Jurisdiction Guide to Third Party Funding in International Arbitration
Pinsent Masons are enthusiastic supporters of third party funding and are increasingly involved in international arbitrations where third party funding is provided.
Introduction

Third party funding ("TPF") arises when a (third party) litigation / arbitration funder provides financial support to enable individuals or commercial entities to pursue or defend legal proceedings. In most jurisdictions with a common law system, such arrangements were traditionally illegal or void, most notably on the grounds of being contrary to the legal doctrines of maintenance and champerty. In recent years, however, there has been a move away from this out-dated position and TPF is now permitted in a number of jurisdictions for international arbitrations and court proceedings related to international arbitrations.

There were of course reasons for TPF and similar arrangements being illegal, but the greater access to justice that TPF gives all litigants, together with the effective way TPF is regulated (or self regulated) in those jurisdictions where it is permitted, means that it has become a significant part of the international arbitration landscape. In the Covid-19 era and beyond, TPF will be even more important with corporations facing unprecedented economic stresses and increasing pressure on cash-flow. In that context, we note that the new 2021 ICC Rules of Arbitration, which will come into force on 1 January 2021, explicitly refer to TPF and include at Article 11(7) a new requirement for parties to disclose any TPF arrangements so that any potential conflicts of interest can be identified and managed. We will comment on this further in the next edition of this Guide.

TPF is ‘non-recourse’, meaning that if there is no recovery, then there is no obligation for the funded party to repay the funder its advances or any return on its investment. This provides parties faced with the prospect of commencing or defending an arbitration with an efficient, “off balance sheet” solution for meritorious claims that removes the financial burden and uncertainty of pursuing this process.

Regulations associated with TPF generally include restrictions as to who can qualify to be a funder (usually relating to financing requirements), mandatory disclosure of TPF arrangements to ensure transparency, the limits of confidentiality of such arrangements, how conflicts of interest are dealt with and the impact on the allocation of legal costs.

Pinsent Masons are enthusiastic supporters of TPF and are increasingly involved in international arbitrations where TPF is provided. In July 2019, Pinsent Masons entered into a preferred supplier arrangement with major funder, Augusta Ventures. The arrangement with Augusta is non-exclusive and in appropriate circumstances Pinsent Masons will work with other third party funders. However, the Augusta arrangement, which applies globally, gives Pinsent Masons’ clients better terms than are generally available in the open market. In particular, Pinsent Masons’ clients receive the benefit of a dedicated facility at preferred rates, including a fast tracked due diligence process and transparent commercial terms. Mark Roe,¹ who leads the Pinsent Masons TPF initiative, describes the arrangement: “Under the fair and transparent terms of the agreement, Augusta will fund the entire cost of pursuing the claim, including all lawyer and expert fees and any other costs. The arrangement is ‘non-recourse’, meaning the claimants pay nothing if the claim fails. Augusta only recovers its costs and fees from sums received from the respondent or other paying party.”

A TPF agreement will specify the funder’s recovery and this varies depending on what is permitted in the relevant jurisdiction. It could be a percentage of the amount recovered or the fees advanced by the TPF plus an uplift.

A funder will of course assess the prospects of success of a claim before entering into a TPF agreement and will as part of such assessment carry out a due diligence exercise to ensure the claim has reasonably strong prospects of success and recovery. This requires a detailed non-disclosure agreement unless the statutory framework provides for communications with funders to be privileged. As funders receive their return on their investment by reference to recoveries made, they are primarily interested in claims with a monetary outcome. Funding is therefore in most part available to claimants, and occasionally to respondents with a strong sizable counterclaim.

In addition, a funder will generally be looking for a “recovery ratio” of at least between 6 and 10.² The recovery ratio is the ratio of legal and other costs to anticipated recovery. For example, if legal and other costs are anticipated to be US$1 million, a funder would require the anticipated recovery by the party to be at least between US$6 to $10 million. TPF in international arbitration is therefore more suited to larger claims, although smaller claims can be brought within the required recovery ratio by the creative use of conditional fee arrangements by the legal representatives, where such arrangements are permitted in the relevant jurisdiction. Where such arrangements are permitted, Pinsent Masons are happy to consider them. This has the effect of reducing the fees advanced by the funder and improving the ratio for smaller claims in particular.

As enforcement of the arbitral award is a key concern for funders, investigations into the respondent’s asset position will be carried out to ensure that the respondent has the financial capability to meet the damages claim against it.

This Guide is intended to provide our clients with a succinct picture of TPF in the major jurisdictions where Pinsent Masons conduct international arbitrations. The Guide will highlight the key features in each of the jurisdictions covered, but local legal advice should be sought on whether TPF on the terms intended with the funder is permissible.

Jason Hambury
Partner, Co-head of International Arbitration (London)
Risk Advisory Services
+44 207 490 6444
+44 7740 584 432
jason.hambury@pinsentmasons.com

Dr Dean Lewis
Partner, Co-head of International Arbitration (Hong Kong)
Risk Advisory Services
+852 2294 3392
+852 9151 3034
dean.lewis@pinsentmasons.com

---

1 E: mark.roe@pinsentmasons.com. T: +44 7770 740487
2 Augusta will expect to fund on the basis that the sums recovered will exceed the amounts advanced by a factor of about 700% (i.e. a ratio of 1 : 7).

