

Developments in the desert

The oasis that third party funding offers

Mark King, Director of Litigation Funding at Harbour, introduces this edition of Harbour View mostly dedicated to changes in the legal landscape of the Middle East, the development of arbitration in the region and how third party funding could sit well within that environment.

It is difficult to fathom that thirty years ago, Dubai's Sheikh Zayed Road (now a 14 lane superhighway bordered by awe-inspiring luxury hotels and offices) consisted of a small carriageway with a smattering of buildings either side. This alone is a bold statement of how the Middle East has transformed over the past decades. Countries such as the United Arab Emirates ("UAE"), Saudi Arabia and Qatar attract significant foreign investment and continue to see their economies grow.

The articles by our guest authors in this Harbour View explain how the legal landscape of the Middle East has changed as a consequence of this economic growth, and continues to do so. In particular, developments in the DIFC/ADGM Courts and in arbitration in UAE and Saudi Arabia illustrate that a number of Gulf countries are eager to instil confidence and certainty in dispute resolution in the region.

This makes the development of third party funding ("TPF") within the Middle East likely, despite its current embryonic stage. That said, the forecast for its future within the region suggests that it could soon enjoy the same attention shown by other leading jurisdictions worldwide. In this article, I set out the role that TPF could play within the Middle East and how it may sit within the current climate.

What do businesses operating in the region say?

Understanding how businesses are impacted by disputes and how they see the current legal landscape in the region is essential in understanding the role that TPF may play. In a conversation with **Helen Graham, General Counsel of Dubai Transport Company**, it became clear that businesses need to assess legal outcomes for which a system of binding precedent and published awards/reasoned judgments is needed. In the local courts, procedures to short-circuit meritless claims and defences would be a welcome development. This together with difficulties in enforcement are key issues they, and undoubtedly other businesses, face in this respect. Indeed, it is hoped that the recent developments in the DIFC/ADGM Courts and in arbitration enable parties to overcome these hurdles.



I asked Helen Graham, General Counsel of Dubai Transport Company, part of the Dutco Group, a few questions which gives an excellent snapshot of the key issues faced by businesses when dealing with disputes in the region.

Is there a common/frequent hurdle businesses involved in disputes face in the Middle East?

“As a civil law jurisdiction, absence of binding precedent in the local courts leaves businesses with uncertainty in how a judge will rule and without a valuable body of knowledge, as a system of precedent encourages detailed factual and legal reasoning. The business community would welcome procedures to short-circuit meritless claims and defences which are a clog in local courts.”

What are the practicalities you and your Board consider in deciding whether to pursue a claim?

“We review enforceability and recoverability from the Defendant; whether an attractive forum for dispute resolution is available and, last but not least, whether the claim is cost effective to pursue.”

What is your experience of getting paid/enforcing judgments and awards in the region?

“Arbitration awards are more likely to be voluntarily complied with, although cost awards are more likely to require enforcement as the ‘loser pays’ principle is not the rule in regional jurisdictions and is resisted. Execution proceedings are inevitably required for local court judgments, although the methods of execution can be limited and are not always effective.”

What do you consider to be the most interesting recent legal development in the Middle East?

“The use of the DIFC Courts as a ‘conduit’ jurisdiction for enforcement in Dubai.”

What are the key factors you look at when appointing a law firm in the region?

“We look at sector experience and legal acumen obviously, but are also assessing the proportionality of legal resources that will be applied and the impacts of that on overall cost.”

The role that TPF can play

Is it permitted?

In the UAE, there is no prohibition against litigation and arbitration and this is also the case for the wider Middle East.

The reason that the concept has not developed much is likely due to historic hurdles which recent legal developments have since sought to remedy. Its use as a viable risk management tool to businesses may therefore not yet have fully permeated through to boards of directors, when considering whether their company should pursue a claim. The changing legal landscape suggests that this may not be for much longer as the use and types of funding offered become more publicised and transparent within the region.

What are the key criteria a funder will consider in funding a claim in the Middle East?

The criteria reputable funders consider when funding a claim in the Middle East are no different to anywhere else in the world. They include:

- a creditworthy defendant
- a clear, reliable and effective enforcement and execution process (addressed in further detail specific to the Middle East later in this publication)
- the ‘likely’ claim value, as opposed to the ‘face’ claim value
- the cost of bringing the proceedings (i.e. amount of funding required)
- the settlement prospects
- a legal opinion concluding that the claim has good merits
- an experienced legal team.

