



## Law and Practice

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TA Advisory is a boutique law firm with headquarters in Geneva and offices in Zurich, Dubai and Belgrade. The firm's expertise and strategic locations enable it to deliver tailored advice to clients across diverse regions, focusing on dynamic markets such as Western Europe, the Middle East, the FSU countries and Africa. TA Advisory is rapidly expanding and consists of around 15 lawyers with a particular focus on dispute resolution (litigation, international arbitration, and cross-border asset recovery). Other main practice areas include corporate matters

(corporate governance, venture capital, mergers and acquisitions, and restructurings), regulatory matters, compliance and sanctions, and white-collar crime. TA Advisory regularly advises clients on innovative funding solutions. Having collaborated with leading litigation funders, the firm's lawyers hold detailed knowledge of the litigation funding market. The team is proficient in evaluating the feasibility of funding potential claims and actively pursuing these claims on behalf of its clients.

## Authors



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## 1. Legal and Regulatory Framework for Litigation Funding

### 1.1 Legality of Litigation Funding

To address whether litigation funding or third-party funding (TPF) is generally permissible in the UAE, understanding the UAE legal system is crucial. This system forms the foundation for the regulations and practices concerning TPF.

The UAE's legal framework is characterised by its division between onshore and offshore jurisdictions, reflecting the country's federal structure and its strategic efforts to attract international business and investment.

The UAE consists of seven emirates, with "local courts" or "onshore courts" referring to the courts within these emirates. These courts handle legal matters in accordance with the federal laws of the UAE, which include elements of Sharia (Islamic law).

In contrast, the UAE has established several free zones, designed as special economic areas where businesses operate under rules distinct from those in the broader UAE. Notably, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) are two such free zones with their own courts and legal systems based on English common law.

This bifurcation into onshore and offshore jurisdictions is critical for understanding how commercial disputes are resolved and how litigation funding is perceived and regulated across the UAE. The distinction between onshore and offshore jurisdictions is pivotal when considering the permissibility and practice of third-party litigation funding in the UAE.

### Onshore Courts

In onshore courts, the application of Sharia does not include specific regulations that either regulate or expressly prohibit litigation funding. This absence of prohibition implies that litigation funding agreements could be considered valid under the current legal framework. However, it is important to note that this area has not been extensively tested in the onshore courts, leaving some uncertainty about how such arrangements might be viewed in practice. There is an opinion that Sharia's prohibition on speculative or uncertain transactions (*Gharar*) could apply to third-party funding arrangements. Nonetheless, the due diligence conducted by funders and careful drafting of funding agreements could mitigate such concerns, aligning with the principle of *Maslaha* (public interest) by enabling parties with limited financial means to pursue meritorious claims.

### Offshore Courts

Contrastingly, in offshore jurisdictions like the DIFC and ADGM, third-party litigation funding is more common and appears to be more openly embraced. These jurisdictions operate under a common-law framework, with the DIFC's laws modelled closely on English common law and the ADGM directly applying English common law and certain UK statutes. The legal costs associated with litigation in these offshore courts are significantly higher and usually uncapped, making third-party funding a more attractive option for litigants in comparison to the nominal and capped legal costs in onshore litigation.

The DIFC and ADGM have issued guidelines concerning third-party funding, indicating a level of interest and acceptance within these financial hubs. These guidelines, coupled with the jurisdictions' common-law-based legal systems, suggest a favourable environment for litigation

funding, particularly for commercial disputes and arbitration proceedings. This reflects the global trend where third-party funding plays a crucial role in arbitration and commercial litigation, offering parties a mechanism to pursue claims that they might not otherwise afford.

The market for litigation funding in the UAE, while not as mature as that in jurisdictions like the UK or the US, is on a clear trajectory of growth. This expansion is driven by several factors, including the increasing confidence in the UAE's legal system, the size and nature of disputes within the region – particularly in sectors like construction – and the strategic importance of the DIFC and ADGM courts. The presence and activity of a number of funders, both internationally recognised and boutique, underscore the growing interest and confidence in the UAE's legal system.

## 1.2 Rules and Regulations on Litigation Funding

Third-party funding is applicable in both litigation and arbitration proceedings within the UAE.

### Litigation (Onshore Courts)

In the onshore UAE courts, there are no explicit statutes, rules, or regulatory bodies dedicated to overseeing litigation funding in proceedings. This absence indicates a permissive environment for litigation funding, underpinned by the broader principles of UAE law and Sharia. While the lack of regulation offers flexibility, parties engaging in litigation funding must navigate the general legal landscape with caution, adhering to principles of good faith and avoiding speculative transactions (*Gharar*), as these are cornerstone concepts in Sharia that could impact the validity and enforceability of funding agreements.

