

# Third-Party Litigation Funding in the UAE: Overview

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A Practice Note providing an overview of the law on third-party litigation funding in the United Arab Emirates. It addresses who can seek funding, when and how to apply for funding, whether it can be used with other funding arrangements, the legal and ethical constraints that might affect funding agreements, issues related to disclosure, confidentiality, and attorney-client privilege, and the range of legal costs and expenses that the funding companies agree to cover. It also highlights recent developments in this field.

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Global legal counsel are often required to evaluate and assess their options for funding a civil case, particularly in jurisdictions where litigation is expensive and involves budgetary constraints, or where they would like to reduce the financial risk of pursuing a claim given the uncertainties associated with litigation outcomes.

Third-party litigation funding, also known as external dispute financing or third-party funding, is where a third party (with no prior connection to the litigation) agrees to finance all or part of the legal costs of the litigation, in return for a portion of any proceeds the funded litigant recovers by settlement or collection of a damages award. The use of third-party funding in international arbitration has been growing over the last several years in many jurisdictions, including the UK, US, continental Europe, Australia, Hong Kong, and Singapore. The mechanism is gaining more popularity and acceptance in civil and commercial litigation.

This Note provides an overview of the law on third-party litigation funding in the United Arab Emirates, including:

- Who can seek funding.
- When to apply for funding.
- Whether it can be used with other funding arrangements.
- The legal and ethical constraints that might have an impact on funding agreements.
- The issues related to disclosure, confidentiality, and attorney-client privilege.
- The factors to consider when seeking funding.
- The terms of funding agreements.
- The legal costs and expenses that third-party funders usually cover.

It also highlights the recent developments that could influence the future landscape of third-party funding.

For more information on third-party funding for international arbitration, see [Practice Note, Third-party funding for international arbitration claims: overview](#).

## Legal Position

### Onshore UAE Courts

The UAE as a jurisdiction covers both the civil law "onshore" court system (applying Sharia law) as well as two common law "off-shore" court systems (the Dubai International Financial Centre (the DIFC) based in Dubai, and the Abu Dhabi Global Market (the ADGM) based in Abu Dhabi). Therefore, when considering the treatment of litigation funding, one has to review the onshore and offshore courts separately.

The onshore UAE courts have not traditionally provided an active market for third-party funding. This is mainly because the onshore UAE courts are perceived as unpredictable, as there is no certainty of outcome, particularly given the lack of the common law concept of precedent. Another relevant factor in this respect is that the UAE courts do not allow successful parties to recover their costs.

The onshore courts may award a successful party nominal costs, but this inevitably proves to be insufficient to cover the actual costs incurred. As a result, given that funders are looking for cases with good prospects of success of the claim, including recovery of costs, the market for litigation funding is still underdeveloped (see *Funder*).

There are no specific statutes, rules, or regulatory bodies that govern litigation funding in proceedings before the onshore courts. However, where parties do contract under UAE law, they should keep in mind that the UAE law applies Sharia law principles, and it recognises the concept of good faith.

In principle, third-party litigation funding is compliant with Sharia law. In particular, it complies with the concept of *maslaha*, public interest, in that it can provide a public benefit by giving parties the opportunity to pursue legitimate claims even if the party in question lacks the funding to pursue their claims. Further, because litigation funders generally carry out extensive due diligence on the merits of a case before providing funding, it is unlikely that the Sharia law principle of *gharar* (a prohibition on speculative or highly uncertain transactions) will apply.

### DIFC and ADGM

The DIFC and the ADGM courts provide scope for potential expansion by third-party funders. They are perceived as being somewhat more predictable than the onshore courts, in part because they are common law systems where past decisions can provide binding precedents, and parties are able to claim their costs in DIFC and ADGM proceedings.

In the DIFC, "funded parties" (the party receiving funding) are subject to certain requirements set out in Practice Direction No. 2 of 2017 on the Third-Party Funding in the DIFC Courts, issued on 14 March 2017 (PD 2017). These include a requirement on the funded party to notify other parties to the proceedings of the funding arrangement, and to disclose the identity of the funder.

Additional guidance for practitioners is provided in Order No. 4 of 2019, issued on 18 September 2019 (DIFC Order 2019) which sets out a Mandatory Code of Conduct for Legal Practitioners in the DIFC Court. While parties receiving funding and the practitioners arguing the case have been given guidance, there are no rules in place that cover the actual funders themselves. However, funders should be aware of the requirements of PD 2017 and DIFC Order 2019 for the purposes of negotiating their litigation funding agreements. By way of example, under the DIFC Order 2019 legal practitioners are prohibited from being "swayed from his or her duties to the client by any conflicts between the instructions or interests of the client and the instructions or interests of any involved Funder" (section 12(E)).

