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VIII. The role of funders during arbitration proceedings

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1. Introduction

The objective of this chapter is to highlight the distinct role of litigation funders in the arbitration process, describing the various levels of involvement by these entities. It emphasises how their financial expertise and risk assessment capabilities can offer support at different stages of the dispute. The role of litigation funders in the arbitration space has become increasingly significant, adding a layer of financial support and strategic guidance to parties engaged in disputes. Unlike traditional legal services providers, litigation funders primarily operate within the domain of financial services, offering capital to cover legal costs associated with arbitration proceedings in exchange for a share of the potential settlement or award. Their involvement spans various stages – from the genesis of the claim through execution of the litigation funding agreement (LFA) all the way to the conclusion of the proceedings – with each stage reflecting differing degrees of engagement. At the outset, funders may assist in assessing the viability of a case, evaluating its merits, potential legal and financial risks. Throughout the proceedings, they may provide ongoing financial support, enabling parties to navigate the complexities of arbitration without the financial burden. Moreover, funders often play a pivotal role in settlement discussions, leveraging their financial expertise to help the client secure a favourable outcome.

Within this spectrum of involvement, funders can range from 'hands-on' funders which actively participate in case strategy and management to more 'hands-off' funders which provide capital with minimal interference in legal matters. This dynamic interplay between legal and financial expertise underlines the evolving landscape of litigation funding in arbitration, in which collaboration between different stakeholders in a dispute and funders can optimise outcomes. Especially the funder's ability to structure financing arrangements efficiently for both clients and lawyers, and to assist the parties in achieving the best outcome in a dispute or finding the optimal strategy to maximise results in settlement discussions, is what renders its contribution valuable. Ultimately, the difference between a good case and a good funding opportunity is the pot of gold at the end of the rainbow.

2. Legal services providers versus financial services providers

It is important to differentiate between:

- litigation funders that operate as legal services providers; and
- those functioning as financial services providers.

The inherent reason behind this distinction arises from the fact that while litigation funders may appear to operate on similar principles,

While some lawyers may prefer oversight, experienced legal practitioners may find excessive legal scrutiny to be burdensome and a drag on the process. A funder with a hands-off approach might be more suitable for legal practitioners who prefer autonomy in managing the dispute.

the way they are structured or operate can vary significantly. While some funders attempt to handle all processes in-house, others may prefer to outsource certain tasks by collaborating with experts. It all boils down to the general ethos of the funder. Hence, while some function like legal services providers, others operate like financial services providers.

It is therefore common for litigation funders to have a team of ex-litigators or arbitration practitioners working alongside the legal team, reviewing submissions, discussing legal strategy and involving themselves closely in legal decisions. These funders take a hands-on approach throughout the arbitration proceedings. On the other hand, funders that adopt a financial services model are likely to take a more hands-off approach. They act more like bankers, supporting skilled lawyers and allowing them to lead the process. Therefore, understanding the level of involvement and the operational style of a litigation funder is extremely important when selecting one. While some lawyers may prefer oversight, experienced legal practitioners may find excessive legal scrutiny to be burdensome and a drag on the process. A funder with a hands-off approach might be more suitable for legal practitioners who prefer autonomy in managing the dispute.

3. Contemplating funding prior to or at the start of the proceedings

The biggest added value of a funder at the beginning of a dispute is a comprehensive analysis of the case from the outset. It will employ a robust method for analysing both legal and financial risks. Litigation funders typically base their assessment of potential cases on five key variables:

- damages;
- enforcement and recoverability;
- merits;
- the parties involved; and
- the legal team.

While the order of importance may vary among funders, these variables remain consistent. Depending on the model adopted by the funder, the way in which it assesses the case or handles the process will differ. For example, a funder that handles everything in-house may review this checklist with in-house experts and make a decision to provide funding (or not). On the other hand, a funder that has adopted a hands-off approach is likely to have a smaller team and, for example, may not have an in-house asset tracer. Consequently, it may wish to engage an asset tracer, a quantum expert and a legal expert in a specific area of law to make a well-informed decision.

This will affect the decision-making process of the funder and, consequently, the timeline. The process is likely to be longer with a traditional funder trying to handle everything in-house, as this involves different departments within the funder. Hence, a decision will take longer than with a funder that has a smaller team and outsources all the processes. Such a funder is likely to expedite things more efficiently than a funder that tries to handle everything in-house. Since there are fewer layers of approval and departments to navigate, clients can expect a smoother experience and a faster decision-making process.

The early-stage involvement of the litigation funder provides the initial stress test for the case, which is also beneficial for the legal team and the client, as the additional scrutiny facilitates a more comprehensive review of the case from the outset. In some cases, even if the funder decides not to invest in the opportunity, it may, in addition to sharing feedback on its decision, provide the client with all reports prepared by its experts. Additionally, when reviewing the case, the funder will be presented with the budget, including the costs of lawyers, experts and various other disbursements; this presents a unique opportunity for the client to receive detailed feedback on the budget.

