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Litigation funding

This guide provides a broad overview of the litigation funding options available and when they may be appropriate.

When deciding whether to bring or fight a claim, a crucial factor is cost. Commercial costs aside, a potential litigant has to consider not only his own legal costs but also his potential exposure to the other side's costs. Historically, other than insuring against such costs, there was little a litigant could do to minimise his exposure. However, recent years have seen a fundamental shift in attitudes towards the funding of litigation and there are now various options available to a litigant to help reduce that risk.

As a matter of English law, the main funding options available are:

- conditional fee agreements (CFAs);
- damages-based agreements (DBAs);
- after the event (ATE) insurance; and
- third party funding.

They can be used separately or in conjunction with each other and, broadly speaking, their use enables a party to English court litigation or English seated arbitration to negate or minimise its exposure to legal costs.

This guide looks at each of these funding options in turn to provide a broad overview of how they operate and when they may be appropriate.

The Jackson reforms

It is not possible to look at litigation funding without considering the impact that the Jackson reforms have had. The reforms take their name from Lord Justice Jackson (or Sir Rupert Jackson as he is now known) who, in 2008, was asked to conduct a "wide ranging review" of the civil justice system. Prompted by the spiralling costs of litigation, his task involved identifying the causes of these escalating costs and recommending ways in which to deal with them. His final report was published on 14 January 2010, in which he set out a coherent package of interlocking reforms aimed at controlling costs and promoting access to justice. The reforms addressed both the funding of litigation and civil litigation procedure.

While he appreciated the importance of funding as a means of providing access to justice, Lord Justice Jackson considered that the mechanisms available had led to disproportionate costs. In particular, he considered the recoverability of CFA success fees and ATE premiums to be key drivers behind the escalating costs of civil litigation. It meant that the funded party paid little attention to costs, and for the paying party, the addition of the success fee and ATE premium doubled or trebled the costs bill. In his view, proportionality could only be restored by ending recoverability. His reforms were therefore designed to ensure that the losing party does not have to pay any more by way of recoverable costs than would have been the case had the funding arrangement not existed. Litigants using these funding mechanisms would have to pay for any additional costs themselves.

Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which came into force on 1 April 2013, gave effect to his recommendations. Consequently, for CFAs and ATE policies entered into from that date, parties who succeed at trial will not be able to recover the CFA success fee or ATE premium from the losing party. This will not affect CFAs and ATE policies entered into before 1 April. In addition, proceedings[1] are exempt for now. These exceptions are (rather misleadingly) referred to as "pre-commencement funding arrangements".

Third party funding, of which Lord Justice Jackson approved as it had no impact on costs between the parties, remains unchanged. Indeed, Lord Justice Jackson thought that third party funders brought much needed costs discipline to civil litigation and sought funders' views in relation to his new costs management rules. In addition, he increased the funding options available by extending the use of DBAs (contingency fee arrangements where the lawyers' fees are set by reference to the damages awarded rather than the work done) to all general civil litigation.

Under the reforms, litigation funding is treated more as a private arrangement between client and solicitor which has little or no impact on the other side (usually a defendant). These arrangements do not need to be disclosed as, unlike before, the defendant incurs no additional liability. As a result of the reforms, and in particular the extension of DBAs, there has been greater co-operation between solicitors, funders and insurers. The funding market continues to evolve and grow; as expected, the Jackson reforms have succeeded in raising the profile of litigation funding for high value commercial disputes.

Conditional fee agreements

Any arrangement by which a solicitor's fees depended on the outcome of litigation were formerly prohibited on the basis that they gave solicitors a direct financial interest in the outcome of a case and thereby threatened the impartiality and independence of the solicitor. However, the erosion of legal aid and access to justice issues led to a change in government policy and, as a result, CFAs were introduced.[2]

What is a CFA?

A CFA is an agreement under which the client pays different amounts for the legal services provided depending on the outcome of the case. CFAs operate to transfer all or part of the risk for a client's own legal costs from the client to the solicitor. They can be structured in a variety of different ways. However, unlike a DBA, CFAs do not provide for a solicitor to receive a "contingent" fee that gives the solicitor a share of any recoveries.

