

Conference on litigation funding; Geneva 23 January 2014

Perspectives of an in-house counsel - Antoine Chavan, Sr. VP Legal, Cotecna Inspection SA.

A. Where we are coming from... a description of the current situation.

Company business model: focussed on contracts with governments in developing countries and with operators in commodity trade and trade finance.

The associated risks include,

- On the claimant side: outstanding payment issues, cases of denied insurance coverage...
- On the defendant side: liability issues and penalty risks... – *outside the scope of this review.*

Such risks do sometimes materialise in disputes.

Complexity comes from the fact that different/less known legal systems and applicable laws come into play.

In case disputes are not settled, litigation can take several aspects, from :

- Disputes before local courts, to
- Arbitrations before established or exotic institutions, or even ad-hoc (no institution) to
- Arbitrations before international public law tribunals like ISCID as an alternative to the civil or arbitral jurisdictions, yet more costly.

Managing litigations entails a substantial, certain cost:

- In terms of outside counsels fees, sometimes experts fees
- In terms of internal time of the legal department staff
- In terms of management time and resources.

Besides, for litigations/arbitrations, even the most “certain” cases, there are financial risks:

- All legal costs are not recoverable even if the case is won; internal costs are irrecoverable
- There is a permanent risk of losing the case meaning the payment of the other party’s fees and costs in addition to executing the award.

B. Alternatives (in case of open litigation)

We typically consider several alternatives when confronted with the litigation risk:

a) Handle essentially inside: own funding

Determine the best capable case handler, depending on

- where the case is tried
- the size of the claim
- the level of control wanted
- the required and available resources: in-house actors (in-house lawyers, concerned business unit management & staff) and external counsel(s).

Finalise budget taking into account size of risk and likely duration of procedure.

Obtain business unit funding of such budget, and the acceptance of the risk of potential loss.

Note that internal costs are rarely truly accounted for and included in the assessment.

Note that on the claim side, litigation can be taken as a business “per se”.

Positive: keep control, freedom to define strategy, maintain management involved and concerned, secure all proceeds in case of success.

Negative: lack of time, continuity of funding, assume risks of loss/partial loss?

b) External funding ... to varying extents

1. Consider “sale” of claim to recovery agency against payment

Often envisaged, once obtained professional market valuation of a claim (typically low value in early stage, potentially increasing as the case progresses towards judgement), but not pursued.

Positive: immediate cash, gain of time, transfer of all the risk at once.

Negative: total loss of control (lose settlement opportunity), low return (high discount on the risk), involvement of staff and management cannot be totally avoided for the establishment of facts (first instance mostly).

2. Consider closing a deal with a law firm on discounted fees and success fee.

Satisfactorily experienced. Deferred expense; Pactum de quota litis?

Positive: cost control, keep control (settlement remains possible), mitigate risk, motivate law firm.

Negative: costs of suit remain, success fee may offset advantages, depending on how they are agreed.

3. Consider litigation funding – stricto sensu

Considered a few times, attempted once, so far.

Positive: risk sharing, cost sharing, gain of time.

Negative: limited litigation control.

See below

C. Litigation Funding as one of the alternatives to manage litigation.

Current experience: why did we choose litigation funding through the involvement of an external specialised funder?

- Execution of an existing arbitral award.
- Long time failed attempts to execute.
- Lack of better idea. ...
- Tired to throw good money at what became considered as “bad” money
- Confident in the capacity of the funder to be more effective
- Confident in the funder to act legally and not harm the company’s image.

Challenges when entering into the relationship:

a) **Preparation work.**

Submission of the complete file: ensure that all steps in the service of the award have been completed successfully. Challenge to retrieve all topical originals in an old case. ... Assistance required from the law firm(s) that has/have been involved at the various stages of the procedure and the various enforcements attempts.

b) **Negotiation** of the “Contract of undertaking the execution of the award and procedural execution costs”. Main points of discussion:

- a. Representations subject to penalty:
 - i. The creditor represents that it owns the claim, that the claim is not barred by limitation (with evidence), that the creditor has never waived collection rights, that the debtor cannot offset own claims, that no collection or partial collection has been obtained, that the collection is not connected to any money laundering... that the creditor's board has agreed to the contract.
 - ii. The creditor represents that it has provided a complete file to the funder... The creditor will provide additional information as required.

- b. Limits in the execution procedures.
 - i. The company retains ownership in the claim (need of POAs in favour of the funder in various languages).
 - ii. All legal actions are undertaken in the name of the creditor by the funder (obligation of means and not of result). The fund is not obliged to collect anything (subject to breach of funding contract!).
 - iii. The company limits its own freedom of action in connection with the claim: nothing can be done without the funder's knowledge and approval. A change of instructions in the course of the contract can trigger a penalty in case there is no common understanding.
 - iv. The funder is fully independent on its strategy. The company shall be essentially informed. This can go as far as requiring the company to settle at "reasonable" conditions (reasonable being defined as a % of the amount at stake in capital).

- c. Financial participation of the funder
 - i. The funder allocates a fixed budget. The budget is not to be refunded in case the collection is unsuccessful.
 - ii. The budget covers all the expenses engaged by the funder, to the exclusion of any other commitment of the company to third parties.

- d. Funder remuneration
 - i. First: reimbursement of budget spent.
 - ii. Then: percentage of any amount collected above the spent budget up to a certain amount (generally capital + portion of interest).
 - iii. Higher percentage of any further amount collected (remaining interest) up to the total of the claim in capital and interest.

- e. Amount of penalties
 - i. Misrepresentation, early termination, separate settlement....
 - ii. Corporate guarantee as security.

c) **The whole story is not yet written!**