

Third-Party Funding: Arab and Islamic Perspectives

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A. Introduction

»Da müssen Sie mal schauen«, I would unfailingly hear as a doctoral researcher whenever Professor Omaia Elwan had identified, through the grapevine, a new legal development in the Middle East. Uttered days or even weeks before news broke on social media or elsewhere on the internet, the advice that »you ought to look into that« sprang from a manifest desire to be on top of (and not just up to date on) the latest developments.

His private library, invaluable both academically and financially,¹ may be deceptive to an uninformed observer: Far from sitting in an ivory tower, Professor Omaia Elwan does not turn a blind eye on practical aspects. His desire to shed light on issues yet unanswered is paired with an understanding that a simple conversation can contribute more to an expert opinion than any book – provided, of course, that the definitive answer is firmly rooted in rigorous legal analysis.²

In that spirit, this contribution addresses a topic of growing practical importance that is yet mostly uncharted territory from a legal perspective. Third-party funding is the practice of paying the expenses of someone else's legal proceedings in return for a share in the proceeds. While it has received growing attention since its inception in the 1990s, a market is still in the early stages of development in Arab states. Accordingly, there is little authoritative writing on the practice in this particular region (with the notable exception of investment treaty arbitration).

B. Elements of a Third-party Funding Arrangement

A funding arrangement must take account of the interests and obligations of all parties involved – the funder, the funded party, and its legal counsel. To that end, the funding agreement can be split up into several contracts reflecting the different roles and legal relationships of the stakeholders.

¹ In one instance, a doctoral thesis then dating back over ten years contained the answer to a particularly tricky problem of the statute of limitation of unjust enrichment claims under Egyptian law. The volume was picked up from the staircase merely »on a hunch«.

² Accordingly, the research for this contribution included informal talks with funding analysts, conducted under the Chatham House Rule. Any errors and inaccuracies should naturally be attributed to the author exclusively.

The key document is a funding agreement between the party to the dispute and the funder. At its core is the funder's obligation to pay the fees and expenses incurred by the party within a defined budget. It also establishes the funder's entitlement to a share of the proceeds, subject to an agreement on their distribution. Typical ancillary provisions are the funder's obligation to confidentiality, dispute resolution (especially regarding the adequacy of fees), and the parties' rights and obligation in view of changed circumstances – such as a settlement offer or information revealing that the chances of success are lower than initially estimated.³

The relationship between counsel and the funded party is generally governed by the same rules and agreements as in non-funded cases. However, funders typically require parties to instruct their counsel to share certain (even privileged) information with the funder, such as new developments affecting the prospects of success. In addition, counsel is typically instructed to provide regular summaries of their activities in addition to itemized invoices.⁴

This way, funders can monitor the development of the case and assess the value of their investment. A funder will also ask counsel to agree to a success-based fee arrangement. This is done in order to limit the investment advanced by the funder (i. e., its outlay) and to incentivize counsel to work towards a successful outcome.⁵

The relationship between counsel and funder is characterised by the counsel's obligation to disclose and advise. The nature of the work of an attorney and the correlating professional obligations will normally prevent the funder from instructing counsel directly. The funder's influence is better described as indirect, through strategic input on key decisions, renegotiation, or even termination of the funding agreement.⁶

The division of the spoils is agreed upon in a separate document between the three parties, called *priority agreement*. It will set out a waterfall mechanism for the distribution of any payments received from the opposing party. The funder will have a first claim to recover its outlay, usually with interest. Additional sums will be paid to the funder and the funded party as profits, and towards the counsel's success-based fees.⁷ To that end, the priority agreement can result in a relatively complex distribution matrix.

In order to secure the funder's claims to its share of the proceeds, the funded claim will serve as a security.⁸ In addition, the funding agreement may specify

³ v. Goeler: *Third-Party Funding*, pp. 36–39; Bench Nieuwveld/Sahani: *Third-Party Funding*, pp. 23–25.

