The New Abu Dhabi Fees Law and the Future of Litigation Funding in the UAE

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On 3 October 2013, the Emirate of Abu Dhabi issued Law No. 6 of 2013 concerning the Judicial Fees payable in the emirate ("AD Fees Law").The law, which came into force on 3 November 2013, regulates the fees payable before the local courts, replacing Abu Dhabi Law No. 16 of 2008.

This article aims to discuss this law, its impact on the dispute resolution landscape in the UAE in general and litigation in particular. The article will look into the future of dispute resolution and whether the new law will create a fertile ground for the adoption of litigation funding in the UAE, and in particular, funding of the court fees incurred by litigants.

The AD Fees Law

The law removed the cap on fees payable before the civil courts of first instance, which had been AED 20,000, but is now 3% of the value of the claim with no cap. The law exempts public entities and employees filing claims against their employers from payment of court fees for all stages of litigation.

The wisdom behind the issuance of the new law, as explained in the preamble of the AD Fees Law, is to ease the burden of filing cases and minimize the amount of malicious and frivolous cases. It is has been noted that there will be cases of high value where corporations will have to choose between paying the fees or keeping it for future investments and forgoing the claim.

Many legal commentators predicted that the decision to change the fees would be unpopular and the legislator would soon realize that it would need to be amended in response to popular demand to do so. However, two years on, the law seems to be here to stay.

By way of comparison, Dubai has not abolished the cap but has instead introduced new caps. Dubai Law No. 21 of 2015 on Judicial Fees Payable before Dubai Courts, was issued on 3 October 2015 and was published in the Official Gazette Issue No. 389 (August 2015) ("Dubai Fees Law"). It came into force on 1 September 2015. The Dubai Fees Law regulates all fees imposed by the Dubai Courts including those related to attachments, civil cases, contracts, real estate, execution, appeals, cassations and other types of cases. The law has set new caps for court fees depending on the value of the claim.

The table below provides the fees structures for initiating claims before the different courts:

Court	Current Fees	Previous Fees	Recoverability
Abu Dhabi Court	3% of the claimed amount with no cap. For a claim of AED 5m, fees would be AED 150,000.	4% of the claimed amount with a cap of AED 20,000	Can be fully recovered
Dubai Court	AED 20,000 for claims up to AED 500,000, AED 30,000 for claims between AED 500,001 and AED 1m; and AED 40,000 for claim amounts in excess of AED 1m. For a claim of AED 5m, fees would be AED.	40,000. 7.5% of the claim amount with a cap of AED 30,000	Can be fully recovered

DIFC Court	5% of the value of the claim (monetary) and/or the property with a minimum of USD 1,500 (AED 5,510) and a maximum of USD 135,000 (AED 495,850). For a claim of AED 5m, fees would be USD 68,065 (AED 250,000).	5% of the value of the claim (monetary) and/or the property with a minimum of USD 1,000 and a maximum of USD 20,000	Can be fully recovered

Since the enactment of the AD Fees Law, we have noted that clients have become cautious and have often chosen to submit unquantified claims, especially in construction related claims where disputes are not certain (such as variation orders and delay payments claims). They tend to file for the appointment of an expert (which is AED 3,000) in order to ascertain the amount that they are entitled to according to the expert and then decide on the payment of the Court fees. Most clients with large claims amounts were not reluctant to pay the fees. However, clients with small claims were more conservative. Ultimately, if the court fees are not paid, either the claim will be dismissed by the court, or it may allow payment of the fees to be deferred to a later stage.

We will now consider the options available for those claimants who are unable to pay the costs of filing a claim.

Sources of Funding in the UAE

Judicial Funding

Currently, there is no particular law that provides for funding before different courts in the UAE. Parties are responsible for any fees payable to the Court, and also the professional fees paid to lawyers handling the claims. Despite this, the judiciary departments in the different emirates have issued several laws and regulations that provide for legal aid under which certain categories of individuals and companies are exempted from paying for some of the fees forming part of litigation or, in some cases, postponing the payment of the fees for them.

