

Third Party Funding in the Middle East

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Historically, the provision of third party funding (“TPF”) in respect of disputes where the substantive or procedural laws pertain to the Middle East and/or where enforcement actions could be carried out in the Middle East, be it in litigation or arbitration, has not been common. This continues to be the case today. In other jurisdictions and in international arbitration more generally, TPF has already emerged as a frequently used funding tool and its role continues to grow.

At its most simplistic, TPF of disputes is where an unrelated party provides funding to another party for a legal case in return for a payment of some kind upon the successful conclusion of the case. This payment can take various forms. Common payment models include payment of a multiple of the funded amount, payment of an agreed percentage of the proceeds of the case, payment of a fixed amount, or a combination of all three. Generally, in the event that the case is unsuccessful, the funder is not entitled to any payment from the TPF user. While TPF is typically extended to a claimant, it can be extended to a respondent, most often (but not exclusively) in the context of counterclaims.

However, TPF in its current form is far from simplistic. As a result of a significant growth in the sector over the last decade, TPF is now a well-developed and relatively sophisticated industry with products that can be adapted to meet the needs of an ever-increasing number of interested parties. It is possible to obtain funding for legal fees together with case-related disbursements. Bifurcated or mixed arrangements can be entered into for costs of appeal and/or enforcement where they are applicable. It is also possible to find funders who will use the relevant legal claim as collateral to obtain financing for, amongst other things, capital for the TPF user during the duration of the claim. There are small and large funders, and increasingly hedge funds, keen to have legal dispute funding as part of their portfolio, have become involved in the industry. The net result for those seeking funding is that there is a full and competitive market of funders who will try hard to make an arrangement work if they can see a decent return for themselves.

TPF started as a means of allowing for greater access to justice. In short, it allowed potential claimants

who would have otherwise not been able to initiate meritorious claims to do so. It is perhaps for this reason more than any other that governments in certain jurisdictions have been keen to allow for the growth of the TPF industry. While access to justice remains an important aspect of TPF, it has grown in popularity and use for more reasons than this. Many users of TPF are more than capable of funding the case themselves. However, they prefer to use TPF because they wish to spread their risk and are willing to distribute their reward in return. Others use TPF to enable them to pursue multiple claims rather than just one claim. Others still want to take the cost of funding a dispute off their balance sheet (some forms of TPF will allow for this to occur). And many wish to benefit from the provision of working capital that TPF is able to provide through using the potential proceeds of the dispute as collateral for business financing.

For the funders, the potential benefits of funding international arbitral disputes are obvious: the value of the claims in international arbitration can be vast, enforcement has the potential to be straightforward (for example, in jurisdictions that are party to the New York Convention), and there are an ever increasing number of participants who are willing to share their returns for the opportunity to bring a successful claim.

Until recently, Australia, England and Wales, and the United States have dominated the TPF industry. These jurisdictions were early adopters of the principle of TPF and were quick to move away from the prohibitions that they once had in place to prevent TPF (such as the doctrines of champerty and maintenance). It is likely that TPF will now grow significantly in Asia due to recent changes in the relevant laws in Singapore and Hong Kong that allow TPF in arbitration and arbitration-related proceedings. In fact, in the one and a half years since Singapore's laws were relaxed in respect of TPF at least five international funders have opened offices in the country, in some form.

TPF in the Middle East

TPF has been generating increasing interest in the Middle East region, both from potential funders and from potential users of TPF.

Currently, none of the UAE, Egypt, or Qatar has laws that expressly allow for TPF. Equally, however, they do not have laws that explicitly prohibit it. The lack of express prohibitions is perhaps not surprising as each of these three are civil law and/or Sharia law jurisdictions. As a result, they do not have the historical relic of the common law doctrines of champerty and maintenance which can prohibit the external financing of legal claims.

Notwithstanding this, historically funders have been reluctant to become involved with arbitrations where the laws of these countries govern the merits and/or procedures of the arbitration and/or where the enforcement action could take place before the courts in these countries. While this is partly because of a lack of familiarity with the jurisdictions, other factors such as the size of the disputes market will also have played a role. However, funders will, whether rightly or wrongly, also have been put off by the perceived uncertainty of arbitrating in these countries. For example, the UAE's lack of a standalone arbitration law until this year will have been a cause of serious concerns. Similarly, the not infrequent inconsistent approach adopted by the local courts in support of arbitration proceedings during the ratification and enforcement of arbitral awards in Qatar will have contributed to the reluctance of funders to step into the region.

