pays" principle (which of course applies in Singapore).

**3. Should there be a requirement for the funder to maintain access at all times, to a minimum capital of S$5m (or its foreign equivalent), and whether the sum of S$5m (or its foreign equivalent) is appropriate?**

We believe there should be such a requirement. The capital adequacy requirements for funder members of ALF are more stringent:

1. When ALF was first established in 2011, funder members were required to demonstrate that they had enough capital to fund the cases in their portfolio for a minimum of 36 months. That requirement has been changed to a minimum of £2million of capital and it is anticipated that amount will continue to rise.

2. Currently, funder members of ALF are in addition subject to an annual audit by a recognised national or international audit firm, and continuous testing of their capital.

There is however more to capital adequacy than setting an arbitrary minimum sum of required capital. The key question is whether or not the funder has sufficient capital to fund all the cases in its portfolio for the lifetime of those cases.

Capital adequacy requirements for funders are an important protection for funded claimants. Such requirements help to ensure that the funder's agreement to pay the claimant's legal costs (and any adverse costs if applicable) is not illusory.

However, such requirements only go so far. It is equally important that the claimant and in particular its lawyers thoroughly investigate a funder's assets, capital structure and track record before entering into a funding agreement.

It surprises us that, even today, it is unusual for claimants and their lawyers to investigate Harbour's capital position. We are rarely asked even simple questions about our funds.

Our point is that while capital adequacy requirements are important, it is just as important that lawyers fulfil their duty to properly advise their clients, by which we mean, as in every type of financial transaction, it is the responsibility of the funded party and their lawyer to ensure that the funder in question is equipped to honour its obligations.

**4. Is (i) the confidentiality requirement that all information and documentation pre and post-funding be kept confidential (subject to any non-disclosure or confidentiality agreement) a sufficient safeguard against potential abuse and (ii) whether TPF affects legal professional privilege and if so what, if anything, should be done?**

A credible funder will carry out a very thorough review of the relevant case materials before making a funding decision. When we perform a case assessment, it is important that we have complete access to all information held by the claimant or the claimant's lawyers which might be relevant to the case.

The first step we take before considering any case-related documentation is to enter into a common interest and confidentiality agreement with the claimant. In addition, if we approve the case for funding, our funding agreements contains confidentiality provisions.

By taking these steps we protect any privilege in documents and mitigate the risk of compromise of a lawyer's duty of confidentiality to the client seeking funding by providing information about the claim to the funder.

A funder's confidentiality agreement coupled with the confidentiality provisions in the funding agreement should be adequate safeguard against potential abuse provided that they are well drafted. And the question of the quality of the drafting should be answered by the claimant's lawyer (or an independent lawyer not connected to the case if the claimant so chooses).

One factor to be considered, depending on the jurisdiction, is that confidentiality provisions adopted by a funder may not prevent the defendant/respondent from making attempts to secure disclosure of documents in the funder's possession. For example:

1. The defendant/respondent may argue that legal privilege in documents prepared by the claimant's lawyer, or for the purpose of the dispute, will be waived when otherwise privileged communications are given to the funder; and

2. That argument may be stronger in jurisdictions that do not recognise a common interest form of privilege (i.e. where information, evidence or legal advice is shared between parties who hold a "community of interest").

These limitations could stifle the growth of TPF in the affected jurisdictions and, ultimately, definitive court authority or legislation might be required if the full benefits of TPF are to be enjoyed in those jurisdictions. It is therefore important that any such issues are addressed in Singapore where they arise.

As an additional point in relation to arbitration proceedings, it is crucial to check the arbitration agreement. Some arbitration agreements incorporate, expressly or by reference, particular confidentiality terms (both as to disclosure of information between the parties and as to the conduct of the arbitration)

Depending on the amount and type of information which a funder may wish to have disclosed to it during the conduct of a case, and the applicable laws, these issues will likely require ongoing attention and management until such time as the case is resolved.

