WOODSFORD
LITIGATION FUNDING

Global trends in litigation funding.

Woodsford Litigation Funding Insight.

Founder Member of the
Association of Litigation Funders

www.woodsfordlitigationfunding.com

Executive summary.

In recent years, a growing number of claimants have begun to use litigation funding to finance their legal disputes. For many organisations, such is the complexity and resource intensity of bringing a large-scale claim, litigation finance is the only viable method by which they can obtain access to justice. Even if their claim has merit, often no other source of funding is appropriate or available. Furthermore, large corporates with relatively deep pockets are increasingly seeing the risk-sharing and accounting advantages of third-party litigation funding.

Globally, there are three wider market drivers behind the growth of litigation funding – which also includes arbitration funding. Firstly, and most importantly, litigation funding is becoming accepted, understood and utilised in an ever-increasing number of jurisdictions. Secondly, as the litigation finance market has matured, it has begun to expand its investor base beyond its historical reliance on high net worth individuals.

Today, banks and hedge funds are increasingly willing to finance meritorious claims, because such claims now constitute a relatively less-risky asset class, uncorrelated to the capital markets and offering more determined positive returns. This, in turn, has enabled litigation funders to invest in an increasing number of disputes. Finally, litigation funders have begun to support a broader range of disputes than previously. Besides financing individual disputes, many ligation funders are now looking to invest in portfolios of similar claims. Increasingly, well-financed law firms and corporates are turning to litigation funding to manage risk and boost their balance sheet.

Nevertheless, inhibitions remain. Even now, the availability and take-up of litigation funding continues to vary from jurisdiction to jurisdiction. Additionally, litigation practitioners are not yet entirely familiar with the full range of funding options available to their clients – even in markets where third party financing is well-established. For both of these reasons, litigation funding has not yet reached its full potential, either globally or in specific markets.

The following whitepaper will explore the differences in litigation funding regimes, how global litigation funding markets are evolving and why there will be a shift towards greater risk sharing.

Understanding differences in litigation funding regimes.

1.

Before litigation funding can be used in any given dispute, it first must be permitted. Historically, in many common-law jurisdictions, litigation funding was effectively prohibited, because it fell foul of the feudal principles of champerty and maintenance. By contrast, in many civil law jurisdictions, no such prohibition has ever existed.

Markets that have seen the most dramatic growth in litigation finance in recent years – notably England and Wales – previously outlawed this funding option due to champerty and maintenance considerations. Often, it appears that the act of liberalising a previously restrictive regime can help spur the blossoming of an active litigation finance market.

In order for litigation funding to be used in any given jurisdiction, another key consideration is the willingness of local law firms to embrace financial risk-sharing in relation to their clients' disputes. Here, the contrasting legal cultures of US and France serve as a case in point. In the US, litigation funding is still regarded as a market with significant growth potential, largely due to the longstanding use of "no-win-no fee" agreements in litigation. By contrast, in France, which does not have a culture of permitting contingency fee arrangements, litigation funding has not yet made a meaningful impact in the local disputes market.

Even in jurisdictions that do allow – or are planning to allow – litigation funding, litigation practitioners cannot seek it for every kind of legal dispute. For example, in some jurisdictions, litigation funding can only be used in international arbitration proceedings, and not for disputes conducted through the domestic courts system.

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2. The evolution of litigation funding in established markets.

Historically, the three largest markets for commercial litigation funding have been Australia, UK and the US. However, each of these markets has evolved in a slightly different manner. In Australia, the litigation funding market evolved mainly to help claimants finance class action claims brought within the domestic courts system. By contrast, the market for litigation funding in the US and UK has tended to focus on high value cross-border arbitration disputes – typically worth between US$ 50 – US$ 100 million. It is probably no coincidence that high-value arbitration-driven litigation funding has proved particularly popular in these two markets, given that both London and New York have world-leading reputations in both arbitration and finance.

Funding can help transform corporate litigation teams from a cost centre to a profit centre.