In the ADGM, Article 225 of the Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the ADGM Regulations) sets out requirements for funding agreements, and the Litigation Funding Rules 2019 (the ADGM Funding

Rules), issued on 16 April 2019, specifically spell out the requirements for a funding agreement to be enforceable before the ADGM courts. For example, the requirements specify that:

- The funding agreement must be in writing.
- The amount payable to the funder must only be a percentage of its expenditure.
- The agreement must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement.

## Preliminary Considerations

### Risks and Advantages of Litigation Funding

#### Client

The benefits of third-party funding within the UAE are the same as the benefits available to parties in other jurisdictions. Third-party funding allows a potential claimant to pursue a claim that they might not otherwise be able to afford due to the substantial costs of bringing a claim. In addition, funding is also sought out by parties who may have the necessary funds to hand but who, for commercial reasons, want to obtain funding from an outside source. Funding can also permit a party to move the legal costs of a dispute off its balance sheet, which may provide some commercial benefit.

Funding does, however, also pose risks to clients. Disclosure of confidential and often privileged information to funders, which is common particularly at the early stages of proceedings for the purpose of obtaining funding, may lead to a potential waiver of privilege and confidentiality with respect to that information. To mitigate this risk, the party seeking funding should avoid sharing any privileged information with funders, as well as ensure that funders are bound by explicit and strict confidentiality obligations.

#### Funder

From the funder's perspective, there are several benefits associated with funding opportunities in the UAE (whether onshore or offshore). The UAE has firmly established itself as a commercial and legal hub in the Middle East and consequently the number of disputes being dealt with within the UAE has increased substantially, with a particular uptick in complex disputes work. As a result, in our experience, there is a mismatch between the demand for funding (which is relatively high) and funding offers. Given this mismatch, any funder who wishes to provide funding in the region is likely to have an extensive choice of cases to fund and may be able to negotiate beneficial terms.

The principal risks for a funder when funding an onshore UAE court case are the uncertainty of outcome, the duration of cases (which can easily run for more than a year), the ease for appealing decisions (the courts are broadly accepting of appeals and the costs for filing an appeal are relatively modest), and the fact that parties cannot recover their legal costs.

One of the principal risks for a funder when funding a dispute before the offshore courts is the potential difficulty in enforcing a judgment. If a debtor's assets are located within the DIFC or ADGM, then enforcement of a judgment against that debtor should be relatively straightforward (whether the judgment in question was issued by the DIFC, the ADGM, or the onshore courts). However, if that debtor's assets are located in onshore UAE, then enforcement will, in practice, take a considerable amount of time. In addition, if enforcement is dealt with by the onshore courts, then all of the risks involved in onshore UAE court proceedings will apply (see above).

## Funding for Defendants

There is no express prohibition on providing funding to a defendant (whether in onshore or offshore laws and regulations). Provided that the funding arrangement complies with the applicable rules, a defendant ought to be able to obtain third-party funding.

## Costs and Expenses Which a Funder May Cover

### Onshore UAE courts

There are no specific regulations in place covering what can and cannot be covered in proceedings before the onshore UAE courts. It will be for the funder and the litigant to agree on what funding is provided and the relevant terms on which it is provided. However, it is not possible to pursue an application for security for costs before the onshore courts, and costs orders are nominal in nature (see *Legal Position*).

### DIFC

Neither PD 2017 nor DIFC Order 2019 explicitly state what a funding agreement may or may not cover in claims before the DIFC courts. In theory, it will be up to the funder and the relevant litigant to agree on what the funding agreement covers, but parties will have to comply with the general requirements under PD 2017 (for example, if a party receives funding it must inform all other parties to the litigation within the appropriate timeframe provided by PD 2017).

### ADGM

The ADGM Regulations and the ADGM Funding Rules set out the requirements for what a valid funding agreement must contain to be recognised by the ADGM Courts. (see *Funding Agreements*). Therefore, it will be for the parties to agree on what the precise scope of the funding arrangement is. However, under Article 225(3)(e) and (f) the ADGM Regulations provide that both:

- "The sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services.
- That amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Chief Justice in relation to proceedings of the description to which the agreement relates".

This indicates that there may be limits imposed on the total amount that a funder can recover, such that a funder's recovery cannot exceed a percentage of the anticipated expenditure incurred by it when funding the relevant proceedings.