Different types of CFA

The classic CFA provides that the lawyer receives no fees if the client loses its case, and his fees plus an increased percentage (up to 100 per cent for commercial litigation and referred to as the success fee)[3] of his normal fees if the client wins (commonly referred to as a "no-win no-fee CFA"). Common variations include:

- "discounted CFA" where the lawyer receives a lesser percentage of his fee (say 75 per cent) if the client loses the case but fees at the full rate and the success fee if it wins; and
- "CFA Lite" where the lawyer operates on a no-win no-fee or discounted CFA basis, but the additional fee and any success fee payable on success is capped at costs awarded or agreed with the other side.

Who can use a CFA?

CFAs were originally introduced in order to provide access to justice to those who would previously have been eligible for legal aid (e.g. personal injury claimants). Now CFAs are available to all litigants, whether claimant or defendant, irrespective of means, including companies. They are available for the provision of "litigation services" which includes English court litigation, English seated arbitration and any sort of proceedings used for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.[4] Although they are typically used by claimants, they can be used by defendants in relation to their defence and/or counterclaim.

Is a party required to disclose a CFA?

Any party entering into a CFA with a success fee that is recoverable from the other side must notify the Court and the other parties of the existence of a CFA but not of the terms of the CFA until it becomes relevant to any costs assessment. As such, post 1 April 2013, disclosure is not required unless the CFA falls within the "pre-commencement funding arrangement" exception.

How does a discounted CFA work in practice?

Commercial clients instructing a City law firm are more likely to use a discounted CFA. From a practical point of view, it would work along the following lines.

- the intention to operate under a CFA does not negate the need for agreed terms of engagement between the solicitor and his client. The CFA will form part of those terms of engagement and will address the basis of charging. Matters such as the scope of work, resources and reporting will be covered by the remaining terms;
- the CFA will set out the definition of the "agreed discounted rate" of fees payable by the client in any event and the basis of calculating any "success fee" payable if the client "wins" the case. What these terms means is explained below;
- throughout the course of the matter, the firm will bill the client for work carried out (usually on a monthly basis) at an **agreed discounted rate** (calculated at a percentage of the firm's normal rates) (the **non-conditional fees**). These bills will include disbursements, (i.e. any expenses, such as court, counsel's and expert fees, disbursements and internal charges, such as photocopying) and will be payable in the usual way;
- the balance of the fees beyond the agreed discounted rate are the **conditional fees**. Conditional fees only become payable if and when the client "wins" the case. The definition of "winning" will be contained in the CFA and needs to be carefully defined. If the client is the claimant, "winning" will usually mean the other side being ordered to or agreeing to pay damages. If the client is the defendant, "winning" could mean either settling below a certain level or succeeding at trial;
- in the event of a "win" the client may also become liable for the firm's **success fee** if included in the CFA. The success fee is calculated as a percentage uplift on the firm's normal rate (the **base costs** (non-conditional plus conditional fees)). This uplift is specified in the CFA and cannot exceed 100 per cent. The level of the success fee in a discounted CFA is calculated by reference to the risk to the law firm of losing the litigation, in which case the firm will not be paid the conditional fees. This is calculated by reference to its assessment of the merits of the case. The stronger the merits, the lower the success fee;
- if the client succeeds at trial, the usual costs-shifting rules apply. So, in the ordinary course, the client could expect to recover a material proportion of its costs (including the non-conditional fees, expenses, disbursements and the conditional fees) from the other side but not the success fee (unless the CFA is a pre-commencement funding arrangement). The precise entitlement will be agreed in a settlement agreement or ordered by the Court after an assessment of costs, although it is unlikely to cover all of the costs claimed. In those circumstances, the client will remain liable for the shortfall, and for any success fee (if not recoverable from the other side); and
- if the client "loses" the case, it will not have to pay the conditional fees or any success fee. However, as the losing party, it should expect to have to pay the other side's costs or a proportion ordered by the Court.

Below is an example of how this would work in practice. It assumes that only one lawyer is working on the matter and provides for a success fee of 50 per cent.

	NORMAL HOURLY RATE (BASE COSTS)	DISCOUNTED HOURLY RATE - THE NON - CONDITIONAL FEES	SUCCESS FEE UPLIFT
Rates	£400	£300	50 per cent

The client is billed £300 per hour plus disbursements, on a monthly basis. Assuming 500 hours work in total, the total bill would be £150,000 plus disbursements.

The additional amount payable (if any) depends on the way the matter is resolved.

