



Litigation Funding in Israel

Woodsford Litigation Funding Insight

The global growth of litigation funding

Until recently, litigation funding was largely confined to certain common law jurisdictions such as the United Kingdom, Australia and the United States, but in the last few years there has been rapid expansion in its use. This growth trend, though not entirely countercyclical, is largely uncorrelated to wider macroeconomic activity, and has led the litigation funding industry to develop from a niche product allowing access-to-justice for capital-constrained claimants, to a sophisticated risk hedging device attractive to even the most well-resourced businesses and a smart source of finance for entrepreneurial firms through a portfolio funding arrangement.

This growth trend has accelerated as the key actors in dispute resolution proceedings become familiar with litigation funding and its many advantages. Sophisticated claimants appreciate how funding can help them manage costs and offset legal risk; entrepreneurial lawyers recognize how third-party funding can help them expand their practice and offer clients flexibility on fees; and forward-thinking judges and arbitrators acknowledge the positive role that litigation funding plays in ‘unlocking’ meritorious claims and fostering access to justice.

Litigation funding is now increasingly being used in disputes in continental Europe, Latin America and Asia, in particular Israel. Having already funded a number of Israeli claimants, Woodsford is excited by the opportunities in the Israeli market and is looking forward to consolidating our position as the leading funder in the country.

What is litigation funding?

Litigation funding, also known as ‘litigation finance’ or ‘third party funding’, is simply an alternative means for a claimant to fund the costs of a legal dispute. A third-party funder, otherwise unconnected to the dispute, usually enters into an agreement with a prospective claimant or law firm to provide funds for the claimant’s legal costs, in return for a share of the award in the event that the claim is successful. The investment by the funder is typically non-recourse which means that if the claim is lost, the claimant is not liable to

reimburse the funder’s investment and owes the funder nothing. In essence, the third-party funder can shoulder the costs risk in a dispute rather than the claimant.

Litigation funding has developed from case-by-case funding for claimants who lack the resources or risk appetite to finance their claim themselves into portfolio financing for both well-resourced corporates and law firms. Litigation funders have capital to deploy into any contentious situation which, in time, may generate a return.

What are the advantages of litigation funding?

Aside from enabling a claimant to advance a claim which might otherwise be stymied due to lack of resource, or allowing a well-resourced company to hedge its legal costs risk, litigation funding can also have substantial strategic benefits that can significantly change the dynamics of a dispute in the claimant’s favor. A funded claimant will often be able to achieve a better settlement outcome more quickly than an unfunded claimant. This is principally because the defendant, upon becoming aware of the claimant’s funding, will appreciate that the common defendant tactic of depleting a claimant’s resources to stifle a claim would likely fail. A funded claimant is also less likely to feel any financial pressure to accept a ‘lowball’ settlement offer. Further, the support of a sophisticated professional funder, such as Woodsford, signals to a tribunal and the defendant that an objective third party with substantial expertise and experience in disputes, is willing to risk its own capital because of the merits of the underlying claim and the prospects of making a recovery.

Although the conduct and control of a funded claim rests firmly in the hands of



the claimant (and its lawyers), a litigation funder like Woodsford, which is staffed by expert litigators with decades of international law firm experience, can also be a valuable resource to the claimant team throughout the life of the claim. For example, Woodsford often assists the claimant’s legal team with key strategic decisions and, if required, can attend mediations or other settlement discussions, which often helps the claimant to demonstrate its financial strength and its stomach for what may become a lengthy dispute.

Litigation funding in Israel

Litigation Funding in Israel is relatively new, and has great potential for companies, individuals, law firms, venture capital funds, technology commercialization companies and private equity firms. The possibility of removing the risk and the costs of litigation from their balance sheet is appealing to sophisticated plaintiffs, whether they have liquidity or solvency issues or are financially robust companies that see litigation as an asset to be financed.

Israel has a thriving, sophisticated economy, but with a domestic market of only 8.5m people, it's unsurprising that many companies look abroad for growth. The Israeli eco-system is flooded with thousands of small or medium sized companies that often experience difficulties whenever they want to expand beyond the relatively small Israeli market. Many of those companies work with local partners when entering a new territory. While this may well be a sensible strategy, there can be serious problems when disputes occur. Whether it be a contractual dispute with a large local partner or patent infringement by a global tech giant, the small Israeli entity will lack both the financial clout and legal expertise to effectively pursue litigation or arbitration in the US, EU or elsewhere.

Litigation Funders can assist Israeli claimants both financially and legally, and

Woodsford will consider funding any type of commercial litigation or arbitration. The scenario cited above, where a small-medium sized Israeli company is in dispute with a large global conglomerate, fits well with classic single case litigation funding. A funder can tip the playing field in the claimant's favour, providing the resources necessary for the claim to be effectively pursued. As mentioned above, the knowledge that a dispassionate, expert third-party has analysed the case in detail and is prepared to invest a significant sum on a non-recourse basis should be a serious wake up call to the defendant and its lawyers.