**5. Should the funded party be required to seek advice from another lawyer on the terms of the agreement?**

We believe such a requirement would probably go too far. Our standard funding agreement contains a warranty that the claimant has received independent advice on the terms of the agreement before entering into it, but the lawyer managing the case that is being funded would constitute independent advice in the vast majority of circumstances.

In our experience, most of the claimants we fund are commercially astute and understand when advice is required. In particular, large corporates with significant experience of litigation and arbitration will generally consider it sufficient that their trusted dispute resolution lawyers advise them on the terms of the funding agreement.

**6. Should there be (a) a condition in the TPF agreement that control of the proceedings is to rest with only the funded party, save that the funder's input may be sought as to appointment of counsel and settlement; (b) a condition in the TPF agreement that states whether, and if so to what extent, the funder may provide input as to settlements; and (c) whether these proposed conditions are sufficient safeguards?**

Funder's in the UK are not permitted to exercise control over litigation and arbitration that they are supporting, and it is recognised that the providing of capital is not control. Funders must not cause the claimant's lawyers to act in breach of their professional duties.

We believe that this "claimant control" model should be adopted in Singapore. However, we believe that to place restrictions on what input a claimant can seek from a funder goes too far. All our funded claimants benefit from the value that we can add to a case, due to our considerable litigation and arbitration experience. We may therefore comment on various stages of a case; we may for example have

input into strategy for settlement negotiations, although we do not participate in the negotiations themselves. The key is that the claimant is not obliged to follow our suggestions – they can take or leave them.

The issue here is really one of potential conflicts of interest, which are a source of concern to critics of TPF. There is a perception that the claimant's lawyers may be unduly influenced by the funder (as the funder pays the bills) and may favour the funder's interests over the claimant's interests. Certainly, lawyers need to assess carefully a funder's bona fides and relationship they may have with them, and ensure that all necessary disclosures are made to a client to enable the client to make an informed decision on the question of funding and its risks and benefits.

As regards settlement negotiations, the funder and claimant may disagree over whether or not to settle a claim. Where the lawyer has been recommended by the funder (and appointed by the claimant), or where the funder offers the prospect of repeat business for the lawyer, some commentators consider that the lawyer may be persuaded to advise the claimant to accept the settlement, even where the settlement may not be in the claimant's best interests.

This has not been our experience and in any event we manage this concern in our funding agreement, with the use of a settlement determination clause. In simple terms, that clause states that where a lawyer recommends that a claimant accept a settlement offer, but the claimant decides not to accept that recommendation and instead continue with the case, we as the funder can trigger a settlement determination by an independent third party (usually a senior barrister, e.g. Queen's Counsel in the UK). If the independent determination is that the lawyer's advice was sound, the claimant must accept the offer. If not, the claimant is free to continue.

The identification and management of this and other conflicts of interest should be a subject for discussion between the funder, the claimant and the claimant's lawyer and should be addressed in the funding agreement. A well-drafted funding agreement will expressly recognise that the lawyer who has the conduct of the claim owes his full professional and fiduciary duties to the claimant. The agreement may also provide that, in the event of a conflict of interest between the claimant and the funder, the lawyer may continue to act solely for the claimant, even if the funder's interests are adversely affected by him doing so. This standard should be observed whether the lawyer is retained by the funder or by the claimant.

In many jurisdictions, lawyers' obligations under their professional conduct rules also assist by prohibiting a lawyer from acting if there is a conflict of interest (*for example, see chapter 3 of the English Solicitors Regulation Authority Code of Conduct 2011*).

Another potential, or perceived, conflict of interest could arise between a funder and one of the arbitrators appointed to arbitrate a dispute (for example, where the arbitrator is a partner of a law firm with which the funder has a relationship). Disclosure of such a connection could cause particular difficulties where the funding has been kept confidential until the arbitration process is well under way. However, this conflict can be avoided by the funder undertaking the appropriate conflict checks in relation to all the relevant participants in the arbitration before agreeing to fund, and by arbitrators making full disclosure in accordance with the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.