- **scenario 1:** the result does not amount to a "win" according to the definition agreed. In that event, no further sums would be payable. However, the client may have to pay part or all of the opponent's legal costs; and
- **scenario 2:** the matter results in a "win" following trial or settlement. The client is liable to pay the following additional sums:

  – the conditional fees – £50,000 (i.e. 500 x £100); and

  – the success fee – £100,000 (i.e. (base costs x 0.5) x 500).

However, the client would expect to recover a substantial portion of his base costs (but not the success fee unless the exceptions to recoverability apply) from the unsuccessful party.

Advantages and disadvantages of a CFA

The key advantage is the fact that CFAs can assist in reducing costs in an unsuccessful case. However, the additional cost of the success fee and the front loading of costs may deter use. Lawyers will only be prepared to act under a CFA where there are good prospects of success. As such, the lawyers will need to consider in detail the strengths and weaknesses of a case and will often seek an opinion from counsel before they agree to act under a CFA. Although these costs will be incurred in any event, the front-loading of costs required may not be attractive to a client.

Post-Jackson, CFAs have become less attractive. However, it is possible to agree a CFA without a success fee, and they continue to be used in high value commercial litigation as a means of risk-sharing between the client and the solicitor.

Damages–based agreements (DBAs)

Lord Justice Jackson was keen to promote access to justice and offer alternatives to the CFA. Consequently, his reforms extended the use of DBAs to all civil litigation matters where CFAs are permitted. Prior to 1 April 2013, DBAs were only allowed in contentious employment matters. From 1 April 2013, DBAs can be used in all contentious business except for criminal or family proceedings or opt-out collective actions in the Competition Appeal Tribunal.

This Quickguide looks at DBAs in general commercial disputes. It does not cover the use of DBAs in employment or personal injury matters, where different rules apply.

What is a DBA?

A DBA is a contingency-fee agreement. It is similar to a CFA in that what the lawyer is paid depends on the outcome of the case. However, unlike a CFA, the lawyer's fee is not calculated by reference to the work carried out, but is calculated by reference to the compensation recovered by the client. If the client wins the lawyer will receive a percentage of the client's damages. If the client loses, the lawyer receives nothing.

In commercial cases, the maximum cap that can be applied is 50 per cent of the sums recovered. The DBA Regulations set out how DBAs work in practice.

Recoverability: what is a losing defendant required to pay?

The fact that a claimant has entered into a DBA should not affect the costs recovered from any unsuccessful defendant, subject to one important exception. The claimant's recoverable costs will be assessed in the normal way by reference to hourly rates and the number of hours spent on a matter. However, by virtue of the indemnity principle (which still applies to DBAs), any claimant funded by way of a DBA may not recover more by way of costs from the other side than the total amount payable under the DBA.

Is a party required to disclose a DBA?

There is no requirement for a party entering into a DBA to disclose that fact to the other side. However, there may be tactical reasons for doing so as the fact that a solicitor is prepared to act under a DBA is indicative of their belief in the merits of the case and could therefore assist in persuading the other side to settle.

How will a DBA work in practice?

A DBA is a contingency arrangement whereby the lawyer will be able to take a share of the damages if the client is successful. If the client is unsuccessful, the lawyer will not be paid. The client will still be liable for expenses (unless otherwise agreed) and adverse costs (unless covered by ATE insurance).

Under a DBA, a client is not permitted to pay anything other than:

The contingency fee (solicitor and counsel fees) minus any costs recovered from the other side	plus	Expenses (disbursements such as expert costs) minus any expenses recovered from the other side

In general commercial litigation, the contingency fee is capped at 50 per cent of the sums ultimately recovered by the client.[5] The sum is inclusive of VAT and counsel's fees. Where counsel is not prepared to act under a DBA, a separate agreement may be required between counsel and the client regarding payment of their fees.

EXAMPLE OF A DBA IN PRACTICE

Claimant (C) enters into a 20 per cent DBA with a solicitor.

C recovers £10 million in damages.

Recoverable legal costs from the Defendant (D) are £1 million (which includes counsel's fees of £300,000) and recoverable expenses are £500,000.

Non-recoverable expenses amount to £20,000.

The total amount recoverable from D is £11.5 million.

C is liable to pay a contingency fee of £2 million (£300,000 of which will be used to pay counsel) and £520,000 of expenses. C is left with £8,980,000.

Is it possible to enter into a partial DBA?