⁴ v. Goeler: *Third-Party Funding*, p. 33.

⁵ *Ibid.*

⁶ See *ibid.*, pp. 41–44.

⁷ See *ibid.*, p. 34.

⁸ *Ibid.*, pp. 31 f.

that any proceeds must be paid to a trustee (either the counsel or an uninvolved party, such as a bank or an external attorney).⁹

C. Issues Arising in the Context of Third-party Funding

Although third-party funders do not normally become parties to the dispute, the addition of an additional party with an interest in its outcome has procedural implications.

I. Disclosure of the Funding Arrangement

Part of the discussion revolves around the funded party's duty to disclose the existence and the identity of a third party with a financial stake in the procedure. This is particularly relevant in arbitration, where members of the tribunal in a funded case may act as counsel in another case supported by the same funder. This raises a potential conflict of interest.¹⁰ Today, the discussion revolves around the extent of disclosure and whether it should be required as a matter of principle or on a case-by-case basis.¹¹

II. Costs: Security, Jurisdiction, Allocation

Another subject of frequent disputes is whether the funded party should be required to provide security for cost. A common reason to resort to third-party funding is a lack of the financial means to fund the proceedings. In such cases, there may be a fear that the funded party, if unsuccessful, will not be able to reimburse the opposing party for the cost it incurred for its defense, prompting a request for security.¹² Alternatively, the question may be raised as to whether the court or arbitral tribunal has the authority to render a cost order directly against the funder.

There are also concerns that parties with financial backing could try to escalate the costs of the dispute.¹³ It may be argued that such a party – even if successful – should be held responsible for a share of the costs.¹⁴ If those concerns appear less marked, that may be because funders tend to eschew the high costs associated with such a strategy.

⁹ Bench Nieuwveld/Sahani: *Third-Party Funding*, pp. 28 f.

¹⁰ ICCA: *ICCA-Queen Mary Task Force*, pp. 82 f.

¹¹ See, e.g., von Goeler: *Third-Party Funding*, pp. 141–160; ICCA: *ICCA-Queen Mary Task Force*, pp. 81, 115. See also article 14 of the ICSID Arbitration Rules 2022.

¹² v. Goeler: *Third-Party Funding*, p. 334.

¹³ Such a strategy was employed – unsuccessfully – in *Excalibur Ventures LLC v. Texas Keystone Inc. et al.*, [2013] EWHC 2767 (Comm). The claimant's approach is summarized by Clarke LJ in [2013] EWHC 4278 (Comm), at paras. 8–63.

¹⁴ v. Goeler: *Third-Party Funding*, p. 343.

D. Opportunities and Challenges in the Arab World

The reason for the slow start of third-party funding in Arab states is likely that Arab legal proceedings are often perceived as tedious and unpredictable.¹⁵ Funders therefore face difficulty in estimating a claim's chances of success while staying invested longer before receiving payment, reducing their rate of return. There may also be lower demand for litigation funding because court fees are kept low.¹⁶

These impediments may be less marked in arbitration,¹⁷ especially when backed by professional institutions from the Arab world or abroad. Still, an unstable legal framework deters funders.¹⁸ Awards are also more likely to require enforcement than elsewhere in the world,¹⁹ meaning that claimants must resort to courts to go »the last mile«. ²⁰ The content of public registers may be disputed, inaccessible, even non-existent, impeding enforcement efforts.

On the other hand, Middle Eastern jurisdictions are considered as rather litigious, and there is a pool of complex, high-value claims stemming from large infrastructure and construction projects. The recovery of legal fees is often limited to a symbolic amount, meaning that parties have to shoulder their expenses even if they succeed. Most importantly, recent reforms are aimed at improving the speed and predictability of proceedings.²¹

E. Islamic Law

Although not technically a jurisdiction, the importance of Islamic law (*šarī'a*) should not be underestimated for both legal and practical reasons. From a legal perspective, third-party funding has remained largely untouched by legislators. Arab jurisdictions provide various mechanisms for such gaps to be filled by Islamic scholarship. The Sanhūrī codes of the Arab Middle East direct a judge to revert to the *šarī'a* where codified law or custom do not provide an answer, or as guidance in the interpretation of written law.²² Likewise, some jurisdictions encourage the

¹⁵ Farhad: Third-Party Funding, p. 392; El Hawawy *et al.*; United Arab Emirates, p. 192.

