The rise of litigation funding in the UAE

Charles Russell Speechlys considers some of the litigation funding options available in the UAE, with a particular emphasis on third-party funding.

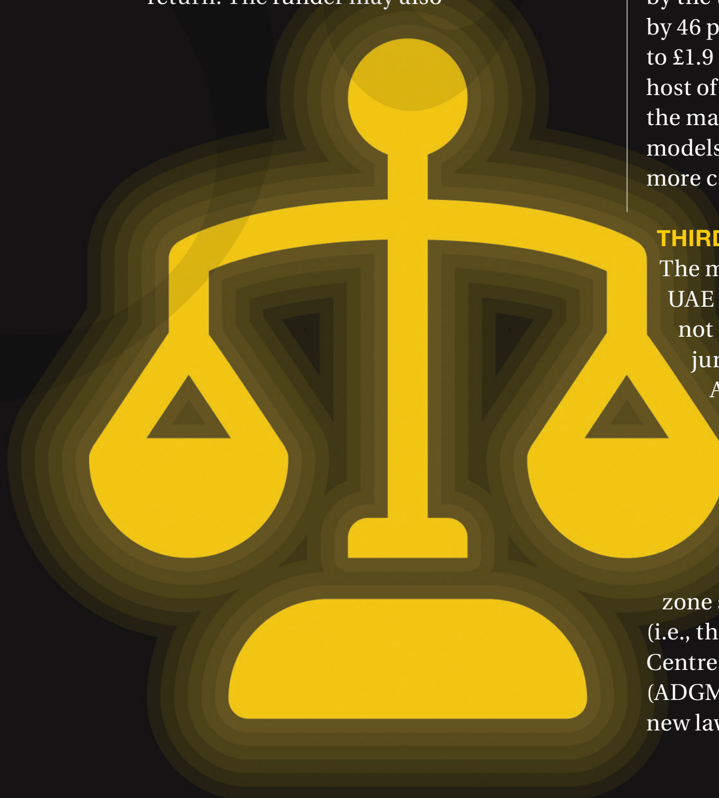
The COVID-19 pandemic has significantly impacted the commercial world, and effective cost management is an increasingly crucial concern for a range of businesses. Commercial entities and individuals that are embroiled in a dispute are operating with reduced budgets for legal spend and, against this backdrop, litigation funding options can offer some much-needed cost relief for parties that are attempting to mitigate the risk of adverse costs.

WHAT IS THIRD-PARTY FUNDING?

Third-party funding involves someone who is not involved in a dispute providing funds to a party to that dispute to cover legal fees and expenses in exchange for an agreed return. The funder may also agree to pay adverse orders for costs and provide security for costs. In addition to funding one-off cases, third party funding is now available to cover a portfolio of cases where the risk of no return for the funder can be spread across a number of cases.

The funder's return will always be tailored to the particular case calculated subject to various factors, including: the size of the expected damages, the likely length of the matter and the level of risk. It could be calculated according to a fixed percentage share (typically 30 per cent to 50 per cent of recoveries), a multiple of the funding to be provided (usually a multiple of three or four) or a combination of both.

Litigation funding continues to grow in the current climate, with the assets held by the top 15 UK litigation funders rising by 46 per cent from £1.3 billion in 2017/18 to £1.9 billion in 2019/20. Furthermore, a host of new funders are continuing to enter the market with more adaptive business models, making litigation funding options more competitive and broader in scope.



THIRD-PARTY FUNDING IN THE UAE

The market for third party funding in the UAE (and the Middle East in general) has not expanded as rapidly as it has done in jurisdictions such as the UK, USA and Australia. This is largely due to the perceived uncertainty and lack of foreseeability of legal decisions issued by the UAE Courts, which evidently creates more risk for legal funders. However, with the progressive development of the free zone systems in Dubai and Abu Dhabi (i.e., the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM)) as well as the introduction of new laws in the UAE that improve the legal

landscape within the region, third-party funding is becoming more widespread. We discuss some of these key developments below.

DEVELOPMENTS IN THE UAE

On May 3, 2018, the UAE published its first stand-alone arbitration law (Federal Law No. 6 of 2018) (New Arbitration Law), which is largely based on the United Nations Commission on International Trade Law Model Arbitration Law, and embodies a more modern and favourable approach to arbitration, with fewer restrictions imposed on both the parties and the arbitral tribunal (thus allowing proceedings to be concluded with more certainty, speed and efficiency).

In particular, the New Arbitration Law provides certainty in respect of enforcement and states that an award is final, binding and that the matter cannot be pursued further (Article 52); giving it the same executory effect as a court judgment of the competent UAE Federal Court of Appeal. The grounds on which a party can seek annulment of the award in the New Arbitration Law are also now far more limited, and there is a positive obligation on a court to recognise and enforce arbitral awards in a shortened period of time. All of these factors give rise to a more attractive market for litigation funders.