Special thanks to Andrea Morgan, Senior Legal Project Manager in the London office of Pinsent Masons, for coordinating the production of this Guide.
England and Wales

Third party funding is permitted and on the rise in England and Wales

The relaxation of the common law rules of maintenance and champerty spawned a rapidly growing funding market with England and Wales emerging as a key jurisdiction for funded claims. Provided the funding agreement does not give the funder an unreasonable return or the right to control the dispute, TPF in an arbitration (and related court proceedings) seated in London³ is permitted as of 1967.⁴

The current landscape of TPF in England and Wales began to be carved out due to a more pragmatic approach taken by the judiciary in various court decisions from 2002 to 2005⁵ as part of the desire to improve access to justice. Since then TPF has and continues to become more prevalent across the legal market in England and Wales, both in terms of the number of cases being funded and in the number of specialist firms offering funding. Although no formal regulation of TPF has been found to be necessary, self-regulation in the form of a code of practice was advisable to provide a layer of protection to funded clients. This led to the Code of Conduct for Litigation Funders⁶ published in November 2011 ("the Code") together with the formation of the Association of Litigation Funders of England and Wales ("ALF"). The Code requires funders to behave reasonably and sets the standards for the capital adequacy of funders, including the specific, limited circumstances in which funders may be permitted to withdraw from a case. Although ALF membership is voluntary, most established third party funders in London have joined. At Pinsent Masons we strongly advise parties to only consider third party funders that are approved members of ALF because they are guaranteed to have access to capital immediately within their control and to comply with all the other provisions of the Code.

At Pinsent Masons we strongly advise parties to only consider third party funders that are approved members of ALF because they are guaranteed to have access to capital immediately within their control and to comply with all the other provisions of the Code.

---

³ Including mediation proceedings and enforcement proceedings related to an international arbitration.
⁴ Maintenance and champerty finally ceased to be criminal offences and torts by virtue of sections 13 and 14 of the Criminal Law Act 1967, following recommendations made by the Law Commission.
⁵ R (on the application of FactorTame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2) [2002] EWCA Civ 992; Arkin v. Borchard Lines Ltd & Others [2005] EWCA Civ 655 ("Arkin").
⁶ See https://associationoflitigationfunders.com/code-of-conduct/ The Code pertains primarily to domestic litigation, and refers to "litigation funding", but equally covers the funding of international arbitrations.
Third party funding arrangements are entirely flexible

When a funder agrees to invest in a claim, it does so after carefully assessing the commercial return on the investment. The factors that generally influence the offered pricing terms of the funding arrangement are largely based on the size of the claim or expected damages, the estimated length of the matter, and the level of risk involved. In order to be able to offer the most competitive terms, English law permits funders and legal practitioners to enter into a number of bespoke and flexible contingent and conditional fee arrangements with clients.

TPF features

Is it mandatory for a party to disclose that it is funded? There is no general requirement under English law for a party to disclose a TPF arrangement to any opposing party or to the court or tribunal. However, from an ethical standpoint, disclosing the existence of funding in arbitrations is desirable given the potential for conflicts of interest between third party funders and tribunals. This is particularly relevant if a tribunal has sat in a number of cases where the claimant has been funded by the same funder, or if the funder is evaluating a case in which the funded claimant is represented by that tribunal’s law firm or chamber.

Are communications with a third party funder privileged? Preparing a claim for a third party funder to assess invariably involves the sharing of confidential documents and legal advice as early as the ‘initial chat’ stage. The terms of a funding agreement also typically require a client’s legal team to send to the third party funder regular reports detailing the case progress. Under English law, a party is able to share privileged and confidential material with a limited number of third parties under an express agreement to keep that material to share privileged and confidential material with a limited number of third parties under an express agreement to keep that material confidential, thereby preserving its privileged status. To protect against an inadvertent waiver of a client’s privilege, parties should enter into a non-disclosure agreement with the funder from the outset.

What are the additional cost benefits of TPF? There is limited legal authority that currently governs the question of costs in funded arbitrations seated in London. However, the general rule in English litigation is that the loser pays the winner’s costs. It is often debated as how that rule applies to a situation where one of the parties is involved in a TPF arrangement.

Can a successful party recover its funded costs? In a 2016 decision of the English Commercial Court, a successful claimant in arbitration was allowed to recover its TPF costs, on the terms agreed with the funder and in addition to the principal award. A tribunal’s jurisdiction to make such an order stems from the English Arbitration Act 1996 which gives the tribunal a general power to award costs as it sees fit. This costs bracket can include the legal and ‘other costs’ of the parties, which in this case was interpreted to mean the funder’s commission.