¹⁶ On the factors of time and predictability see v. Goeler: *Third-Party*, pp. 19–21.

¹⁷ *Ibid.*, pp. 79 f.

¹⁸ One notable example is the dissolution of the DIFC-LCIA Arbitration Centre by virtue of Dubai decree No. 34/2021. The likely involvement of a government entity is another factor, see Farhad: Third-Party Funding, p. 393.

¹⁹ See Blanke: *UAE Arbitration Legislation and Rules*, para. I-229.

²⁰ Bälz: *Anerkennung und Vollstreckung*, p. 61.

²¹ Such efforts include the establishment of specialized commercial courts and offshore jurisdictions.

²² E.g., article 1 (2) of the Egyptian Civil Code; article 1 (2) of the Qatari Civil Code; article 2 of the UAE Civil Code; art. 2 (2) of the Jordanian Civil Code.

legislator to have recourse to the *ṣarīʿa* when enacting new legislation.²³ Practically, Islamic finance has long become a market of its own. If third-party funding can be structured to comply with Islamic law, it has potential as a new market segment.

I. Key Issues

Thus far, the potential of Islamic law to provide a regulatory framework for third-party funding is only beginning to attract scholarly attention. This section outlines the two main obstacles to western-style finance in the Islamic *ṣarīʿa* and how they relate to third-party funding.

1. Interest

The best-known rule of the *ṣarīʿa* relating to finance is certainly the prohibition of usury (*ribā*). Although the notion of *ribā* may be debated, it generally includes the taking of interest for profit.²⁴

When it is said that third-party funders do not charge interest,²⁵ this statement requires qualification. It is common for funding agreements to stipulate that interest accrues on any payments made by the funder.²⁶ Interest is added to the outlay recoverable before any net profits are shared. Certainly, such interest is not comparable to interest payable on a loan, as the funded party does not guarantee that it will be paid back. Still, it is conceivable that such stipulations would be considered usurious under Islamic law.

Further, the funder's share in any proceeds increases over the duration of the proceeding until payment is made. Such a structure could be considered as a hidden form of interest because it compensates the funder for the time value of its investment. Instead, parties may wish to opt for a simpler structure in which the funder's share remains constant irrespective of the length of the proceedings.

2. Uncertainty

The prohibition of uncertainty (*ḡarar*) was originally intended to prevent gains without any corresponding counter-value, especially through speculation.²⁷ It

²³ E.g., article 2 of the Egyptian Constitution of 2014, unchanged from the 1980 amendment, provides that the *ṣarīʿa* is the main source of legislation (arab. *al-maṣḍar ar-raʾīsī*) in Egypt. On that provision, see Egyptian Court of Cassation, judgment dated 22 February 2022, case No. 13892, 81st judicial year; Elliesie: Islamic Finance and Banking, pp. 217 f.

²⁴ Elliesie: Islamic Finance and Banking, pp. 210 f.

²⁵ Farhad: Third-Party Funding, p. 390; Eken: Analysis of Third-Party Funding, pp. 10 f.; Ali: Litigation funding, p. 794.

²⁶ V. Goeler: *Third-Party Funding*, p. 30.