However, the arbitration landscape in the Middle East is changing.

The UAE has, as of June 2018, a new arbitration law based on the UNCITRAL Model Law that has modernised arbitral practice in the country. Although the new law brings with it some uncertainties, its replacement of the outdated civil code provisions that dealt with arbitration has been universally welcomed. Since 2017, Qatar has also had a new arbitration law. This too replaced certain provisions of Qatar's civil code and significantly reformed arbitration law in Qatar. Further, Qatari courts have handed down judgments that uphold the right to automatically enforce foreign arbitral awards under the New York Convention.

Significantly, some provision has been made in respect of TPF in the Dubai International Financial Centre (DIFC). In 2017, the DIFC Courts issued Practice Direction (No. 2 of 2017) which sets out the requirements for funded parties to observe in respect of their relationships, interactions, and contracts with funders in legal proceedings in the DIFC Courts.

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TPF and Sharia law

While there is no express provision for TPF in Sharia law, it is arguable that the principles of Sharia law do not prohibit it. In fact, some features of Islamic finance transactions may be said to be analogous to TPF.

Three of the key features of Sharia law are the prohibition of *riba* (interest), *gharar* (excessive speculation) and *maisir* (gambling). TPF does not necessarily conflict with any of these principles. It is generally not interest that is awarded to the funder in a successful case; rather it is a share of awarded damages in a pre-agreed ratio. Importantly, excessive speculation and gambling are also likely to be absent in light of the extensive due diligence and research that often goes into a potential case before funding is granted. However, Sharia law will likely prohibit investments in (or receiving funds from) businesses or ventures that are considered *haram* (sinful) and funders will need to keep this in mind when considering funding disputes that pertain to Sharia law.

Steps entailed in obtaining TPF in an arbitration

Funding arrangements are bespoke agreements. The process of obtaining TPF will depend on the funder, the jurisdiction, and the case. Typically, funders prefer being approached after any initial investigations have taken place so that they know a claim is not entirely speculative. A party's legal advisor should know, amongst other things, when the appropriate time to consider TPF is and when the appropriate time to contact potential funders is.

A funder will want to obtain as much relevant information as possible in order to make its decision. There are no set rules on what they will want to see but it will likely include a full summary of the case, any pleadings or correspondence, any legal advice obtained in respect of the merits, and some form of costs budget and timetable. The time a funder may take to review and consider a proposal will vary and if the case is large and/or complex, may take some time. As well as considering whether there is a good prospect of success in the claim, a funder will also likely think about the ease of enforcement (including an opponent's creditworthiness), timescales, the amount of damages that may be available, and the subject matter of the dispute. After judgments such as the English court decision in *Excalibur Ventures LLC v Texas Keystone Inc*, where funders and their parent companies were required to pay the defendants' costs as a result of funding a US\$1.6 billion claim that was objectively hopeless and which failed on every point, funders are likely to be exceptionally rigorous when assessing whether to take on a claim.

Notwithstanding this, care and caution should be exercised when sharing materials and information with a funder, in particular in respect of privilege. Each jurisdiction is different but it is generally sensible for the party and the funder to sign a confidentiality agreement which makes clear how privilege and confidentiality are being dealt with.

If a funder offers to fund a case, a party should discuss the offer with their legal team and take advice as to ramifications and potential risks of the offer. As well as considering the financial aspects of the offer,

attention should also be paid to practicalities such as a funder's right to terminate the arrangement and the ongoing role of the funder throughout the case.

Once the funding arrangement has been finalized and the claim is initiated, it is crucial that the tri-party relationship between the funded party, its lawyers, and the funder is appropriately balanced. In particular, the extent to which the funder exercises control of the arbitration, the level of communication between the funder and the funded party's lawyers, as well as the level of communication between the funded party and its lawyers, are all issues that need be thought through and monitored from the very outset. Where the relationship is not managed adequately, there can be serious consequences for everyone involved.

Conclusion

The recent global changes towards TPF of disputes, the rise of the use of arbitration in the Middle East, and the ever-increasing cost of international arbitration, all point to a likely increase in the use of TPF for Middle East focused international arbitrations.

Al Tamimi & Company's [Arbitration team](#) regularly advise clients on third party funding in international arbitration matters. For further information please contact [Thomas Snider](#) (t.snider@tamimi.com) or [Jane Rahman](#) (j.rahman@tamimi.com) or [Khushboo Shahdadpuri](#) (k.shahdadpuri@tamimi.com).