HFW LITIGATION

CLIENT GUIDE
KNOWLEDGE MANAGEMENT

FUNDING DISPUTES IN THE UNITED ARAB EMIRATES

At HFW we recognise that financing litigation and arbitration is a major consideration for clients when deciding whether to bring an action or resist a claim, no matter the size of the organisation, or merits of the claim. We have therefore created an internal Funding Committee to advise on the best approaches to funding and ensure that we are able to offer a seamless and efficient service through the established relationships we have with both brokers and funders.

The use of funding will enable you to bring or defend claims by:

1. Managing and reducing the financial liability for your costs and those of your opponents.
2. Improving liquidity thereby freeing up capital for use in the running of your business.

This Client Guide concerns the position in the United Arab Emirates; however our lawyers and Funding Committee also have considerable experience in successfully guiding clients on how best to structure the financing of their claim globally and have well developed relationships with the main funders and brokers. We are happy to advise you on the best approach for you to take and invite you to discuss your options with us, please contact our Funding Committee or your usual HFW contact.

At the outset, it is important to highlight that the use of funding is generally permitted in the UAE, including in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) freezones. However, the exception is contingency agreements such as Damages Based Agreements (see below).

Benefits of all four options include:

1. Increased protection for your costs and from those of your opponents.
2. Clarity and greater certainty over your financial risk.
3. Potential reduction to costs exposure.
4. Improved financial liquidity.

Funding and insurance options: a closer look

1. TPF (third party funding)

What is it?

TPF is a financing arrangement in which the funder agrees to pay the party's legal fees, usually including experts, external counsel, and other disbursements, in accordance with an agreed budget. While it is commonly referred to as 'litigation funding', funding is now also widely used globally in arbitration.

Factors to consider:

- TPF is lawful in the UAE. In the DIFC/ADGM Courts (and generally), the funder must not exercise control over the running of the matter, which could render the funding illegal and open to allegations of 'champerty' and 'maintenance'.

- The key issue for clients to note is that the investment made by the funder is not a loan. The impact of the funding depends on whether the claim is successful or not, and terms will be pre-agreed:
  - **Unsuccessful:** the client will not have to pay anything, and the funder loses the money it has invested in the case.
  - **Successful:** the funder will be entitled to a return on its investment from the damages that are ultimately recovered by the claimant.
- The prospects of success must be high (generally at least 60-70%).
- If secured, as a third party has effectively "backed" your claim, TPF can promote settlement or negotiations. Opponents often review their position when they know that funders are supporting the claim.
- It can take a long time to put in place TPF, as the funder will undertake its own due diligence process, review the merits and obtain their own advice. Working with HFW can help due to our strong track record and relationships with funders.
- The costs of funding may not be recoverable in the UAE.
- In the event that the proceedings are in DIFC/ADGM Courts or in arbitration, the funder will require that the client has ATE insurance to cover the risk of adverse costs orders. This is not a concern in UAE onshore litigation because adverse costs orders are not typically issued by those courts or only nominal in nature.

2. CFA (conditional fee arrangement)

What is it?

A CFA is an agreement between the solicitor, and often the barrister (if required), and the client where the client's fees are dependent on the outcome of the case:

- **Unsuccessful:** the client pays the solicitor's fees at a reduced rate – less than standard rates.
- **Successful:** the client pays the solicitor's fees at standard rates plus an uplift known as a success fee for up to 100% of the costs, expressed as a percentage uplift on the amount that would be payable if there was no CFA.

Factors to consider:

- CFAs are legal in the UAE, and permitted in the onshore, ADGM, and DIFC Courts and in arbitration proceedings seated onshore and in the freezones.
- Legal costs are recoverable in the DIFC and ADGM Courts and in arbitration, but the uplift is likely not recoverable. Only nominal legal costs are recoverable in the onshore UAE Courts, so the uplift would not be.
- CFAs must not be structured to permit lawyers to be rewarded by reference to the share of the proceeds on success. This is generally not permitted in the UAE. Therefore, CFAs are generally structured by reference to the fees actually incurred.

3. DBA (damages based agreement)

What is it?

A DBA is an agreement whereby legal fees are contingent on the success of the case and are determined as a percentage of the total award recovered by the client. They are also known as contingency fee agreements and no-win no-fee agreements.

Factors to consider:

- DBAs are generally not permitted in the UAE, except for the ADGM.
- The DIFC Best Practice Code expressly prohibits contingency fee agreements, and we consider that this will likely cover DBAs as well. However, recent case law suggests that the position in the DIFC will possibly evolve in due course.
- The cost of funding in DBAs would not be recoverable in any proceedings in the UAE.

4. Costs Insurance

What is it?

There are two main types of costs insurance:

- BTE Insurance (before the event): this refers to any legal costs insurance the client already has in place before the dispute arose. If the claim arises in the client's capacity as a corporate officer or director, then directors and officers' insurance (D&O insurance) may be available.
- ATE Insurance (after the event): this is generally taken out after a dispute has arisen to meet some of the legal costs and expenses of the case.

Factors to consider:

- This kind of insurance is not widely available in the UAE, and generally limited to proceedings in the DIFC and ADGM Courts, where the risk of an adverse costs orders generally arises.
- In the onshore courts, costs are not awarded other than in a nominal amount. The need for ATE insurance therefore is limited.
- Generally, insurers will not provide litigation insurance to cover the parties' own costs and disbursements in their entirety. Sometimes, it is possible for some portion of a party's own costs to be covered (eg. external counsel's costs or expert costs).
- There are no regulations preventing the use of such insurance cover in the UAE, although the involvement of local insurers is generally required.

If you have matters in the Middle East for which you would like to arrange funding or you would like to explore alternative fee agreements, in the first instance, please do not hesitate to contact Nick Braganza, Partner in the Dubai Office. Nick is a member of the HFW Funding Committee. Alternatively, you may contact our Funding Committee directly (funding.committee@hfw.com), or your usual HFW contact.

NICK BRAGANZA
Partner, Dubai
T +971 4 423 0587
E nicholas.braganza@hfw.com

NICOLA GARE
Professional Support Lawyer
Dispute Resolution
T +44 (0)20 7264 8158
E nicola.gare@hfw.com

Published August 2022

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our capabilities, please visit hfw.com.