It was originally envisaged that DBAs would work on a similar basis to CFAs in that they could be entered into at any stage in the litigation and on a discounted basis. So, if a client decided half way through a matter to enter into a DBA, that would be possible. Equally, where solicitors are not prepared to take the risk of a full "no win, no fee" agreement, they could agree to be paid a lesser sum in exchange for a percentage of the damages should the client succeed. However, the Government has ruled out the possibility of hybrid or partial DBAs.

The DBA Regulations have also been heavily criticised as being unfit for purpose. Given that failure to comply with the Regulations means that a DBA is unenforceable, and therefore costs cannot even be recovered from the unsuccessful defendant let alone the client, take-up of DBAs has been slow. The Law Society and Bar Council have cautioned against their use until this issue, and other areas of uncertainty arising under the DBA Regulations, are clarified. Consequently, the DBA Regulations are currently under review.

Certain funders are prepared to offer hybrid-DBA funding packages. These operate on the basis of the lawyer entering into a DBA with the client, but then entering into a separate arrangement with the funder to off-set some of the risk in exchange for a share in the lawyer's reward. We may therefore see an increase in the use of DBAs.

When will a DBA be appropriate?

For those considering DBAs, the following is a useful preliminary checklist.

- DBAs will only be available to claimants with a substantial claim or defendants with a substantial counterclaim. Given that, in commercial litigation, the contingency fee cap is set at 50 per cent of sums ultimately recovered, the level of damages will have to be sufficiently high to ensure that the fee covers the solicitor's costs, counsel's fees and an uplift to reflect the risk of a nil return should the client lose;
- solicitors will require good prospects of success and will need to conduct sufficient due diligence to satisfy themselves of the merits of the case. Solicitors will have their own risk profile, but it is likely to be similar to that of third party funders, where it is generally assumed that a case requires a 70 per cent prospect of success for a funder to consider it;
- solicitors will also need to satisfy themselves that the prospects of recovering the damages from the defendant(s) are good. The contingency fee can only be applied to "sums ultimately recovered" and therefore, even if the client is successful, no contingency fee will be payable until the defendant actually satisfies the judgment or any settlement reached; and
- DBAs have been extended so that they are possible in all civil litigation except for family or employment matters, or in opt-out collective actions before the Competition Appeal Tribunal.

After the event insurance

As with CFAs, after the event insurance (ATE) was introduced in response to the erosion of legal aid and concerns about access to justice. A CFA addresses a potential claimant's liability for its own legal costs. There remained the question of potential liability for the other side's legal costs (adverse costs). The Government therefore approached the insurance industry and asked if there was insurance protection available to protect potential claimants against the risk of losing a case. The result was the introduction of ATE insurance.

What is ATE insurance?

ATE insurance is a type of legal expenses insurance that provides cover for the legal costs incurred in the pursuit or defence of litigation and arbitration. The policy is purchased after a legal dispute has arisen. ATE insurance can be purchased for nearly all areas of litigation with the exception of matrimonial and criminal law.

Types of ATE cover available

ATE insurers offer a variety of cover, tailored to the specific needs of the client. Broadly speaking, the insurance will typically cover the client's liability for the expenses and disbursements of the client's own lawyers (although can extend to cover own legal fees for an increased premium) and opponent's legal costs in the event that the opponent wins. Therefore, a client which has a discounted CFA and an ATE policy and which loses litigation will only be liable for its own lawyers' fees at an agreed discounted rate (unless own legal fees are also insured).

Methods of paying the ATE insurance premium

When first introduced ATE insurance was not widely used because claimants were not prepared to pay the large premiums required at the beginning of a case. The market has since evolved and other methods of payment of the premium have been introduced to make it more attractive.

While the terms of the premiums offered vary from provider to provider, there are four main types:

- **One-off premiums.** These were the original form of premium and are payable up-front and do not cater for the fact that the case may settle early. If an early settlement were reached, the premium already paid could potentially have been greater than any costs liability.
- **Staged premiums.** In recognition of the problems posed by one-off premiums, insurers are now prepared to offer staged premiums so that the premium payable increases as the matter progresses and so remains proportionate to the costs incurred.
- **Deferred premiums.** The premium is only payable by the policyholder at the conclusion of the case, which has obvious cash flow advantages, especially if also contingent.
- **Contingent premiums.** This form of premium is contingent on success. It is only payable if the case is won. If the case is lost, the premium is not payable. However, the downside is the cost of the premium, which is much higher than the standard premium.[6]

The market post-Jackson has evolved with more products now available. New pricing models – including models which offer a combination of the above – are being used and generally, ATE insurance has been re-positioned as a funding option. Whereas pre-Jackson ATE was considered wedded to CFAs, it is now regarded as a stand-alone funding option, and is often included as part of a funding package. In high value commercial litigation, the abolition of recoverability has not reduced the demand for ATE insurance.

