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Dear Sirs,

Response to Proposed Amendments to the ICSID Rules

We refer to your press release inviting comments on the proposed amendments to the ICSID Rules, published by ICSID on 3 August 2018.

Woodsford Litigation Funding Limited (“**Woodsford**”) is one of the most established litigation and arbitration funders, with offices in London, the USA and Singapore as well as presence in Australia and Israel. Woodsford has been presented with many ICSID cases requiring funding, and has funded a number of those cases. Woodsford therefore has a keen interest in the orderly operation of ICSID arbitrations, in particular as regards the regime applicable to third party funding of such arbitrations.

Woodsford is a founding member of the [Association of Litigation Funders](#) (ALF) in England & Wales, the members of which are self-regulated by the [ALF’s Code of Conduct](#). The English legislature has chosen not to regulate funding in England & Wales through statute, but instead to allow members of the ALF to apply this self-governing code. This has worked well; the number of disputes between members of the ALF and funded parties has been very limited and the English judiciary has endorsed the satisfactory operation of third party funding pursuant to this regime. In 2017, Lord Keen of Ellie (the Lords Spokesperson for the Ministry of Justice) responded to a question in the House of Lords regarding regulation of third party funding as follows: “The Government does not believe that the case has been made out for moving away from voluntary regulation, as agreed by Parliament during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.” More recently, in March 2018 Lord Justice Jackson, whilst reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime in England & Wales, stated that his proposals to “promote [third-party funding] and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so.”

This system of ‘self-regulation’, which has operated so successfully in England & Wales in respect of the conduct of funders, has also served the parties in ICSID arbitrations well in relation to the funding of those claims. The present ICSID rules do not seek to ‘regulate’ third-party funding of claims (being silent on the matter) and have operated without significant problems, relying upon the discretionary powers of a tribunal to address the disclosure of funding (and any associated issues) as appropriate.

Since litigation funding has become a commonplace element of litigation and arbitration in many jurisdictions, including international commercial and investor-state arbitration, several arbitral institutions and legislators have had the opportunity to review their institutional rules or legislation and to make amendments as they see fit to accommodate the issues and challenges that can, on occasion, arise when claims are financed by parties other than the claimant. At the time of writing, in only a very small number of enacted rules or legislation is disclosure of the existence of a third-party funder (and the identity of that funder) mandatory (being the International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission; the Hong Kong Arbitration Ordinance and the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules; and Singapore's Legal Profession (Professional Conduct) Rules 2015).

Woodsford is an established professional funder with very significant capital committed to claims involving top quality legal counsel, and is proud of its involvement in the high calibre of cases that it funds. Accordingly, it is not averse to disclosure of the existence of funding, generally, or of Woodsford's identity, specifically, per se. However, mandatory disclosure potentially has significant disadvantages for funded parties.

First, the funded party is potentially exposed to increased costs in complying with such an obligation (in circumstances where no concern over potential conflict may exist). Second, mandatory disclosure to an adverse party may also give rise to distracting satellite disputes and attempts by parties, i.e. defendants, to defeat litigation through the tactic of attacking the funding arrangements, seeking irrelevant disclosure, making frivolous challenges to arbitrators and seeking unwarranted applications for security for costs, rather than focusing on the dispute in hand. Since mandatory disclosure can cause significant unfairness to the claimant in this way, if disclosure is to be mandatory, the arbitral tribunal must then ensure that such dilatory tactics are tightly controlled. This should include any disclosure being to the tribunal only and limiting such disclosure to the existence and identity of the funder only.

Whilst the reasoning expressed by ICSID that disclosure assists in ensuring that awards are not challenged because of actual or perceived conflicts arising out of the existence of a third-party funder is understood and appreciated, as far as Woodsford is aware, there is no reported decision of an ICSID award being challenged on such a basis. In any event, any professional 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 Investment Advisory Panel, was an arbitrator if there was a risk of conflict, as it would be contrary to Woodsford's interests to do so. Similarly, arbitrators are also 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.

Whilst Woodsford recognises that there are advantages in the certainty that mandated disclosure of third party funding could bring (and as stated above, holds no concern over disclosure of the existence or identity of funders per se), Woodsford's view is that, on balance, no amendment to the ICSID Rules as regards the disclosure of third party funding on a mandatory basis (or otherwise) is necessary or expedient. If any change is deemed to be necessary, such amendment need only memorialise the existing position and that adopted by many other institutional rules and guidelines: that the Tribunal has the power to order a party to disclose whether it is funded (and the name of that funder), if the particular circumstances of the case so require that

disclosure be made, as determined by the Tribunal based on the facts at hand. This balances the rights of a party to order its commercial affairs as it chooses, whilst providing flexibility to the Tribunal and the parties to determine the best approach in each case.

We remain at your disposal should any further assistance be required.

Yours faithfully

Simon Walsh

Senior Investment Officer
Woodsford Litigation Funding Limited