It is important to remember, however, that the New Arbitration Law is still relatively untested and the path to enforcement of arbitral awards in the UAE is still complex. Furthermore, the New Arbitration Law itself is silent on the concept of third-party funding in the and some could argue that third-party funding is in conflict with the public policy considerations of UAE Law[1]. However, these concerns are largely misplaced as funders carry out extensive due diligence prior to agreeing to finance litigation (creating an equitable risk-sharing approach with the parties to a dispute), and the laws of the UAE do, in certain contexts, provide for things that the laws of Shari'ah would typically be averse to (such as the charging of interest in defined circumstances, which is allowed for in the UAE Commercial Code).

DEVELOPMENTS IN THE DIFC

Historically, the DIFC courts have recognised the existence of third-party funding agreements, for example in the cases of *Rafed Al Khorafi and Others v Bank Sarasin-Alpen (ME) Ltd and Bank Sarasin & Co Ltd (DIFC Courts – 21 August 2014 - CFI 026/2009) and Vannin Capital Pcc Plc v Mr Rafed Abdel Mohsen Bader Al Khorafi and others (DIFC Courts – 18 April 2016 - CFI 036/2014).*

On March 14, 2017, the DIFC implemented Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC Courts which sets out the requirements that funded parties must observe in the DIFC courts including: the requirement that the funded

party must put every other party on notice of the fact that it has entered into a litigation funding arrangement and of the identity of the litigation funder (but not the terms of the funding, unless ordered by the DIFC Courts) and that the DIFC Courts have inherent jurisdiction to make costs orders against third parties, including third party funders. This is a significant development as it emphasises the permissibility of third-party funding in the market and creates transparency in respect of the third-party funding arrangement, which addresses any concerns around the motives of third-party funders and the extent to which their involvement in a dispute may affect the strategy of the case and any potential settlement negotiations between the parties.

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DEVELOPMENTS IN THE ADGM

The ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appoints Regulations 2015 (ADGM Regulations) expressly address litigation funding agreements (Article 225). Conditions that must be satisfied for a litigation funding agreement to be valid in the ADGM include that any such agreement must not relate to proceedings that cannot be the subject of an enforceable conditional fee arrangement, that the funding agreement must be in writing, that the funder must be a legal person and that notice of the agreement must be given to all other parties. In addition, the ADGM's Litigation Funding Rules 2019 (ADGM Rules) regulate third party funding and set out a number of requirements for third-party funding arrangements to be valid and enforceable in the ADGM courts. The Rules facilitate the implementation of third-party funding in the ADGM and offer clarity and guidance in respect of the relationship between lawyers, parties to a dispute and litigation funders.

ALTERNATIVE FUNDING OPTIONS?

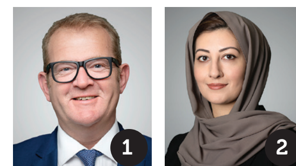
It is important to note that third-party funding is not the only option available to parties in the UAE wishing to manage the cost of litigation. Other litigation funding options that are available are: conditional fee agreements (CFAs); damages-based agreements (DBAs) and after the event (ATE) insurance.

CFAs operate to transfer all or part of the risk for a client's own legal costs from the client to the lawyer. The usual form of CFA provides that the lawyer receives no fees if the client loses its case, but if the client wins the lawyer is entitled to his/her normal fees plus an increased percentage (usually up to 100 per cent) of his/her normal fees. Whether or not a CFA is enforceable under DIFC Law is still unclear – DIFC Court proceedings generally prohibit contingency fee arrangements, although CFAs are permitted where a lawyer receives an uplift in fees in the event of success but not a share in the proceeds. A CFA is permitted in the ADGM provided it complies with the requirements in section 222 of the ADGM Regulations.

A **DBA** is a contingency-fee agreement where the lawyer's fee is calculated as a percentage (usually capped at 50 per cent) by reference to the compensation recovered by the client. A DBA is permitted in the ADGM provided it complies with the requirements in section 224 of the ADGM Regulations. **ATE** insurance agreements are between a client and non-lawyer third parties and provide cover for the legal costs incurred in the pursuit or defence of litigation and arbitration and is purchased after a dispute has arisen.

Each of the litigation funding options above can be used separately or in conjunction with each other. On March 4, 2020 Charles Russell Speechlys launched a new initiative for clients called "Feesible". Feesible is a suite of funding solutions for clients providing a mix of the four options mentioned in this article.

1. For example, there have been suggestions that litigation finance may offend the Sharia'h doctrines regarding gambling, excessive speculation or uncertainty and the charging of interest (known as Riba).



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