

Financing Disputes

Third-Party Funding

Financing Disputes: Presentation Overview

- Types of Third-Party Funding
- Institutional funding structures: what funding looks like
- Funding applications in the energy industry
- The funding agreement
- Legal framework in Canada
- Funding in arbitration
- Negotiating a funding agreement
- Questions

Types of Third-Party Funding

- Traditional Examples
 - Contingency fee arrangements
 - Financial institution loans
 - Corporate financing
- Insurance
 - BTE
 - ATE
 - Political risk
- Institutional Third-Party Funding (TPF)
 - An arrangement between a company that specializes in the business of financing disputes and an entity (usually a plaintiff/claimant), where the funder provides financing to that entity that is secured against the dispute

Views on TPF: Then vs. Now

“Such a business plan [...] is to embrace the gambler’s Nirvana: Heads I win, and Tails I do not lose. The founders of the Convention could not have foreseen in any way the emergence of a new industry of mercantile adventurers as professional BIT claims funders.”

- *RSM Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, Assenting Opinion of Gavan Griffith (13 August 2014)

“Should third-party funding ever be permitted? If so, under what conditions? Is such funding a legitimate tool allowing the pursuit of meritorious claims which otherwise could not be brought? Or is it a form of reprehensible [barratry]?”

- *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, Dissenting Opinion of Edward Nottingham (13 August 2014)

“The propriety of third party funding agreements is controversial and problematic, and, in my opinion, at a minimum, they should not be allowed to operate clandestinely. [...] There is a legitimate concern that if not regulated, third party funding might subvert the public policy purposes of class proceedings.”

- *Fehr v Sun Life Assurance Company of Canada*, 2012 ONSC 2715

Views on TPF: Then vs. Now

“In my opinion, [...] the Litigation Funding Agreement satisfies the sufficiency factor. [...] [It] partially protects the financial and human capital of class counsel [and] may expand the roster of firms prepared to assume the risks of class action litigation.”

– *Houle v. St. Jude Medical Inc*, 2017 ONSC 5129

“In its modern incarnation, dispute funding has the ability to transform a legal claim into a financial asset, which can potentially be monetized or used as collateral in order to secure finance. At present, dispute funding is moving more into the realm of corporate finance, with increasingly diverse and sophisticated options becoming available.”

– ICCA-QMUL Task Force Report on Third-Party Funding (April 2018)

“The use of [third-party funding] can ‘help [claimants] bring claims that they could not otherwise afford to bring’.”

– Victoria Shannon Sahani, “Judging Third-Party Funding” (2016)
63 UCLA L Rev 388 at 396-397

Types of Third-Party Funding

Why institutional funding?

For **companies**:

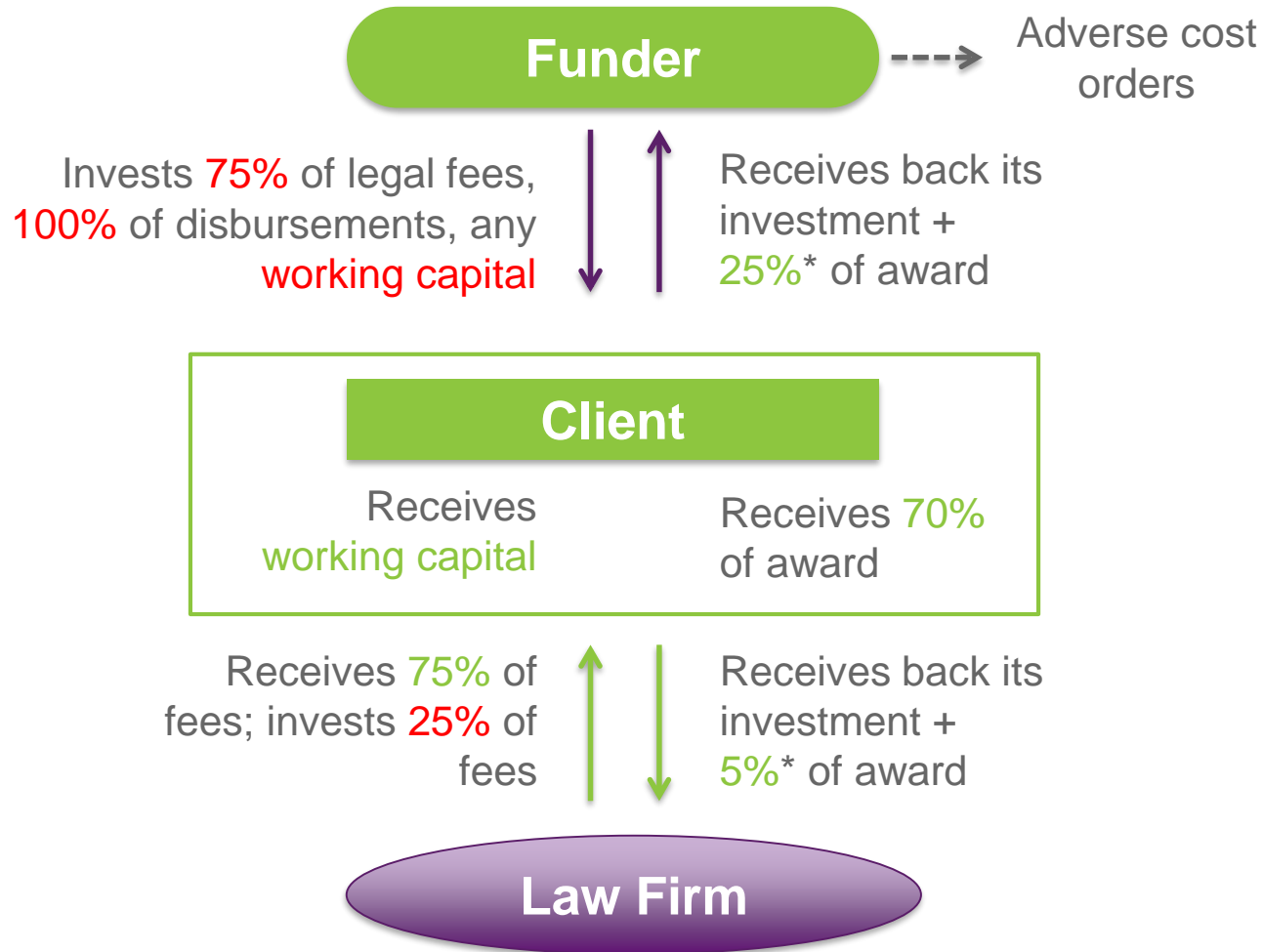
- Litigate with firm of choice at no cost
- Free up capital
- Protect from risks and liabilities
- Simplify balance sheet
- Provide cost certainty

For **firms**:

- Meet client demands for creativity and costs certainty
- Driver for more business / work with new clients
- Upside in success bonus
- Better realization