Australia, the UK and US offer sharply different opportunities for future litigation finance growth. Although the Australian market is well-established, it is also small, with little potential for further expansion. By contrast, the UK market has considerable room for development. However, the UK market is also in danger of becoming saturated by an ever-increasing number of litigation funders – not all of whom are likely to survive.

More positively, the US market has ample room for expansion. Here, the main challenge for achieving greater take-up of litigation funding is likely to be cultural. In light of their long-standing willingness to act for clients on a no-win-no-fee basis, some litigation focused law firms currently regard themselves as being in competition with litigation funders. This is because the business model of both law firms and litigation funders is based on a willingness to share the risks and rewards of their clients' disputes. Ideally, litigation finance should be regarded as complementary to contingency fee based funding, rather than a source of competition with it.

For finance directors and corporate GCs, litigation is often too expensive and too unpredictable to make good accounting sense. A business with a litigation claim effectively holds a receivable, which is not considered a balance sheet asset under many accounting standards. Further, accounting rules require that litigation costs are expensed, flowing through the P&L, thereby reducing operating profits. Even when the claim is resolved successfully, the associated income is treated as a one-off item, rather than as operating income. All in all, litigation claims rarely assist companies in maximising profits and/or minimising expenses. However, by financing claims that would not normally be pursued, litigation funding can help transform corporate litigation teams from cost centres to profit centres.

Litigation funding in evolving markets.

3.

The main growth markets for litigation funding include those jurisdictions that see a significant amount of litigation and those that already have a leading reputation for international arbitration – essentially following the pattern established by New York and London. In the civil law world, Brazil and Argentina are two key growth markets. Beyond that, many of the opportunities for future growth in the civil law world are likely to occur on an ad hoc basis. Realistically, such growth will largely be driven by individuals who have become familiar with ligation funding, either as a result of local awareness-raising programmes, or in light of personal exposure to the business model.

In the common law world, both Singapore and Hong Kong are now in the process of overturning their long-standing prohibitions on the use of litigation finance. These territories can therefore be regarded as potential growth markets. Law reform bodies in these jurisdictions have recently concluded that existing restrictions threaten their markets' futures as leading centres for international dispute resolution. Just as importantly, they have also concluded that equivalent liberalisations undertaken in other jurisdictions have worked in clients' interests.

Neither Singapore nor Hong Kong have yet embarked upon a comprehensive liberalisation of their local litigation funding regimes, their reforms will initially only permit litigation funding for international arbitration. Later, assuming no problems are encountered, it is likely that further liberalisation will occur, which will then allow litigation funding to be used to support claims brought before the domestic Hong Kong and Singaporean courts. The gradual introduction of litigation financing will not hinder its success in Hong Kong and Singapore, for the main market for high value litigation finance in these geographies is for arbitration-driven disputes.

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Another jurisdiction likely to undergo liberalisation in the near future is Ireland. Like in Hong Kong and Singapore, the legality of litigation funding is currently in doubt in Ireland, due to its apparent conflict with the common law rules of champerty and maintenance. This issue is now pending before the Irish Supreme Court. However, even if the Supreme Court upholds the current prohibition, it is likely that the ban will ultimately be overturned by the Irish parliament. That said, because Dublin is not a major international arbitration centre, it is unlikely that Ireland will become a significant market for litigation finance.

4. Potential avenues for growth.

Globally, regulatory reform is helping to expand the market for litigation finance in specific geographies. But the market is also experiencing a growth through the diversification of its models.

The first growth market is in relation to portfolio funding. For clients, this type of arrangement can be advantageous, because the cost of arranging litigation funding can be lower than financing a series of individual disputes. Risk is reduced when capital is deployed across a number of cases and due diligence can be expedited for follow-on disputes of a similar nature.

The second key growth market is in relation to "mid-market" disputes – those cases which are noticeably smaller than the US$ 50 – US$ 100 million claims currently favoured by litigation funders. Today, even large enterprises often struggle to finance mid-sized claims from their own resources. It is likely that, in the future, ligation finance will play an increasing role in supporting meritorious claims worth between US$ 10 – US$ 50 million.