While funding can be applied to all types of disputes, including high value domestic Israeli claims, many of the disputes that need funding and will be of interest to a funder will have an international element – funders like large, complex disputes – and the Israeli party and its local lawyers may lack the necessary expertise, for example, to enforce a patent globally or to manage an international arbitration. The large, London-based funders, such as Woodsford have deep relationships with numerous global firms and are able to work in partnership with the Israeli party and its lawyers to help find (and fund) the most appropriate legal representation across multiple jurisdictions.

Protecting Israeli intellectual property

The advantages of litigation funding for both patent owners and patent litigators are substantial. A capital constrained patent owner who might not otherwise have the resources to protect its invention is given the opportunity to have its day in court. This is particularly true in “David v Goliath” cases, an all too frequent scenario in patent infringement, where a smaller claimant, such as an inventor, takes on a bigger, more well-resourced defendant, who may use a

strategy of attrition to exhaust the claimant's appetite and ability to prosecute its claim.

While a small nation, Israel has a dynamic economy and thriving tech sector. A recent Global Competitiveness Report has the country rated as one of the most innovative in the world, with the fifth highest number of patents per head, one of the highest spending on research and development as percentage of its economy and the highest

concentration of start-ups per capita. Israel therefore has thousands of small and medium-sized high-tech companies that cannot afford the costs of a high-value patent litigation.

Partnering with a well-capitalized funder such as Woodsford substantially levels the playing field and allows a claim to survive on its merits. Even where a patent owner has the resources to fund a dispute, litigation funding offers many other advantages. Funding allows a claimant to unlock the value of a potential claim and preserve capital for other uses, while transferring the ongoing costs and contingent liabilities of the claim to a third party. For Israeli start-ups or entrepreneurial companies focused on research and development, funding can allow them to protect their critical IP rights, while also getting on with their core businesses. Ultimately, funding permits a patent owner to hedge some of its risk, ensuring that it will be in a better position if its claim is successful, but in no worse position if its claim is not successful. Thus, funding transforms patent litigation from a traditional “win-lose” proposition to a “win-don’t lose” proposition.

As mentioned above, litigation funding can also have substantial strategic benefits and lead to better settlement outcomes. A patent owner, knowing that they have the resources to fully prosecute a dispute, will be in a more advantageous position for settlement and will not be forced to accept a low offer merely on account of their capital constraints. And again, the fact that a sophisticated litigation funder like

Woodsford has backed a patent owner’s position sends a powerful signal to the infringing defendant and court that a third party with substantial expertise believes strongly in the novelty of the invention and merits of the underlying claim to put their own capital at risk.

“For Israeli start-ups or entrepreneurial companies, funding can allow them to protect their critical IP rights, while also getting on with their core businesses.”

A striking recent example is a claim that Woodsford funded for an Israeli claimant in the spring of 2018, which resolved in October 2018 with an attractive settlement against a large international conglomerate. As the settlement conference wrapped up, the defense counsel remarked to the claimant’s lawyer that the company never settles any of the (several hundred per year) patent claims against it – and only did so on this occasion because the case was supported by a funder. A clear example of a funder’s power to tip the playing field to the claimant’s advantage.

To reiterate, litigation funders like Woodsford do not control the litigation; but we are staffed with expert IP litigators with decades of international law firm experience and can provide valuable resource to patent owners and their lawyers. However all decisions regarding the litigation, licensing and potential settlement remain firmly in the hands of the lawyer and patent owner.

Funding International Arbitration

There has been a tremendous uptake of third party funding of international arbitration in recent times, regardless of claim type or venue. This is hardly surprising: international arbitration generally involves complex commercial disputes with sophisticated counsel at

premier international law firms. The resulting fee burden can be substantial. Moreover, many international arbitrations involve claimants who are capital constrained (often as a direct result of a respondent’s conduct) and would not be in a position to have their claims heard in the

absence of third party funding.

Anecdotally, Woodsford's experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding. Indeed, what little public data is available confirms this trend—for example, in connection with the International Centre for Settlement of Investment Disputes (ICSID) recent proposed rule on third party funding, the Centre noted an “increased resort” to funding and counts at least 20 recent cases involving third party funding.

Woodsford has significant experience in funding International arbitration claims, which are a world apart from regular commercial litigation. It is often a highly complex and lengthy process involving stakeholders across multiple jurisdictions.

Another important issue is the impact of third party funding, if any, in the allocation of costs and related costs orders. While arbitral panels generally have wide discretion in the allocation of costs, the principle of ‘costs shifting’ (i.e. the loser pays the winner’s costs) is prevalent in arbitration in numerous jurisdictions. In general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs. See, e.g., *Kardassopoulos and Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010); *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Decision on Costs (28 April 2011).

Significantly, particularly in circumstances involving improper conduct on the part of the respondent, a funded claimant may be able to recover not only the costs of the arbitration but also the premium or success fee paid to the funder. For example, in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd*, [2016] EWHC 2361 (Comm.), the English High Court, which had supervisory jurisdiction, reviewed the

decision made in an ICC arbitration seated in London to award the claimant (Norscot) not only its legal costs of the arbitration, but also the cost of paying the funder, Woodsford, the funding ‘success fee’ on the basis that the respondent had caused the claimant’s impecuniosity and effectively ‘forced’ it to seek funding. The respondent challenged the award on the basis that the arbitrator erred in concluding that he had jurisdiction to award such costs as “Other Costs”. The English High Court upheld the award.