Recoverability

Unless the ATE insurance policy was entered before 1 April 2013, or falls within one of the "pre-commencement funding arrangement" exceptions (publication and privacy or insolvency-related proceedings), the ATE premium will not be recoverable from the other side.

For ATE policies which do fall within the exception, the Court will not assess any issue of recoverability until the conclusion of the proceedings, or the part of the proceedings to which the insurance relates. At that stage, it is open to the losing party to challenge the reasonableness of the premium. To the extent the Court finds that the premium is unreasonable, the insured (the successful party) will be liable for the shortfall. This is also the case if the insurer is unable to recover the premium from the losing party, e.g. because they have become insolvent.

Is a party required to disclose the existence of an ATE insurance policy?

A party entering into an ATE insurance policy where the premium is recoverable must notify the Court and the other parties of its existence and the level of cover provided. Failure to notify could have an impact on the recoverability of the premium. Where the premium is not recoverable, there is no obligation to disclose.

When can ATE insurance be used?

Not all cases will be appropriate for ATE insurance. Unlike third party funding (see below), ATE insurance is not reliant on a damages outcome; ATE insurers are more concerned with recoverability of the premium from the insured. ATE insurance is therefore:

- available to claimants and defendants (although more frequently used by claimants as it is commonly included as part of a funding package where a damages outcome is required);
- generally available only for multi-track cases, i.e. cases where there is no fixed costs recovery rate; and
- unlikely to be provided where the case involves novel issues (and, if offered, premiums are likely to be very high given the additional risk).
  Attitudes to risk among insurers will vary but, generally speaking, they will expect an assessment of the chances of success (usually by counsel's opinion) of a minimum of 60 per cent before they will offer cover. In this respect, they operate on a similar basis to third party funders (see below).

Advantages and disadvantages of ATE insurance

Advantages

- removes the risk of having to pay the other side's costs if you lose your case;
- provides an incentive for the other side to settle where the premium is recoverable, particularly where staged premiums are used, as they will know that the insurer has conducted a separate analysis of the merits of the case. Having ATE insurance also sends the message (if disclosed) that the insured is in the litigation for the duration having already minimised the litigation costs risk; and
- ATE policies can be arranged at any stage of the case, although they may be more difficult and expensive to secure later in the process.

Disadvantages

- the additional cost of the premium, which could be substantial;
- substantial costs can be incurred in packaging a claim for an insurer and securing the insurance. In addition, most insurers (like funders) require a separate assessment of the merits of the case. Insurers will not fund cases that are unlikely to succeed or where prospects are marginal;
- the policy will contain a list of exclusions and will need to be negotiated with care; and
- unlike third party funding, an ATE policy may not always be sufficient by itself to defeat an application for security for costs. This is due to the fact that the Court may not accept the policy because of the possibility of insurers subsequently cancelling the policy. [7]

Third party funding

Historically, the English law principles of "maintenance" and "champerty"[8] have prevented the funding of litigation by third parties. The underlying justification for this was to avoid third parties profiting from litigation in which they had no legitimate interest. As part of the desire to improve access to justice, the judiciary has adopted a more pragmatic approach to third party funding and has recognised the role it has to play in civil litigation.[9] In his final report, Lord Justice Jackson was very supportive of its continued existence and growth. Third party funding is therefore permitted notwithstanding that it gives the funder a share of recoveries from the litigation, provided the funding agreement does not give the funder an unreasonable return or the right to control the litigation.

What is third party funding?

Third party funding is where someone who is not involved in a dispute provides funds to a party to that dispute in exchange for an agreed return. Typically, the funding will cover the funded party's legal fees and expenses. The funder may also agree to pay the other side's costs if the funded party is so ordered, and provide security for costs. Its application can extend beyond litigation and arbitration to all forms of dispute resolution, and it is available for a variety of commercial disputes.

As the use of third-party funding has increased, so have the number and range of institutions that are prepared to finance litigation and arbitration. In addition to specialised third party funders, insurance companies, investment banks, hedge funds and law firms have entered the market.

