

Litigation Funding

Contributing editors

Steven Friel and Jonathan Barnes



2019

GETTING THE
DEAL THROUGH 

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Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

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Preface

Litigation Funding 2019

Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
November 2018

United Arab Emirates

James Foster, Courtney Rothery and Jennifer Al-Salim

Gowling WLG

1 Is third-party litigation funding permitted? Is it commonly used?

There are a number of judicial authorities within the United Arab Emirates and it is necessary to look at each separately when considering third-party funding.

Commercial disputes arising in the United Arab Emirates will be resolved by the local civil law courts unless the parties have opted into another jurisdiction or signed a valid arbitration agreement.

The United Arab Emirates consists of seven emirates. 'Local courts' or 'onshore courts' (see below) refer generically to the courts of the seven emirates.

In addition, the United Arab Emirates has a number of free zones where companies can set up and do business under the rules of the free zone. These rules are different from those that apply to companies doing business elsewhere in the United Arab Emirates. Businesses located in the free zones are commonly referred to as being in 'off-shore' United Arab Emirates, with areas outside the free zones being known as 'onshore' United Arab Emirates.

Two free zones in the United Arab Emirates have their own courts, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). The rules of those courts determine the circumstances in which the courts have jurisdiction. Additionally, contracting parties, whether registered in these free zones, in onshore United Arab Emirates or outside the United Arab Emirates altogether, can agree that the DIFC or ADGM courts have jurisdiction to resolve their commercial disputes.

The DIFC and the ADGM also have their own common-law based laws. The DIFC's laws are modelled closely on the principles of English common law. English common law is directly applicable in the ADGM, as are certain United Kingdom statutes.

Parties doing business in the United Arab Emirates also have the option to agree that disputes will be resolved by arbitration. Parties can choose between having the arbitration seated in onshore United Arab Emirates, in the DIFC or in the ADGM. In the case of an onshore seat the arbitration will be governed by the recently enacted UAE Federal Arbitration Law (Law No. (6) of 2018). Arbitration seated in the DIFC will be subject to the DIFC Arbitration Law (DIFC Law No. 1 of 2008) while arbitration in the ADGM is governed by the ADGM Arbitration Regulations 2015.

There are no rules or laws that prohibit litigation funding in the United Arab Emirates. Indeed, there is a strong argument that litigation funding is consistent with the key jurisprudential principle in sharia law that a transaction should benefit public interest (*maslaha*) in the sense that funding can give parties of limited financial means a method of funding meritorious claims that they might otherwise be unable to pursue.

Case reporting of local court decisions is confined to important decisions of the Courts of Cassation and so the attitude of the local courts to third-party funding is difficult to discern. However, there has been no indication from reported cases that it is either discouraged or regarded unfavourably although it is still relatively uncommon in the local courts.

Some commentators have suggested that the sharia law prohibition on speculative or highly uncertain transactions (*Gharar*) may apply to third-party funding arrangements in onshore UAE. However, funders usually carry out extensive due diligence on the merits of a case before

agreeing to funding, and in those circumstances it seems unlikely that the *Gharar* prohibition would apply. The risk can be further mitigated by careful drafting of the funding agreement, with the risks and benefits to both parties being clearly identified so that it is clear that neither party is taking excessive risk.

Third-party funding in the DIFC court is permitted and the DIFC court issued a Practice Direction on Third Party Funding in March 2017. The rules in the DIFC Practice Direction largely mirror the position in England and Wales but they are not identical.

Third-party funding in the ADGM courts is permitted by Part 9 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (ADGM Courts Regulations), unless the matter relates to proceedings that cannot be the subject of an enforceable conditional fee agreement, or to any proceedings specifically prescribed by the Chief Justice.

Third-party funding is not addressed specifically in the arbitration laws applicable in onshore United Arab Emirates, the DIFC or the ADGM but there is no reason to suppose that it would not be permitted under the general laws applicable in those jurisdictions. The fact that third-party funding is specifically permitted in litigation in the DIFC and ADGM courts is a good indicator that it would not be prohibited in arbitration seated in the DIFC or ADGM.

