

Litigation funding—an introduction

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What is litigation funding?

Dispute resolution funding is a simple financing arrangement whereby the funder agrees to pay the client's legal fees in bringing a claim (usually including experts, outside counsel and disbursements) in accordance with an agreed budget. While it is commonly referred to as litigation funding, such funding is now also widely used in arbitration—both in the context of commercial arbitration and public international law.

The key issue for clients is that the investment made by the funder is non-recourse. The impact of litigation funding depends on whether the claim (whether litigation or arbitration) is successful or not:

- unsuccessful—the client will not have to pay anything and the dispute resolution funder loses all the money it has invested in the case
- successful—the funder will be entitled to a return on its investment from the damages that are ultimately recovered by the claimant, see Stage 4—terms agreed including period of exclusivity

Why use litigation funding?

This will depend on the financial position of the claimant:

- impecunious claimants—the answer is obvious: funding enables claimants who would otherwise not have been in a position to bring their meritorious claim to do so and/or enables them to instruct counsel they may otherwise not have had the resources to instruct
- well-capitalised claimants—funding, among other things, enables them to de-risk the claim (either entirely or partially), aids cash-flow and means that bringing the claim will not have any impact on the claimant's balance sheet or its EBITDA position (earnings before interest, taxes, depreciation and amortization). For well capitalised claimants, whether or not to use funding is a commercial decision and one that often makes commercial sense

Assessment of the claim

When considering whether to fund a claim, funders will not only assess the merits of the claim from a liability perspective but will also consider a number of other factors including (inter alia):

- quantum and anticipated costs (proposed budget for the claim)
- chances of success
- enforcement risk including factors such as status and domicile of the defendant
- applicable law and jurisdiction

For more detailed information, see Checklist: What funders look for—checklist.

The funder will expect to see detailed documentation, often including a legal opinion from the instructing solicitor or counsel, addressing each of these factors and any other points relevant to the claim being considered.

A detailed assessment of each of the different relevant factors will determine whether a funder is prepared to invest in a particular claim and the terms that they may offer in respect of it. It is important to remember that each funder has different investment criteria and one funder may place more reliance on one particular factor than another.

Terms

The funding terms agreed between the funder and the claimant will vary significantly between cases. However, in the normal course, the return the funder requires is likely to be based on either:

- a multiple of the costs they have invested in the case, or
- a percentage of the damages recovered by the claimant, or
- a combination of both

The exact terms of the funding arrangement agreed between the parties will be reflected in a funding agreement to be entered into between the client, the client's lawyers and the funder.

It is difficult to say with any specificity what the funding terms of a particular case may be because there are so many different factors that individual funders consider and place reliance upon. Key for most funders when offering terms is the difference between the funding sought and the total quantum of the claim. Although the ratios can vary significantly across the market, by way of example, Vannin Capital works on a 1:10 funded costs to quantum ratio, meaning that the budget for the claim must be a maximum of 10% of the total anticipated damages recovery (ie if the claim value is £10m the funder will fund costs up to a maximum of £1m).

Stating the obvious, the greater the difference between the funding sought (ie the investment being made by the funder) and the quantum of the claim, the better the terms are likely to be.

Other key considerations—Association of Litigation Funders

Although there are an increasing number of players in the market, the majority of the large, professional funders established in the UK are members of Association of Litigation Funders (ALF). ALF is an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales.

By working with a member of ALF, parties accessing litigation funding are assured that they will find an organisation that meets the high quality standards that should define the funding industry. ALF's code of conduct provides standards by which all its members must abide. It sets the standards for the capital adequacy of funders, sets out the specific, limited circumstances in which funders may be permitted to withdraw from a case, and outlines the way in which the roles of funders, litigants and their lawyers should be kept separate. The Code of Conduct is available on the Association of Litigation Funders website, see: Association of Litigation Funders website—Code of conduct.

The ALF also maintains robust and efficient complaints handling procedures.

Information on ALF can be accessed via Association of Litigation Funders website.

Other key considerations—insurance

As a general rule, when funding litigation in the UK (the position is different when funding arbitration or funding claims in other jurisdictions because there isn't the same costs shifting provisions) a litigation funder will require the claimant to obtain after the event (ATE) insurance to insure against any adverse costs risk if the claim loses and a costs award is made against the claimant.

How this is structured can vary significantly between funders as follows:

- funders provide ATE insurance to the claimant themselves
- the funder has ATE portfolio policies provided by an independent insurer, so ATE insurance does not need to be sourced from the market for every individual case, like Vannin Capital
- funders require claimants to obtain standalone ATE policies for their particular case

When considering the cost of funding it is always important to ask whether ATE insurance will be required; whether the ATE insurance can be provided by the funder and, if so, at what cost.

For more information on ATE Insurance, see Practice Note: Costs insurance.

Other key considerations—control and strategy

A concern that is often raised in connection with litigation funding is the level of control a funder will seek to exert over a case and the litigation strategy being pursued in connection with it once a case is funded.

As a general rule, this concern is misconceived. This is for two reasons:

- the equitable doctrines of maintenance and champerty prevent a funder stepping into the shoes of a claimant to exert control or decide the strategic direction of a case
- most of the primary players in the funding market are members of the ALF. The rules of ALF expressly state that a funder will 'not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder'



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