### Litigation (Offshore Courts)

The offshore courts of the DIFC and ADGM present a more structured legal framework for litigation funding, characterised by explicit rules and guidelines that align closely with common law principles. Both the DIFC and ADGM frameworks are designed to foster a transparent, ethical, and efficient environment for litigation funding.

The DIFC Courts have established the DIFC Practice Direction No 2 of 2017 on Third-Party Funding (PD 2/2017) alongside the DIFC Mandatory Code of Conduct for Legal Practitioners (Order No 4 of 2019). PD 2/2017 mandates the disclosure of third-party funding agreements to all parties engaged in litigation, promoting transparency. Furthermore, it recognises the DIFC Court's authority to impose cost orders on third parties, including funders, depending on the specifics of the case. The DIFC Mandatory Code of Conduct outlines the responsibilities of legal practitioners involved in litigation funding, underscoring the importance of prioritising client interests and upholding professional integrity.

Similarly, the ADGM courts have implemented the ADGM Courts, Civil Evidence, Judgments, Enforcement, and Judicial Appointments Regulations 2015 (ADGM Regulations 2015), along with the ADGM Funding Rules 2019. These rules stipulate various requirements concerning the funder and funding agreements, including the necessity for funded parties to receive independent legal advice. This ensures they give informed consent, further embedding the principles of transparency and ethical practice in third-party funding within the ADGM.

### Arbitration

The regulatory landscape for arbitration within the onshore UAE courts is delineated by Fed-

eral Law No 6 of 2018, which received its most recent updates through Federal Decree 15/2023, issued on 4 September 2023. Meanwhile, the framework for arbitration within the DIFC and ADGM is established under the DIFC Arbitration Law No 1/2008 and the ADGM Arbitration Regulations 2015, respectively. These legal instruments draw inspiration from the UNCITRAL Model Law, aligning the UAE's arbitration practices with global standards of excellence. Importantly, none of these statutes impose restrictions on third-party funding, allowing for its use in arbitration proceedings across the jurisdiction.

### 1.3 Non-legal Rules

Funders who provide financial backing for arbitration cases in the region must follow specific requirements set by the arbitration rules relevant to each dispute. A prominent institution in this area is the Dubai International Arbitration Centre (DIAC), which recently revised its procedures with the new DIAC Arbitration Rules 2022. Under these updated rules, a party receiving third-party funding is required to clearly disclose the details of this funding to the arbitration panel (see **1.6 Disclosure Requirement**).

In December 2023, the Abu Dhabi Chamber of Commerce and Industry announced the launch of the Abu Dhabi International Arbitration Centre (branded as arbitrateAD). Effective 1 February 2024, the Abu Dhabi International Arbitration Centre's new governance structure and arbitration rules have replaced the existing rules of the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). The arbitration rules introduced by arbitrateAD uphold similar principles regarding the disclosure of TPF arrangements, ensuring a consistent emphasis on transparency across the UAE's arbitration practices (see **1.6 Disclosure Requirement**).

### 1.4 Consumer Protection, etc

In the UAE, third-party litigation financing faces no restrictions based on the nature of the opposing party involved in a dispute. This uniform approach applies equally to both individuals and corporate entities, without consideration of the dispute's monetary value. Consequently, the financing entity is at liberty to negotiate terms with the party receiving the funds, including the decision to engage or not engage in an agreement with the opposing party and determining the scope of such an agreement. This flexibility allows for a broad range of funding arrangements to be tailored to suit the specific needs and circumstances of the parties involved.

### 1.5 Unlawful Terms

Firstly, as previously discussed (see **1.2 Rules and Regulations on Litigation Funding**), it is important for agreements within the onshore jurisdiction to respect Sharia principles. These principles could influence the validity and enforceability of litigation funding agreements. Parties must ensure their agreements fully comply with applicable Sharia.

Secondly, a crucial consideration for parties entering into litigation funding agreements in the UAE is the treatment of confidentiality and legal privilege. Unlike some jurisdictions where legal privilege extends to documents and communications shared with funders, the UAE does not necessarily recognise legal privilege in this context. Therefore, it is vital to ensure that sharing documents with funders does not inadvertently waive any privilege that might otherwise apply. Funding agreements should explicitly state that neither the agreement itself nor any shared documents constitute a waiver of legal privilege.

Thirdly, another key aspect is maintaining the independence of the litigation process from the

funder's influence. Both the DIFC and ADGM require practitioners to avoid conflicts of interest and to prevent funders from effectively taking control of the litigation. This is to ensure that the funded party retains autonomy over their case. Agreements should clearly indicate that all decisions regarding the conduct of the litigation are made by the party, not the funder. Legal practitioners are to act on instructions from their clients alone, safeguarding the client's interests and the integrity of the legal proceedings.