Will a third party funder be liable for another party’s costs? Arbitral tribunals do not generally have the jurisdiction to issue an adverse costs order against third party funders because the funder is not typically a party to the arbitration agreement, and under section 61 of the English Arbitration Act 1996 a tribunal does not have jurisdiction to make a costs order against a non-party to the arbitration. Third party funders are therefore protected from adverse costs orders when funding arbitration proceedings seated in London. Recent court decisions that have had a profound impact on the English litigation funding market eroded the previous certainty that a funder’s liability for payment of the successful parties’ legal costs is capped at the funding amount it had provided to the unsuccessful claimant. This development, although significant for funded litigations, has little impact on the funding of arbitrations. Any risk for adverse costs awards is a matter for the funding agreement to deal with and appropriate insurance may be arranged to cover the funded party’s liability for an adverse costs order.

Scheherazade Dubash
Senior Practice Development Lawyer (London)

---

7 In the Matter of Edwardian Group Limited [2017] EWHC 2805 (Ch), the High Court rejected an application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.
8 Documents shared without a general intention to waive privilege as against the world at large, but instead subject to a limited waiver with respect to an identified third party, are described as subject to a ‘limited waiver’.
9 Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd [EWHC 2361 (Comm)].
10 Those terms included that the funder would receive the greater of 300% of the funding amount or 35% of the amount recovered in the case of “success” (as defined in the funding agreement).
11 See section 59(1)(c) of Arbitration Act 1996.
12 See Davey v Money [2019] EWHC 997 (Ch) and ChapelGate Credit Opportunity Master Fund Ltd v Money & others [2020] EWCA Civ 246.
TPF is permitted in Singapore

TPF in international arbitration seated in Singapore and related court (including enforcement) and mediation proceedings has been permitted in Singapore since 2017.¹⁴ This was an important step towards reinforcing Singapore’s position as the leading Asia Pacific international dispute resolution hub. Singapore’s Minister of Law announced on 10 October 2019 that TPF will be extended to domestic arbitrations in 2019 as well as to certain proceedings in the Singapore International Commercial Court (SiCC) and mediations connected with those proceedings.¹⁵ However these changes are currently still awaiting implementation.

Only professional funders are permitted to enter into TPF arrangements in Singapore. A qualifying third party funder must carry on the “principal business” of funding dispute resolution proceedings (in Singapore or elsewhere) and have a paid up share capital or managed assets (as defined in the Regulations) of not less than S$5 million (or the foreign currency equivalent).¹⁶

Singapore lawyers and foreign lawyers based in Singapore are permitted to introduce or refer third party funders to clients provided they receive no direct financial benefit from the introduction or referral. Lawyers are also allowed to advise or act for their clients in relation to TPF contracts (as long as they do not receive any financial benefits, other than fees for legal services).¹⁷ Foreign lawyers not based in Singapore are free to represent parties in international arbitrations in Singapore and are not regulated by the Singapore legislation.¹⁸ They therefore have even more flexibility in relation to TPF arrangements.

TPF contract fee arrangements are entirely flexible

Complete flexibility is provided to TPF contracts, in particular arrangements based on a percentage of the sums recovered and/or conditional fees are permissible for providers of TPF.¹⁹ However Singapore lawyers are not permitted to enter into such agreements²⁰ which may make it difficult to obtain TPF for smaller claims.

A qualifying third party funder must carry on the “principal business” of funding dispute resolution proceedings (in Singapore or elsewhere) and have a paid up share capital or managed assets (as defined in the Regulations) of not less than S$5 million (or the foreign currency equivalent).

---

¹⁴ Civil Law Amendment Act and the Civil Law (Third Party Funding) Regulations 2017.
¹⁶ Civil Law (Third Party Funding) Regulations 2017.
¹⁷ Legal Profession Act (LPA) and the Legal Profession (Professional Conduct) Rules 2015 (Legal Profession Rules). The 2017 amendments to the CLA were accompanied by related amendments to both the LPA and the Legal Profession Rules.
¹⁸ Section 35 LPA.
¹⁹ Section 5 Civil Law Act.
²⁰ It is not clear whether these fee arrangements are available for foreign lawyers taking advantage of S35 of the LPA, where such fee arrangements are allowed in their home jurisdiction.
TPF features

Singapore has not yet introduced any statutory code of practice, however, many of the usual features of TPF have statutory support. First, amendments were made to the Legal Profession Rules to address problems of conflicts of interests between legal practitioners and third party funders.²¹ Secondly, those rules also address the obligations of disclosure of the TPF arrangement by the Singapore legal representative.²² There is no similar duty imposed on foreign lawyers in relation to proceedings in Singapore. There may thus be inequality in the disclosure obligations between the parties in Singapore-seated arbitrations where one party is represented by Singapore lawyers and one by foreign lawyers.

There are no regulations or authorities dealing with the recoverable costs in a TPF arbitration so a tribunal may not have jurisdiction to award costs based on any uplift on those costs payable to the funder, following a successful claim (although such an award may be possible under the ICC Rules in some jurisdictions²³). For this reason, Augusta does not usually require claimants to take out After the Event Insurance (“ATE”)²⁴ to cover the risk of an adverse costs award. There are also no regulations requiring a funder to meet any adverse costs order in the event that a claim fails or dealing with whether a TPF arrangement can be a ground for security for costs, particularly in circumstances where there is no obligation on the funder to respond to any adverse costs order. However, this is likely to be something that a tribunal will take into account if an application for security for costs was made, albeit not in itself being conclusive as to a party’s financial status.

