



LITIGATION FUNDING IN THE DIFC

NEW MANDATORY CODE
OF CONDUCT IMPACTS
ON THIRD PARTY
FUNDING IN THE DIFC

On 18 September 2019 the DIFC Courts issued Order No.4 of 2019 prescribing a Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the "Order").

Whilst the Order is mainly concerned with the minimum levels of conduct expected of DIFC Courts practitioners in respect of their duties owed to both their clients and the courts, it also sets out various requirements in relation to third party litigation funding, and is therefore of interest to funders and parties alike.

Previously, third party funding in the DIFC was governed by Practice Direction No.2 of 2017 – Third Party Funding in the DIFC Courts, issued on 14 March 2017, which confirmed that third party funding is permitted in the context of DIFC Courts proceedings and set out various requirements to be observed by "Funded Parties".

However, the Practice Direction did not extend as far as to prescribe any requirements on Practitioners.

Obligations on Practitioners

Under the new Order, obligations on DIFC Practitioners insofar as they relate to third party funding include:

- A general duty to avoid conflicts of interest;
- Being prohibited from being swayed from their duties to the client by any instructions or interest of a Funder, unless the client has given written authorisation for the Practitioner to take instructions from the Funder instead of the client;
- A requirement to advise clients who are proposing to enter, or are already a party to a Litigation Funding Agreement ("LFA") as to the effect of such agreement, if any, on the clients' potential responsibility to pay legal costs and expenses, which will remain the clients' responsibility unless otherwise agreed between the client and the Funder; and
- A prohibition from receiving referral fees or benefits of any kind from a Funder, arising from the referral of a client to the Funder, unless full disclosure is made in writing to the client. The relevant provisions of the Order do not specify that consent must be received from the client, which may suggest that disclosure alone (i.e. without consent) is sufficient. However, it is advisable to obtain written consent.

Breaches of the Order are referable to the DIFC Courts Registrar for investigation and further action, if deemed to be appropriate, including the imposition of penalties on individual Practitioners and/or their respective Firms (such as private or public admonition, fines, suspension

or removal from the Register of Practitioners).

Obligations on Funded Parties

Under the Practice Direction, a Funded Party is required to:

- Give notice in writing to every other party to the relevant dispute, and the DIFC Court Registry, that it has entered into an LFA; and
- Disclose the Funder's identity (there is, however, no requirement for the Funded Party to disclose a copy of the LFA itself unless the Court orders otherwise).

For Part 7 claims, such notice must be given (a) in the Case Management Information Sheet submitted prior to the Case Management Conference ("CMC"); or (b) if the LFA is entered after the CMC, within 7 days of the date of the LFA. For all other claims, notice must be given either (a) as soon as practicable after the commencement of the proceedings, which may include within the claim form itself, or in the particulars of claim, if appropriate; or (b) if the LFA is entered into after the commencement of the proceedings, within 7 days of the date of the LFA.

Obligations on Funders

Whilst neither the Order nor the Practice Direction impose any express obligations on Funders, Funders should be aware of the requirements applicable to Practitioners and Funded Parties for the purposes of negotiating their LFAs.

Additionally, Funders should be aware that the Practice Direction also makes clear that the DIFC Courts have inherent jurisdiction to make costs orders against third parties, including Funders, where appropriate.

Whilst the DIFC Courts follow the English approach of ordering costs on a standard or indemnity basis, there

are some key differences, including that:

- the average rate of costs awarded over the past 10 years following assessment on the standard basis is just over 85%, and therefore significantly higher than the usual rate in other common law jurisdictions; and
- indemnity costs may be awarded against parties for unsuccessfully challenging arbitral awards, pursuant to Practice Direction No.1 of 2017.

Funders should therefore be mindful that they may be required to pay adverse costs at levels higher than those in other common law jurisdictions.

Further, Funders should be aware that successful parties, in recovering the costs of their claim, may be limited to the threshold rates applicable to Practitioners, as set out in Registrar's Direction No.1 of 2017, according to their respective levels of experience.

For additional information, please contact the author of this briefing:

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