ENYO LAW

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16th October 2015

Litigation and Arbitration Funding

Introduction

The cost of English litigation or international arbitration proceedings can be substantial. However, there are a number of funding options available that can help ease the legal costs burden and reduce the financial risk of the proceedings in which you are involved. Where, following an early stage analysis, your legal case is assessed as sufficiently strong, we can work with you and, as appropriate, third parties, to put together a funding package aimed at hedging the risk and minimising the costs burden of pursuing your legal claims.

In broad outline, the funding options available under the current law in England are as follows:-

Third Party Funding

A third party (for example, a professional funding company, hedge fund or venture capital fund) may agree to fund your upfront costs of the dispute, for example our and counsel's fees and other legal expenses, in return for a fee, which is payable only in the event that your case is successful. The nature and level of the funder's "success fee" will vary from case to case, but typically it will be calculated as a multiple of the funded amount and/or as a percentage of any sums recovered from your opponent.

Save in exceptional circumstances, funders will not consider funding your case unless and until the prospects of success of the legal claims in question have been properly analysed and assessed as "strong" by your legal team (usually requiring a counsel's opinion as to the merits) and, occasionally, by the funder's legal team.

Conditional Fee Agreement ("CFA")

Where we are confident in the prospects of your case succeeding, we may be prepared to align our and your interests by entering into a CFA. A CFA is an agreement between you and us under which our fees are initially discounted (for example by 25%) in return for payment of the deferred 25% plus a "success fee" in the event that your case is ultimately successful. The success fee element (expressed as a %) is based on the level of fees incurred and not on the amount recovered from your opponent (compare this to a DBA arrangement – see below). In this way, we would share in the risk of the dispute as the overall level of our fees would depend on whether or not your legal claims succeed; your day-to-day legal costs would be reduced; and the obligation to pay certain legal costs would be deferred until, and be contingent upon, the successful conclusion of your case.

It should be noted that whilst you may be entitled, if your case proceeds to a final trial or hearing and is successful, to recover a proportion of your legal costs from your opponent, under the current law in England any CFA success fee (i.e. the uplift element in excess of 100% of our fees) would be not be recoverable.

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Damages Based Agreement ("DBA")

A DBA is an agreement between you and us under which our fees would be calculated as a percentage of any sums recovered from your opponent through legal proceedings. To this extent, therefore, it is similar to the US-style contingency fee. Throughout the life of the dispute, whilst you may be required to pay certain disbursements, under a DBA you would not be required to pay any amount of our or counsel's legal fees. Relatively recently introduced (1 April 2013), the regulations governing DBAs in England continue to evolve. Until the UK Government clarifies a number of important aspects of the DBA statutory regime – the Civil Justice Council recently (August 2015) recommended significant reforms to the prevailing legislation – the English legal profession will likely continue to tread cautiously when considering whether or not to take a case on under a DBA arrangement. However, in principle, a DBA represents a clear hedge of the financial risk of legal proceedings and more closely aligns the lawyer's and the client's interests in the outcome of a case than a CFA (or traditional hourly rate arrangement). Under a DBA, legal fees are in proportion to the extent of the success achieved; and in the event that the claim does not succeed, legal fees (solicitor's and counsel's) would not be payable.

After the Event Insurance ("ATE")

The legal system in England permits a successful party to recover a proportion of its costs from its unsuccessful opponent. If your case is ultimately unsuccessful, you may therefore be required to make a payment towards your opponent's legal costs (or "adverse costs") which, in large commercial disputes, could be a significant amount.

ATE insurance can provide protection against such an eventuality, i.e. the ATE insurer would indemnify you against any liability to pay adverse costs up to the limit of indemnity under the ATE policy. It can also be used, in certain circumstances, to reimburse some of your own legal expenses, such as the fees of experts and counsel. Payment of the ATE premium is typically structured to be deferred to the end of the case and contingent on success. However, English law no longer permits the recovery of the cost of the premium from the losing party (save in certain specified circumstances such as insolvency cases).

We have extensive experience of running disputes with ATE insurance in place, and through our well-established contacts in the ATE market – insurers and brokers – we can assist you in obtaining the right level of cover at an appropriately structured premium rate.

Conclusion

The funding options available to any party to legal proceedings in this jurisdiction will very much depend on the particular circumstances and nature of its case. We can help you to identify and secure the funding package that best reflects your needs, such that your exposure to the risks and legal costs of pursuing your claims is effectively managed and suitably hedged.

Please contact either Michael Green on 020 3837 1602 or michael.green@enyolaw.com or Charlie Morris on 020 3837 1621 or charlie.morris@enyolaw.com if you would like to discuss any of these options in more detail.

Michael Green
PARTNER

Charlie Morris
ASSOCIATE