A further important issue is the relevance, if any, of third party funding in connection with a tribunal’s consideration of security for costs applications. While each jurisdiction or tribunal has different rules that apply to such applications, in general, unless a tribunal establishes the likelihood that costs could, in principle, be awarded against an unsuccessful claimant, it cannot make a decision on security for costs applications. Moreover, a tribunal will often lack the jurisdiction to make an order for security for costs against a funder which is not party to the arbitration agreement.

Woodsford has a successful track record of providing finance solutions for many high-value international arbitration cases, and in particular, bilateral and multilateral investment treaty cases (the details of our investments are confidential). Woodsford employs arbitration experts including our Investment Advisory Panel member, John Beechey, a former President of the ICC International Court of Arbitration, and our CEO, Steven Friel, an ex-partner in the London office of international law firm Brown Rudnick who acted for and against states in investment treaty disputes and was recognized by the Legal 500 as “outstanding” for his work in international arbitration.

Israeli Litigation and Arbitration

In addition to International Litigation and Arbitration, Woodsford will fund high-value Israeli domestic litigations and arbitrations, where the use of funding has grown significantly over the past 3 years.

According to Israeli law, a plaintiff's hard costs cannot be paid by their law firm. One of the most significant costs in Israeli litigation are court fees, which are 2.5% of the claim quantum (up to 25m NIS) and 1% for any quantum above this – and half of the court fees need to be paid at the time the claim been filed, with the 2nd half payable once the trial begins. In addition, expert, counsel and administrative expenses

cannot be paid by the claimant's law firm, and in a high-value dispute, these can be a significant portion of the costs of the case. A third-party funder is perfectly positioned to pick up these outlays.

With an international presence, a funder like Woodsford can help Israeli parties pursuing a claim overseas and non-Israeli claimants involved in domestic litigation or arbitration in Israel. Woodsford can help bridge the claimant's lack of knowledge of the Israeli legal system, powerfully combining our capital with our extensive network of connections within Israel's top law firms.

The Possibilities for Funding in Israel

While litigation funding is relatively new for Israel, it is well-established and accepted in many jurisdictions around the world and its continued growth seems certain. Lawyers should familiarize themselves with the benefits it can bring to their clients, including to those clients who may be able to finance their claims themselves. For

Israeli companies involved in large, international disputes or those looking to enforce patents globally, partnering with an established funder such as Woodsford, that combines substantial financial resources with deep connections at leading firms worldwide, can make a real difference.

The regulation of litigation funding in Israel

Third party funding of litigation and arbitration is permitted in Israel and has received positive judicial endorsement. Although the courts have not provided comprehensive rulings on the Israeli court's approval regarding all of the issues relevant to litigation funding, the courts have, through positive endorsement of funding, established a favorable environment for litigation funding in Israel.

In Benny Bachar Zoabi Construction company vs Bank Hapoalim, LF 29526-10-16 (Nazareth District) (published in Nevo, 26 October 2017), the vice-president of Nazareth district court, Judge Attif Ailablouni, while holding that a litigation funding agreement was valid, also encouraged the use of such funding agreements in liquidation cases.

According to the Civil Procedure Regulations, 5744-1984, only the party to the litigation can be liable for adverse

costs. To date, the courts have not been asked to rule on whether an unsuccessful party should pay the litigation funding costs of the successful party. There is no general requirement for a litigant to disclose a litigation funding agreement to any opposing party or to the court. To date, the courts have not ordered the disclosure of funding agreements when requested to do so, because the funding arrangements were found not to be relevant to the determination of the dispute (a primary requirement for obtaining a disclosure order). However, if the court finds the agreement relevant to the dispute, it can compel disclosure of a funding agreement. Further, in liquidation cases the liquidator will have to obtain the court's approval to engage in a funding agreement, and as part of this procedure the liquidator is likely to be ordered to disclose the agreement to the court and possibly to the creditors and shareholders.

About the author

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In his role as Director of Litigation Finance, Israel for Woodsford, Yoav helps introduce leading Israeli law firms and their clients to our full range of litigation finance solutions.

Yoav has extensive experience in commercial litigation and arbitration over a broad spectrum of sectors, having acted in the commercial, industrial and governmental disputes, before different legal instances tribunals, including all Israeli courts, arbitrators and mediators.

Prior to joining Woodsford, Yoav was an Associate at Ron Gazit, Rotenberg in Tel Aviv, where he represented clients across a range of areas, including intellectual property, media, antitrust and environmental disputes.

Yoav is a graduate of the University of Bar Ilan, where he obtained a Bachelor of Laws degree (Hons). Yoav also did a period of study abroad at the Monash University in Prato, Italy. Yoav is a member of the Human Rights Forum at the Israeli Bar Association.

About Woodsford Litigation Funding

Founded in 2010 and with offices in London, the USA, Tel Aviv 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 is a founder member of the Association of Litigation Funders of England and Wales.

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