Under the AD Fees Law, most public entities are exempted from paying court fees to commence a claim against any individual or body. The law further exempts employees from the payment of fees for any claims that they may have against their employers. This exemption is further supported by the provisions of Article 5 of the UAE Labor Law.

The Dubai Fees Law also exempts certain categories of individuals and claims from payment of court fees, including (at Articles 8 and 9) any claims, appeals and requests filed by ministries, federal and local entities of the Government of Dubai or any other Emirate.

Though not specifically ways of funding litigation, these exemptions reduce the cost of litigation for the selected individuals.

Likewise, the Dubai International Financial Centre (“DIFC”) has set up a pro bono program to help those who cannot afford the cost of filling claims and paying their lawyers. The program has enlisted a number of local and international law firms who take on cases at no cost. If the claim succeeds, the defendant will have to pay the legal costs of the claimant, but the money will be paid to the DIFC Pro Bono centre, not the law firm.

Commercial Funding

In the UAE there are companies that will agree to fund litigation. They are referred to as Debt Collection Companies (DCC), and are not to be confused with debt collection agencies (that help parties pursue debtors and often buy the debt at a discounted price and pursue the debtor themselves). DCCs have been around in the UAE for quite some time now. These companies usually tend to fund monetary claims, libel, compensation based claims whether based on personal injury or other forms of loss and damage. In recent years some of these companies have offered assistance with regards to property disputes claims but at a smaller scale.

DCCs typically fund claimants rather than respondents. The common denominator for these claims is that they are small scale claims and the reason for resorting to DCCs is either for administrative reasons, debt collection or for reasons related to uncertainty of the outcome (such as litigation in personal injury claims). This is commonly known as third party funding (TPF). The third party (individual or company) usually provides funds to the litigant to file their claim. Ideally, the funds provided are expected to cover the claimant's legal fees, expert fees and miscellaneous expenses, and liability for adverse costs. In some cases, funding may be limited to the legal fees or fees for filing the claim, with the client having to incur all other expenses (expert fees, translation fees). In return the funder is supposed to receive a percentage of the amount awarded by the court in the event the claim succeeds.

There are different models for funding litigation but there are common traits in all these models. The models are all available for litigants with damage claims or defendants with substantial counter-claims. They usually pick and choose claims based on their probabilities of success. In recent years, these companies have started to hire in-house legal counsel to advise them and asses the probabilities of each claim and in some cases, legal professionals are behind such companies.

Some law firms used to provide funding – and some of them still are – by charging a percentage of the judgment amount (a contingency fee arrangement). But this practice should no longer exist as it has been prohibited by law. Today, funding agreements have to be in terms of an ordinary retainer detailing amounts payable at each stage and the services that are to be provided in order to be admissible before the Courts, should the funder decides to claim its fees.

Contingency fee arrangements, though illegal in the UAE, are often used in other jurisdictions and have helped in reducing the cost of access to justice. The laws in these jurisdictions support the use of these methods to fund litigation. For example, they have been used in the USA for many years, and in England contingency agreements for contentious matter became legal in 2013.

There are no available and reliable data to assess the effectiveness of DCC's and their practice in general. However, we feel that there is a need for regulation in this area, especially with regards to how much such companies should charge and how to secure the payment of their funding, as well as regulations on their model of business.

Indirect Funding

Another way of litigation funding is where either a right or a debt is transferred. The transfer of rights is typically found in claims that are covered by insurance where the insurance company pays out to the insured and, in doing so, becomes entitled to pursue recovery of the amount paid out from the wrongdoer. Article 1030 of the UAE Civil Code, which deals with subrogation, states that the insurer is allowed to take the place of the assured in respect of any amounts paid to the insured for the costs of bringing claims against the person who caused the loss out of which the liability of the insurer arose.

The transfer of a debt can be between any other entities or individuals based on the terms of their agreements (i.e. conventional debt collection agencies). Payment of other parties' debt is also considered to be a form of funding.