## How Does Litigation Funding Work

The precise terms of a funding arrangement will depend on what the parties negotiate, although where a dispute is being pursued before the onshore courts, the parties must take care that their agreement does not offend the general Sharia law principles which may apply (see *Costs and Expenses Which a Funder May Cover*).

Whether a claim is pursued onshore or offshore, the funder will not become a party to the proceedings. However, where a claim is pursued before either the DIFC Courts or the ADGM courts, the litigant receiving funding will have to notify the other parties to the dispute that it is receiving funding, although the funding agreement itself will not have to be disclosed.

If the litigant is successful with their claim, then the recovery will be made to the litigant. It will therefore be for the litigant to then distribute the funder's share of the recovery to the funder.

## Other Funding Arrangements

Third-party funding is not the only option available to parties in the UAE. Other available litigation funding options, which may be used separately or in combination with litigation funding, include:

- **Conditional fee arrangements.** These operate to transfer all or part of the risk for a client's own legal costs from the client to the lawyer. The common form of conditional fee arrangement provides that the lawyer receives no fees if the client loses their case, but if the client is successful then the lawyer is entitled to their normal remuneration plus an uplift (increased percentage) of their fees. Conditional fee arrangements are permitted in the ADGM provided they comply with the requirements of Article 222 of the ADGM Regulations, including being made in writing and not relating to proceedings which cannot be the subject of an enforceable conditional fee agreement. Additional conditions are however imposed in certain circumstances; for example, when a success fee is agreed, the agreement must cap the limit of the success fee as a percentage, in other words, the fee cannot be a stand-alone fixed amount, but rather it must be a maximum percentage of the amount recovered (see *Costs and Expenses Which a Funder May Cover, ADGM*). The enforceability of conditional fee arrangements before the onshore courts and the DIFC Courts remains uncertain.
- **Damages-based agreements (DBAs).** These provide that the lawyer's fees are calculated as a percentage by reference to the compensation recovered by the client. DBAs are permitted in the ADGM provided they comply with the requirements of Article 224 of the ADGM Regulations. Similar to conditions applicable to third party funding agreements and conditional fee agreements (CFAs), DBAs must be in writing, and they must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement. They are also only payable once the services provided under the relevant DBA are completed and a specified financial benefit is achieved.
- **After the event (ATE) insurance.** ATE insurance provides cover for the legal costs incurred in bringing or defending a claim (whether in litigation or arbitration) and is purchased directly by the client after a dispute has arisen.

## Constraints on Litigation Funding

### Actions Not Suitable for Third-Party Funding

Strictly speaking, there are no restrictions on which types of claims can or cannot be funded, provided ethical and sharia principles are complied with.

However, third-party funding is uncommon in onshore litigation proceedings (see *Legal Position*).

### Ethical Constraints

There are a number of ethical constraints that both the funder, the funded party and counsel need to be aware of and compliant with as a matter of UAE law. By way of example:

- A funder is prohibited from exercising control over the conduct of the dispute. Doing so, may render the funding illegal and open to allegations of "champerty" (where a third party "maintains" litigation in return for a share of the proceeds). Although third party funding is not regulated in the UAE, and therefore the concepts of champerty and maintenance are not explicitly recognised (see *Legal Position, Onshore UAE Courts*), parties are under a general obligation to perform

contracts in good faith as a matter of fact. As a result, champerty and maintenance would arguably fall foul of the good faith obligation.

Therefore, third-party funding agreements should be drafted carefully and must take into account the impact of this restriction on the conditions of funding. It is advisable to clearly set out the powers of each party under a funding arrangement to ensure there is no imbalance of power or excessive control being exercised by one party over the other. This may include, for example, provisions as to who is to provide solicitors/counsel acting on the dispute with instructions, and whether any consultation between the parties needs to take place before a decision on settlement is made. The funding agreement should also include a series of undertakings which prohibit a party from suppressing evidence, influencing witnesses, or imposing an improper settlement.

- In both offshore and onshore jurisdictions in the UAE, legal practitioners are bound by certain rules of conduct which will have an impact on third-party funding arrangements. For example, the DIFC Order, imposes a general duty on legal practitioners to avoid conflicts of interest (see *Funding Agreements*). The impact of this duty is that when undertaking due diligence against the third-party funder, counsel must be independent of the funder and not compromise the interest of the client. Similar obligations exist in the ADGM Funding Rules.
- The DIFC Order also prohibits legal practitioners from accepting commission or referral fees or any other benefits from funders, unless full disclosure is made in writing to the client. Similar provisions apply in the ADGM under the ADGM Funding Rules.