## 1.6 Disclosure Requirement

In onshore court litigation, there is no requirement to disclose litigation funding agreements, nor can disclosure be compelled.

However, in offshore courts within the DIFC and ADGM jurisdictions, disclosure obligations are more pronounced. According to DIFC PD 2/2017, litigants must notify other parties of the existence of funding and disclose the funder's identity, but not the details of the funding agreement unless the court specifically requires it. The ADGM Regulations 2015 mandate that a party with a litigation funding agreement must notify other parties in writing about the agreement. This notification does not extend to revealing the funder's identity or the terms of the agreement unless further ordered.

For arbitration proceedings under the DIAC Arbitration Rules 2022 in the UAE, any party with third-party funding must disclose this to all other parties and the centre, including the funder's identity and their commitment to adverse costs liability, before the tribunal is constituted. Post-constitution, a new funding agreement that could lead to a conflict of interest with tribunal members is not permitted. If such an agreement is made, similar disclosure requirements apply to all parties, the centre, and the tribunal.

Similarly, the arbitrateAD Arbitration Rules stipulate that parties must inform the case management office, all other parties, and the tribunal about any non-party funding agreements, including the funder's identity. If an agreement is in place before proceedings begin, the claimant should include this information in the initial request.

## 2. Adverse Costs and Insurance

### 2.1 Adverse Costs

In onshore court proceedings, third-party funders are generally not liable for adverse costs. The onshore courts focus on the case merits and issue orders accordingly, without the power to enforce cost orders against funding parties.

In contrast, within the DIFC, the courts possess inherent jurisdiction to potentially hold third-party funders accountable for adverse costs. Article 9 of PD 2/2017 allows for such orders when the courts find it fitting based on the specifics of the case. While there are no reported decisions explicitly addressing this scenario, it is anticipated that the DIFC courts might adopt a similar stance to the English courts.

In the ADGM, Article 15 of the ADGM Funding Rules 2019 states that the litigation funding agreement must explicitly indicate that the funder agrees to the jurisdiction of ADGM Courts regarding disputes over costs between the funded party and any other party to the proceedings. While Part 9 of the ADGM Regulations 2015 does not explicitly confer the power to make cost orders against third-party funders, and there are no recorded decisions to that effect, the ADGM courts, which apply English common law, may follow English case law in holding a funder liable for adverse costs under suitable conditions.

In the context of arbitration, it is highly unlikely for third-party funders to be held liable for adverse costs since an arbitral tribunal generally does not have the jurisdiction to make cost orders against non-parties to the arbitration agreement. Therefore, the risk for a funder in an arbitration scenario regarding adverse costs is significantly lower than in court proceedings.

## 2.2 New Security for Costs

In onshore UAE courts, which follow civil law principles, the concept of security for costs is generally not recognised.

In the offshore courts of the DIFC and ADGM, which operate under a common law framework, there is a different approach. The DIFC Courts have explicit rules allowing them to order security for costs from claimants or third parties. The DIFC Courts may take into account the fact that a party has disclosed that it is a funded party when making determinations on applications for security for costs, but the fact that a party is a funded party shall not by itself be determinative (Article 8 of PD 2/2017). Similarly, the ADGM courts can require security for costs.

In arbitration proceedings within the UAE, an arbitral tribunal typically does not have the jurisdiction to order a third-party funder to provide security for costs, as its authority is limited to the parties involved in the arbitration agreement.

## 2.3 Insurance

After the Event (ATE) insurance, which provides coverage for the risk of incurring adverse costs in legal proceedings, is not commonly utilised in the United Arab Emirates. Its application is mostly limited to the DIFC and ADGM courts, where the potential for an adverse costs order is more prevalent due to their common law framework which allows for such cost orders. In addi-

tion, legal costs in the DIFC and ADGM courts can be substantially higher than in onshore litigation.

In onshore UAE courts, the awarding of costs is typically nominal, significantly reducing the need for ATE insurance. Furthermore, insurers in the UAE generally do not offer litigation insurance that covers all of a party's costs and disbursements. Coverage, when available, may only extend to certain aspects, such as external counsel or expert fees.

There are no specific regulations in the UAE that prohibit the use of ATE insurance. Hence, parties, particularly claimants, are at liberty to procure ATE insurance if they deem it necessary. While ATE insurance is technically allowed in the UAE, the market for such insurance products is not well-developed. The future growth of ATE insurance in the UAE will likely depend on the availability and demand for suitable insurance products and the evolution of the legal landscape, particularly concerning cost risks in litigation and arbitration.

