Dispute Financing
Unlocking value and sharing risk

6 October 2020

Presentation Overview

- Types of Third-Party Funding
- Institutional Third-Party Funding
- The Funding Agreement
- Questions

Poll

Types of Third-Party Funding

- Traditional Examples
  - Contingency fee arrangements
  - Financial institution loans
  - Corporate financing

- Insurance
  - BTE
  - ATE
  - Political risk

- Institutional Third-Party Funding (TPF)
  - An arrangement between a company that specializes in the business of financing disputes and an entity (usually a plaintiff/claimant), where the funder provides financing to that entity that is secured against the dispute

Institutional Third-Party Funding

What this looks like

- Disputes are looked at as investment by the funder
- Standard one-off / single case funding
- Portfolio funding across more than one dispute
  - If obtained by a client directly, funding can then apply to several ongoing disputes
  - If obtained by a law firm, funding can then apply across several matters that firm is handling for different clients

Single case funding

Funder

May or may not cover adverse cost orders

Invests a % or set amount of **legal fees**, a % or set amount of **disbursements**, and/or any **working capital**

Receives back its investment
+
[% of award / other metric]

Disputing Party

Receives funding / working capital

[% of award / other metric]

Usually but not always on a type of contingency or % fee reduction [receives a % throughout via client/funder]

If successful, receives back its % reduction
+
[% of award / other metric]

External Disputes Counsel

Institutional Third-Party Funding

Changing views

- "Such a business plan […] is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose. The founders of the Convention could not have foreseen in any way the emergence of a new industry of mercantile adventurers as professional BIT claims funders."

RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Assenting Opinion of Gavan Griffith (13 August 2014)

- "The propriety of third party funding agreements is controversial and problematic, and, in my opinion, at a minimum, they should not be allowed to operate clandestinely. […] There is a legitimate concern that if not regulated, third party funding might subvert the public policy purposes of class proceedings."

Fehr v Sun Life Assurance Company of Canada, 2012 ONSC 2715

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Institutional Third-Party Funding

Changing views

- "In its modern incarnation, dispute funding has the ability to transform a legal claim into a financial asset, which can potentially be monetized or used as collateral in order to secure finance. At present, dispute funding is moving more into the realm of corporate finance, with increasingly diverse and sophisticated options becoming available."

ICCA-QMUL Task Force Report on Third-Party Funding (April 2018) 4

- "[Third-party funding] is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds itself for objection."

Giovanni Alemanni and Others v Argentine Republic, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014)

Institutional Third-Party Funding

Why?

- Litigate with firm of choice at no (or lower) cost
- Free up capital
- Protect from risks and liabilities
- Simplify balance sheet
- Provide cost certainty

Institutional Third-Party Funding

Creative Solutions

- Company A is entering into a plan of arrangement under which it will be purchased by Company B
- Company A has been pursuing a fairly substantial claim in ongoing litigation. The litigation is still winding its way through the courts at the time of the arrangement
- Company A creates a "litigation trust"

Institutional Third-Party Funding

Creative Solutions

- Under the arrangement:
  - the shareholders in Company A receive their designated consideration and a right to pro-rata proceeds from the litigation;
  - the litigation and any proceeds therefrom are assigned to the litigation trustee;
- Following the close of the arrangement, the litigation trust sells all of its issued and outstanding shares to the institutional funder. The proceeds from that sale are then distributed to the shareholders of Company A, monetizing the still ongoing litigation for its former shareholders, and Company B does not acquire the dispute.

Institutional Third-Party Funding

What about Champerty and Maintenance?

- “Where the financing comes from for the purpose of pursuing a lawsuit is of no concern to the Court and does not create an abuse of process. … A Court should not be concerned with how an action is funded. That is not for the courts to know and in my judgment cannot be considered an abuse of process”

Jacobi v Newell No. 4 (County), [1992] AJ No 1087, para 19

- “Champerty and maintenance are actionable torts. Maintenance involves providing financial support to another to bring an action. Champerty involves not only providing financial support, but also sharing in the fruits of an action if damages are awarded.”

Stewart Estate v TAQA North Ltd, 2015 ABCA 357 at para 470

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The Funding Agreement
Mechanics

- Returns
- Control, Termination and Settlement
- Conflicts of Interest
- Privilege and Confidentiality
- Disclosure of Funding Agreements

The Funding Agreement
Negotiation

- Choosing a Funder
- Use of a Funding Broker
- Early Process and Due Diligence
- Negotiating the Funding Agreement
  - Long form agreement
  - ILA

The Funding Agreement
Additional Considerations

- Nature of the Dispute
- Applicable Rules, Guidelines
- Conflicts of Interest
- Disclosure
- Enforcement

Thank You

Rachel Howie
Partner, Calgary
+1 403 268 6353
rachel.howie@dentons.com

Gord Tarnowsky, Q.C.
Partner, Calgary
+1 403 268 3024
gord.tarnowsky@dentons.com