## Attorney-Client Privilege and Confidentiality

Before being provided with confidential or privileged documents, funders will typically be required to enter into a confidentiality agreement.

While third-party funding arrangements remain relatively unregulated onshore, offshore in the ADGM they are subject to the following provisions, the purpose of which is to preserve the confidentiality and privilege of documents to the maximum extent possible:

- The funding agreement must require the funder to observe the confidentiality and the privileged nature of all information and documentation relating to the proceedings to the extent required by law (Rule 12(1)).
- The funding agreement must prohibit the funder from seeking disclosure of information from the funded party's lawyer or law firm that is subject to either legal privilege or is confidential, unless the information is sought with the funded party's written consent or disclosure is ordered by any courts or required by law (Rule 12(2)).

There are no equivalent rules in the DIFC.

## Role of Claimant's Counsel

The role of claimant's counsel typically commences at an early stage and usually involves identifying potential suitable funders, clearing conflicts, and entering into strict non-disclosure agreements.

Claimant's counsel will typically:

- Provide an opinion on the merits of the claim (including jurisdiction, liability, and quantum) and an estimate of costs.

- Negotiate and finalise the third-party funding agreement on behalf of the client (including advising clients on the content, suitability, and impact of the agreement).

## Choosing a Funding Company: Factors to Consider

Key factors to consider when selecting funders include:

- Whether the funder has sufficient capital and finances.
- Whether the fund has a defined period or sunset date.
- Reputation of the funder.
- Experience in the market with similar types of claims.
- Proposed funding terms.
- Level of imposed involvement.

## Deciding to Fund a Claim: Factors to Consider

Although any details of third public funding in the UAE are confidential, and there are no public records of such cases in the UAE, based on our experience funders are usually only interested in larger claims. Since construction-related claims tend to be substantial, the nature of the industry lend itself to litigation funding, and funders have appetite for funding construction claims. While funders do fund single claims, their preference is to spread risk across a portfolio of claims so that, if one claim fails, they are still able to recover their costs from others.

When carrying their commercial assessment as to whether or not to fund a claim, funders will consider in particular:

- The identity of the defendant or respondent and whether they have sufficient assets in enforcement friendly jurisdictions to satisfy any award rendered against them. If, for example, a defendant is insolvent or only has assets in jurisdictions which are regarded as high risk this will be a serious concern for any funder.
- The merits of the claim, as it must be clear that the potential claimant is likely to succeed. Any claims which are of questionable merit, in other words when prospects of success are less than 60%, are unlikely to be funded.
- The initial views of credible experts in construction disputes.
- Estimated litigation or arbitration costs and prospects of recovery, to assess whether the claim represents a viable investment. The typical ratio looked at by funders is 10:1 in a single case scenario, in other words if USD7 million funding is required then the funder will expect the estimated recovery to be at least USD70 million.
- The financial status of the claimant themselves. If there are serious concerns about a claimant's solvency, then this may be a cause for concern particularly when the claimant is incorporated in a jurisdiction which does not have a sophisticated insolvency regime.

Omni Bridgeway and Fulcrum Capital are funders currently operating in the UAE.

## Funding Agreements

See *Costs and Expenses Which a Funder May Cover* for details on what can and cannot be covered in proceedings before the courts.

### Onshore UAE Courts

There are no statutory rules governing litigation funding agreements in onshore UAE courts.

### DIFC

In the DIFC, neither PD 2017 nor DIFC Order 2019 impose any express obligations or limitations on funders. However, funders should be aware of the requirements applicable to Practitioners and Funded Parties (as defined in the applicable DIFC regulations) for the purposes of negotiating their funding agreements.

Under DIFC Order 2019, obligations on DIFC practitioners insofar as they relate to third party funding include:

- A general duty to avoid conflicts of interest.
- Being prohibited from being swayed from their duties to the client by any instructions or interest of a funder, unless the client has given written authorisation for the practitioner to take instructions from the funder instead of the client.
- A requirement to advise clients who are proposing to enter, or are already a party to a litigation funding agreement, as to the effect of such agreement, if any, on the client's potential responsibility to pay legal costs and expenses, which will remain the client's responsibility unless otherwise agreed between the client and the funder.
- A prohibition from receiving referral fees or benefits of any kind from a funder, arising from the referral of a client to the funder, unless full disclosure is made in writing to the client. The relevant provisions of DIFC Order 2019 do not specify that consent must be received from the client, which may suggest that disclosure alone (without consent) is sufficient. However, it is advisable to obtain written consent.