As the market has developed, the range and sophistication of funding products and structures available has broadened. There is no one size fits all and the description above is funding at its most basic. Third party funding, or "litigation finance" as it is commonly referred to, has evolved. In addition to funding one-off cases, litigation finance is being used for a broader range of purposes, with the proceeds of the litigation or arbitration being used as collateral. Another recent trend is the development of portfolio funding, where funders provide a funding package that covers a portfolio of cases.

When is funding appropriate?

Recent innovations in the products available have made third party funding appropriate in more situations than was previously the case. However, if looking to fund on a one-off case basis, the following is a useful preliminary checklist:

- runders are unlikely to provide funding for cases that do not involve a claim for damages. Given that funders receive their return by reference to recoveries made, they are primarily interested in claims with a damages outcome. As such, funding is generally only available to claimants or defendants with a counterclaim;
- unless they specialise in funding smaller claims, funders will generally only fund one-off cases where likely damages are assessed at £10 million plus. Funding litigation or arbitration is a high risk investment, and funders will require a certain investment to quantum ratio. This usually requires a damages outcome of at least £10 million;
- funders will require good prospects of success. They will undertake their own separate analysis of the claim and only fund it if they have confidence in it and the way it is being advanced;
- funders will want to know if the target (i.e. the respondent) is able to meet the claim, costs and interest. The funder will want to know where assets are situated; enforcement risk is a key concern. If situated in jurisdictions where enforcement is difficult, that may deter some funders. Other considerations, including whether the target will fight to the bitter end, may also influence the funder; and
- generally speaking, funders will cover court and other tribunal work. The use of third party funding in international arbitration is increasing, particularly in investment treaty arbitration, where the potential returns are significant. See our Quickguide: Third Party Funding in International Arbitration for more detail. Other jurisdictions, e.g. the U.S. and Australia, are also popular with third party funders.

Advantages and disadvantages

A potential party may approach a funder for various reasons:

- necessity: Litigation and arbitration can be expensive. If a claimant does not have the means to pursue a meritorious claim, funding may well be its only option;
- Risk management: Claimants with the funds to litigate or arbitrate may want to lay off some of the risk associated with costly proceedings, and be prepared to give up a proportion of any recoveries to do so. It also enables a company to invest that money elsewhere. In addition, the funded party is relieved of costs pressures and cash-flow issues associated with the legal costs of the dispute;
- validation: Funders are only interested in good claims. They will therefore conduct extensive due diligence and carry out their own analysis of the merits before agreeing to provide funding. This objective analysis may assist the claimant to shape its case strategy, and may also encourage early settlement once the other party is made aware that the claim has the backing of a funder; and
- levelling the playing field: Where a claimant with little means is faced with a defendant with substantial or unlimited resource, having a funder's support helps level the playing field.

However, there are also disadvantages to using third party funding:

- a successful claimant will generally have to pay a significant proportion of his or her recoveries to the funder;
- although funders are generally prohibited from taking undue control or influence in a litigation matter or an arbitration, there may be some loss of autonomy on the part of the funded party (in particular when considering settlement) as funders may reserve the right of approval of the settlement; and
- substantial costs can be incurred when packaging the case for presentation to a funder. These will have been wasted if the application for funding is unsuccessful. Even if successful, funders are not usually liable for any costs incurred before the funding arrangement is put into place, including the costs of packaging and the negotiation of the funding arrangements (see below).

Approaching a funder: practical tips

Finding a funder

Third party funding is a developing market with new funders entering all the time. When choosing a funder, it is important to ensure that a funder has sufficient capital to meet all liabilities that could arise. This should not be an issue if dealing with a reputable funder with an established track record. However, proper due diligence as to financial standing and reputation should be carried out, particularly if dealing with entrants new to the market. At the very least, check to see if the funder is a member of the Association of Litigation Funders.

Packaging the claim

If you think you have a claim that is appropriate for funding, and just want a "preliminary feel" for whether a funder would be interested, most funders are prepared to discuss a case informally over the telephone.

If the funder is interested, the next step will be to "package" the claim so that the funder can carry out a full assessment of the merits. Typically, a funder will require:

- key documents and evidence so that proper case analysis can be carried out either by in-house experts or external counsel;
- any legal advice and opinions given by the legal team and counsel. This should cover both liability and quantum – the funder will need to be satisfied of the value of the claim;
- information on the respondent's position. A funder will investigate this independently as it is crucial for them to be confident of recovery. However, useful information includes financial viability of the respondent, location of any assets, and their attitude towards disputes; and
- a detailed budget, including the number and cost of any expert witnesses likely to be required, and a timeline setting out the anticipated process up to trial.

