

Litigation funding in Dubai

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Dispute Resolution analysis: Mark King, director of litigation funding at Harbour Litigation Funding, takes a look at developments in third party funding of disputes in Dubai and explains why the use of funding has become a hot topic in the Middle East recently.

What is the current position in relation to third party funding?

There is no prohibition against third party funding (TPF) of disputes in the United Arab Emirates (UAE) or the wider Middle East. Notwithstanding this, the use of funding by individual and corporate claimants in the region has not progressed as quickly compared to other jurisdictions. Funders historically were less comfortable with the legal landscape of the region but developments over the past decade, particularly in arbitration, enforcement and the offshore 'common law' free zones, are increasing their interest in the region (for example, active enforcement of foreign arbitral awards under the New York Convention which the UAE ratified in 2006).

Thanks to developments in TPF in the region, most notably in the Dubai International Financial Centre (DIFC) which has now formally adopted a [Practice Direction](#) on TPF, this may be about to change.

What reforms are in place?

The Practice Direction is a concise document that sits behind the DIFC Court's procedural rules and applies to all claims litigated in the DIFC Courts. It seeks to place some degree of regulation on funding arrangements in the jurisdiction without fettering the determination of the claim or the arrangement in place between claimant, funder and lawyer.

The DIFC Courts retain a wide discretion to decide issues on future funded cases and expressly clarify the following three key issues relevant to funded claims.

Disclosure of the funding agreement

Funded parties must notify all other parties and the court where it has entered into a funding agreement, including the identity of the funder. However, disclosure of the funding requirement is not required unless ordered expressly by the court.

Security for costs applications

The DIFC Courts can take into account the fact a party is funded when determining security for costs applications, but the fact a party is funded is not by itself determinative.

Costs orders against funders

The DIFC Courts will have inherent jurisdiction to make a costs order against a third party funder where appropriate in the circumstances of the case.

Subsequent to the Practice Direction, we understand that the Academy of Law's code of conduct applicable to legal practitioners in the DIFC is also being reviewed in relation to TPF. This is a further opportunity for the principles surrounding funding in the region to develop.

How will those reforms impact on the current position?

The requirement to disclose the identity of a funder and that a claim is funded can send a powerful message to an opponent that a third party funder is willing to back the claim. Likewise, the identity of the funder is relevant, particularly for security for costs applications. Although the court has a wide discretion on disclosure of a whole or part of the funding agreement, it is encouraging that this is not the norm. The agreement contains confidential, privileged and commercially sensitive information and, in our view, should only be ordered in exceptional circumstances as this information could be exploited by an opponent.

If the defendant suspects the claimant may not be able to pay the defendant's costs if the claim loses, it can obtain security for those costs at the outset. Experienced funders should be able to provide adequate information to demonstrate that there is no risk to the defendant by reference to their funding arrangement. However, the information provided must be balanced to ensure that a funder is not required to give information which may place the claimant at a disadvantage.

The court's determination in this respect is also encouraging as it should restrict those funders who do not have adequate and reliable capital behind them to satisfy any costs risk which may be made.

The court's wide discretion in making non-party costs-awards is akin to the power given to the courts under [section 51](#) of the Senior Courts Act 1981 in England and Wales. Although drafted fairly broadly, it is suspected that such orders will be made where the court considers the funder to have interfered with the proceedings, prolonged the claim unnecessarily or have been responsible for the parties incurring costs without justification.

While not extensive, the Practice Direction's clarification of several issues pertinent to TPF are welcome. It is a solid endorsement of the use of funding through ensuring access to justice or as a viable risk management tool and seeks to protect the integrity of the industry, for example, by the risk of ordering disclosure of a funding arrangement or ordering sanctions against a bad or inexperienced funder.

Is this specific to Dubai or are other Gulf States bringing in similar reforms?

The Abu Dhabi Global Market (ADGM) has also adopted a similar structure to the DIFC. It is too early to tell whether it could be a serious competitor but it too offers a 'common law' jurisdiction in the Middle East. The ADGM has also publicly endorsed the use of TPF (see Article 225 of the Civil Evidence, Enforcement and Judicial Appointments Regulations 2015).

It is hoped that as further publicity on the use and principles of TPF increases, this will prompt other jurisdictions to adopt their own frameworks governing TPF arrangements. The developments in the UAE are certainly a promising start.

Are there any other points of interest worth mentioning here?

It is worth mentioning in a bit more detail the possible reasons as to why the use of funding has become a hot topic in the Middle East recently. There are some key legal developments that provide funders with added comfort in assessing the risks of funding disputes in the region. These include:

New arbitration laws based on international arbitration practices

The adoption of international arbitration procedures is a welcome development that many Middle Eastern countries are pursuing. Recent examples include Saudi Arabia and Qatar who have introduced new arbitration laws based upon the United Nations Commission on International Trade Law (UNCITRAL) Model Law. It is hoped that the UAE will ratify their new Federal Arbitration Law (also based upon the UNCITRAL Model Law) by the end of the year.

Enforcement

Countries have also sought to strengthen the enforcement process for judgments and arbitral awards, particularly those from other jurisdictions. In 2012, Saudi Arabia introduced its new enforcement law and there is encouraging evidence that this is promoting a clear and effective enforcement process. A good example is the recent enforcement and satisfaction (the latter being the most important) of a US\$18.5m International Chamber of Commerce award handed down in London against a Saudi Arabian debtor.

Mark King has advised and represented clients in high value, complex, commercial disputes in litigation and arbitration on a domestic and international level. He gained his experience, first as an associate with Clyde & Co in Dubai and then as a senior associate with Mayer Brown in London. Mark has specific expertise in dealing with high value construction and energy disputes and has a particular focus on the Middle East and the use of third party funding in that region.

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