The reference to third-party funding in the draft new Dubai International Arbitration Centre (DIAC) Rules is another recognition of the legitimacy of third-party funding in an arbitration context.

The new Federal Arbitration Law in the United Arab Emirates is based on the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law, with some adaptations to fit the local legal framework. The grounds for challenge of an arbitration award closely follow the equivalent provisions in the Model Law, with some additional grounds for challenge based on irregularities in the arbitral proceedings. Much will depend on how the new law is interpreted by the onshore courts, but the new law should generally lessen concerns over enforcement of onshore UAE-seated arbitration awards against assets in onshore United Arab Emirates. This should make the funding of arbitration in the United Arab Emirates a more attractive prospect than it was previously.

2 Are there limits on the fees and interest funders can charge?

There are no specific laws or rules that limit the fees that third-party funders can charge where the proceedings are in the onshore courts. Interest may be recoverable under onshore UAE law in certain specified circumstances, but compound interest will not be recoverable.

UAE law recognises the principle that parties are free to contract on the terms they wish. The courts have power to intervene in certain circumstances but these are unlikely to apply in a third-party funding context. Contracts in the United Arab Emirates must be performed in accordance with the requirements of good faith.

There are no limits in the DIFC Practice Direction on the fees and interest funders can charge. However, DIFC law is modelled on English law and so funders should be mindful of the English law rules of maintenance and champerty. Modern English law recognises that third-party funding does not of itself amount to either maintenance or champerty. However, if the funding agreement contains an element of impropriety, such as the exercise of disproportionate control or the recovery of excessive profit, it could breach the rules and be void.

The ADGM Courts Regulations provide that the sum to be paid by the funded party 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 services' and 'that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Chief Justice'. This suggests that damages-based payments to the funder will not be permitted.

The ADGM court applies English common law directly and so the comments regarding maintenance and champerty are also relevant.

The arbitration laws applicable in onshore United Arab Emirates, the DIFC and the ADGM do not specifically provide for third-party funding. However, for arbitrations with a DIFC or ADGM seat see the comments about maintenance and champerty above.

3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

There is currently no legislation or regulation for third-party funding of cases in the onshore UAE courts.

The DIFC Practice Direction and the ADGM Court Regulations referred to in question 1 provide for third-party funding.

The UAE Federal Arbitration Law, the DIFC Arbitration Law and the ADGM Arbitration Regulations are silent on third-party funding.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

There are no specific rules applying to lawyers advising on third-party funding for cases in the onshore courts.

Expatriate lawyers who practise in the United Arab Emirates and are registered and regulated by professional supervisory authorities in their home countries may still be required to comply with their own relevant ethical rules.

The Mandatory Code of Conduct for Legal Practitioners in the DIFC courts and the ADGM Courts Rules of Conduct 2016 make no specific mention of third-party funding.

No specific professional or ethical rules apply in relation to third-party funding in arbitration.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

There are currently no public bodies in the United Arab Emirates with a particular interest in or oversight over third-party funding. However, the Government of Dubai Legal Affairs Department may have an interest in third-party funding to the extent that it relates to any issue falling within the (non-mandatory) Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai 2015.

The DIFC Authority was established to oversee the development, management and administration of the DIFC. The Authority may have an interest in third-party funding if it is likely to bring more cases before the DIFC courts but there is currently no specific oversight over third-party funding in either the DIFC or ADGM courts or in arbitration, although we anticipate that this may change as interest in third-party funding continues to grow.

6 May third-party funders insist on their choice of counsel?

The quality of the lawyers conducting the litigation or arbitration will, as in other jurisdictions, be an important factor in the funding decision. However, funders will not generally insist on use of a particular counsel, consistently with the principle that litigation funders do not control the litigation.

7 May funders attend or participate in hearings and settlement proceedings?

Proceedings in the onshore UAE courts are public so third-party funders are in principle free to attend the hearings. However, the proceedings are in Arabic and involve very little in the way of advocacy. Hearings are generally limited to the submission or exchange of written memoranda by or between the parties' advocates.