## 3. Lawyer Ethics

### 3.1 Alternative Fee Structures

In the UAE, the permissible fee structures for lawyers and the applicable restrictions vary across different jurisdictions within the country. While the UAE's onshore jurisdictions adhere to a more traditional model that prohibits certain alternative fee arrangements, the financial free zones like DIFC and ADGM offer a more liberalised approach, allowing for a variety of such arrangements under specific regulations designed to ensure fairness and the best interest of the clients.



- Contingency Fee Arrangements – the UAE Law, particularly onshore, prohibits contingency fee arrangements where lawyers would receive a portion of the proceeds as success fees. This prohibition extends to DIFC Court proceedings, where lawyers are not allowed to engage in such agreements under the existing legal framework.
- Conditional Fee Arrangements (CFAs) – in contrast to contingency fees, CFAs are acceptable under certain conditions. In the DIFC, lawyers may receive an increased fee – known as an “uplift” – if their client’s case is successful. This uplift is not a share of the proceeds but an enhanced fee structure based on the successful outcome of the matter. Full transparency with clients is required, with all arrangements disclosed and deemed to be in the client’s best interest. In the ADGM, CFAs are enforceable if they satisfy all the conditions designed to ensure that fee arrangements are fair and do not conflict with the principles of justice.
- Damages-Based Agreements (DBAs) – DBAs, where lawyers’ fees are a percentage of the compensation recovered, are generally not permitted in the UAE. The ADGM is the exception, where such agreements are allowed, provided they comply with certain requirements.

## 3.2 Fee Sharing

In the DIFC and ADGM, there are specific restrictions in place concerning the sharing of fees and referrals between lawyers and third-party funders.

In the DIFC, the Mandatory Code of Conduct prohibits practitioners from accepting referral fees or benefits from third-party funders without disclosing such arrangements in writing to their clients. The Code requires that clients be

fully informed of any financial or other interests that the practitioner or their law firm may have in referring the client to any third party. Additionally, any recommendation by a practitioner to use a specific third-party service must be in the client’s best interest.

Similarly, the ADGM has clear stipulations regarding litigation funding agreements. These agreements must not involve any commission, fee, or share of proceeds being paid to a lawyer or law firm for introducing or referring a client to a funder. Furthermore, the ADGM regulations specify that a funder must not be partially or wholly owned by a lawyer or law firm that has referred the funder to a client or has a client with an ongoing LFA with the funder.

These regulations ensure that there is no conflict of interest and that the professional conduct of the lawyers remains unbiased by financial incentives from third-party funders. The overarching principle is to safeguard the interests of the client and maintain the integrity of the legal process.

## 3.3 Equity Ownership

Traditionally, law firm ownership in the UAE has been exclusive to licensed legal practitioners, ensuring adherence to the industry’s codes of ethics and professional conduct.

Yet, recent shifts have emerged, when DIFC and ADGM adopted a more open stance on law firm ownership and management. These zones now allow non-lawyers to hold equity stakes in law firms, within certain guidelines and after obtaining the necessary regulatory consent. This move aims to infuse law firms with diverse management skills and fresh investment streams, fostering growth and innovation within the legal sector.

In the ADGM, similar to other jurisdictions with common law traditions, non-lawyers are also able to acquire financial stakes in law firms. This reflects a broader movement towards diversifying the management and investment in legal practices, recognising the benefits that professionals from other fields can bring.

## 4. Taxes

### 4.1 Taxes on Legal Fees

In the UAE, a 5% Value Added Tax is applicable to legal services, and this tax is generally added to the fees that clients pay to their lawyers.

The ability of clients to recover this VAT hinges on their business's registration status with the UAE VAT system. VAT-registered businesses using legal services for activities that are taxable may be eligible to deduct the VAT incurred as an input tax, in line with the guidelines set by the UAE Federal Tax Authority.

On the other hand, businesses that are not VAT-registered, those using legal services for non-taxable activities, or those that meet the criteria for VAT-exempt or non-deductible categories, will not be able to reclaim the VAT.

Individuals who incur legal fees for personal matters, and who are not involved in VAT-chargeable business activities, are also unable to recover the VAT paid on these services.

### 4.2 Withholding on Payments to Offshore Jurisdictions

Generally, the UAE does not impose withholding taxes on outbound payments. This would mean that a third-party funder based in any of the jurisdictions of the Cayman Islands, Delaware in the United States, Guernsey, Ireland, Jersey and Luxembourg would not typically be subject to a withholding tax on the returns they receive under a third-party funding agreement from the UAE.