4. During the course of the proceedings

Assuming that the initial stages yield a positive result and the parties end up signing an LFA, the funder will have certain requirements from the lawyers to ensure that it receives a sufficient update on the case and the budget. As previously mentioned, the extent of these reporting duties varies substantially between funders. The contribution of funders that act as legal services providers extends beyond financial means. They provide legal support to the client to bring the case to the finish line. They have experienced lawyers on their teams who are likely to have few years of practice under their belts, so they may provide feedback on each submission to the tribunal or go over each draft to shape the legal structure.

On the other hand, hands-off funders recognise that their greatest value to a dispute lies in their financial capabilities. These funders primarily act as financial specialists, prioritising risk assessment and structuring financing to support legal proceedings. Their expertise lies in pricing risk and creating efficient funding arrangements, enabling lawyers to concentrate on the case without worrying about cash flow. They ensure that the deal is structured in a cost-efficient manner and that, while lawyers stay within their budget, their payments are processed smoothly.

Funders have various methods to ensure that lawyers adhere to the budget initially provided to them. Funders' financial risk assessment

Funders have various methods to ensure that lawyers adhere to the budget initially provided to them. Funders' financial risk assessment relies heavily on the ratio between damages and the budget; an opportunity must be economically viable to pursue. The magic number is also known as the 1:10 ratio.

relies heavily on the ratio between damages and the budget; an opportunity must be economically viable to pursue. The magic number is also known as the 1:10 ratio. Otherwise, if the numbers are too tight – meaning that the budget is too high and the damages too low – the client might end up with a smaller portion of the award or settlement proceeds. Contrary to general perceptions, funders do not seek to receive the majority of the proceeds. Therefore, they might employ their own methods to monitor the lawyers' budget.

This is particularly helpful for the lawyers, as they may not be fully aware of their total spending. Budget tracking systems typically indicate how much is required at each stage of the case, with specific amounts allocated accordingly. Consequently, when the law firm submits its invoices over an agreed period – usually monthly – the funder can review the numbers. This system benefits the client by ensuring that the funder not only provides the necessary funds for the entire arbitration process but also ensures its cost effectiveness. Additionally, this method guarantees cash flow for the lawyers. Funders typically allow lawyers to reallocate funds across the different stages of the proceedings or to provide additional funding if needed (subject, of course, to the terms of the LFA). Some funders even include a contingency in the budget for emergencies. This financial exercise also offers valuable guidance when making decisions on

experts. Funders have extensive experience with expert costs and can ensure that lawyers receive the best work at the right prices. This gives the legal team confidence in engaging with top experts, knowing that the funder will provide financial support to cover these costs.

5. Conclusion of the proceedings

Litigation funders possess extensive financial modelling knowledge combined with legal understanding, making them invaluable at assisting clients and lawyers with the evaluation of settlement options. While some funders may actively participate in negotiations, leveraging their expertise to achieve favourable outcomes, others limit their involvement to providing mathematical analyses to guide decision making. It is important for funders to refrain from overstepping boundaries and allow legal teams to lead negotiations while providing support as needed.

Therefore, the funder can still be involved in the final stages of arbitration proceedings in different ways. Beginning with settlement discussions, hands-on funders may attempt to steer the discussion to protect their interests. On the other hand, the real value of a funder in settlement discussions lies in providing the legal team and the client with financial guidance to understand their current circumstances and what an ideal settlement might look like. Ultimately, there will be costs incurred by the parties and, therefore, a certain amount of money will be deployed by the funder from the committed amount. This means that the returns of each party should be calculated properly to determine the ideal settlement area for the client, ensuring that once the funder and the lawyers have been paid, it will be left with a substantial amount that meets its expectations. Hence, this mathematical exercise should be the most important contribution of the funder during settlement discussions.

After an award has been given, funders can be involved in three different ways. First, the client may choose to sell the claim and monetise it rather than waiting for enforcement. In this scenario, the funder pays an upfront payment and takes the risk of enforcement. Second, the funder may cover the costs of the enforcement process. Some funders have in-house enforcement specialists who oversee the entire process; while others prefer to engage with external asset tracers or enforcement specialists, depending on the types of assets or jurisdiction involved. In this capacity, as financial services providers, they fund the lawyers to engage with the best asset tracers and allow the lawyers to run the process. The third and final alternative is a hybrid model whereby the funder makes an initial upfront payment and then provides funding for enforcement. Once enforcement is successful, it makes a back-end payment.

In summary, litigation funders play a unique and valuable role in the arbitration process, providing financial support and strategic guidance to the parties involved in disputes. By leveraging their legal understanding and their expertise in risk assessment and financial modelling, funders contribute to the efficient management of cases in pursuit of favourable outcomes for clients. However, it is essential for funders to operate within regulatory and ethical frameworks, ensuring transparency and respecting the autonomy of legal teams and clients throughout the arbitration process.

This chapter 'The role of funders during arbitration proceedings' by Hasan Tahsin Azizagaoglu, Ayse Yazir and Nishant Nath Singh is from the Special Report '*Funding International Arbitration*', published by Globe Law and Business.

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