The majority of hearings in the DIFC and ADGM courts are public (unless the court orders otherwise) and so there is no reason why funders could not attend, although participation would not generally be permitted. All hearings are conducted in English.

The extent to which a funder may be able to participate in settlement discussions will largely depend on the terms of the funding agreement. Funders must be careful to avoid exercising disproportionate control in order to avoid breaching the rules against maintenance and champerty referred to in question 2.

Arbitration hearings are private but if both parties agreed to the funder attending the hearing then this may be possible provided the tribunal did not have objections. It is very unlikely that the funder would be able to participate in hearings.

8 Do funders have veto rights in respect of settlements?

There are no specific rights to veto and the ability to do so would depend on the terms of the funding agreement. There is nothing in principle to prevent a funding agreement giving the funder the right to make continuance of funding conditional on acceptance of reasonable settlement proposals. However, where the funding agreement is subject to UAE law the UAE Civil Code will require it to be performed in accordance with the requirements of good faith.

9 In what circumstances may a funder terminate funding?

The funding agreement is likely to confirm the circumstances in which it can be terminated by the funder. These circumstances will usually include changes in the prospects of success during the course of the proceedings.

If the funding agreement is subject to UAE law then the UAE Civil Code will apply to it. Article 267 provides that a contract can only be varied or cancelled 'by mutual consent, or an order of the court, or under a provision of the law.'

It is advisable for the funding agreement to state expressly that agreement to the termination provisions constitutes 'mutual consent' for the purpose of article 267.

There are no specific provisions dealing with the termination of funding in DIFC or ADGM court proceedings or in arbitration. However, given that the DIFC and the ADGM courts are common law courts and follow (or apply) English law it would be sensible to adopt termination provisions that are compliant with the Association of Litigation Funders' Code of Conduct in England and Wales.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The role a funder will take in the process will depend on the terms of the funding agreement. Most funding agreements will set out the due diligence process the funder will undertake before committing to funding, as well as the ongoing monitoring. It is important that funders do not reserve the right to control the proceedings (see question 2 regarding maintenance and champerty), but they will generally require to have input at key stages of the litigation process.

A funder will not be required under any law or regulation to take an active role in cases in the United Arab Emirates, whether in onshore or DIFC-ADGM litigation or in arbitration seated onshore or offshore in the United Arab Emirates.

11 May litigation lawyers enter into conditional or contingency fee agreements?

UAE law prohibits contingency or success fee arrangements between lawyers and clients (although this prohibition does not apply to any agreement between a funded party and the funder).

Contingency fee arrangements are generally prohibited in DIFC court proceedings, although conditional fee arrangements (CFAs) are permitted (where a lawyer receives an uplift in fees in the event of success but not a share in the proceeds).

CFAs are permitted in the ADGM provided they comply with the requirements in section 222 of the ADGM Court Regulations. Damages based agreements are also permitted, subject to the requirements of section 224.

There are no provisions addressing the position in arbitral proceedings. However, given the position summarised above it is likely that CFAs would be permitted in arbitration seated in the DIFC or ADGM (but not in onshore United Arab Emirates) and that contingency fee agreements would not be permitted wherever the UAE seat.

12 What other funding options are available to litigants?

There is no developed system of state sponsored legal aid in the United Arab Emirates but both the Dubai Legal Affairs Department and the DIFC Academy of Law have well-organised pro bono schemes that can be available to potential claimants depending on their circumstances and the type of claim involved.

13 How long does a commercial claim usually take to reach a decision at first instance?

It usually takes at least 12 months to get a decision from the court of first instance in the onshore UAE courts. The proceedings can last longer if the court decides to appoint one or more court experts to investigate technical issues.

In the DIFC and ADGM courts a claim is likely to take approximately 12 months to get to trial but this will depend on the complexity of the case and the court's availability.

The ADGM court opened in December 2015 but the first claim was not issued until August 2017 and to date there have only been three judgments handed down by the ADGM court. It is therefore difficult to determine timings. However, the ADGM courts have expressed their commitment to helping parties to resolve disputes in a timely manner.

