

Litigation Funding: A Global Perspective

Monday, October 28, 2013

Presented by the IADC International Committee

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Moderator



Ianika Tzankova

BarentsKrans N.V.

The Hague, The Netherlands

ianika.tzankova@barentskrans.nl

Presenters



Dr. Ulrich Classen

*CDC Cartel Damage Claims
Brussels, Belgium*

classen@carteldamageclaims.com



Christopher Rother

*Deutsche Bahn AG,
Berlin, Germany*

christopher.rother@deutschebahn.com



Michelle Fox

*Quinn Emanuel Urquhart & Sullivan, LLP
Sydney, Australia*

michellefox@quinnemanuel.com



Ralph Sutton

*Bentham Capital
New York, NY*

rsutton@benthamcapital.com

Litigation Funding

I. Litigation Funding in Europe

In Europe, a litigation funding market has emerged in the past years mainly in the UK. The market volume is about 400 – 500 Mio Euro a year. Litigation funders in the UK are backed mainly by funds investors. The fact that ATE (After The Event) insurance fees are not considered to be case costs anymore might impact the UK market significantly.

Outside the UK, litigation funding plays a minor role with litigation funders backed by insurance companies. For insurances companies litigation funding often causes conflicts of interest as potential defendants are often big corporations which could be customers or potential customers of insurers.

II. Claims and venues

Litigation funders focus on both big commercial litigation and tort claims against big corporations. As far as tort claims are concerned, follow-on competition claims have played an increasingly important role in the past years.

In the UK, specialised law firms like Hausfeld LLP offer their clients to bring claims on a sole contingency fee basis which is permissible under the bar rules of England and Wales. In contrast, in most other European countries it is not permissible for lawyers to work on a sole contingency fee basis. Accordingly, the majority of claims financed by litigation funders are brought before courts in the UK. Jurisdictions outside the UK play only a minor role. However, specialised claim vehicles like Cartel Damage Claims that bring claims in jurisdictions like Germany, the Netherlands and Finland would also work with litigation funders.

Litigation Funding

III. Are Litigation Funders an option for corporate victims?

Generally, litigation funding would be considered to be an option for individuals and small companies seeking who do not have the necessary financial means to bring their claims to court.

However, in tort cases litigation funding could be an option for corporate victims, too. As jurisdictions in Europe do not provide for US style class actions, the risk for an individual corporate victim to bring a tort claim on his own might be too high. A single plaintiff will often not be in the position to build up sufficient leverage to motivate big corporate defendants to settle. Against that background, litigation funders could play an important role to bundle claims of groups of corporate victims.