²⁷ *Ibid.*

was first formulated for a game of chance called *maysir* and later extended to excessive risk or uncertainty in commerce.²⁸

When it is said that third-party funding bears no uncertainty because funders conduct a thorough investigation into each case before making a funding decision,²⁹ it should be added that funders do not confine themselves to cases where recovery is near-certain. Through a practice known as portfolio funding, funders may agree to fund higher-risk cases as well if the risk of such individual cases is mitigated by pooling several cases funded for the same client or the same law firm. In other words, portfolio funding allows the funding of riskier individual cases, as well.³⁰

That being said, Islamic law does accept that business comes with a risk and success is never certain.³¹ The risk of a counterparty defaulting on its obligation, necessitating enforcement, is part of ordinary business life. It exists irrespective of external funding.³² In addition, the fact that funders exert significant efforts to mitigate their risk distinguishes them from speculators and gamblers, especially where their payout does not exceed market rates.³³

II. Qualification of Third-party Funding Agreements under *Šarī'a* Law

In order to gain a better understanding of how Islamic law would treat third-party funding arrangements, it is apt to take a closer look at the taxonomy of contracts in *šarī'a* law and how third-party funding agreements fit in.

1. Mušaraka

Eken likens third-party funding to, inter alia, a partnership, or *mušaraka*.³⁴ In such a relationship, two or more partners contribute capital to the partnership's assets in order to pursue a joint business venture. Any profits, once realized, are divided according to a pre-agreed ratio.³⁵

The similarities between typical third-party funding arrangements and the *šarikat al-ʿinān* are most obvious. Under this particular form of *mušaraka*, each partner continues to contract with third parties in their personal capacity; profits and losses are shared between the partners internally.³⁶ In addition, the partners

²⁸ Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, pp. 82–84.

²⁹ See the references cited above, at footnote 25.

³⁰ V. Goeler: *Third-Party Funding*, p. 22.

³¹ Siddiqi: *Islamic Banking and Finance*, pp. 18 f.

³² For the criterion of causation, see *ibid.*

³³ Eken: *Analysis of Third-Party Funding*, p. 11.

³⁴ *Ibid.*, p. 12.

³⁵ AAOIFI: *Shari'ah Standards*, p. 327 (No. 12, rule 3/1); Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, pp. 181–184.

³⁶ Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*.

may agree to restrict the management of the enterprise to one partner (e.g., the funded party).³⁷

From a western point of view, it is easily understood that the funded party contributes the disputed claim to the partnership's assets.³⁸ By contrast, *ṣarī'a* scholars do not accept capital contribution in the form of debt owed to one of the partners,³⁹ much less if the debt is disputed. The capital must be readily available to be invested to the benefit of the partnership, which unpaid debt is not.⁴⁰ It is thus unlikely that a third-party funding arrangement could be considered as a lawful *muṣāraka*.

2. Muḍāraba

Some scholars consider the financing agreement as a *muḍāraba* (also known as *qirāḍ*),⁴¹ akin to a silent partnership.⁴² The partner known as the capital owner (*rabb al-māl*) provides funds to the business venture, whereas the agent (*amīl* or *muḍārib*) conducts the work.⁴³ Net profits are shared between the partners as agreed beforehand.⁴⁴ The capital owners bears any net losses alone; the agent is only burdened with the work done in vain.⁴⁵

At first glance, litigation funding appears to be a prime example of a *muḍāraba*. The funder (as capital owner) provides the capital, which the funded party (the agent) puts to use, subject to the conditions stipulated in advance.⁴⁶ Profit-sharing resembles priority agreements as the repayment to the capital owner takes priority over the distribution of net profits.⁴⁷

Yet the *muḍāraba* differs from typical third-party funding agreements in that the agent's contribution is characterized as work. The characteristic contribution of the funded party is not its work, but an asset, i.e., the claim subject to the dispute. While the funded party may put substantial efforts into a litigation,

³⁷ AAOIFI: *Shari'ah Standards*, p. 330 (No. 12, rule 3/1/3/2).

³⁸ Although in western states, accounting principles may also prevent a company from entering disputed debt on its balance sheet as an asset.

³⁹ AAOIFI: *Shari'ah Standards*, pp. 328 f. (No. 12, rules 3/1/2/1 and 3/1/2/4).

