



Litigation and Arbitration Funding in the Middle East

Woodsford Litigation Funding Insight

The use of litigation funding is expanding rapidly across the legal world.

This trend has accelerated as the key actors in dispute resolution proceedings become familiar with litigation funding and its many advantages. Sophisticated claimants appreciate how funding can help them manage costs and offset legal risk; savvy lawyers recognise how third-party funding can help them expand their practice and offer clients flexibility on fees; and forward-thinking judges and arbitrators acknowledge the positive role that litigation funding plays in promoting meritorious claims and fostering access to justice.

Until recently, use of litigation funding was largely confined to the United Kingdom, Australia and the United States. However, within the last few years there has been rapid expansion in its use, particularly in connection with international disputes, and litigation funding is now increasingly being employed in disputes related to Asia, Latin America - and the Middle East. Indeed, for many reasons, the Middle East is a region that we believe will become increasingly inviting for litigation funding.

And as a central hub for global trade, the region regularly sees substantial high-value disputes involving sophisticated entities. It has a well-developed legal services market, regulatory regimes that do not prohibit third party funding, and legal systems—including innovative free-zone jurisdictions - that are increasingly arbitration-friendly and aligned with international legal standards, particularly regarding recognition and enforcement of foreign awards.

As a global litigation funder, Woodsford regularly receives inquiries from parties involved in Middle-East related proceedings and we expect the frequency of these inquiries to grow substantially in the coming years. As such, lawyers and arbitrators involved in high-value litigation and arbitration in the region should begin to familiarise themselves with how litigation funding works in practice and the many advantages offered by partnering with a litigation funder like Woodsford.

The Benefits of Litigation Funding

Litigation funding, also known as “litigation finance” or “third party funding,” is simply an alternative means for a claimant to fund the costs of a legal dispute, whether an arbitration or a litigation.

Rather than an individual or corporation paying the costs out-of-pocket (which can cause significant strain on a company’s operations) or a lawyer proceeding on contingency (which many firms cannot accommodate), a commercial litigation funder finances the cost of the proceedings in return for a share of any award.

This kind of funding is typically non-recourse - if the claim is lost, the claimant is not liable to repay the investment of the funder. Thus, in a typical funding arrangement, the outside litigation funder shoulders the majority of the risk. The advantages of litigation funding for both lawyer and claimant are substantial. Most fundamentally, litigation funding

facilitates access to justice. A capital-constrained claimant who might not otherwise have the resources to prosecute its claim (sometimes as a direct result of the defendant’s wrongful conduct) is given the opportunity to have its day in court. This is particularly true in “David v Goliath” cases where a smaller claimant takes on a bigger, better-resourced defendant, who may use a strategy of attrition to exhaust the claimant’s appetite and ability to prosecute its claim. Partnering with a well-capitalised funder like Woodsford substantially levels the playing field and allows a claim to survive on its merits.

Even where a claimant has the resources to fund a dispute, litigation funding offers many advantages. Funding allows a claimant to unlock the value of a potential claim and preserve capital for other uses, while transferring the ongoing costs and contingent liabilities of the claim to a third party. Moreover, funding can have potential



accounting benefits, as it takes ongoing litigation expenses off a company's books. Ultimately, funding permits a claimant to hedge some of its risk, ensuring that it will be in a better position if the claim is successful, but in no worse position if the claim is not successful. Thus, funding transforms litigation from a traditional "win-lose" proposition to a "win-don't lose" proposition.

Litigation funding can also have substantial strategic benefits and lead to better settlement outcomes. A claimant, knowing that they have the resources to fully prosecute a dispute, will be in a more advantageous position for settlement and will not be forced to accept a low offer

can boost their financial position. Law firm finance, where a funder provides capital directly to a firm, cross-collateralised against a portfolio of cases that the firm has taken on a contingent basis, can mitigate cash flow challenges, providing a certainty that legal invoices will be paid in a timely manner and provide lawyers a more stable financial position, allowing them to focus on better advocating their client's positions. Equally, an agreement with a funder may allow a law firm to take on new clients and offer more flexible arrangements to existing clients.

Finally, it should be emphasised that litigation funders do not control the litigation or arbitration. Although a litigation



merely on account of their capital constraints. Furthermore, the fact that a sophisticated litigation funder like Woodsford has backed a claimant's position sends a powerful signal to the defendant and court that a third party with substantial expertise believes strongly in the merits of the underlying claim to put their own capital at risk.

From the perspective of law firms, a litigation finance agreement with a funder

funder like Woodsford, staffed with expert litigators with decades of international law firm experience, can provide valuable resource to claimants and their lawyers, all decisions regarding the litigation and potential settlement remain firmly in the hands of the lawyer and claimant. Indeed, by relieving some of the financial stresses of litigation, working with a litigation funder like Woodsford allows a lawyer and claimant to focus in on the merits of a dispute.