The law as outlined above is complemented by a trio of soft law instruments developed by industry stakeholders in Singapore to promote best practices in connection with TPF in the city-state. The Law Society of Singapore, Singapore Institute of Arbitrators and SIAC all have guidelines and practice recommendations much of which seek to complete the picture where the statutory framework may be incomplete.

SIAC’s Investment Arbitration Rules 2017 (“IAR”) include explicit provisions on TPF and SIAC is likely to extend similar provisions to the 2021 edition of its international commercial arbitration rules that are currently open for public consultation. The IAR empower the tribunal to order full disclosure of the TPF arrangement including whether the funder has committed to undertake an adverse costs order.²⁵ The tribunal can also take into account the TPF arrangement in apportioning the costs of the arbitration.²⁶

Dr Dean Lewis
Partner, Co-head of International Arbitration (Hong Kong)

²² Rule 49A.
²³ Essar Oilfields Services Limited v Norscot Rig Management PVT Ltd [EWHC 2361 (Comm)].
²⁴ ATE premiums are usually in the range 25 to 40% of the costs risk insured against.
²⁵ Rule 24 (l) and Rule 35.
²⁶ Rule 33.1.
Hong Kong

TPF is permitted in Hong Kong

TPF in international arbitration and mediation is permitted in Hong Kong. On 1 February 2019, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 entered into force. This Ordinance amended the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620)\(^\text{27}\) to ensure that TPF of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty. This new legislation provides for measures and safeguards in relation to TPF and implements the Code of Practice for Third Party Funding of Arbitration issued on 7 December 2018 by the Law Reform Commission of Hong Kong (the “Code of Practice”).\(^\text{28}\)

The Code of Practice sets out the practices, standards and obligations of third party funders to carry on TPF in Hong Kong. A funding agreement must include a Hong Kong address for service for the third party funder, set out the name and contact details of the specified advisory body responsible for monitoring and reviewing the operation of TPF, and the third party funder must maintain access to a minimum of HK$20 million of capital. It must also ensure that it maintains the capacity to pay all its debts and cover its aggregate funding liabilities for a minimum period of 36 months.

The third party funder also has to take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it. If the funded party confirms in writing that it has taken independent legal advice before entering into the funding agreement, this requirement is deemed to be satisfied.

TPF features

The funding agreement must state whether (and if so to what extent) the third party funder is liable to the funded party to meet any liability for adverse costs, pay any premium for costs insurance, provide security for costs, and meet any other financial liability.

For the duration of the funding agreement, the third party funder must maintain effective procedures for managing any conflict of interest that may arise. It must not take any steps that cause or may cause the funded party’s legal representative to act in breach of its professional duties. Moreover, the third party funder must observe the confidentiality and privilege of all information and documentation relating to the arbitration and the subject of the funding agreement.

Third party funders also have obligations in terms of control. For example, the funding agreement must set out clearly that the third party funder will not seek to influence the funded party or its legal representative to give control or conduct of the arbitration except to the extent permitted by law. As for disclosure requirements, the funder must remind the funded party of its obligation to disclose information about the funding agreement under sections 98U and 98V of the Hong Kong Arbitration Ordinance (Cap. 609).

The HKIAC 2018 Administered Arbitration Rules (“HKIAC Rules”) explicitly refer to TPF. The HKIAC Rules provide that if a funding agreement is made, the funded party shall communicate a written notice to all other parties, the arbitral tribunal, any emergency arbitrator and HKIAC of the fact that a funding agreement has been made, as well as the identity of the third party funder.\(^\text{29}\) Finally, under the HKIAC Rules, the tribunal can take into account any funding agreement in determining all or part of the costs of the arbitration.\(^\text{30}\)

Hana Doumal
Registered Foreign Lawyer (Hong Kong)

\(^{27}\) Available at: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf.

\(^{28}\) Available at: https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm.

\(^{29}\) Article 44.1.

\(^{30}\) Article 34.4.
TPF is permitted in France

TPF is permitted in France and is considered a positive development towards access to justice. However, it remains fairly unregulated. The lack of legislative or regulatory framework at the national level stems, in part, from the relatively low cost of litigation in France as compared to common law countries. Moreover, punitive damages do not exist under French law and courts generally grant modest fees to the winning party compared to the actual costs that might have been incurred. As a result, the potential sums to be recovered by the funders are relatively low.

Although there has not yet been a significant need for TPF in French litigation, arbitration practitioners have recently reflected on TPF in French law. On 21 February 2017, the Conseil de l’Ordre of the Paris Bar adopted a resolution (the “Resolution”) and released a report (the “Report”) in support of TPF particularly in relation to international arbitration. To date, the Resolution and the Report are the only documents to address TPF in arbitration under French law.

Both the Resolution and Report confirm that no provision of French law “prevents a party from using the services of a third party to finance an international arbitration procedure” and that TPF is in the interests of clients and counsels alike.