Arbitration timelines depend on the availability of parties and the arbitrators, the complexity of the issues and the institutional rules or ad hoc procedures adopted by the parties. However, a time frame of 12 to 18 months from commencement to award would generally be realistic for arbitrations seated in the DIFC or ADGM.

Arbitrations seated in onshore United Arab Emirates are now subject to the new UAE Federal Arbitration Law, which has introduced a number of modernising and streamlining initiatives in line with the United Arab Emirates' ambition to adopt best international arbitration practice. Disregarding other potential variables, arbitration in onshore United Arab Emirates is now likely to be comparable in terms of time-scale to arbitration in either of the two offshore seats.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

In the onshore courts appeals to the Court of Appeal and from there to the Court of Cassation are routine for larger value claims. Appeals can take up to one year before each appeal court.

There are no available statistics about the proportion of judgments of the DIFC and ADGM courts that are appealed. As at September 2018, the ADGM courts are yet to receive an appeal. Given the efficient case management procedures in both courts, appeals are likely to be dealt with quickly.

Awards in arbitrations seated in the DIFC or ADGM are final and cannot be appealed. The only recourse against an award is by an application for setting aside.

In arbitrations seated in onshore United Arab Emirates the new Federal Arbitration Law provides that an arbitral award can only be challenged by an application for setting aside the award on the grounds specified in article 53 (see question 15).

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There are no reported statistics but we would estimate that more than half of judgments issued by the onshore UAE courts require enforcement proceedings where the assets are located onshore in the United Arab Emirates.

Judgments cannot be enforced against assets and property that is owned by the United Arab Emirates or the governments of the seven emirates. Therefore, if a judgment is against a government (or quasi government) entity then the creditor has to rely on voluntary payment.

Where the debtor is not a government entity then applications can be made to the local UAE execution courts to attach funds in the debtor's bank accounts up to the value of the judgment, and have them paid to the creditor. Assets such as property, machines and vehicles can also be attached and sold at auction with the proceeds being paid to the creditor (after the courts' expenses).

When assets cannot be located, an application can be made to the court for an arrest order against the manager of a company against which a judgment has been issued.

The conditions for the enforcement of foreign judgments in the onshore courts are listed under article 235 of the UAE Civil Procedure Law. It is likely to be difficult to enforce a foreign court judgment in the onshore courts unless there is a mutual recognition and enforcement treaty between the United Arab Emirates and the relevant foreign jurisdiction.

There are no reported statistics on the proportion of judgments requiring enforcement in the DIFC and ADGM courts.

The DIFC court's judgments are relatively easy to enforce in onshore Dubai under the Judicial Authority Law. The DIFC court is categorised as a court of the United Arab Emirates and it therefore benefits from the reciprocal enforcement treaties entered into by the United Arab Emirates, including those with the Gulf Cooperation Council, France and India. The court has also entered into memoranda with various countries, including England and Wales, Australia and Singapore to govern reciprocal enforcement. Overall, the DIFC court has established robust enforcement procedures and they are favourably looked upon within the region.

The ADGM courts have also entered into various memoranda to aid the enforcement of judgments, including a memorandum of understanding with the Abu Dhabi Judicial Department and the Federal Ministry of Justice. This is expected to aid enforcement in onshore Abu Dhabi.

Enforcement of a DIFC or ADGM arbitral award can only be refused on the narrow grounds set out in the DIFC Arbitration Law and ADGM Arbitration Regulations. Decisions on enforcement are made by the DIFC and ADGM courts respectively and they can be expected to deal with matters expeditiously.

DIFC arbitration awards that have been recognised and enforced by the DIFC court can be enforced and executed in onshore Dubai under the Judicial Authority Law. The ADGM court memorandum of understanding referred to above will assist with enforcement and execution of ADGM arbitration awards in onshore Abu Dhabi.

In arbitrations seated in onshore United Arab Emirates the new Federal Arbitration Law provides that enforcement of an award can only be challenged on the limited grounds specified in article 53, which broadly follow the equivalent provisions in the 2006 UNCITRAL Model Law, with some additional grounds for challenge based on irregularities in the arbitral proceedings. The Model Law provisions are themselves based on the recognition and enforcement grounds under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Applications to enforce awards are made directly to the Court of Appeal, with one appeal to the Court of Cassation. Applications must be dealt with by the Court of Appeal within 60 days.

