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LITIGATION FUNDING



Funding for Insolvent Estates in Asia

Woodsford Litigation Funding Insight

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Access to Justice for Insolvent Estates

Third-party funding has long been recognised as a tool enabling access to justice for impecunious claimants which would otherwise be unable to afford the significant legal costs involved in pursuing large commercial claims.

An insolvent estate is the quintessential impecunious claimant – it may have good claims against deep-pocketed defendants, but due to a lack of resource those claims may not be pursued at all or they may be settled for significantly less than their true value. Legal claims are often the most valuable assets in an insolvent estate and it benefits both creditors and insolvency practitioners to unlock and realise that value.

In 2015, following his review of litigation costs in the UK, Lord Justice Jackson noted, specifically in relation to insolvency claims and addressing the need to maintain access to justice, that: *“In larger cases IPs will be able to take advantage of third party funding, which is a new arrival on the litigation scene”*. In fact, litigation funding had been available to IPs for many years prior to 2015, but even in 2018 it is still a relatively under-utilised tool in an IP’s armoury.

Litigation funders and insolvency practitioners can be, and are, a very happy marriage; one has access to numerous legal claims but limited funds and the other has funds to unlock and support those claims. Where third-party funding has been used by IPs to date, the outcome has been beneficial for the funders, the IPs – particularly in terms of fee generation – and the creditors alike.

Seeking funding for claims

Given that Insolvency Practitioners are duty-bound to act in the best interests of the creditors as a whole, and that it is often in the best interests of the creditors to pursue the estate's claims, it is likely an extension of that duty to explore and seek the most financially advantageous method of financing those claims.

Insolvency practitioners' first port of call when seeking funding for a legal claim is often the creditors of the estate itself. Clearly, creditors have a vested interest in recovering the amounts owed to them by the insolvent estate and that may involve attempting to realise any contingent assets that the estate may have, including any legal claims. However, while the creditors may be willing and able to provide funds to assist in pursuing a legal claim, they often lack the appetite for litigation risk (and particularly adverse costs risk over

which they have no control) and fear the possibility of 'throwing good money after bad'. There may also be the added complication for the insolvency practitioner of having to deal with a number of different creditors and all of their competing interests and requirements.

Seeking funding for claims from a professional third-party litigation funder simplifies the process considerably. Litigation funders have significant capital resources and appetite for litigation risk, are professional and experienced in bringing legal claims (if the correct funder is chosen) and can relieve creditors from the frequently onerous and time-consuming task of financially backing, and then monitoring, litigation. For the insolvency practitioner, it brings the added benefit of dealing with only one funder rather than a disparate group of creditors.



Funding for Insolvency Claims in Singapore

Third-party funding is not generally permitted for litigation in the Singapore courts, as it is prohibited by the doctrines of champerty and maintenance, which provide that any party without a legitimate interest in the action is prevented from assisting or supporting a party to that action in return for a share in any claim proceeds.

However, litigation funding for claims by insolvent estates has been effectively permitted in Singapore since the Singapore High Court's decision in *Re Vanguard Energy* [2015] SGHC 156. In *Re Vanguard*, the court held that the sale by a liquidator of a cause of action and the proceeds of such actions are permitted under the statutory insolvency regime (specifically section 272(2)(c) of the Singapore

Companies Act). More broadly, the High Court also stated (albeit obiter) that the assignment of a bare cause of action, or of "the fruits of such actions", might be permissible if: (a) it is incidental to a transfer of property; (b) the assignee has a legitimate interest in the outcome of the litigation; or (c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. Whether or not the administration of justice may suffer will be viewed in light of prevailing public policy at any given time, with particular regard to ensuring access to justice (for example, if a good claim might be stymied if permission is not given) as well as the respective interests of insolvent estates and their creditors.



Funding for Insolvency Claims in Hong Kong

As in Singapore, third-party funding is not generally permitted for litigation in the Hong Kong courts. The doctrines of champerty and maintenance are not only torts under Hong Kong law, but are also indictable offences at common law, punishable under section 101I of the Criminal Procedure Ordinance by imprisonment and a fine.