The Permissibility of Litigation Funding in the Middle East

The Middle East is, of course, comprised of many distinct legal systems and so caution should be taken when considering the region as a whole. However, broadly speaking, litigation funding is not prohibited in the region. This is not surprising as most Middle East legal systems are either code-based, civil law or Islamic law based systems. As such, they did not inherit the English common law's feudal prohibitions on champerty and maintenance, which,

maslaha or public interest, which is consistent with litigation funding's goal of helping meritorious claimants obtain access to justice. Further, when Woodsford partners with a claimant, it is not merely providing capital but truly sharing in the risks and rewards of the claimant. If a claim is unsuccessful, there is no guaranteed return and no recourse to underlying assets; if the claim is successful, then Woodsford and the claimant share in the award, with



although they have gradually fallen away in most jurisdictions, have somewhat slowed the growth of litigation funding in some common law regions.

Moreover, Woodsford believes that litigation funding is fundamentally consistent with the basic tenets of Islamic finance. A key principle of *Shariah* is that the underlying transactions should benefit

the claimant maintaining a majority interest. As such, litigation funding is in keeping with the traditional prohibitions on *riba* (interest), *gharar* (speculation) and *maysir* (gambling). Ultimately, litigation funding agreements are bespoke agreements and Woodsford has the flexibility and sophistication to structure them in way that accounts for the unique considerations of *Shariah* compliance.

Promulgation of New Rules & Guidelines

Recent developments in the region's legal landscape underscore both the permissibility of litigation funding and herald a likely uptick in litigation funding in the coming years.

In early 2017, the **Dubai International Financial Centre (DIFC)** Courts released Practice Direction No. 2, which set out the rules for how funded matters should proceed in the DIFC Courts.

Further, consistent with the approach of other jurisdictions globally, the Practice Direction provides that funding may be taken into account when considering a security for costs application, but the fact that a party is funded does not by itself warrant such an order.

By proactively issuing these rules, the DIFC underscored the permissibility of funding and signaled the likely growth of



Under the new Practice Direction, a party must disclose their funded status and the identity of the funder. However, unless the Court orders otherwise, parties are not required to disclose the terms of their underlying funding agreement. Thus, the rule ensures that potential conflicts may be avoided at the outset, while maintaining appropriate confidentiality between the party and funder.

funding in the near term.

Similarly, the **Abu Dhabi Global Market (ADGM)** has issued Regulations (partially modelled on English and Australian common law) that expressly allow for litigation funding and outline the procedures to be followed for matters before the ADGM Courts. Specifically, the regulations provide that such agreements shall not be



unenforceable merely because they involve litigation funding (§225.1). Further, while the regulations mandate the disclosure of funding, they expressly limit that disclosure to “only the fact” of a party’s funded status rather than the underlying funding agreement or terms (§225.6). Finally, the regulations allow the Courts to issue costs orders that include the costs payable under a funding agreement (§225.10-11).

Finally, the **Dubai International Arbitration Centre (DIAC)** is currently revising and updating its arbitration rules, which are expected to be adopted early this year. Although not yet final, it is understood that the new rules will include provisions recognising the permissibility of litigation funding, and providing directions as to disclosure and the interplay between funding and costs orders.

From Woodsford’s perspective, such rules are helpful because they give clarity to the

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allowable status of litigation funding, provide direction on disclosure to alleviate concerns for conflicts and provide an opportunity for the larger community of practitioners to familiarise themselves with the uses of litigation funding. Woodsford expects that other jurisdictions and arbitral centers in the region will issue similar guidelines in the coming years to stay at the forefront of emerging legal issues and, perhaps, as a competitive effort to encourage more funded matters within those jurisdictions.

Looking Forward

Woodsford is a global litigation funder that is committed to access to justice, funding meritorious claims that might otherwise be frustrated by the substantial costs and risks involved in high-value litigation and arbitration. The Middle East region, led by the forward-thinking work of the DIFC, ADGM and DIAC, is already receptive to the use of litigation funding and we expect that the region will see a continued increase

in the use of litigation funding in the coming years, especially as the region continues to solidify its status as an attractive venue for international arbitration. Woodsford looks forward to working with lawyers and arbitrators in the region and we stand ready, willing and able to contribute to access to justice in the region through the funding of meritorious claims.

About the authors

Zachary has extensive trial litigation experience, having represented both plaintiffs and defendants in a wide variety of commercial disputes in state and federal courts in the United States, as well as in international proceedings. He has particular expertise in intellectual property disputes and technology related matters, complex business litigation and competitor disputes, government contracts and whistleblower actions, art related matters, and international human rights litigation.

Prior to joining Woodsford, Zachary was a Senior Associate in the Los Angeles office of the global litigation firm Quinn Emanuel Urquhart & Sullivan. Prior to that, Zachary clerked for Judge Shira A. Scheindlin in the Southern District of New York and was an associate in the New York office of Shearman & Sterling, where he focused on international disputes and project finance.

Zachary received his J.D. from Cornell Law School, where he was an Articles Editor on the Cornell Law Review, and his B.A. from Yale University, where he was a Sulger Scholar.

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About Woodsford Litigation Funding

Founded in 2010, with offices in London and Philadelphia Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford Litigation Funding is a founder member of the Association of Litigation Funders of England and Wales.

Woodsford's role in supporting claimants in David versus Goliath litigation was highlighted in a landmark ruling of the English High Court: Essar Oilfields Services Limited v Norscott Rig Management PVT Limited [2016] EWHC 2361 (Comm)

For further information, visit www.woodsfordlitigationfunding.com or email **Steven Savage** at ssavage@woodsfordlf.com