16 Are class actions or group actions permitted? May they be funded by third parties?

The onshore UAE courts do not have a system for filing class or collective actions and all claims must be filed separately.

The DIFC courts permit representative party actions where more than one person has the same interest in a claim. However, certain types of claims are excluded from representative actions. In addition, the DIFC courts permit group litigation and the court may order the management of claims that give rise to common or related issues of fact or law. There is nothing in the DIFC Practice Direction on third-party funding that suggests that such actions could not be funded by third parties.

The ADGM Court Procedure Rules provide for group litigation orders where there are common or related issues of fact or law. Provided the group action does not relate to a type of proceedings for which funding is not permitted by the ADGM Courts Regulations it may be funded by third parties.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The onshore UAE courts only make nominal awards for costs. The award is not intended to compensate the winning party for the costs incurred in having won the claim.

The DIFC court may order the unsuccessful party to pay the costs of the successful party. The DIFC Practice Direction on third-party

funding does not make clear whether the litigation funding costs of the successful party will be recoverable from the unsuccessful party. We are not aware of any reported decision on this point.

The ADGM court may make such an order on costs as it considers just. The ADGM Courts Regulations provide that a costs order made in any proceedings may, subject to court procedure rules, include payment of any amount payable under a litigation funding agreement.

The DIFC Arbitration Law and the ADGM Arbitration Regulations require the arbitral tribunal to fix the costs of the arbitration in the award, though there is no express obligation to order payment of those costs by either of the parties. Arbitrators will normally do so though and costs are likely to be awarded to the successful party in the absence of unusual circumstances.

We are not aware of any DIFC or ADGM seated arbitrations in which the unsuccessful party was ordered to pay the litigation funding costs of the successful party.

However, the judgment of the *English Commercial Court in Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) addressed this issue, finding that the definition of 'other costs' in section 59(1) of the English Arbitration Act 1996 could include third-party funding costs. English court judgments have persuasive authority in the DIFC courts and the ADGM courts directly apply English common law, so it may well be that this judgment would be followed by the DIFC or ADGM courts depending on the interpretation given to the definitions of costs in the relevant arbitration law and regulations.

In arbitrations seated in onshore United Arab Emirates, the new UAE Federal Arbitration Law provides that the arbitral tribunal shall assess the costs of the arbitration and may order that any or all of the costs are to be borne by one of the parties. The Law provides that the costs of the arbitration shall comprise the fees and expenses of the tribunal and the costs of experts appointed by the tribunal. There is no express reference to legal costs (unlike in the arbitration laws and regulations of the DIFC and ADGM) and so it will be important to review the applicable arbitration rules and any agreement between the parties when considering the recoverability of legal costs.

18 Can a third-party litigation funder be held liable for adverse costs?

The onshore United Arab Emirates courts will not make costs orders against third parties.

The DIFC Practice Direction on third-party funding provides that the DIFC courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems it appropriate.

We are not aware of any reported decisions that address this point. However, we would expect the DIFC court's position to mirror that of the English courts, who have shown themselves willing in appropriate circumstances (such as the unsuccessful funded party being impecunious and unable to pay the other party's costs) to hold a funder liable for costs, capped at the level of funding provided.

Part 9 of the ADGM Courts Regulations contains no express powers to make costs orders against third-party funders and there are no reported decisions in the ADGM courts that hold a funder liable for costs.

However, given that the ADGM court applies English law common law it is likely that the ADGM court would follow English case law and so may hold a funder liable for adverse costs in appropriate circumstances.

It is very unlikely that a funder in an arbitration case would be held liable for adverse costs as an arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement.

19 May the courts order a claimant or a third party to provide security for costs?

The onshore United Arab Emirates courts are civil law courts and do not order security for costs, which is predominantly a common law concept.