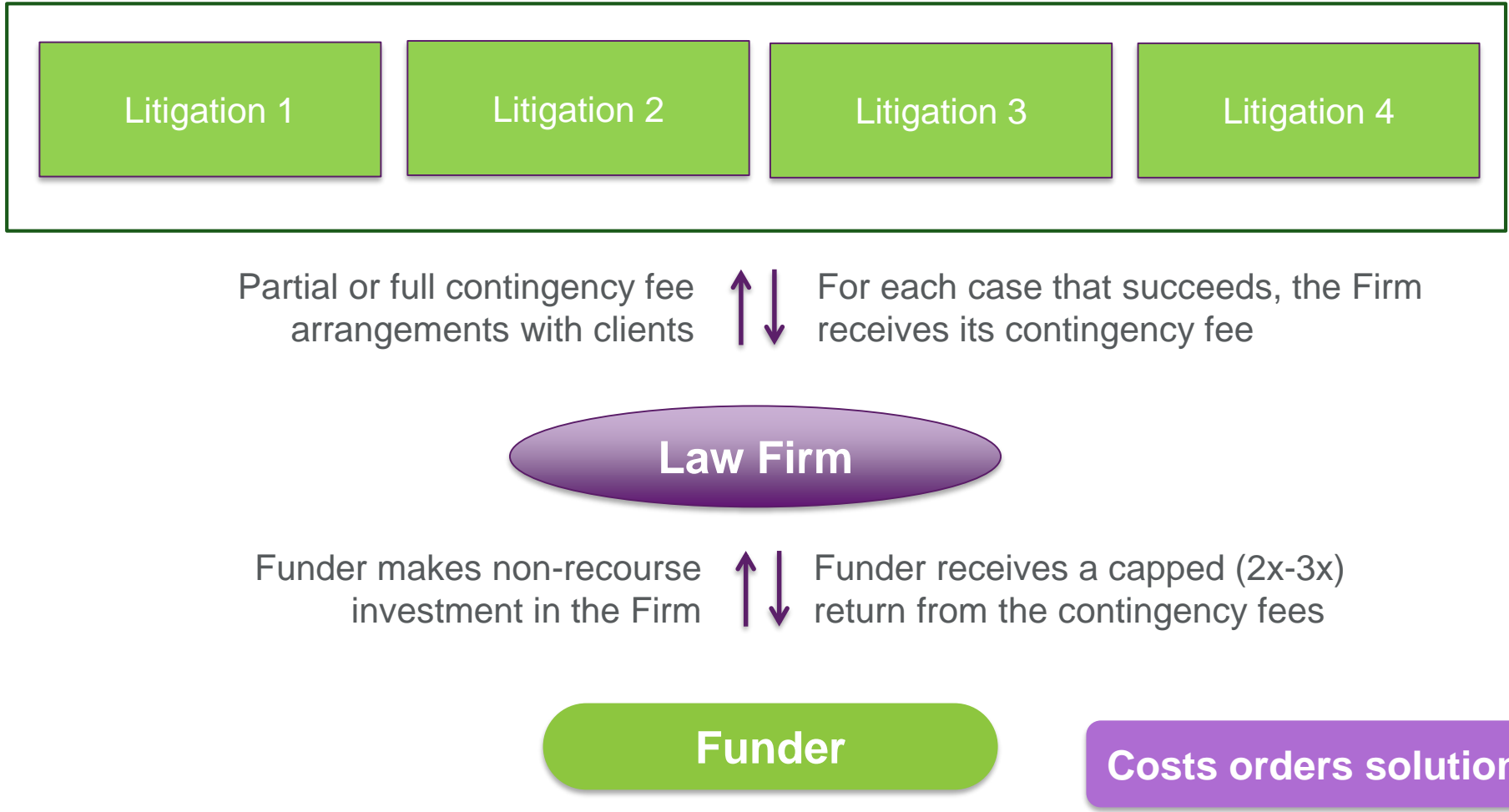
Institutional Funding Structures

Single Case Illustration



Institutional Funding Structures

Portfolio Funding Illustration



Applicability to Energy Disputes & Transactions

- “David and Goliath” cases
- Asset expropriation
- International arbitration
- Intellectual property
- M&A risk management

The Funding Agreement

What are the terms for funding?

- Returns
 - Multiple of investment amount or %
 - Caps?
 - Returns increase over time
 - Priority waterfall
- Control, Termination and Settlement
 - Funders cannot control litigation in Canada
 - Rights to terminate in specific circumstances
 - Mechanism for resolving disputes over settlement offers

The Funding Agreement

What do you need to consider?

- Conflicts of Interest
 - Lawyer's interest in return through risk-sharing
- Privilege and Confidentiality
 - NDA between funder and client
 - Communications protected by different privileges
 - Funder bound by implied undertaking
- Disclosure of Funding Agreements
 - Funding Agreement not privileged; certain terms are privileged.
 - Different application in class actions, commercial litigation, insolvency and arbitration

Legal Framework in Canada

Maintenance & Champerty

- Medieval English statutes against maintenance & champerty
- Criminal prohibition abolished in 1953
- “Champerty and maintenance are actionable torts. Maintenance involves providing financial support to another to bring an action. Champerty involves not only providing financial support, but also sharing in the fruits of an action if damages are awarded.” - *Stewart Estate v TAQA North Ltd*, 2015 ABCA 357 at para 470
- *McIntyre Estate v Ontario (Attorney General)* (2002), 61 OR (3d) 257 (ONCA)
- First cases to consider ‘litigation funding’ were class actions
- Funding not champertous *per se*
- Funder cannot “stir up” or control litigation, or take excessive return

Legal Framework in Canada

Litigation

- *Schenk v. Valeant Pharmaceuticals*, 2015 ONSC 3215
 - Plaintiff of modest means
 - No reason why litigation funding could not be used for commercial litigation
 - Fee of up to 50% acceptable
 - Agreement was amended and later approved
- *Seedlings Life Sciences Ventures v. Pfizer Canada Inc.*, 2017 FC 826
 - Federal Court had no jurisdiction to “approve” of funding
 - “The manner in which Seedlings chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant.”
 - Litigation funders are bound by the implied undertaking rule

Funding in Arbitration

“[Third-party funding] is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds itself for objection.”

Giovanni Alemanni and Others v Argentine Republic, ICSID Case No ARB/07/8,
Decision on Jurisdiction and Admissibility (17 November 2014)

- Additional considerations
 - Applicable Rules, Guidelines
 - Conflicts of Interest
 - Disclosure
 - Enforcement

Negotiating a Funding Agreement

- Choosing a Funder
 - Long-term partnership
 - Capitalization, track record and expertise
- Early Process and Due Diligence
 - Term Sheet
 - Funder parameters
 - Due diligence process and timing
- Negotiating the Funding Agreement
 - Long form agreement
 - ILA

Thank you

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