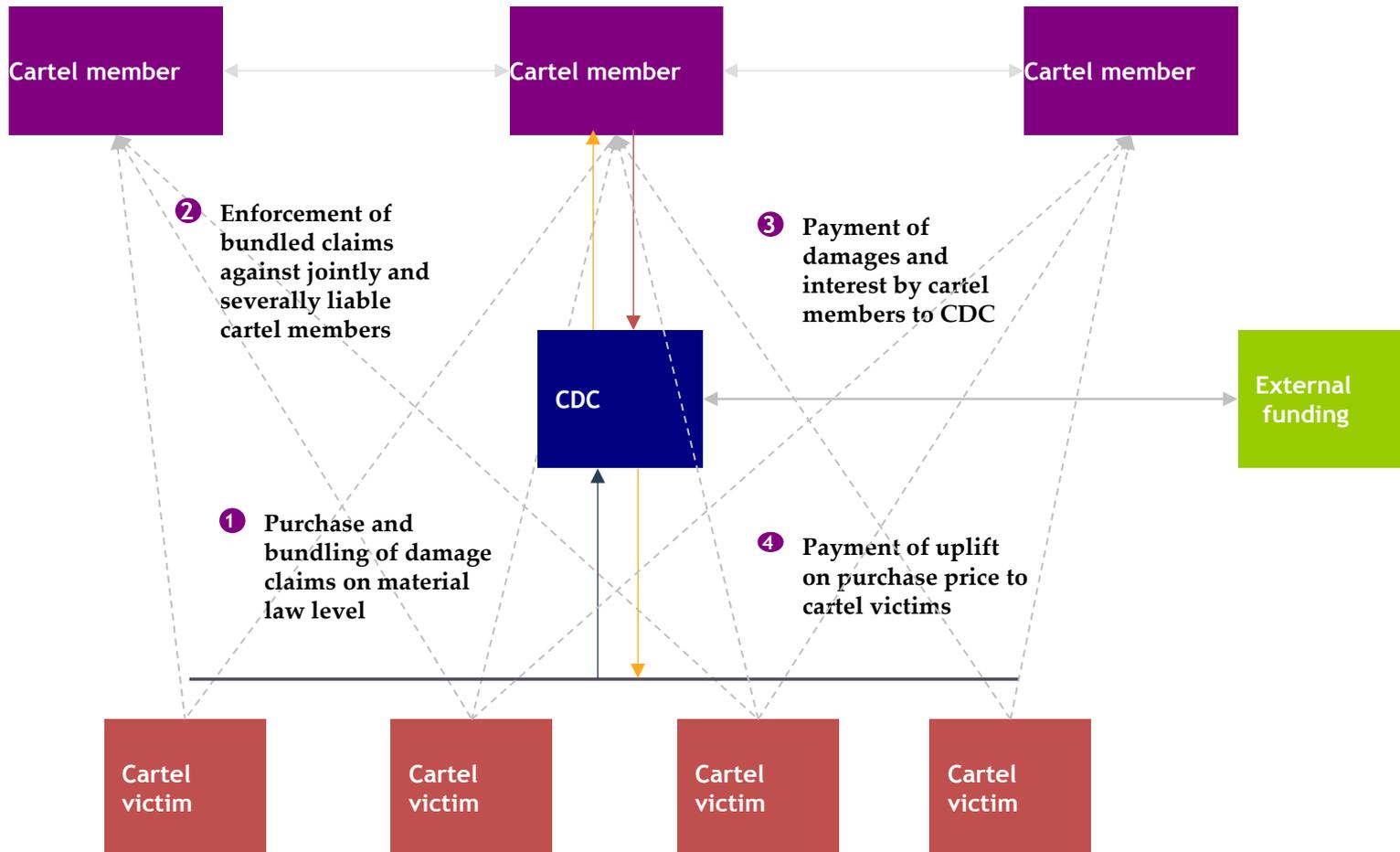
In the vast majority of cases, there is only an indirect relationship between litigation funders and corporate victims. The direct relationship to litigation funders will be maintained by law firms and specialised claim vehicles like Cartel Damage Claims.

The approach of CDC in the overall litigation funding context

Overview

- Purchase of damage claims = distressed debt management
- Concept of claims purchase recognized and applied across jurisdictions in continental Europe
- 'Hybrid' role of CDC
 - Antitrust damage claims as high value claims (long-lasting infringements, market wide effects across the EU)
 - Focus on 'follow-on' claims: Careful *ex-ante* assessment of cases ensures that only meritorious claims are pursued
 - Bundling of claims by CDC enhances chances of enforcement of claims and opens investment opportunities for external funders
- Funding requirements
 - Litigation costs (external lawyers, court fees, economic experts)
 - Adverse cost risk ('loser pays rule'): Significant differences across EU
- Growing number of investment funds with focus on litigation finance across the EU
 - Due to specific features generally great interest in follow-on antitrust actions
 - Need for specialized case-management and expertise

The approach of CDC to the enforcement of antitrust damage claims



CDC's approach is court-approved by the German Federal Court of Justice (BGH) and maximizes the chance of successful enforcement of damage claims.