The Rules of the DIFC courts provide that security for costs orders may be made against claimants. They also provide that an order may be made against someone other than the claimant where the court is satisfied that it is just to make an order and one or more of the circumstances listed in the relevant rule applies, including the situation where

Update and trends

The recognition and regulation of litigation finance by both the DIFC and ADGM courts demonstrate that it is now seen as a mainstream feature of litigation in those courts. The United Arab Emirates has also taken a significant step towards its goal of becoming the main hub for international arbitration in the Middle East with the recent passing of the new Federal Arbitration Law. This modernised law should give greater certainty to funders, both as to the procedural conduct of arbitrations seated in the United Arab Emirates and as to the prospect of successful enforcement of any award. The legal and financing communities will be eagerly awaiting the first decisions of the UAE courts under the new Arbitration Law for confirmation of a supportive approach to its interpretation and implementation.

a person has contributed to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings. The DIFC Practice Direction on third-party funding reinforces this and states that the court has an inherent jurisdiction to make costs orders against third parties, including funders, where the court deems it appropriate.

The ADGM Civil Procedure Rules provide that a defendant may apply for security for costs under the conditions set out in any relevant practice direction and such an application may seek an order against someone other than the claimant.

An arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement and so could not order a third-party funder to provide security for costs.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

See question 19. The onshore UAE courts do not make orders for security for costs.

The DIFC Practice Direction on third-party funding provides that when the DIFC court is making decisions on security for costs it may take into account that a party has funding, but the fact that a party is funded shall not by itself be determinative.

The ADGM's Practice Direction on security for costs sets out the factors for the court to consider and does not refer to the funding of the claim.

There are no express powers for arbitrators to award security for costs under the relevant arbitration laws and regulations.

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance and other types of costs insurance are not commonly used in the United Arab Emirates, whether in litigation or arbitration.

ATE insurance would in principle be permitted, but the growth of an ATE market in the United Arab Emirates will depend on the availability of suitable products.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

A litigation funding agreement does not need to be disclosed in onshore court proceedings and disclosure cannot be compelled.

The DIFC Practice Direction on third-party funding provides that a litigant must provide notice of the fact of funding to every other party and must disclose the identity of the funder, but not the funding agreement itself unless the court orders otherwise.

In the ADGM court a litigant who enters into a litigation funding agreement must put every other party on written notice of that fact but is not required to disclose the identity of the funder or the funding agreement.

There is no general requirement to disclose information about third-party funding in arbitration, although tribunals may be able to order disclosure, for example to avoid the risk of any potential conflict between the funder and any of the arbitrators.

23 Are communications between litigants or their lawyers and funders protected by privilege?

There is no concept of legal privilege in the onshore courts. There are however a number of relevant laws relating to confidentiality which may in practice have a similar effect including Federal Law No. 23 of 1991 regarding the regulation of the legal profession.

The DIFC and ADGM courts recognise the concept that certain documents and correspondence will be privileged from disclosure.

A funder is likely to be given access to privileged material before deciding whether to fund the case. The litigant and the funder should therefore enter into a non-disclosure agreement before confidential and privileged material is disclosed. The NDA should specify that the litigant and the funder have a common interest giving rise to common interest privilege.

Privilege in communications between litigants and their lawyers is likely to be recognised by an arbitral tribunal in the United Arab Emirates whether the arbitration is seated on- or offshore.

24 Have there been any reported disputes between litigants and their funders?

There have been no reported disputes in the onshore courts.

There was a case in the DIFC courts in 2014 (Claim No: CFI-036-2014) that involved Vannin Capital. Vannin had provided funding for claimants in litigation who subsequently discharged their lawyers without finalising a replacement payment receipt mechanism under the funding agreement. Vannin filed a claim with the DIFC court to protect and preserve its interest in the funding agreement. Vannin obtained an order for a sum of around US\$11 million to be paid into court and held until the court's further instruction as to who any payments should be made to and in what amount.

There have been no reported disputes in the ADGM. However, the courts only opened in December 2015.

25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

As a general point parties seeking funding should carry out adequate due diligence on prospective funders to satisfy themselves about their reputation, financial standing and values.



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