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BRIEFING

THIRD PARTY FUNDING IN THE MIDDLE EAST

MARCH 2019

- IN THIS BRIEFING WE CONSIDER THE BENEFITS OF THIRD PARTY FUNDING & HOW THERE ARE INCREASED OPPORTUNITIES FOR COURT LITIGATION & ARBITRATION FUNDING IN THE MIDDLE EAST & IN THE UAE IN PARTICULAR.

What is "third party funding"?

Third party funding ("TPF") is where a third party funder agrees to pay a party's legal costs for pursuing a legal claim (whether through court litigation or arbitration) in return for an agreed share of any damages awarded and recovered by the funded party.

The use of TPF in certain jurisdictions such as England and Wales, Asia and the United States is common place. In the Middle East, however, TPF has not had the same traction because funders have tended to have a negative perception about the certainty and foreseeability of legal decisions.

In the United Arab Emirates ("UAE"), that perception has been progressively changing due to the advancement of the innovative free zone systems in Dubai and Abu Dhabi, and the introduction of new laws that improve the legal landscape. Last year, for example, the UAE introduced a UAE Arbitration Law based on the UNCITRAL Model Law. This new Arbitration Law has gone some way towards improving the laws that apply to onshore arbitration proceedings, thereby creating greater certainty about the enforceability of onshore arbitral awards: See our briefing on the topic here.

In this briefing we consider the benefits of TPF and how there are increased opportunities for both court litigation and arbitration funding in the Middle East, and in particular in the UAE.

“TPF COMPLIES WITH ONE OF THE MOST PROMINENT SHARIA’H PRINCIPLES, MASLAHA, IN SERVING THE PUBLIC INTEREST…”

Benefits of TPF

The Middle East continues to see a huge number of disputes, most notably in the energy and infrastructure sectors. More often than not, the amounts in dispute are significant as are the costs of pursuing or defending any claim. Contractors in particular can be reluctant to dedicate significant amounts of capital to pursuing or defending a claim even though they may be confident of their legal position and rights.

There are a number of publicly listed international funders employing large teams of disputes lawyers and assessors who are experienced in assessing the legal merits of any case right through to the practical obstacles of enforcing and recovering any arbitral award or court judgment. Such funders tend to be very cautious and selective about the cases or portfolio of cases they take on but if TPF can be secured, it opens up the possibility for a party to:

- take the costs of a dispute “off the balance sheet” and retain capital for other business purposes or objectives;
- remove the “losing” risk in the sense that if the funded party loses its claim it will not have lost all of the legal costs but if its wins the claim, it will recover damages it may otherwise have written off;
- balance the risks of litigation across its business by funding a pool of claims, some with strong prospects of success and others with weaker prospects of success;
- leverage off the tactical advantage of demonstrating to the counter-party in the dispute that it has the funds to pursue its claim(s) through to final hearing. This can essentially balance the playing field against a cash rich counter-party; and
- add a layer of merit testing to its legal case with the resources of the funder. Any sensible funder will only take on a case or a portfolio of cases after it has received its own legal advice and carefully assessed the prospects of recovering an award or judgment made in favour of the funded party.

With these significant benefits in mind, the funding of litigation and arbitration proceedings can be an attractive proposition particularly for contractors with a portfolio of claims with varying degrees of chances of success. But is such funding permitted in the UAE?

TPF in the UAE

The UAE is one of the fastest growing legal jurisdictions in the Middle East and is somewhat unusual in the sense that it has a civil law legal system onshore and common law legal systems in its free zones (see following).

Onshore

In onshore UAE (that is outside the jurisdiction of the free zones), the UAE civil laws apply subject to *Sharia’h* principles.

Under UAE law, there is no absolute prohibition on TPF per se and it is considered that TPF complies with one of the most prominent *Sharia’h* principles, *maslaha*, in serving the public interest; it should be in the public interest for funds to be made available to a party for the purpose of pursuing or defending its legal case.

Prohibitions on interest (*riba*), excessive speculation (*gharar*) and gambling (*maisir*) should not be infringed because:

- a funding arrangement typically provides for the funder to receive a share of the damages award (and not interest on the funded amount); and
- a funder is unlikely to be excessively speculative or take unwarranted risks and will rather study a case carefully and agree to only fund legal proceedings if it is satisfied that the funded party has a strong chance of success and recovery.

DIFC/ADGM free zones

The Dubai International Financial Centre ("DIFC") and Abu Dhabi Global Market ("ADGM") free zones have their own legal systems and courts. The DIFC laws are modelled on English law while the ADGM applies English law directly. As such, the English law approach to TPF is of relevance.

Historically, TPF would have infringed the English common law prohibitions against champerty and maintenance. Statute has significantly diminished the scope of these prohibitions and (subject to public policy considerations) the modern English law is generally more accepting of litigation funding.

"TPF HAS BECOME A COMMON COMPONENT IN FINANCING LITIGATION & ARBITRATION PROCEEDINGS IN MANY LEADING CIVIL AND COMMON LAW JURISDICTIONS."

The DIFC and ADGM laws do not prohibit third party funding but the regulation of its use is underway. Following a public consultation, in 2017 a DIFC Courts Practice Direction was issued requiring a funded party to disclose the existence of any funding arrangement including the identity of the third party funder. The actual funding agreement does not, however, need to be disclosed unless the court orders disclosure. The judge can also take into account the funding arrangement when considering any applications for security for costs but the existence of the funding will not in itself be determinative. In line with English law (Civil Procedure Rules Part 25.14 (2)(b)), the DIFC Courts Practice Direction states that the DIFC Courts have jurisdiction to make cost orders against third party funders (and that would extend to security for cost orders).

In November 2018, the ADGM issued a public consultation on the ADGM Draft Funding Rules in recognition of the fact that "third party funding has become a common component in financing litigation and arbitration proceedings in many leading civil and common law jurisdictions". The Draft Funding Rules set out specific requirements in relation to the terms of funding agreements, conflicts of interest and the requirement for independent legal advice by the funded party. Once approved, the ADGM Funding Rules will apply to court litigation and arbitration proceedings conducted in the ADGM.

In summary

As the legal landscape in the UAE continues to change, we are seeing a much greater appetite for TPF funding of court litigation and arbitration cases in the UAE.

Such funding opportunities could be extremely beneficial to those operating in the UAE and we are able to advise on the options available and the applicable procedures.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

CHARLOTTE BIJLANI
Partner
Dubai

T +971 4 278 2300
cbijlani@wfw.com

THOMAS WHITFIELD
Associate
Dubai

T +44 20 7814 8000
twhitfield@wfw.com

MUSTAFA DARWICH
Trainee Solicitor
Dubai

T +971 4 278 2313
mdarwich@wfw.com

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