AUSTRALIA: LITIGATION FUNDING

PROS & CONS

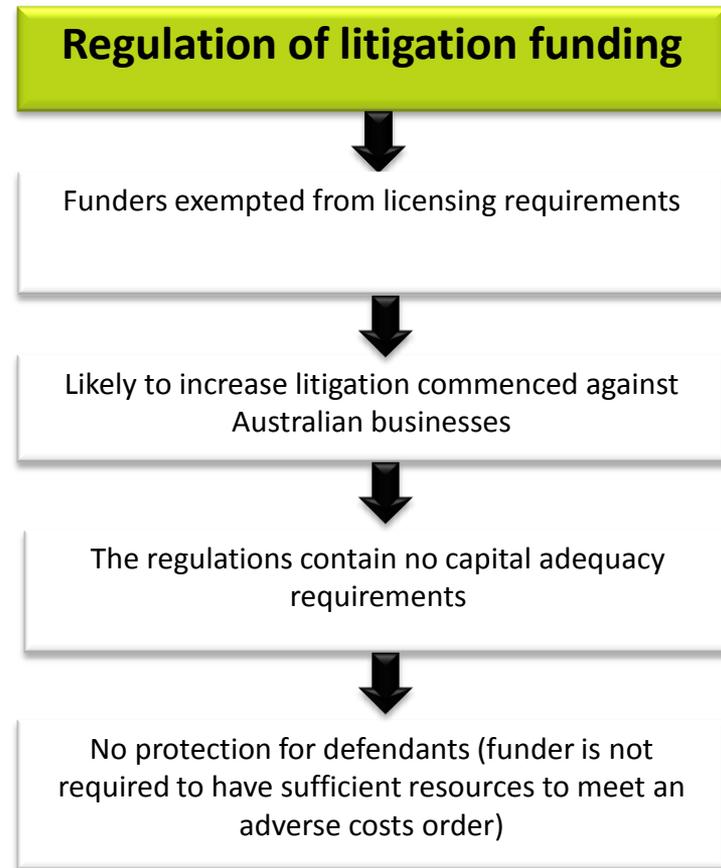
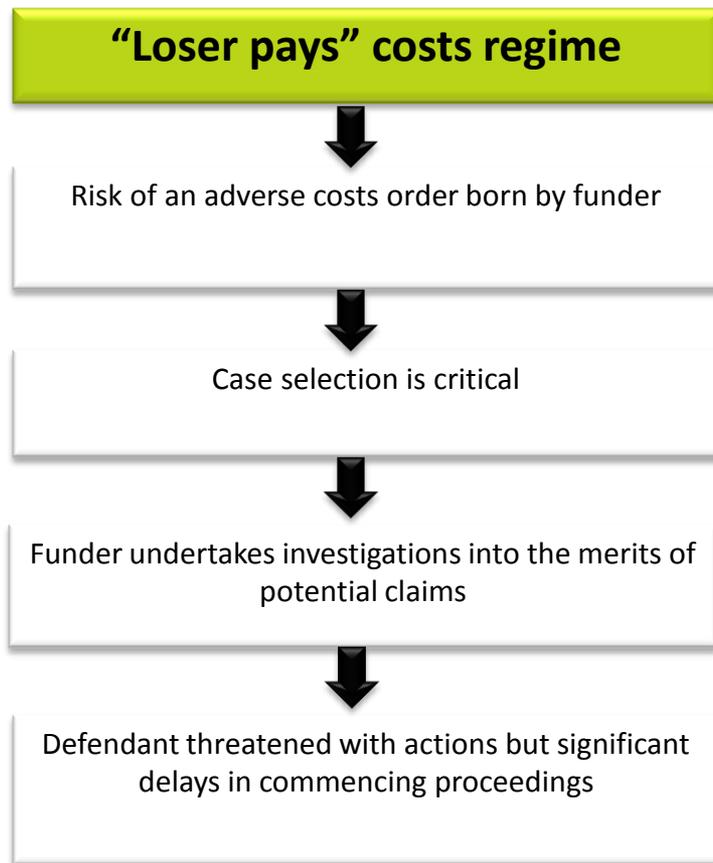
What are the benefits?