The Resolution also establishes ethical rules to protect attorneys and their clients. Any attorney representing a party funded by a third party funder is bound by his or her ethical obligations only to his or her client, the funded party. Moreover, an attorney representing a funded party cannot advise the third party funder in any way, even if asked by the client. In particular, an attorney must receive his or her instructions only from the funded party, and must refrain from communicating any type of information concerning the case to the third party funder.

As of today, there is no legislation in effect in France that would question the validity of TPF arrangements. French courts have addressed funding agreements in one case and held that such an agreement was a sui generis contract. However, TPF contract fee arrangements must comply with some general provisions under French law. Indeed, such fee arrangements must meet the conditions set out by article 1128 of the French Civil Code which are: (i) the consent of the parties, (ii) their capacity to contract and (iii) a lawful and certain content.

Moreover, French Courts might intervene and regulate the TPF contract fee arrangements. The French Cour de cassation might sanction any success fee which is excessive for the services rendered. As a result, such jurisprudence might apply to TPF and may lead to a reduction of the funder’s fees if considered excessive.

34 Société Foris A.G. v. S.A. Veolia Propreté, Court of Appeals of Versailles (12th chamber s. 2), 1st June 2006, no. 05/0103.
35 Article 1128 of the French Civil Code: “The following are necessary for the validity of a contract: 1. the consent of the parties; 2. their capacity to contract; 3. content which is lawful and certain.”
36 Cour de cassation, Civ. 1re, 23 November 2011, no. 10-16.770.
TPF features

The Resolution and Report highlight the main features and challenges posed by TFP under French Law: the impact of the involvement of a third party on the ethical obligations incumbent on counsel – particularly with regards to conflicts of interest and professional secrecy – and the issue of disclosure of the funding arrangement.

Preventing conflicts of interest

Article 4.1 of the Règlement Intérieur National de la profession d’avocat (RIN) imposes ethical obligations on French lawyers and prohibits the representation or the defence of more than one client in the same case.³⁷

The counsel of the funded party must have an exclusive relationship with its client without any interference and communication with the funder. The relationship between the funder and the funded party must be considered as a factual relationship, independent from the one between the attorney and his client.³⁸

However, this principle does not preclude the attorney from receiving direct payment or indirect payment from the funder as French law authorizes the payment from a third person.³⁹

Professional secrecy

In France, the common law concept of privilege is covered by professional secrecy,⁴⁰ which imposes criminal liability on lawyers for breach of confidentiality obligations.⁴¹

As the Paris Bar Council Resolution clarified, the third party funder is not the client. Lawyers are not to advise the third party funder, receive instructions from the third party funder, communicate any information concerning the case, or meet with the third party funder in the absence of the client. Accordingly, French lawyers may not communicate any information concerning the case to the third party funder as this information is privileged. Practically speaking this means that it falls on the client to keep the third party funder in the loop during the arbitration.

As any information communicated to the third party funder by the client will not be covered by privilege or professional secrecy, it is highly recommended that the client and the third party funder enter into a confidentiality agreement at the outset of the relationship.

Disclosure of the funding arrangement

According to the Paris Bar Council, any French attorney representing a funded party should encourage his or her client to disclose to the tribunal the existence of TPF. Although there is no mandatory requirement to such disclosure, French law provides that both parties and arbitrators shall act diligently and in good faith in the conduct of the proceeding.⁴² Disclosure of the existence of TPF to the tribunal might thus be considered as part of the good faith imposed upon the parties.

The Paris Bar Council also advises attorneys to warn the client of the possible consequences that such non-disclosure may entail, in particular with regard to the potential nullity of the award and the obstacles to its enforcement.⁴³

Frédéric Gillion
Partner (Paris/Singapore)

---

³⁷ Article 4.1 of the RIN: “The lawyer can neither be the counsel nor the representative or the defender of more than one client in the same case […]”


³⁹ Article 1342-1 of the French Civil Code: “Satisfaction [e.g. payment] may even be rendered by a person who is not bound to do so, except where the creditor legitimately refuses it.”

⁴⁰ Article 2.1 of the RIN: “The professional secrecy of the lawyer is of public order. It is general, absolute and unlimited in time.”

⁴¹ Article 226-13 of the French Criminal Code: “The disclosure of information of a secret nature by a person who is a depository of such information by state or profession, or by reason of a function or a temporary mission, is punishable by one year’s imprisonment and 15,000 euros of fine.”

⁴² Article 1464 paragraph 3 of the French Code of Civil Procedure.

United Arab Emirates

TPF is permitted in the United Arab Emirates

The UAE is made up of seven Emirates with local courts that are often referred to as ‘onshore’ courts. As the onshore UAE legal system is based on civil law, it has not inherited many of the historical impediments to TPF (notably champerty and maintenance) faced by common law jurisdictions. In addition, the UAE has a number of commercial ‘free zones’ where companies can set up and do business under the rules of the particular free zone (‘offshore’ UAE). Two of these free zones, the Dubai International Financial Centre (the “DIFC”) and the Abu Dhabi Global Market (the “ADGM”), have their own independent legal systems and courts.⁴⁴ The amount of regulation for TPF across these jurisdictions differs.