However, in the case of *Unruh v Seeberger* [2007] 10 HKCFAR 31, the Hong Kong Courts confirmed three exceptions to the prohibition on litigation funding, namely:

1. ‘common interest’ cases, involving third parties with a legitimate interest in the outcome of the litigation;
2. where ‘access to justice considerations’ apply; and
3. a miscellaneous category, including insolvency litigation.

Although the boundaries of these exceptions are likely to be subject to further debate, it is the third of these exceptions – i.e. insolvency claims – which is most commonly used in Hong Kong.

Subsequently, in *Re Cyberworks Audio Video Technology Ltd* [2010] 2 HKLRD 1137, the Hong Kong Court confirmed that a funding agreement which includes an assignment of a cause of action by a liquidator will be permitted. The liquidator’s right to assign causes of action is also conferred by section 199(2) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, which empowers liquidators, with the permission of the Court or the committee of inspection, to “sell the real and personal property and things in action of the company by public auction or private contract”. This includes assigning a cause of action.

Even where a claim falls outside the section 199(2)(a) exception to champerty and maintenance, the Hong Kong courts have been willing to facilitate litigation funding in the insolvency context, as long as there is a ‘legitimate commercial purpose’ (See for example, *Jeffrey L Berman v SPF CDO Ltd* [2011] 2 HKLRD 815; and *Re Po Yuen (To's) Machine Factory Ltd* [2012] 2 HKLRD 752).



Growth of litigation funding in Asia

Following the amendments to the law last year in Singapore and Hong Kong, permitting third-party funding in the context of arbitration, some of the more forward-looking, international litigation funders, including Woodsford, have opened offices in Asia, predominantly in Hong Kong or Singapore. While many of those will focus only on the new opportunities in international arbitration, Woodsford will also focus on claims by insolvent estates. IPs in Asia that have been thus far limited

to local sources of capital will now be able to access the international markets. However, while IPs might consider that the recent growth in litigation funding leaves them spoilt for choice, they would be well-advised to take funding only from reputable and experienced operators in the funding market, like Woodsford, not least because capital taken from the ‘wrong funder’ may be here today, but gone tomorrow.

Woodsford Litigation Funding

Woodsford is one of the longest standing litigation funders in the world and was one of the founder members of the Association of Litigation Funders, an independent body that has been charged by the UK Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England. We have liaised with law reform bodies around the world, including in Asia, on best practices. Woodsford has offices in Europe, the USA and Asia and is staffed with former lawyers, accountants and bankers who between them have extensive experience of a wide variety of litigation, arbitration and investments, and are well-placed to understand and assist with any claims that IPs might wish to pursue.

Woodsford can fund IPs on a case-by-case basis or, if an insolvent estate has a number of potential claims, Woodsford can fund some or all of them on a portfolio basis. In this way, Woodsford can facilitate the administration of an insolvent estate by covering not only the legal fees required to advance claims, but also any defence and administration costs and, importantly, the IPs’ fees. Woodsford’s funding is provided on a non-recourse basis and also covers the adverse costs risk so if the estate’s claim fails to result in a recovery, the creditors of the estate suffer no loss beyond the debts already owed to them by the estate. Woodsford’s funding effectively provides a no-risk solution.

Conclusion

Insolvency practitioners are duty-bound to act in the best interests of the creditors of the estate and it may be that those interests are best served by realising valuable legal claims which vest in the estate. Third-party funding will often be the key that allows those assets to be unlocked, realised and shared with creditors. If they haven't

already done so, insolvency practitioners would therefore be well-advised to familiarise themselves with litigation funding and the reputable professional litigation funders operating in the market. Woodsford stands ready and willing to assist insolvency practitioners in this regard.



About the author

Charlie Morris is an English-qualified senior lawyer with significant experience of handling high-value international litigation and arbitration, including both commercial and investor-state disputes. He heads up Woodsford's Asia Pacific practice and is responsible for assessing any opportunities arising out of the region.

Before joining Woodsford in March 2016, Charlie was a solicitor at London disputes boutique Enyo Law LLP, having qualified previously at international firm Addleshaw Goddard LLP.

About Woodsford Litigation Funding

Founded in 2010, with offices in London, Philadelphia and Singapore 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 **Charlie Morris** at cmorris@woodsfordlf.com