⁴⁰ AAOIFI: *Shari'ah Standards*, pp. 354 f. (No. 12, Appendix B).

⁴¹ Ali: Litigation funding, p. 794; 'Abd ar-Raḥmān b. Muḥammad az-Zīr/b. Muḥammad al-Qarni: تمويل التحكيم من طرف ثالث, pp. 385–387.

⁴² Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, p. 185; Elliesie: *Islamic Finance and Banking*, p. 206.

⁴³ AAOIFI: *Shari'ah Standards*, p. 370 (No. 13, rule 2); Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*; 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: تمويل التحكيم من طرف ثالث, p. 382.

⁴⁴ AAOIFI: *Shari'ah Standards*, pp. 373 f. (No. 13, rules 8/1, 8/3 and 8/7); Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*.

⁴⁵ 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: تمويل التحكيم من طرف ثالث, p. 385; Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*.

⁴⁶ 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: *ibid.*, pp. 385 f.

⁴⁷ See AAOIFI: *Shari'ah Standards*, p. 374 (No. 13, rule 8/7), pp. 374, 385.

the majority of work is often done by attorneys. This shift of focus is necessary because Islamic law does not recognize debt as an asset that is constitutive of a valid partnership.⁴⁸ Accordingly, doctrinal analysis must focus on other factors unless the funded party is to provide part of the funding itself.

Even if the work employed by the party itself is negligible, this need not preclude the formation of a valid *muḍāraba*. The agent (the funded party) may be permitted to delegate work to a third party (an attorney) and even pay the attorney with the funds provided by the capital owner (the funder).⁴⁹

Still, the social justification of the *muḍāraba* is bringing together those who have capital but lack commercial experience and those who are commercially savvy but in need of funding.⁵⁰ A third-party funding arrangement, where the agent does not contribute its business acumen but rather its mere legal position as the (alleged) creditor, would have to be considered as atypical.

3. Ġu'āla

The *ġu'āla* can be simply described as the offer of a reward. In its rudimentary form, it is directed *ad incertas personas*, to anyone who produces a certain result to the benefit of the offeror.⁵¹

The *ġu'āla* resembles modern third-party funding because the parties accept that the envisioned objective may not be achieved, without any recourse for amounts spent in its pursuit.⁵² In fact, the *ġu'āla* has historically been employed to retrieve debt which is difficult to collect. In such a scenario, the person returning the debt to the offeror can be rewarded with a share in the collected money.⁵³

The influential Ḥanafī school of Sunni legal thought prohibits *ġu'āla*. This is because the amount of work necessary to achieve the objective is not determined, leaving unacceptable uncertainty.⁵⁴ The other schools of Sunni Islam accept the *ġu'āla* as valid, mainly because they see a practical need and consider it sufficient that the desired result be specified.⁵⁵

⁴⁸ See above. For the *muḍāraba* see also AAOIFI: *Shari'ah Standards*, pp. 373, 385 (No. 13, rule 7/3 and appendix B).

⁴⁹ See AAOIFI: *Shari'ah Standards*, pp. 376 f. (No. 13, rules 9/1/2 and 9/4); 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: تمويل التحكيم من طرف ثالث, p. 385 (يتولى الطرف الممول أو «[»The funded party or its representative takes charge of the work«]).

⁵⁰ AAOIFI: *Shari'ah Standards*, p. 383 (No. 13, Appendix B); Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, p. 160.

⁵¹ AAOIFI: *Shari'ah Standards*, p. 426 (No. 15, rule 2); 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: تمويل التحكيم من طرف ثالث, p. 378; Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, p. 160.

⁵² 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: *ibid.*, p. 381.

⁵³ AAOIFI: *Shari'ah Standards*, pp. 428, 430 (No. 15, rules 5/3/2/2 and 8/2).

⁵⁴ 'Abd ar-Raḥmān b. Muḥammad az-Zīr/Fāris b. Muḥammad al-Qarni: تمويل التحكيم من طرف ثالث, p. 379; Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, p. 160.