As with all aspects of dealing with conflicts, it is the obligation of client and their lawyer to ensure there are no conflicts in the way they are conducting the case – asking the funder if there are any conflicts they foresee or should declare is one part of that and need no be over complicated as simply part of the process.

**7. Is the proposed condition that funders not take steps to cause the funded party's counsel to be in breach of his professional duties a sufficient safeguard?**

We believe that it is. Please see our answer to question 6. above.

**8. Should the funder's liabilities apart from the legal costs of the proceedings, and the extent of such funding if any, be included in the TPF agreement?**

A funding agreement is a commercial contract entered into freely by its parties. The agreement should set out everything that is agreed between funder and claimant. So, if for example it has been agreed that the funder will be responsible for adverse costs and security for costs, this should be made clear in the agreement and any limits on the funder's liability in this regard spelled out.

**9. Do the proposed termination provisions represent a sufficient safeguard?**

We believe that they do.

Such safeguards are embodied in the Code of Conduct by which all funder members of ALF must abide. The Code provides that funders must behave reasonably and may only withdraw from funding in specific circumstances, that is where the funder reasonably:

1. Ceases to be satisfied about the merits of the dispute;

2. Believes that the dispute is no longer commercially viable; and

3. Believes that there has been a material breach of the funding agreement by the funded party.

Where there is a dispute about termination (or settlement), a binding opinion must be obtained from an independent QC, who has either been instructed jointly or appointed by the Bar Council.

**10. Should the existence of the TPF agreement, the name of the funder and whether the funding agreement contains a costs indemnity clause be disclosed to the court/tribunal and any opposing party? Should the proposed requirement to disclose funding agreements extend to any agreements the opposing party has in place to fund its case, including insurance?**

We believe that this goes too far and that the position adopted in the UK is sufficient.

The UK Government concluded following its consultation in 2000 on "Conditional Fees: Sharing the Risks of Litigation" that in privately funded litigation there is no obligation on either party to disclose how a case is being funded. There are however protections for a losing party who may be subject to additional costs as a result of a

funding arrangement; they should have access to certain specific information about that arrangement.

In the UK case of *Pedro Emiro Florez Arroyo and Others v BP Exploration Company (Columbia) Ltd QBD 06/05/2010* it was held that these requirements balanced the "interests of the parties with funding arrangements and the interests of those who face the claims for additional costs which result from them" and should therefore be considered sufficient without the necessity to disclose the entire agreement.

In practice, Harbour's involvement as funder of a case is commonly disclosed, whether in the course of dealing with a security for costs application or simply to make it clear to the defendant that an independent and professional third party has assessed the case as suitable for investment. This message can assist the early resolution of a dispute.

That said, a number of our significantly capitalised funded claimants (i.e. large corporates) prefer that our involvement in the case remains private.

**11. Should funders be prohibited from assigning their rights under the TPF agreement save where the court/tribunal approves the assignment? Will the prohibition be effective?**

We believe that this goes too far. However, if a code of conduct is adopted such as the UK Code then that could include a requirement than on an assignment to the assignee will be equally compliant with the code.

**12. (a) should there be an approving authority to approve all TPF agreements; (b) who should this approving authority be; (c) should this authority also approve withdrawal of funding under a TPF agreement; and (d) should this authority provide input where there are disputes between the funder and funded party as to settlement or termination of the funding agreement?**

We echo our comment above that a funding agreement is commercial contract between consenting parties. We strongly believe that intervention of the sort proposed is entirely inappropriate.

We are aware of no such intervention vis-à-vis commercial contracts in other sophisticated jurisdictions, and indeed courts such as the UK courts are at pains to avoid interference into commercial arrangements agreed between consenting parties.

The fact remains that in any piece of litigation or arbitration, there is a third party already involved, namely the judge or the arbitral panel and if any party has an issue about any aspect of the proceedings they have the right and ability to seek adjudication on it from that third party, but it is not their job to determine what commercial parties should agree.