Alternative funding methods for corporate litigation

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Dispute Resolution analysis: As litigation funder Burford Capital signs a $45m deal to provide third party funding for the BT Group, Rosemary Ioannou, senior counsel at Vannin Capital, explains the attraction of this alternative method of funding for large corporates.

What is the attraction of third party litigation funding for corporates?

Historically, dispute resolution was regarded as the preserve of impecunious claimants. The appeal of funding to impecunious claimants is obvious—it enables them to bring meritorious claims which they otherwise would not have the resources to pursue.

However, the third party funding market has matured. As it has, it has become clear that companies of all sizes have an appetite for financial alternatives to paying standard legal fees and eliminating any cost risk or exposure for themselves.

In recent years, we have seen an exponential increase in well-capitalised organisations, including large corporates, using funding to eliminate the cost risks of bringing claims. Dispute resolution funding is a non-recourse investment. This means that if the funder invests in the claim but there is no damages recovery, the funder loses all of the money it has invested and the claimant pays nothing. For many corporates—where the cost of litigation is often one of the deciding factors as to whether to pursue a meritorious claim—this is very attractive.

By using dispute resolution funding, corporates are taking the cost of bringing claims off their balance sheet. There is no impact on profit and loss accounts or on a company's earnings before interest, tax, depreciation and amortisation. Funding means that increasingly squeezed legal budgets are not spent on litigation, but companies can still recover, for their own benefit, the vast majority of damages received.

How is the relationship between corporate and funder structured?

Fundamentally, the relationship between a corporate and funder is the same as in any third party funding arrangement—the funder is providing non-recourse financing to the claimant.

However, how this is structured varies on a case-by-case basis and very much depends upon whether the corporate is seeking funding for a one-off case, portfolio funding of a number of related cases or, indeed, off-balance sheet funding for all of the litigation it may be pursuing over a defined period of time.

In a third party funding scenario, what large corporates involved in a large number of disputes at any one time benefit from is the ability to have a non-recourse facility cross-collateralised against a portfolio of cases.

Whatever the situation, third party funders will work with the applicable corporate to ensure the funding structure being deployed is appropriate for that organisation bearing in mind (inter alia) the volume and value of the disputes, the costs of bringing them and the expected time frame to resolution.

How do the litigation funders make their money?

The basic model of dispute resolution funding is simple—the funder pays for the costs of the dispute. If the claim is successful, ie the claimant makes a damages recovery, the funder will be paid a return out of the damages that are recovered by the claimant. In the normal course, this is generally structured as either a percentage of the damages recovered or a multiple of the money invested by the funder.

In a portfolio funding scenario, this straightforward model is often developed to reflect the more complex nature of the funding being deployed. However, at its heart, whatever complexities are added to the basic model of funding, it will remain a non-recourse investment, removing cost risks for claimants pursuing meritorious claims, in circumstances where the funder will only make a return on its investment if, ultimately, the claimant makes a damages recovery.

What are the risks associated with third-party funding?

Provided they are working with well-established, professional funders, such as Vannin Capital and the other members of the Association of Litigation Funders who all adhere to a strict code of conduct, the risks of third party funding for claimants are very low.

What does 2016 hold for litigation funding in the UK?

The exponential rise in the use of dispute resolution funding that we have seen in recent years will continue. Knowledge of funding among private practice lawyers has been increasing steadily. However, many in-house lawyers are now also very much alive to the benefits of funding and many, as a matter of course, are approaching funders directly, before they have even instructed external counsel.

Dispute resolution funding has been considered 'mainstream' among more forward-thinking lawyers and their clients for some time. I predict that 2016 will see funding becoming 'the norm' among the whole of the dispute resolution community.

Interviewed by Duncan Wood.

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