⁵⁵ AAOIFI: *Shari'ah Standards*, pp. 426, 435 (No. 15, rule 3 and Appendix B).

The Ḥanafī scepticism points to a distinguishing factor between the *ḡu'āla* and typical third-party funding arrangements. What is typically required from the offeree in a *ḡu'āla* is the performance of work. The *ḡu'āla* is, in essence, likened to a service contract.⁵⁶ It cannot be denied that third-party funders exert significant efforts in the course of a funding relationship – be it an initial analysis, be it ongoing monitoring and advice during the proceedings. In fact, parties may even seek out funders specifically for their expertise, rather than for financial reasons. Where, however, such analysis is primarily conducted in order to assess the prospects of the funder's investment, the funding arrangement would have to be considered as an atypical (although not necessarily unlawful) *ḡu'āla*.

F. Codified Legal Systems

I. Egypt

It is hardly disputable that, in the absence of any regulation, third-party funding is permitted in Egypt as a matter of principle. Indeed, the arbitration initiated by Muḥammad al-Ḥarāfī against the Government of Libya was backed by a third-party funder.⁵⁷ The claimant won an award of close to USD 1 billion plus interest.⁵⁸ The respondents' challenge was ultimately rejected in Egypt,⁵⁹ and the enforcement of the award is ongoing in France, after reaching the courts of cassation in both states several times. The *al-Kharafi* arbitration demonstrates that there is potential for third-party funding in Arab states, especially when paired with a thought-through enforcement strategy which need not confine itself to the Arab world.

1. Disclosure of the Funding Arrangement

The absence of regulation means that there are limited possibilities to force the funded party to disclose its relationship to the funder. Whereas in arbitration, such an order would ordinarily be considered to be within the authority of the tribunal, courts rarely order the disclosure of documents.

2. Cost

Similarly, there is no regulation of the effect of a funding arrangement on costs. While the Egyptian Arbitration Law is silent as to the tribunal's authority to award costs, article 42 of the arbitration rules of the Cairo Regional Centre for

⁵⁶ Oberauer: *Islamisches Wirtschafts- und Vertragsrecht*, pp. 159 f.

⁵⁷ Cairo Court of Appeal, judgment dated 3 June 2020, case No. 39, 130th judicial year, para. 26.

⁵⁸ *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya et al.*, Final Arbitral Award dated 22 March 2013, item 7 of the operative part.

⁵⁹ Egyptian Court of Cassation, judgment dated 24 June 2021, case No. 12262, 90th judicial year.

International Commercial Arbitration (or CRCICA Rules, for short) specify that the tribunal may award costs, including legal fees. Article 46 adds that the costs should be borne by the losing party, unless the tribunal finds that a different apportionment is ›reasonable‹ in the circumstances of the case.

The ›loser pays‹ principle applies in Egyptian courts, as well.⁶⁰ Where the funded party adopts a particularly aggressive approach, the mechanism of article 185 of the Egyptian Code of Civil and Commercial Procedure may apply. This provision authorizes the court to order the winning party to bear some or all of the costs, »if the winning party has caused expenses which were without use«.

The Egyptian Code of Civil and Commercial Procedure does not provide for security for costs in the main proceedings of a litigation. By contrast, article 24 (1) of the Egyptian Arbitration Law empowers the arbitral tribunal to order security for costs (only) if authorized by the parties. It could be argued that article 46 (1) and (2)(c) of the CRCICA Rules contains such an authorization. It empowers the Tribunal to grant interim measures, including by »provid[ing] a means of preserving assets out of which a subsequent award may be satisfied«. It is likely that this provision was primarily conceived to ensure enforcement of a substantive claim. Regardless, the language does apply to a cost award in favour of the respondent. In any event, the requesting party must demonstrate the danger of irreparable harm to it, and a reasonable possibility of success on the merits.⁶¹

In arbitration, there is no provision authorizing the tribunal to make a cost order against funders. Such a step would be conceivable only if the arbitration agreement could be extended to the funder. However, Egyptian jurisprudence only accepts such an extension where the third party was involved in the negotiation or performance of the contract between the parties to the arbitration.⁶² Such involvement is beyond the scope of typical third-party funders.

