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Jun 15, 2020

Dispute Finance 101: What is Litigation Funding and How Can Strategic Clients Use It?

Dispute finance is a form of specialized funding where an entity with no prior interest in a legal dispute provides financial support to a party to that dispute. The funding is non-recourse; the funder receives its return only from the successful outcome of the case.

Litigation finance has become increasingly sophisticated in recent years, and is now used by commercial actors in litigation and arbitration for a wide variety of reasons. This article sets out what type of funding is available, why dispute finance is used, and key considerations for clients and counsel exploring this option. The next article in this series will set out the evolving jurisprudence on funding.

What Type of Funding is Available?

Dispute funding can cover any of the expenses associated with litigation. Funding arrangements are bespoke, and tailored to each client's needs and risk appetite, but they typically cover:

- **Legal fees:** Funding can cover all or a portion of the legal fees, usually the most significant expense in litigation. Lawyers issue their bills to the client, who approves the fees, and the funder pays on behalf of the client. This allows the client to retain top counsel of his or her choice.
- **Experts and other disbursements:** Funders can pay for all the out-of-pocket expenses of litigation, including expert reports, arbitration fees, travel and other costs.
- **Adverse costs protection:** In the "loser pays" court system, the unsuccessful party is required to pay a portion of the successful party's fees and expenses. A funder can indemnify the client against those costs awards.
- **Working capital:** Most financiers will not advance capital secured against litigation, but where the case size justifies it, sophisticated litigation funders can. Clients can use their litigation as collateral for a cash infusion, either to keep the business operating during the dispute or for development and expansion.
- **Enforcement:** Clients may have obtained favourable

judgments that have not been paid, often because the defendant's assets are in a foreign jurisdiction or the defendant has absconded. Litigation funders with enforcement expertise can turn these paper judgments into cash.

Why Do Clients Use Dispute Finance?

Dispute finance is a cost and risk management tool. Where a litigant does not have the resources to match a better-funded opponent, it levels the playing field. Where a client does have resources, it allows the client to share litigation risk with the funder and use those resources for its core business and use the funder's capital for the litigation. In this regard, dispute finance is a form of project finance – litigation can be a long, expensive project, so it's prudent to partner with a funder who is specialized in the area and whose investment is non-recourse if the project is ultimately unsuccessful.

Other common reasons include:

- **Monetizing an asset:** Where clients have to choose between using their resources for the litigation or for another business purpose, they may abandon the litigation. Litigation can be a pillar of liquidity, so funding ensures that the client does not leave an asset on the table.
- **Expert review:** Professional litigation funders are experts at assessing litigation. Their review can inform strategy and assist management in deciding whether or not to proceed.
- **Signal to the defendants:** As funders assess cases carefully before funding them, their decision to invest in a matter can send a strong signal about the strength of the claim to the other side. It discourages "scorched earth" defense tactics, as the defendants know there is sufficient funding to bring the matter to a meritorious conclusion, and can lead to earlier settlements.
- **"Rebalancing" the balance sheet:** Under generally accepted accounting principles, litigation expenses are recorded when incurred but no corresponding asset is recognized until the litigation is resolved. Even if the company wins, the recovery is recorded as a non-recurring event "below the line." By partnering with a funder, a company removes the litigation expense from its balance sheet, improving its EBITDA, and ameliorating the financial consequences of bringing meritorious suits.
- **Protecting the company's position:** Because of

concerns about cost, a company may allow meritorious claims to fall by the wayside or accept a low settlement. Litigation finance allows a company to realize the full, merits-based potential of the claim and demonstrates to the marketplace that it will protect its rights, thereby deterring potential wrongdoers and competitors.

Key Considerations

When exploring litigation funding, clients and counsel will want to consider the following:

- **Return structure:** What is the cost of the litigation funding, and is it fair in light of the risk that is being transferred to the funder? Does the return structure align the incentives of the client, counsel and funder?
- **Capital adequacy:** Does the funder have sufficient capital to meet its commitment to finance the matter to its conclusion and to pay any costs awards?
- **Expertise:** Does the funder have the legal expertise to assess the claim and provide strategic advice where appropriate? Does the funder appreciate the nuances of the jurisdiction and the legal issues at play?
- **Responsiveness:** Is the funder available to discuss case developments, and a partner during the unforeseeable twists and turns inherent in all litigation?

Counsel and clients are increasingly considering dispute finance as a strategic option, and exploring how it might help them advance meritorious claims.

About the Author

Thanks to Naomi Loewith of Omni Bridgeway for this article. Omni Bridgeway is a global leader in dispute resolution finance, with expertise in civil and common law legal and recovery systems. It is a publicly traded funder (ASX: OBL) and has funded disputes and enforcement proceedings around the world since 1986. To learn more about dispute finance, contact Naomi at nloewith@omnibridgeway.com or visit www.omnibridgeway.com.