The funder will then conduct extensive due diligence in order to satisfy itself of the merits of the case. Factors that will influence its decision are listed above. Timing will depend on the complexity of the case and whether the funder conducts the due diligence in-house or has to seek assistance from external counsel.

Calculating the funder's return

The funder's return, and the way it is calculated, will always be tailored to the particular case. Funders adopt different approaches to pricing and various factors will be taken into account, including: the size of the expected damages, the likely length of the matter, and the level of risk.

The way the return is calculated will vary between cases and funders. It could be calculated according to a fixed percentage share (typically 30 per cent to 50 per cent of recoveries), a multiple of the funding to be provided (usually a multiple of three or four), or a combination of both. Funders are becoming more innovative in their approach; for example, some funders are prepared to take an equity share in the claimant company (where the only asset is the claim). The funder's share of the proceeds can also be staged depending on when success is achieved or by reference to the extent of the damages recovered.

Issues to consider when dealing with a funder

Privilege and confidentiality

A funder will need to be provided with confidential information as early as the "preliminary chat" stage. It is therefore sensible to enter into a non-disclosure agreement at this early stage.

Packaging a claim for third party funders will invariably involve sending privileged documents and legal advice. Does sending these confidential documents to a funder constitute a waiver of privilege? Under English law privilege can be protected by entering into a non-disclosure agreement with a funder or agreeing that any documents are sent to the funder on a restricted waiver basis. For more on privilege, see our Privilege Quickguide.

Exclusivity

At some point an interested funder will ask for exclusivity. This usually occurs just before the funder is about to incur significant costs in reviewing a case. If a funder relies on external assistance to assess the merits of a claim, exclusivity may be required at an early stage. Although understandable from the funder's point of view, it could be disadvantageous as it would prevent other funders from looking at a case, and there is no guarantee that the particular funder will decide to fund at the end of the due diligence process. Caution should therefore be exercised before agreeing to exclusivity.

Reporting requirements

As to the level of involvement of funders in the matters they fund, in general, most funders will adopt a "light touch" approach. The funders will be conscious of the need to remain at arm's length, otherwise the arrangement could be found to be unenforceable. In addition, funders will have too many cases to be actively engaged with any one of them. Funders will therefore only require limited reporting, usually on a quarterly basis or at key stages of the litigation or arbitration.

Regulation of third party funding

Given that there is now substantial judicial support for third party funding, the debate has moved on from whether there should be funding at all to whether the funding market requires regulation. In 2008, it was agreed that formal regulation was not necessary but that there should be self-regulation in the form of a code of practice. This approach was endorsed by Lord Justice Jackson in his final report. The Code of Conduct for Litigation Funders was finally published in November 2011 together with the formation of the Association of Litigation Funders of England and Wales, membership of which is voluntary. All members will be bound by the Code. It is hoped that both developments will put an end to the calls for more formal statutory regulation. Whether that will be the case remains to be seen.

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1. These are set out in The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013. They originally included claims brought by insolvent parties, but that exemption ended in April 2016, and defamation and privacy proceedings, the exemption of which ended in April 2019.
2. CFAs were introduced by virtue of section 58 of the Courts and Legal Services Act 1990 (the "1990 Act").
3. In personal injury claims the limit is 25 per cent for first instance cases and 100 per cent in appeals.
4. Section 58A(4) of the 1990 Act.
5. The cap only applies at first instance and not on appeal.
6. In *Motto -v- Trafigura* Ltd [2011] EWCA Civ 1150 the contingent deferred premium was set at just under 62 per cent. It was recovered in full.
7. Premier Motorauctions Ltd (in liquidation), Premier Motorauctions Leeds Ltd (in liquidation) -v- Pricewaterhousecoopers LLP, LLoyds Bank Plc [2017] EWCA Civ 655..
8. Maintenance is the financial support of litigation by a third party with no legitimate commercial interest in it. Champerty is maintenance where the maintainer receives a share of the proceeds.
9. *Arkin -v- Borchard Lines Limited & Ors* [2005] EWCA Civ 655.

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We bring together lawyers of the highest calibre with the technical knowledge, industry experience and regional know-how to provide the incisive advice our clients need.

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