II. United Arab Emirates

Among Arab jurisdictions, the United Arab Emirates (UAE) belong to the few which have introduced regulation of third-party funding. As usual, distinction must be made between the legal and judicial system of the UAE and its constituent Emirates on one hand (also known as the ›onshore‹ or ›mainland‹ legal system), and the ›offshore‹ financial centers, namely the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). Far from being mere financial centers, the offshore jurisdictions are subject to a separate

⁶⁰ Article 184(1) of the Egyptian Code of Civil and Commercial Procedure. The recovery of attorneys' fees is limited to a nominal amount, see above, Section C.

⁶¹ Article 26 (3) of the CRCICA Rules.

⁶² Egyptian Court of Cassation, judgment dated 22 June 2004, cases No. 4729 and 4730, 72nd judicial year; Court of Appeal Cairo, judgment dated 5 February 2013, cases No. 35, 41, 44 and 45, 129th judicial year.

system based on common law, with separate courts from the civil law onshore courts.⁶³

1. Onshore

The governments of the UAE and its constituent Emirates take a rather reluctant approach towards third-party funding. In fact, to the knowledge of the author, the UAE is party to the only bilateral investment treaty prohibiting third-party funding of arbitration claims.⁶⁴ As with its Egyptian counterpart, UAE federal law does not regulate third-party litigation funding, nor security for cost in main proceedings.

Third-party funding is addressed in the arbitration rules of the Dubai International Arbitration Centre (DIAC Rules). These rules came into force shortly after the DIFC-LCIA arbitration center was disbanded by virtue of Dubai Decree No. 34/2021. Pursuant to article 22.1 of the DIAC Rules, the funded party must disclose the fact that it is funded, the identity of the funder and whether the funder is liable to cover an adverse cost award. Article 22.2 specifies that parties may not enter into funding arrangements after the constitution of the tribunal if that would lead to a conflict of interest on the part of the tribunal. Pursuant to article 22.3, the tribunal may take into account the funder's liability for adverse costs (if any) when making its cost decision.

2. DIFC

The Dubai International Financial Centre was one of the first Arab jurisdictions to witness a funded litigation.⁶⁵ It was also among the first to regulate third-party funding: The Chief Justice of the DIFC Courts has provided guidance on litigation funding by issuing Practice Direction No. 2 of 2017. Subsection 3 of the Practice Direction specifies that the funded party must disclose the fact that a funding arrangement exists, as well as the identity of the funder. It authorizes the court to order the disclosure of the funding agreement or parts thereof.

Pursuant to subsection 9 of the Practice Direction, the DIFC Courts have inherent jurisdiction to make cost orders against funders. The funder must be joined to the proceedings for the purposes of costs only and be given the opportunity to attend a hearing on costs.⁶⁶

⁶³ For details see Blanke: *UAE Arbitration Legislation and Rules*, paras. 1062 and 1068.

⁶⁴ Article 24 of the Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (2018).

⁶⁵ *Mr. Rafed Abdel Mohsen Bader Al Khorafi et al. v. Bank Sarasin-Alpen (ME) Ltd. and Bank Sarasin & Co. Ltd.*, [2009] DIFC CFI 026, which later turned into a dispute between the claimants and their funders, *Vannin Capital PCC PLC v. Mr. Rafed Abdel Mohsen Bader Al Khorafi et al.*, CFI 036/2014.

⁶⁶ DIFC Court Rule 38.67.

As a consequence of the courts' inherent jurisdiction, it may grant a request for security for costs, if it considers it »just to make such an order« in the circumstances of the case.⁶⁷ Subsection 4 of the Practice Direction specifies that the funding arrangement may be taken into account but should not automatically result in such a request being granted.