- Facilitates greater levels of access to justice
- Cost efficiencies
- Enforcement of statutory consumer protection and regulatory norms

What is the harm?

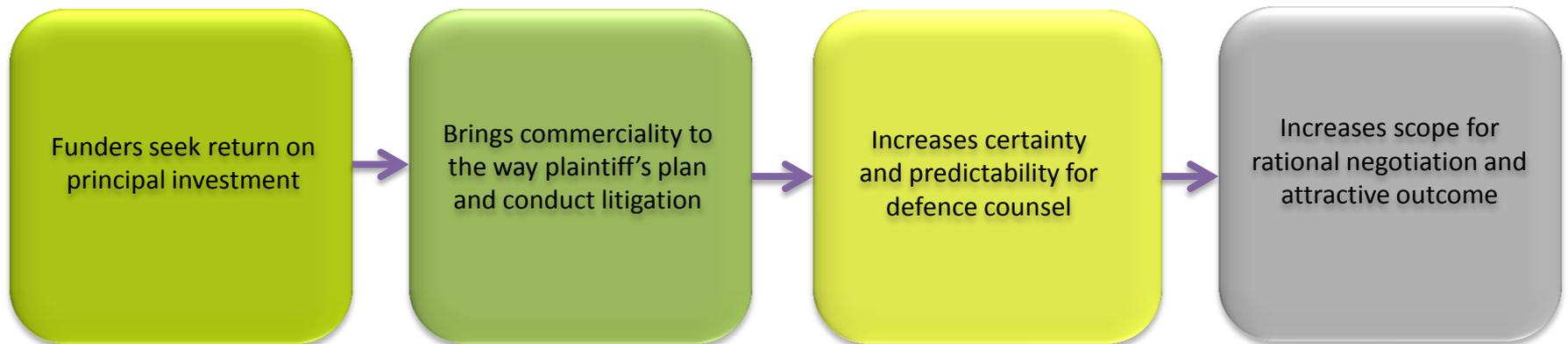
- Questionable benefits to group members (how much do they really recover?)
- Converts legal system into a forum for entrepreneurial conduct
- Conflicts of interest

Australia: costs implications



Australia: Impact on litigation

- Third party funding is mainly used by plaintiffs.
- There may be a market for alternative fee structures for defence funding but this seems quite far off in the current regulatory environment.
- In the main:



Overview of IMF and Bentham IMF

IMF Australia

- Publicly listed on the Australian Stock Exchange since 2001
- Cash balance of over \$70 million
- 80% of the Australian funding market
- Hourly fees funding only