### ADGM

- In the ADGM, the ADGM Funding Rules regulate the content of funding agreements by stipulating minimum criteria for a funding agreement to be enforceable. The agreement must be in writing and include the following minimum information:
  - The scope, amount, and timing of funding.
  - The funder's recovery including the timing and manner of recovery.
  - Whether the funder is liable for adverse costs and adverse costs insurance.
  - The funder's involvement in potential settlements.
  - The circumstances in which the funder can terminate the litigation funding agreement.
  - Confidentiality obligations on litigation funders, including a duty to preserve legal privilege where applicable.



- The funder must also take reasonable steps to ensure that the funded party has received independent legal advice on the funding agreement.
- The funding agreement must not have terms which could induce the funded party's lawyer to breach their professional duties or allow the funder to influence the funded party's lawyer in such a way that the funder takes control of the dispute.

## Notification

### Onshore UAE Courts

Before the onshore courts, there are no statutory rules governing litigation funding and therefore no requirement to disclose the existence or terms of the funding agreement.

### DIFC

In the DIFC, under PD 2017, a funded party is required to both:

- Give notice in writing to every other party to the relevant dispute, and to the DIFC Court Registry, that it has entered into a litigation funding agreement.
- Disclose the funder's identity. There is, however, no requirement for the funded party to disclose a copy of the litigation funding agreement itself unless the court orders otherwise.

Part 7 claims are those that do not fall within the jurisdiction of the small claims tribunals and where a Part 8 claim is not appropriate. Part 8 claims are used when the claimant seeks a decision on a question that is unlikely to involve a substantial dispute of fact, or if there is a rule of practice direction which permits or requires the use of a Part 8 Claim Form. Part 7 claims tend to be the most common types of claim.

For Part 7 claims, such notice must be given either:

- In the Case Management Information Sheet submitted before start of the Case Management Conference (CMC).
- If the litigation funding agreement is entered after the CMC has taken place, within seven days of the date of the litigation funding agreement.

For all other claims, notice must be given either:

- As soon as practicable after the commencement of the proceedings, either within the claim form itself, or in the particulars of claim, if appropriate.
- If the litigation funding agreement is entered into after the commencement of the proceedings, within seven days of the date of the agreement.

### ADGM

Under Article 225 of the ADGM Regulations, a litigant who enters into a litigation funding agreement must put every other party to the proceedings on written notice of the fact that a funding agreement has been entered into. Parties need to apply to the ADGM courts if they seek further details as to the funder, such as for example their identity, or as to the funding agreement.

## Unsuccessful Claims

A funder may be liable for an adverse cost order depending on the terms of the funding agreement.

PD 2017 provides that the DIFC courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems it appropriate.

Part 9 of the ADGM Regulations does not contain any express powers to make costs orders against third party funders. However, the ADGM Funding Rules require that the funding agreement include an obligation for the funder to submit to the jurisdiction of the ADGM courts for the purpose of disputes relating to costs between the funded party and any other party to the ADGM court proceedings.

To the best of our knowledge, there are no reported decisions of the DIFC or the ADGM courts holding a funder liable for costs. However, we would expect the DIFC and ADGM courts' positions to follow UK case law, and therefore they may hold a funder liable for adverse costs in appropriate circumstances.

While the DIFC courts follow the UK approach of ordering costs on a standard or indemnity basis, there are some key differences, including that:

- The average rate of costs awarded over the past ten years following assessment on the standard basis is just over 85%, and therefore significantly higher than the usual rate in other common law jurisdictions.
- Indemnity costs may be awarded against parties for unsuccessfully challenging arbitral awards under PD 2017.

Funders should therefore be mindful that they may be required to pay adverse costs at levels higher than those in other common law jurisdictions.

Funders should also be aware that successful parties, in recovering the costs of their claim, may be limited to the threshold rates applicable to practitioners, as set out in Registrar's Direction No.1 of 2017, according to their respective levels of experience.

## Recent Developments

While funders have traditionally focused on markets such as the US, Europe and Australia because of their size and the perceived predictability of their legal systems and enforcement regimes, in recent years they have become far more interested in the Middle East. This is due to the number and size of disputes, including in particular construction disputes, as well as the existence of the DIFC and ADGM courts, whose rules and procedures are very similar to the common law courts of the UK. The increasing track record of successful enforcement and the prevalence of arbitration have also contributed to funders' growing interest in the UAE and the wider Middle East/North Africa (MENA) region.

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