5. Why claimants are embracing litigation funding.

From its inception, one of the key benefits of litigation funding for claimants and their legal advisors has been the provision of access to justice. It relieved claimants of the need to fund ligation entirely out of cash flow and permitted them to use litigation funding to finance meritorious claims they would otherwise have been unable to pursue. This is particularly true in 'David v Goliath' cases where a smaller claimant takes on a bigger, 'more powerful' defendant. However, there are two additional major benefits of using litigation funding.

Firstly, as litigation funding is typically 'non-recourse', (meaning funders will lose their entire investment if a case they fund is unsuccessful) litigation funders will only fund claims they believe are likely to succeed. Therefore, professional funders will undertake their own independent and rigorous evaluation of every claim they are asked to fund. Should they refuse to fund a claim on the grounds of merit, claimants may wish to reconsider whether their claim is likely to succeed. Additionally, having a funder on board can often lead the defendant in a case to seek a settlement. Knowing that the claimant is well-resourced by a dispassionate third-party who has objectively

reviewed the merits of the case and is prepared to invest significant capital on a non-recourse basis can be a very powerful wake-up call.

Secondly, the use of litigation funding can be highly advantageous from the perspective of corporate accounting. Once litigation funding has been approved, the costs and contingent liabilities of pursuing a claim are effectively transferred to the third-party funder. At this point, the claimant can treat their dispute as a potential asset, rather than as a liability.

Helpfully, in light of the growing international acceptance of the concept, many more claimants, law firms and businesses around the world can now benefit from both the financial and advisory benefits offered by litigation funders. And, with the growing availability of funding for portfolio claims and mid-market disputes, the market for litigation funding looks likely to expand still further in the next few years.

The market may not yet be universally appreciated or understood, but the situation is clearly improving. Globally, the ever-expanding availability and sophistication of litigation funding is now playing a significant role in enabling corporates to effectively share and manage litigation risk, while still facilitating access to justice to impecunious claimants seeking to enforce their meritorious claims.

Points to consider for claimants when engaging a litigation funder

With usage of litigation funding increasing around the world, many more litigation funders are now entering the market. Before deciding to engage a particular provider, claimants and their legal advisors may find it helpful to consider the following issues:

1. Does the litigation funder have a track record of financing meritorious claims?

2. In jurisdictions where such bodies exist, does an independent regulator oversee the litigation funder? If not, why not?

3. Will the litigation funder finance your dispute from their own resources, or effectively act as a broker for finance obtained by third parties? If the funder is proposing to finance your matter from their own resources, can they demonstrate – and independently verify – that they have access to sufficient capital to take your dispute to its conclusion?

4. Who will assess the merits of your funding application? Do the funder's assessors have sufficient expertise to make an informed, and independent, judgment about the merits and value of your claim?

5. Does the litigation funder have the necessary policies and procedures in place, in order to securely process the confidential – and often privileged – information needed to conduct their evaluation of your claim's merits?

6. Does the litigation funder conduct itself in a professional manner? Does it respond promptly and helpfully to emails and telephone queries?

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About Woodsford Litigation Funding

Founded in 2010, Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford Litigation Funding is a founder member of the Association of Litigation Funders of England and Wales.

Woodsford's role in supporting claimants in David versus Goliath litigation was highlighted in a landmark ruling of the English High Court: Essar Oilfields Services Limited v Norscott Rig Management PVT Limited [2016] EWHC 2361 (Comm)

For further information, visit **www.woodsfordlitigationfunding.com** or email **Steven Savage** at **ssavage@woodsfordlf.com**

Further reading

'Getting The Deal Through - Litigation Funding 2017', edited by Woodsford Litigation Funding experts, Steven Friel and Jonathan Barnes. This is a global comparative survey of the law and practice of third-party litigation. The book includes jurisdiction-by-jurisdiction contributions from leading practitioners around the world, and covers key markets in Europe, The Americas and Asia. To download the book, visit:
http://woodsfordlitigationfunding.com/about-woodsford/downloads