

Kluwer Arbitration Blog

THE HUNT FOR FUNDING

Lisa Bench Nieuwveld (Conway & Partners) · Friday, February 17th, 2012

My experience, first hand, from hunting for a third party funder was different than I had anticipated. I have been researching this newer field for some time now and have entered some previous posts which go more into the basics of what it is and how it works. So, I won't repeat all of those details here except to clarify that by third party funding I am referring to a fund or investor source which then covers the costs and legal fees for a claim before a court or tribunal, whose repayment is entirely contingent on the success of the claim and payment of the award.

I was approached with a possible BIT claim with a very strong case on the merits. The damages were also quite high –certainly high enough in terms of the legal and expert costs and then ultimately sharing some with the third party funder should the arbitral tribunal agree it is a meritorious claim. I felt confident that this claim, after all of my research, would prove attractive to most third party funders, and at the very least one. And, of course, we only needed one.

What I learned instead is that it is quite difficult to get a third party funder on board. From researching my book and my PhD, I had made several contacts within the third party funder community. All of the third party funders I know are friendly professionals who were great about taking the time to discuss this possible claim with me and consider whether it was worth pursuing from their standpoint. By pursuing, I mean for them to fund. I was impressed with their availability and willingness to discuss the case with me to at least see whether it was worth a deeper dive into.

This is what I further learned: First, a good third party funder is going to appreciate the need for a confidentiality agreement to be in place before sending over the client's information. This is a dynamic, unresolved field and that includes how to treat information sharing with these third parties. It is important to get this covered immediately. Second, they are typically very approachable and very happy to consider a case based on what information you have. This may not mean they are ready to then negotiate a funding agreement, but they may be able to look at a well-prepared overview memorandum in order to spot some initial red flags before spending a considerable more amount of time (which you may or may not get paid for) essentially preparing the entire Statement of Claim or such before they determine that it is not the right case for them to fund. This piece of information was especially useful and I think is a great way to get an idea about a case before committing to a significant amount of time. No doubt, it still takes a good amount of effort as the memo should at a minimum provide a summary of the facts, which legal claims will likely be made and key measures establishing these legal claims, rough litigation budget, and, of course, damages. Damages are probably the biggest key, which leads me to the next learning point. Third, even with a high amount of damages backed by strong liability claims, it is not so much the

amount of damages that matter or even that you can prove them but more the amount of sunk costs. By sunk costs I am referring to the amount already spent on the investment. It is this number that is truly the magic number since, at the very least, with a meritorious claim, one would expect to get that amount back. This should typically be in several million to tens of millions before being a true attention getter of a third party funder.

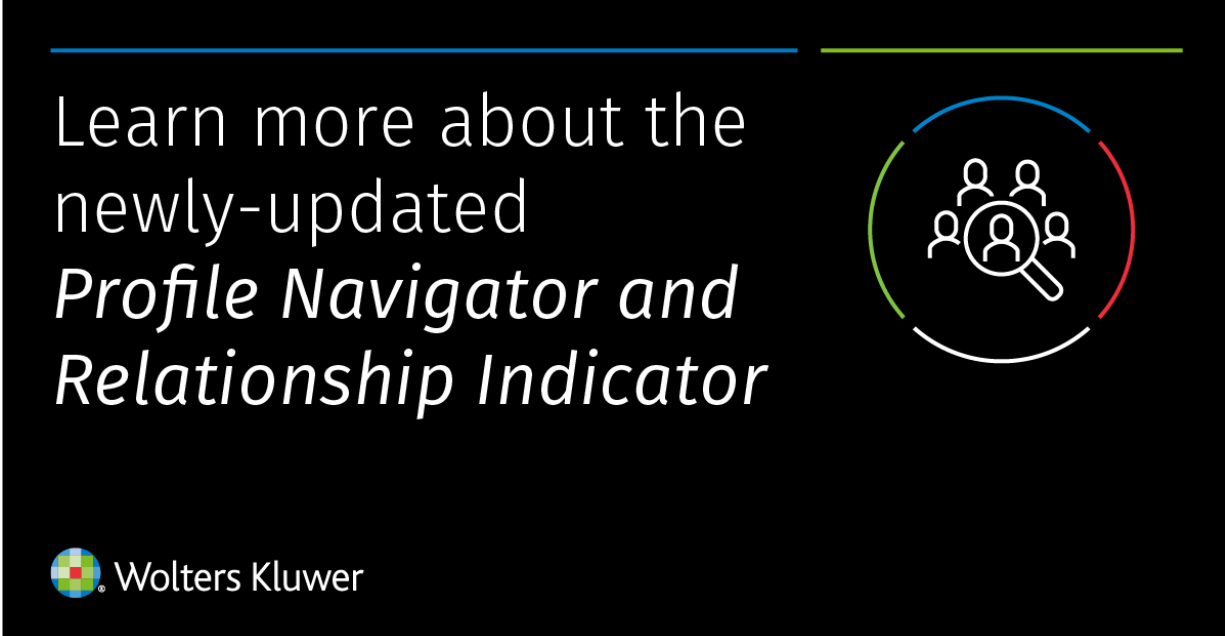
This information was interesting and useful to learn, making it worthwhile to share. Third party funders are incredibly approachable and truly willing to look at prospective cases with you, one which has not yet been initiated or those already happening. Sunk costs, though, is a crucial number. Incidentally, we are still considering funding options for this particular case, even though it has a lower sunk costs amount.

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