

Shining a light on funding

Rosemary Ioannou of Vannin Capital takes a closer look at the practice direction on third party funding in the DIFC Courts.

Knowledge, experience and use of dispute resolution funding across the globe has grown exponentially in the recent years. This growth has resulted in a closer focus on dispute resolution funding, its regulation, its place and operation in key dispute resolution centres like Dubai. This is inevitable in circumstances where funding is increasingly used, not just by impecunious claimants, but also by well-capitalised entities and individuals and their representatives. They use funding as a strategic financial tool as part of their legal and financial strategy and commercial approach.

The closer focus on funding has resulted in more scrutiny of the industry. This includes the most recent development in Dubai, the publication of the long awaited draft Practice Direction on Third Party Funding by the DIFC Courts (the Draft PD). This article considers the draft PD in the context of wider legislative changes to funding across the world.

close enough to be included in this list), the Arbitration and Mediation Legislation (Third Party Funding) Amendment Bill was officially published, opening the way for the use of third party funding in Hong Kong. It is still unclear as to when it will be discussed before Parliament. However, given the speed of the process to date, one suspects it won't be too long, most likely before the end of 2017.

On January 10, 2017, Singapore passed an amendment to its civil law permitting dispute resolution funding in the jurisdiction for the first time for arbitration proceedings.

In the UK, where for the last five years' professional funders have been able to opt-in to a self-regulating regime as members of Association of Litigation Funders (ALF)¹, 2017 began with a statement from Justice Minister Lord Keen, "The Government does not believe that the case has been made out for moving away from voluntary regulation." Given the

legislative developments noted above, some may interpret this as the UK being behind the curve compared to other jurisdictions in respect to the growth and development of dispute resolution funding.

However, ALF remains the only organisation of its kind in the world providing any form of regulation of funders. In such circumstances, arguably, it is understandable that with funding playing an increasingly important role in the global dispute resolution landscape, with Brexit

2017 – GLOBAL DEVELOPMENTS IN THE FUNDING LANDSCAPE

We are less than two months into 2017 and there have been a number of significant developments in the global dispute resolution funding landscape.

In Hong Kong, on December 30, 2016 (not quite 2017 but



and the uncertainty that may bring to litigation in the UK, the government there didn't want to over-commit itself to further regulation which may unnecessarily tie its hands.

DIFC: DRAFT PD ON THIRD PARTY FUNDING IN THE DIFC COURTS

Most recently and probably of most interest to the readership is the publication of the Draft PD by the DIFC on January 16, 2017.

The Draft PD can be accessed on the DIFC Courts website².

The Draft PD itself is a fairly short document. Its key provision is the requirement for the fact of funding to be disclosed (although disclosure of the funding agreement is not required). What steps may be taken once armed with this information remains at the discretion of the Court. Seemingly leaving this discretion as broad as possible, the draft makes clear that the DIFC Courts:

- a) may take into account the fact that a party is funded when determining applications for security for costs but the fact of funding shall not by itself be determinative; and
- b) have inherent jurisdiction to make costs orders against third parties, including funders, where the Courts believe that the third party has caused or contributed to the initiation and running of a meritless claim, defence or counterclaim.

The draft PD does not seek to formally regulate funding before the DIFC Courts. However, in requiring the fact of funding to be disclosed, it provides the Court with the information it needs to address and alleviate the key concerns and criticisms that are often levied in the context of funded claims, such as potential conflict of interest, confidentiality, adverse cost exposure and cost control.

In taking a pragmatic approach, the DIFC has acknowledged the growth and use of funding and has equipped itself with the necessary tools to ensure a professional approach to funding is adopted in the jurisdiction. In so doing, it has struck the right balance between the need for openness and clarity about funding to ensure accusations of impropriety can't be levied, while at the same time giving the Court freedom and discretion to set its own precedent and approach to funding. Such

an approach will inevitably need to take account of the facts and circumstances of the particular funded claim before it, including, inter alia: the parties, the legal representation involved and the facts, history and legal basis of the dispute. For its part, Vannin Capital welcomes the draft PD and the approach the DIFC Courts have taken in respect to it.

CONCLUSION

The flurry of legislative developments in Dubai and other key dispute resolution centres across the globe in early 2017 emphasises the increasing level of interest, awareness and use of dispute resolution funding.

Legal practitioners, experts and parties to disputes are realising the breadth of the offering from professional funders and are using it to their advantage, deploying funding as a strategic financial tool for traditional single claims (be that for impecunious claimants or well-capitalised ones looking to de-risk their claims, using funding as part of their legal and financial strategy) but also for portfolio funding, using groups of claims to cross-collateralise risk and therefore decrease the funding terms.

This increased knowledge and use of funding is shining a light on innovative funding products. At the same time, there is a broader acceptance of funding as an integral part of the dispute resolution landscape. We have witnessed an exponential rise in approaches for funding in recent years. This trend looks set to continue through 2017 and beyond as funding is embraced by practitioners, claimants and legislators across the globe. 📈

1. <http://associationoflitigationfunders.com/>
2. <http://difccourts.ae/practice-direction-third-party-funding-difc-courts-open-consultation-19-february-2017/>



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