



FUNDING DISPUTES IN ENGLAND AND WALES

At HFW we recognise that financing litigation and arbitration is a major consideration for clients when deciding whether to bring an action or resist a claim, no matter the size of the organisation, or merits of the claim. We have therefore created an internal Funding Committee to advise on the best approaches to funding and ensure that we are able to offer a seamless and efficient service through the established relationships we have with both brokers and funders.

The use of funding will enable you to bring or defend claims by:

1. Managing and reducing the financial liability for your costs and those of your opponents.
2. Improving liquidity thereby freeing up capital for use in the running of your business.

This Client Guide concerns the position in England and Wales, however our lawyers and Funding Committee also have considerable experience in successfully guiding clients on how best to structure the financing of their claim globally and have well developed relationships with the main funders and brokers. We are happy to advise you on the best approach for you to take and invite you to discuss your options with us, please contact our Funding Committee or your usual HFW contact.

Benefits of all four options include:

1. Increased protection for your costs and from those of your opponents.
2. Clarity and greater certainty over your financial risk.
3. Potential reduction to costs exposure.
4. Improved financial liquidity.

Funding and Insurance options: a closer look

1. CFA (conditional fee arrangement)

What is it?

A CFA is an agreement between the solicitor, and often the barrister, and the client where the client's fees are dependent on the outcome of the case:

- **Unsuccessful:** the client pays the solicitor's fees at a reduced rate – less than standard rates.
- **Successful:** the client pays the solicitor's fees at standard rates plus an uplift known as a success fee for up to 100% of the costs, expressed as a percentage uplift on the amount that would be payable if there was no CFA.

Factors to consider:

- Since 1 April 2013, the CFA success fee is no longer recoverable from the losing side and will be paid by the party. However parties are not required to inform their opponents that a CFA is in place.



- Solicitor and client both share the risks associated with the litigation.

2. Costs Insurance

What is it?

There are two main types of costs insurance:

- **BTE Insurance:** this refers to any legal costs insurance the client already has in place before the dispute arose. If the claim arises in the client's capacity as a corporate officer or director, then directors and officers insurance (D&O insurance) may be available.
- **ATE Insurance:** this is generally taken out after a dispute has arisen to meet some of the legal costs and expenses of the case. There are two basic types:
 - **Both sides' ATE:** this provides cover for both the client's own costs and any costs orders made against them.
 - **ATE insurance in connection with a CFA:** this provides cover for an opponent's costs but not a client's own costs.

Factors to consider: Premiums

Staged premiums

- The premium increases as the matter progresses.
- Remains proportionate to the costs incurred.
- Discounted if the case settles early.

Deferred premiums

- The premium is only payable by the policyholder at the conclusion of the case.
- Cashflow advantages.
- Usually more expensive than staged premiums.

Contingent premiums

- The premium is contingent on success.
- Payable only if the case is won.
- ATE insurers will usually calculate the premium as a percentage of the opponent's costs, varying depending on the merits of the case.

3. DBA (damages based agreement)

What is it?

A DBA is a type of contingency fee agreement between a solicitor and client. The client will make a payment to the representative if the client obtains a specified financial benefit, usually damages paid by the losing side in the case. The payment amount will be determined as a percentage of the compensation received.

Factors to consider:

- If the case is unsuccessful, the representative is generally not entitled to be paid.
- Since 1 April 2013, DBAs can be used in almost all contentious business, other than criminal and family proceedings. Before that date, they were only allowed in certain tribunals.

4. TPF (third party funding)

What is it?

TPF is a financing arrangement in which the funder agrees to pay the party's legal fees, usually including experts, external counsel, and other disbursements, in accordance with an agreed budget. While it is commonly referred to as 'litigation funding', funding is now also widely used globally in arbitration.

Factors to consider:

- TPF is lawful in the UK providing that the funder does not exercise control over the running of the matter, which renders the funding illegal and open to allegations of 'champerty' and 'maintenance'.
- The key issue for clients to note is that the investment made by the funder is not a loan. The impact of the funding depends on whether the claim is successful or not, and terms will be pre-agreed:
 - **Unsuccessful:** the client will not have to pay anything and the funder loses all the money it has invested in the case.
 - **Successful:** the funder will be entitled to a return on its investment from the damages that are ultimately recovered by the claimant.
- A funder, as part of the TPF, will usually require that the client has ATE insurance (see above) in place to ensure that the risk of any adverse costs orders are covered by insurance, and they will often be able to arrange this.

Pros

1. Often acts as a second opinion.
2. Can promote settlement or negotiations.
3. Opponents often review their positions once it is known that funders are supporting a claim.
4. The level of contribution to costs or disbursements is calculated by reference to the amount of the claim.

Cons

1. **Time:** it takes longer to put in place than any other arrangement. The funder needs to review the merits, often obtaining their own advice. The relationships we have with brokers and funders and the process we adopt will ensure that decisions are made as quickly as possible; we usually estimate at least six weeks.
2. **Cost:** in litigation the cost of putting this in place whether accepted by the funder or not is usually payable by the client. The costs may however be recoverable in arbitration¹.
3. Prospects of success need to be at least 60%.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact our Funding Committee (funding.committee@hfw.com), or your usual HFW contact to discuss.



NICOLA GARE

Professional Support Lawyer
Dispute Resolution
T +44 (0)20 7264 8158
E nicola.gare@hfw.com

Published: June 2018

Reviewed: 1 April 2019

1. *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