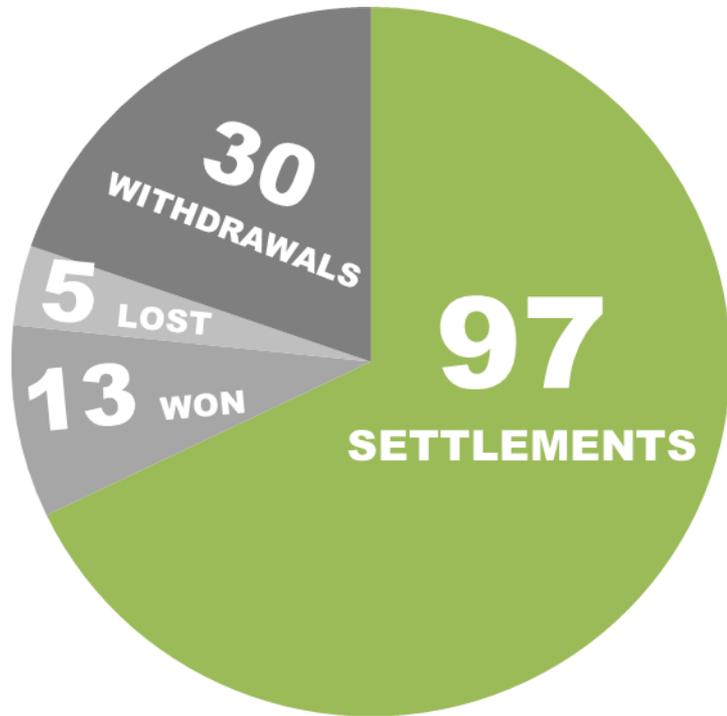


Bentham (IMF)

- US arm of IMF Australia
- Launched October 2011
- Same investment process and rigor as IMF
- Hourly and partial contingency funding

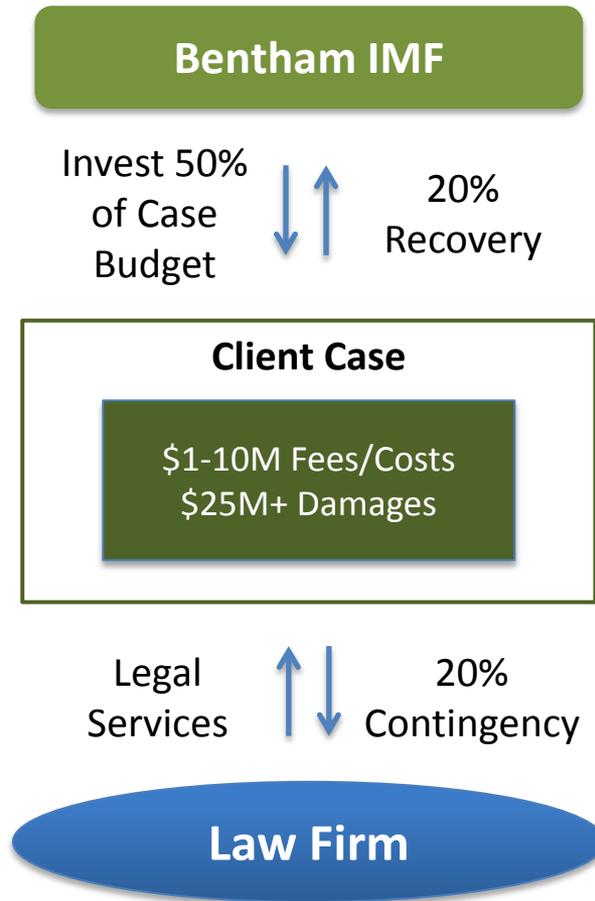


IMF: The World's First and Most Successful Funder



- **145 commercial cases completed**
- **Generated revenue of \$1.24B:**
 - \$815M to Clients
 - \$422M to IMF comprising:
 - \$140M reimbursement of costs
 - \$282M net revenue to IMF (excluding overheads)
- **Gross ROI of 310%.**
- **Average investment period: 2.3 years**
- **Lost or withdrawn cases total \$10.4M**

Bentham IMF Investments in Single Cases



Issues for Law Firms

Benefits:

- Boost law firm profitability – Firms use contingency cases to increase revenue
- Smooth cash flow – Always on-time payments to firm during cases
- No loss of control – Lawyer and client retain control of strategy and settlement
- No corners cut – Counsel can focus on case merits, not client ability to pay
- New case referrals – Bentham relationship aims to be a two-way flow of litigation and capital

Concerns:

- Confidentiality and disclosures to Bentham
- Control of litigation and settlement
- Alignment of incentives
- Capital needs above budget caps

Questions for Presenters?



Dr. Ulrich Classen

*CDC Cartel Damage Claims
Brussels, Belgium*

classen@carteldamageclaims.com



Christopher Rother

*Deutsche Bahn AG,
Berlin, Germany*

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