How to make your CFO happy – transforming litigation from liability to asset

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Picture the scene. Your trusted external law firm advised that you have a strong claim, likely to yield a significant financial upside for your business. The budget to run the claim is £2m, including adverse costs risk, but subject to possible change. The firm cannot agree to a fixed fee. They also advise that your business might be in breach of its fiduciary obligations to its customers if it does not pursue the claim. You take the proposal to the chief financial officer (CFO) and you know their two key questions will be: 'Can you guarantee we will win?' and 'Can you guarantee we won't exceed that budget?' And you know the answers are 'No' and 'No'.

CFOs and in-house lawyers have different training and mindsets. Accountants are trained to see black and white whereas lawyers are accustomed to shades of grey, which lack the certainty an accountant craves.

The general counsel wants to prosecute valid claims and team up with the best legal team. The CFO is less enthused about dedicating part of his limited budget to pursuing litigation, which is inherently unpredictable and about which you will only ever have imperfect, incomplete information. Views of what constitutes 'acceptable risks' are divergent. Given the uncertainty about the outcome of litigation or arbitration, I understand that. Every claimant who comes to Harbour believes they have the 'best ever' case, guaranteed to succeed. We have funded many claims which everyone advised we would win, which either lost or failed to recover any money.

A strong partnership between the GC and the CFO benefits both the individuals and the company.

A CFO is interested in reducing financial risk. Likewise, the GC is trying to reduce legal risk and exposure to claims or criticism for the business. The trick is to stop treating litigation as a liability and transform it into an asset by removing the financial risk. This is where third-party funding (TPF) comes in.

Shift the burden of risk

When a funder financially backs a case, in our case higher value commercial claims, all legal and case-related costs are paid regularly and on time by the funder – not the business. If the case is settled/won and monies received, the funder takes a pre-agreed share of the proceeds. If the case is lost, the loss is the funder's – not the claimant's. The business is only paying monies to the funder when it receives monies from a case. TPF allows CFOs to take the legal cost budget off balance sheet and use that working capital for other purposes, while the GC can pursue good claims.

External funding also helps strengthen the chances of the case succeeding by ensuring the case is properly resourced. The GCs can tap into

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the funder's experience gained from funding other matters when desired.

From liability to asset

In the last 12 months, we have seen an upsurge in direct enquiries from corporates, approaching us for assistance with funding but also law firm selection, as GCs recognise we work with an extensive range of firms on all types of disputes.

Our evaluation of the claim for funding adds an informed second opinion on the prospects of the claim from experienced litigators – the Harbour team comes from first-class private practices and senior in-house positions – for no charge.

We help develop and agree the budget for a case. As we ring fence that budget in our fund, we make sure all assumptions have been considered. This exercise helps focus the minds of all involved, clearly strategising the objectives for the claim.

Corporate clients may worry they cede control to the funder when they agree to take on funding. That is not the case: we neither control the litigation team, nor the settlement discussions when they arise.

In fact, we are regularly invited on the litigation committee formed by corporates to manage the large disputes we fund. Thus we can share the experience gained from funding a wide range of other cases – what works and what does not – to positive effect.

Your due diligence

How to decide on a funder? GCs and their external law firms should ask a few questions as part of their due diligence when they explore the possibility of working with a funder:

- Is the funder a member of the Association of Litigation Funders and able to demonstrate they have the funds to satisfy the capital adequacy test?
- Where do they get their funds from?
- Does the funder ring fence their funding so the claimant has confidence funding is in place for the whole of their case?
- How many claims have they funded and are they funding?
- In which jurisdictions are they funding?
- How fast can they move?
- How do they deal with issues when they arise, as it always does in the unpredictable world of litigation?

I am always surprised how little I get asked those questions when meeting claimants and lawyers alike – the answers to these questions are critical when choosing a funder.

Is it for me?

As the GC of a global mining group put it: 'It's no secret that companies are looking to extract value from every dollar… Budgets are generally more constrained. Often I think redress is not pursued because the injured party does not have or want to commit the funds to what could be a risky "investment" ie proceedings. Being able to share that risk with a funder will give parties the opportunity of obtaining full value from the transaction without worsening the situation.' ■