Litigation Funding in Other jurisdictions

In other jurisdictions, like the UK, USA, Australia and Hong Kong, litigation funding is well established, whether its damage-based fee agreements with lawyers or third-party funding. There are several forms of funding, including contingency fees, conditional fee arrangement, before-the-event insurance and after-the- event insurance.

Contingency Fee is similar to a ‘damaged-based agreement’, in which the total payment will be a percentage of the amount to be recovered.

Conditional Fee Arrangements are where the lawyer only charges if the case is successful, and with an uplift. If the case is lost, no fee is charged (‘no win no fee’).

After-the-Event insurance is an invention of the insurance industry. This type of insurance provides cover for legal costs incurred either in litigation or arbitration and is purchased after the occurrence of the legal dispute and offers cover for all areas of litigation apart from matrimonial and criminal cases. Before-the-Event insurance is where the cover is offered before any dispute has occurred.

Insurance Companies and Litigation

Insurance business in the UAE is regulated by the general rules provided for in Federal Law No 5 of 1985 as amended by Federal Law No. 1 of 1987 (the Civil Code) and more specifically, by the provisions of the Federal Law no. 6 of 2007 (the “Insurance Law”).

Article 3 of the Insurance Law defines the term insurance as “A contract pursuant to which the insurer shall be obliged to pay the insured or the beneficiary in whose favor the insurance has been concluded a sum of money, regular proceeds or other monetary indemnity in case the insured accident or risk occurred, in return of installments or any other monetary sums paid by the insured thereto”.

Insurance contracts usually cover a wide range of sub categories, such as life insurance, marine insurance and professional liability insurance.

Liability insurance covers, in some instances, claims that the insured may have against another company. When such event occurs, for example damages caused by fire, the insurance company pays the insured sum to the insured and then, pursuant to the law of subrogation, becomes entitled to recover the insured amount paid out to the party.

Such a claim often requires the insurance company commencing legal proceedings in the competent court for the recovery of the damages. The cost associated with such a claim will typically be borne by the insurance company. However, with the removal of the court fees cap in Abu Dhabi, we anticipate a hike in the insurance premium to cater for the cost associated with such claims. Although not clearly labeled, this can be seen as a kind of indirect funding for claims.

In our opinion there is room for the introduction of insurance products that fund litigation costs, such as after-the-event insurance. Ideally the insurance would cover the client’s liability for expenses incurred by their advocate, although this could be extended to cover legal fees and the opponent’s legal costs where the insured loses in court. At the moment this type of insurance is not available in the UAE.

Article 6 of the Executive by-Law of the Insurance Law provides that additional categories and insurance products can be created/included by the Insurance Authority at any time. Therefore, the legal support needed is available. However, it is very early to decide whether the UAE insurance market is ready for such a product. Certainly DCC and similar companies will be better prepared to take this share of the market. Perhaps in the near future insurance companies will venture into this filed. Emirates Insurance Association (EIA) can also play a role in exploring the possibility of venturing in this flourishing business.

The Effect of the New Law

All these forms of litigation funding are limited to certain types of litigation. However in our opinion, corporate litigation has the greatest potential to be transformed by litigation funding due to the high court fees. Small to medium enterprises with huge claims which have not budgeted for litigation will have to consider the amount to be spent on litigation and the amounts to be recovered on a successful outcome. Companies always try to balance their spending in a way that does not affect future investments, and litigation budgets will need to carefully managed to deal with the possibility of large court fees.

It is our opinion that the new law has created a good environment for the use of litigation funding, especially for the funding of court fees. With the cost being too high for individual claimants, litigants will be forced to look for alternative ways to fund their claims from the onset and will therefore be forced to turn to litigation funding. It is however important to note that the claims being funded by third parties or through any other form of litigation funding will be thoroughly examined before commencement. This is because with the high cost, the funders will need to be sure of success before commencement of any litigation. It is our opinion that any contingency agreements between clients and advocates will be fewer in number and those made will be in relation to claims whose chances of success can be ascertained upfront.