3. ADGM

The jurisdiction and procedure of the ADGM courts are regulated by the ADGM Court Regulations 2015 and the ADGM Court Procedure Rules. Detailed rules on third-party funding are set out in the Litigation Funding Rules 2019.

Section 225 (1) of the ADGM Courts Regulations clarifies that, in principle, third-party funding arrangements are enforceable as a matter of ADGM law. Pursuant to section 225 (5) and (6), the funded party must disclose the existence of external funding; it is not necessary, however, to disclose the identity of the funder. This is different in arbitration: Section 37 (1) of the ADGM Arbitration Regulation 2015 specifies that the funded party must disclose the fact that it is funded and the identity of the funder. Section 37 (3) adds that the tribunal may order the disclosure of further information (in practice, these are likely to include the funder's obligation, if any, to cover an adverse costs award or an obligation to take out insurance for such an event).

Section 225 (3) of the ADGM Court Regulations sets out certain aspects to be addressed by the funding agreement, which are further detailed in Part 3 of the Litigation Funding Rules and in line with applicable law⁶⁸ and industry practice⁶⁹.

Part 2 of the Litigation Funding Rules sets out requirements for funders. Most importantly, rule 4 prescribes that funders must conduct third-party funding as a principal business and have (liquid) assets equivalent to at least USD 5 million. Rules 5 (1) (a) and 13 (1) prohibit various forms of financial entanglement between funders and counsel.

Rule 15 specifies that the funder must submit to the jurisdiction of the ADGM Courts for »disputes relating to costs as between the Funded Party and any other party«. This jurisdictional issue should be distinguished from any substantive liability of the funder for adverse costs, which depends on the terms of the funding agreement.⁷⁰ Instead, article 75 (4) of the ADGM Court Procedure Rules specifies that a defendant may request the court to order security for costs against non-litigants (which would include a third-party funder), and that the court can

⁶⁷ DIFC Court Rules 25.103 and 25.104 (2).

⁶⁸ E.g., Rules 9 (1) (a) and 13 (3) (compliance with the lawyer's professional duties).

⁶⁹ E.g., Rule 10 (funder's involvement in settlements), Rule 11 (termination of the funding agreement) and Rule 12 (confidentiality).

⁷⁰ See Rule 8 (1) (a) (»The Litigation Funding Agreement must state *whether* [...] the Funder is liable to the Funded Party to meet any liability for adverse costs«, emphasis added).

order such security if it is satisfied »that it is just to make such an order«. While this language appears to have been borrowed from its DIFC counterpart, the ADGM Court Procedure Rules do not impose additional conditions.

G. Outlook

The few recent examples of funded cases before Arab tribunals may serve as a proof of concept for successful third-party funding. The early regulations enacted by the offshore jurisdictions of the UAE may have a pull effect, and counsel and funder are well-advised to carefully look into the nuanced differences between them, especially regarding the scope of the required disclosure.

In addition, the user base of third-party funding has extended beyond the pen-iless. External funding of lawsuits is increasingly employed to keep legal costs off the balance sheet. In other words, funds that would otherwise be spent on litigation are used elsewhere. This is particularly attractive in the construction sector, where maintaining cash flow is a constant worry.

As with any investment, a growth of the third-party funding market in the Arab world will depend on increased legal certainty and accelerating procedure, especially in litigation.

On the demand side, there is potential for a new market for investment conforming to Islamic norms. As opposed to typical instruments of project finance, it appears as though third-party funding is not in contrast, but rather in line with instruments employed in Islamic finance. The challenge lies in structuring funding arrangements in a way that is in keeping with Islamic law (however defined) while at the same time taking account of the legitimate interests of all parties involved.

How this challenge can be resolved is certain to raise further debate which can best be predicted with another Elwanian dictum: We'll have to see – »Wir müssen mal schauen«.

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