Parties doing business in the UAE have the option to agree that disputes will be resolved by arbitration. Parties can choose between having the arbitration seated onshore in UAE, in the DIFC or in the ADGM. In the case of an onshore seat the arbitration will be governed by the UAE Federal Arbitration Law (Law No. (6) of 2018). Arbitration seated in the DIFC will be subject to the DIFC Arbitration Law (DIFC Law No. 1 of 2008) while arbitration in the ADGM is governed by the ADGM Arbitration Regulations 2015.

There are no rules or laws that expressly prohibit TPF in onshore UAE but the question of whether it is permitted under UAE law is yet to be definitively tested in the UAE courts. Some commentators have argued that TPF promotes access to justice and is therefore aligned and consistent with principles of Sharia law. The position that TPF is permitted in the UAE is also supported (at least by implication) by DIAC releasing draft arbitral rules in 2018 which make reference to funding in the context of apportioning costs (although these rules are yet to be implemented) as well as the DIFC and ADGM taking steps to regulate the use of TPF.

TPF in proceedings before the DIFC courts is permitted. In March 2017, the DIFC courts issued a Practice Direction⁴⁵ on TPF which clarifies the requirements that funded parties must observe in the DIFC courts, and how they should interact with funders in legal proceedings. The Practice Direction requires funded parties to disclose the existence of a funding arrangement and identity of the funder without necessarily divulging confidential terms (unless ordered to by the court). While the DIFC Arbitration Law is silent regarding TPF in DIFC seated arbitrations, the fact that it is permitted before the DIFC courts suggests by implication that it would be permitted in arbitration.

TPF in the ADGM, whether in relation to court or other proceedings (eg. arbitration) appears to be permitted by operation of Article 225 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (ADGM Courts Regulations), unless the matter relates to proceedings that cannot be the subject of an enforceable conditional fee agreement, or to any proceedings specifically prescribed by the Chief Justice and provided other criteria are met.

The UAE Arbitration Law is based on the UNCITRAL Model Law and does not include any prohibition on the use of TPF in arbitrations such that, as with litigation, there is no express prohibition on TPF and its use in arbitrations in the UAE has increased over the last few years and continues to do so.

TPF fee arrangements

The lack of specific TPF regulation means there is uncertainty surrounding the permissibility of TPF onshore in the UAE. Lawyers recommending TPF or advising clients in relation to TPF should consider whether such arrangements are in accordance with their professional obligations (e.g. whether funding is in the best interest of the client, potential conflicts of interest etc). There may also be other relevant considerations, for example, whether a potential funder is appropriately licensed to provide funding.

The DIFC courts have issued a mandatory code of conduct for legal practitioners registered with the DIFC Courts that regulates TPF in DIFC court proceedings.⁴⁶ However, there is no equivalent for arbitrations seated in the DIFC.⁴⁷ In broad terms, DIFC lawyers must advise their clients on the effect of the funding agreement and only recommend the use of TPF when it is in the client’s best interests.⁴⁸ TPF arrangements in the ADGM free zone are highly regulated.⁴⁹ They are also prescriptive as to who can provide funding⁵⁰ and impose various obligations on funders.⁵¹ Notably, the ADGM Regulations apply to any proceedings including arbitration.⁵²

⁴⁴ The DIFC and the ADGM also have their own common-law based laws. The DIFC’s laws are modeled closely on the principles of English common law. English common law is directly applicable in the ADGM, as are certain United Kingdom statutes.
⁴⁵ Practice Direction No. 2 of 2017. Available at: https://www.difccourts.ae/2017/03/14/practice-direction-no-2-2017-third-party-funding-difc-courts/
⁴⁶ Order No. 4 of 2019.
⁴⁷ DIFC law does permit the laws of England and Wales to supplement its laws in some circumstances and it may be the case that in the absence of DIFC law regulating TPF, that the laws of England and Wales relating to TPF have some force.
⁴⁸ Any breach of the Order can be referred to the DIFC Courts Registrar for investigation and further action, including penalties on individual Practitioners and/or their respective firms.
⁴⁹ See, e.g., the ADGM Courts Regulations and the ADGM ‘Litigation Funding Rules’ 2019 which supplement the Regulations.
⁵⁰ A funder’s principal business must be funding proceedings to which they are not a party. They must have also qualifying assets of not less than USD 5 million (or equivalent). A funder must also be independent of the client and its legal counsel.
⁵¹ For example, funders are to ensure the funded party has received independent legal advice in relation to the funding agreement and its terms prior to execution and must ensure the funding agreement is in writing.
⁵² ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, Art. 225(8).
In addition to the regulations in the DIFC and ADGM in regards to TPF fee arrangements, it is worth noting that the UAE takes a strong position on contingency / conditional fee arrangements. Both the UAE and DIFC prohibit contingency or damage-based arrangements between lawyers and clients namely, where the lawyer takes a share in the proceeds of the outcome of litigation or arbitration proceedings. However, this prohibition does not extend to agreements between a funded party and the funder. Conditional fee arrangements (“CFAs”), where a lawyer receives an uplift in fees in the event of success but not a share in the proceeds, are permitted provided the success fee is clearly quantified. CFAs and damages-based agreements between clients and lawyers, whether relating to court or arbitral proceedings, are permitted in the ADGM provided they comply with the requirements in sections 222 to 224 of the ADGM Court Regulations.