What benefits could it offer?

In its simplest form, TPF means a third party agrees to pay a claimant's legal costs of pursuing its claim, in return for a share of the proceeds if the claim is won. Traditionally, funding was aimed at individuals and businesses who had a good legal claim but insufficient funds to pursue it. Even if a party did have some funds, it was a common tactic for 'Goliath' defendants to increase the duration and cost of the proceedings to exhaust the claimant's funds and discourage them from continuing. A claimant backed by a funder sends a strong message to defendants that such tactics do not work and that an experienced third party believes in the strength of the claim by covering the costs of pursuing it.

In addition, we see a new demand for funding from blue chip businesses, listed companies and financial institutions who see it as an effective hedging tool. Their use of external funding allows a claim to be pursued despite a restricted legal budget or it frees up working capital preserved for other purposes. If litigation or arbitration claims are externally funded, a business need not include the legal costs within its balance sheet, which for listed companies could have a detrimental effect on share price.

Of course, one of the main benefits remains that if the claim is not successful, there is nothing for the claimant to repay, regardless of their motivation to seek funding. This is the risk the funder takes.

Any positive regional developments for TPF?

The expectation that the use of TPF in the region will increase is supported by specific recent developments in Dubai and Abu Dhabi.

In the Dubai International Financial Centre ("DIFC"), a working party is preparing a draft practice direction which is set to endorse the use of TPF for claims heard in the DIFC Court. It is expected that this practice direction will be released in conjunction with recommended best practices regarding third party funding

which will draw largely upon the Association of Litigation Funders' Code of Conduct adopted in England and Wales, of which Harbour is a founding member. This is encouraging as it can ensure that funders meet certain requirements intended to protect claimants who may seek the use of funding for claims in the DIFC.

Harbour and other funders have offered practical insights on the practice direction to the DIFC working party and it is expected that the DIFC will invite further comments on its draft practice direction and guidelines for the use of TPF through a public consultation in autumn 2016.

Speaking with Harbour, the **Registrar of the DIFC Courts, Mark Beer OBE**, confirmed that: "The future of international dispute resolution will favour those centres which acknowledge the importance of third party funding, and provide a regulatory framework which supports its development in an open and balanced way. As legal fees increase, and pressure to contain costs builds, in-house legal teams will be looking for better ways of managing litigation budgets and reducing litigation risk. Third party funding is one solution, but if not carefully nurtured it can lead to unjust outcomes. Courts, in particular, need to embrace the advantages of well-structured funding to increase access to justice and ensure that contracts are honoured, whilst at the same time eliminating some of the poor practices that have been seen in markets which do not regulate third party funding. As we in the DIFC Courts have seen case values and complexity increase significantly over the past few years, with the average value per claim being US\$32m in 2015, the need to provide a supportive environment to our end users, being global commerce, which allows them to spread the cost and risk of litigation is as important as ever."

In Abu Dhabi, the newly established Abu Dhabi General Market ("ADGM") has its own court with jurisdiction over civil disputes. The ADGM Courts' own Procedural Rules reflect much

of the Civil Procedure Rules in England and Wales. Article 225 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 stipulates that funding agreements may be used subject to certain requirements set out in the Regulations.

A number of international arbitral institutions, also used by parties in the Middle East, have recognised the use of TPF in arbitration proceedings and are responding to it positively. For example, the ICC sets out guidance to tribunals on recoverability of costs by a funded party and issues regarding security of costs and disclosure of information on the funding provided (see the ICC Commission Report on Decisions in Costs in International Arbitration published in 2015). However, it is important to remember despite these developments that the underlying seat of the arbitration must not have any prohibitions or restrictions on funding.

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Where next?

These legal developments have helped to mitigate a number of hurdles which may have otherwise restricted the availability of TPF in the Middle East. This should encourage claimants involved in disputes in the region to seriously consider how funding may help them effectively manage their litigation/arbitration risk.

Funders may still be cautious of funding claims in the local courts of Middle Eastern countries because of the costs and challenges mentioned elsewhere in this publication. However, we find that the progress made in enforcement, arbitration and in the DIFC/ADGM courts provides us with more comfort in considering funding claims in the region than ever before and we think there is every reason to suggest that the use of funding will continue to grow in the region.