

CODE OF CONDUCT for LITIGATION FUNDERS

November 2016

1. This code ('the Code') sets out standards of practice and behaviour to be observed by Funders (as defined in clause 2 below) who are Members of The Association of Litigation Funders of England & Wales ('the Association') in respect of funding the resolution of disputes within England and Wales.

2. A litigation funder:

2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or

2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'),

('a Funder') in each case:

2.3 to fund the resolution of disputes within England and Wales; and

2.4 where the funds are invested pursuant to a Litigation Funding Agreement ('LFA') to enable a party to a dispute ('the Funded Party') to meet the costs (including pre-action costs) of resolving disputes by litigation, arbitration or other dispute resolution procedures.

In return the Funder, Funder's Subsidiary or Associated Entity:

2.5 receives a share of the proceeds if the claim is successful (as defined in the LFA); and

2.6 does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of disputes within England and Wales.

4. A Funder shall accept responsibility to the Association for compliance with the Code by a Funder's Subsidiary or Associated Entity. By so doing a Funder shall not accept legal responsibility to a Funded Party, which shall be a matter governed, if at all, by the provisions of the LFA.

5. A Funder shall inform a Funded Party as soon as possible and prior to execution of an LFA:
 - 5.1 if the Funder is acting for and/or on behalf of a Funder's Subsidiary or an Associated Entity in respect of funding the resolution of disputes within England & Wales; and
 - 5.2 whether the LFA will be entered into by the Funder, a Funder's Subsidiary or an Associated Entity.
6. The promotional literature of a Funder must be clear and not misleading.
7. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity.
8. An LFA is a contractually binding agreement entered into between a Funder, a Funder's Subsidiary or Associated Entity and a Funded Party relating to the resolution of disputes within England and Wales.
9. A Funder will:
 - 9.1 take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute;
 - 9.2 not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;
 - 9.3 not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder;
 - 9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund and in particular will:
 - 9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity;

- 9.4.1.1. to pay all debts when they become due and payable; and
- 9.4.1.2. to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.
- 9.4.2 maintain access to a minimum of £5 m of capital or such other amount as stipulated by the Association;
- 9.4.3 accept a continuous disclosure obligation in respect of its capital adequacy, including a specific obligation to notify timeously the Association and the Funded Party if the Funder reasonably believes that its representations in respect of capital adequacy under the Code are no longer valid because of changed circumstances;
- 9.4.4 undertake that it will be audited annually by a recognised national or international audit firm and shall provide the Association with:
 - 9.4.4.1. a copy of the audit opinion given by the audit firm on the Funder's or Funder's Subsidiary's most recent annual financial statements (but not the underlying financial statements), or in the case of Funders who are investment advisors to an Associated Entity, the audit opinion given by the audit firm in respect of the Associated Entity (but not the underlying financial statements), within one month of receipt of the opinion and in any case within six months of each fiscal year end. If the audit opinion provided is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the firm to continue as a going concern, the Association shall be entitled to enquire further into the qualification expressed and take any further action it deems appropriate; and
 - 9.4.4.2. reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the Funder or Funder's Subsidiary or Associated Entity satisfies the minimum capital requirement prevailing at the time of annual subscription.
- 9.5 comply with the Rules of the Association as to capital adequacy as amended from time to time.

10. The LFA shall state whether (and if so to what extent) the Funder or Funder's Subsidiary or Associated Party is liable to the Funded Party to:
 - 10.1 meet any liability for adverse costs;
 - 10.2 pay any premium (including insurance premium tax) to obtain costs insurance;
 - 10.3 provide security for costs; and
 - 10.4 meet any other financial liability.

11. The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may:
 - 11.1 provide input to the Funder Party's decisions in relation to settlements;
 - 11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity:
 - 11.2.1 reasonably ceases to be satisfied about the merits of the dispute;
 - 11.2.2 reasonably believes that the dispute is no longer commercially viable; or
 - 11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party.

12. The LFA shall not establish a discretionary right for a Funder or Funder's Subsidiary or Associated Party to terminate a LFA in the absence of the circumstances described in clause 11.2.

13. If the LFA does give the Funder or Funder's Subsidiary or Associated Entity any of the rights described in clause 11, the LFA shall provide that:
 - 13.1 if the Funder or Funder's Subsidiary or Associated Entity terminates the LFA, the Funder or Funder's Subsidiary or Associated Entity shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 11.2.3;
 - 13.2 if there is a dispute between the Funder, Funder's Subsidiary or Associated Entity and the Funded Party about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.

14. Breach by the Funder's Subsidiary or Associated Entity of the provisions of the Code shall constitute a breach of the Code by the Funder.
15. The Association shall maintain a complaints procedure. A Funder consents to the complaints procedure as it may be varied from time to time in respect of any relevant act or omission by the Funder, Funder's Subsidiary or Associated Entity.
16. The Code (as amended) applies to LFAs commencing on or after the date hereof.

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