**TPF features**

In terms of recovery of TPF funding costs in UAE seated arbitrations, the UAE Arbitration Law only provides for recovery of the fees and expenses of the tribunal and any tribunal appointed experts. The ability for a party to recover funding costs in arbitrations seated in onshore UAE is therefore likely to turn on the arbitration agreement, any separate ad hoc agreement between the parties and the agreed institutional rules. The DIFC Arbitration Law allows tribunals greater discretion in the award of costs but is otherwise silent on whether funding costs are recoverable. While there may be some scope to argue that funding costs fall within the tribunal’s jurisdiction in regards to costs, there is no definitive decision on this issue. For ADGM seated arbitrations, the ADGM Regulations (Art. 225(8) & (10)) appear to permit tribunals to take account of funding costs when making cost awards.

It is unlikely that a funder in arbitration proceedings would be held liable for adverse costs as an arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement, although consideration would need to be had to the arbitration agreement, any separate ad hoc agreement between the parties and the agreed institutional rules.

While there is no concept of legal professional privilege or litigation privilege in the UAE, legal professionals are subject to obligations of confidentiality. Communications and agreements with third parties (including funders), which are likely to include sensitive information and which may be a target for disclosure requests, should be protected through confidentiality agreements.

**Jed Savager, Partner (Dubai)**

**Angus Frean, Senior Associate (Dubai)**

---

53 Law No. 6 of 2018, the Arbitration Law, Article 46(1).
54 The approach in other jurisdictions of taking out insurance to cover legal costs including adverse cost orders (e.g. “After the Event” or “Before the Event” Insurance) is not common in the UAE and is not widely available in the insurance market.
55 DIFC Law No. 1 of 2008, DIFC Arbitration Law, Article 38(5).
TPF is permitted in Switzerland

In Switzerland, it is recognized that TPF plays an important role in increasing access to arbitration for some parties. In a landmark decision of 2004, the Swiss Federal Supreme Court held that TPF is permissible under Swiss law and protected by the principle of freedom of commerce guaranteed by the Swiss Constitution.⁵⁷

Attorneys practicing in Switzerland are obliged, depending on the specific circumstances, to make their clients aware of the possibility of TPF and to advise them regarding the conclusion of the TPF agreement.⁵⁸

There is no specific legislation in Switzerland regarding TPF in arbitration. However, existing provisions in various parts of Swiss legislation protect attorneys and their clients when it comes to TPF. For example, in view of their professional duty to avoid conflict of interests, attorneys are not allowed to advise and represent their client and at the same time be in a relationship with the funder so that they have an own interest in the funding.⁵⁹

A TPF agreement between the funder and the client usually provides for certain control and participation rights of the funder regarding the case strategy and management, thereby influencing the attorney-client relationship. In principle, such control and participation rights of the funders are permissible.⁶⁰ However, in the event of a conflict of interest between the funder and the client, the attorneys owe their professional and fiduciary duties to the client.

No disclosure obligation in Switzerland

There is no obligation or best practice in Switzerland that parties must disclose being funded in a Swiss-based arbitration. However, some authors argue that such an obligation exists under specific circumstances.

The IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, provide that any legal or physical person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party. Consequently, a conflict of interests may arise, for example, in a scenario in which an arbitrator in Case A is serving as counsel to claimant in Case B that is financed by the same funder as claimant in Case A. Such a scenario might require the disclosure of the TPF in order to exclude possible negative consequences on the arbitration or the enforcement of the arbitral award.

Furthermore, claimants, of course, are free to disclose the TPF to strengthen their negotiating power.

Roger Büchi
Attorney at Law, LL.M.
Blum&Grob Attorneys at Law Ltd, Zürich

---

⁵⁸ Decision of the Swiss Federal Supreme Court 2C_814/2014 of 22 January 2015, para. 4.3.1.
⁵⁹ Decision of the Swiss Federal Supreme Court 2C_814/2014 of 22 January 2015, para. 4.3.1.
Jason specialises in international arbitration, litigation and strategic project advice in the energy, infrastructure and manufacturing sectors. Over the last 25 years, he has represented clients on major projects around the world including LNG facilities, FPSOs, offshore process platforms, drilling rigs, refineries, gas turbine and coal fire power stations, waste-to-energy plants, pipelines and tunnels.

Jason has acted as counsel and advocate on international arbitrations under the ICC, LCIA, UNCITRAL and SCC Rules and on ad-hoc arbitrations and has advised on a wide array of disputes, ranging in value from $50m to over $1bn, in both common law and civil law jurisdictions.

Dr Dean Lewis
Partner, Co-head of International Arbitration (Hong Kong)
Risk Advisory Services

Dean is a leading arbitration and mediation specialist representing parties in disputes arising out of major infrastructure and energy projects across Asia Pacific and the Middle East. For more than 35 years, he has appeared as lead advocate or party representative in ad-hoc arbitrations and under the rules of the ICC, UNCITRAL, HKIAC, SIAC, AIAC and LCIA with many clients amongst the largest contractors globally. Dean also accepts arbitral appointments and is currently Presiding Arbitrator in a Middle East energy project arbitration under the HKIAC Rules.
Our global arbitration team

Frédéric Gillion
Partner
Paris/Singapore
+65 6305 8484
+65 8128 6574 / +33 6 16 41 63 22
frederic.gillion@pinsentmasons.com

Sofia Martinez Parra
Partner
Madrid
+34 910 484 030
+34 910 484 030
sofia.martinezparra@pinsentmasons.com

Sibylle Schumacher
Partner
Munich
+49 89 203043 541
+49 172 898 27 88
sibylle.schumacher@pinsentmasons.com

Mark Raymont
Partner
Dubai
+971 4 373 9630
+971 50 652 3708
mark.raymont@pinsentmasons.com

Junaid Banoobhai
Partner
Johannesburg
+27 10 493 4604
+27 83 270 1117
junaid.banoobhai@pinsentmasons.com

Pamela McDonald
Senior Associate
Doha
+974 442 69222
+974 5030 3480
pamela.mcdonald@pinsentmasons.com

Mohan Pillay
Partner
Singapore
+65 6305 0901
+65 8869 3482
mohan.pillay@pinsentmasons.com

Nicholas Brown
Partner
Singapore
+65 6305 0908
+65 8798 0986
nicholas.brown@pinsentmasons.com

Sam Boyling
Partner
Beijing and Shanghai
+65 6309 5671
+65 8798 1081
sam.boyling@pinsentmasons.com

Helena Chen
Partner
Beijing and Shanghai
+86 10 8519 0098
+86 13 8100 55060
helena.chen@pinsentmasons.com

Adrienne Parker
Head of Perth
Perth
+61 8 6500 2302
+61 422 125 222
adrienne.parker@pinsentmasons.com

Matt Croagh
Head of Australia
Sydney and Melbourne
+61 3 9909 2558
+61 414 798 194
matt.croagh@pinsentmasons.com

Katharine Davies
Partner
London
+44 207 054 2629
+44 7901 688 118
katharine.davies@pinsentmasons.com

Vincent Connor
Partner
Hong Kong
+852 2294 3490
+852 9186 7221
vincent.connor@pinsentmasons.com

Mark Roe
PM lead on TPF
Partner
London
+44 20 7490 6212
+44 7770 740 487
mark.roe@pinsentmasons.com

For further details about our international arbitration practice please visit here.
About Pinsent Masons

A true sector focus: going beyond purely legal guidance

Pinsent Masons is a full-service international law firm. We respond to the pressures and opportunities facing businesses globally with legal excellence and innovation.

With office locations on four continents, wherever your commercial interests take you, we have the footprint and expertise to provide support. We recognise that giving a first class service goes beyond just legal excellence. A deep understanding of local cultural and commercial issues, and an innovative approach, underpins all of our advice. We understand the key political, economic, commercial and regulatory issues, helping to minimise risk and maximise opportunities.

We have market-leading expertise in five key global sectors:

- Technology, Science & Industry
- Energy
- Financial Services
- Infrastructure
- Real Estate

We provide a strong local presence with an excellent understanding of the local market, backed up by our innovative technologies and global resources.

Recognised Legal Innovators
For us, innovation is about more than finding ways to make an old model fit a new world. Innovation is about fundamentally changing how high quality legal advice is formulated and excellent service is delivered. We partner with our clients to lead through innovation, rather than be disrupted by it.

This firm excels in every area and is one of the most innovative in the industry

As one judge noted in the 2018 Lawyers Awards

---

Pinsent Masons | Jurisdiction Guide to Third Party Funding in International Arbitration
A diverse and international team

Ideally placed to advise you wherever you are based, and wherever your projects or commercial business may take you

With some 200 dedicated arbitration practitioners based in London, Paris, Singapore, Hong Kong, Dubai, Doha, Johannesburg, as well as Mainland China and Australia, our arbitration expertise has a truly global footprint. We represent clients on commercial and investment treaty arbitrations all over the world involving different procedural and substantive laws, issues of public and international law, enforcement and treaty rights.

Our lawyers have acted in arbitrations involving parties in more than 80 countries, across 6 continents. Many of them are multilingual and are qualified in more than one jurisdiction. We also maintain strong connections with, and regularly work together with, local counsel and intermediaries. There are few firms that can match our footprint for international arbitration expertise.

Our lawyers frequently act as advocates (some are QC advocates) and they also sit as arbitrators.

We have a strong in house forensic accountancy team that provides specialist support to our clients involved in international arbitration.

*Pinsent Masons is head and shoulders above their competition when it comes to high stakes, international construction arbitration.*

"Taken from GAR directory"