

“The focus of the funder is not if the dispute is good – it’s whether the other side has any money.”



SUSAN DUNN | FOUNDER, HARBOUR LITIGATION FUNDING

Looking back over the last five years, what were the key trends in litigation funding?

It’s been all about the international growth of funding with the increase in cross-jurisdictional litigation and international arbitrations. You could not be a funder and say: “I’m only going to fund in England and Wales.” We now fund in 17 jurisdictions. Since 2015, there’s been a significant increase in the use of funding. It was the insolvency lawyers who first used funding and now it’s every type of dispute. The next wave is governments at national and local level, using funding. This makes a lot of sense as government legal budgets are under constant pressure and even more so with the strain Covid has put on national finances.

Is that local authorities and regions? What about states?

All of them. I’m in discussions now with a country at presidential level about them using funding to recover monies that left the country. The easiest one to identify is corrupt politicians, but we’re talking about certain countries that have enabled money to leave the country, avoiding tax. Then you’ve got the domestic enforcement matters. Look at the annual budget for the SFO – it’s tiny, they’ve got so little money to pursue fraudsters.

It’s staggering what people will pay for legal services. Clients are still not unionizing as we might expect to say: “Enough! We’re not getting what we should be from you.” The more law firms farm out the lower-rate admin stuff, the more they can even increase hourly rates for the really difficult technical and strategic work, which is usually the interesting work. There’s still too much squeamishness about having more blunt conversations.

We’re talking to law firms about facilities and portfolios of cases. To provide that type of funding we ask for historic data about case outcomes and budgets, but very few law firms record that information and yet it would be so useful to them if they did, as we find when we analyse our own data. When I asked one partner, “When did you last look at your past estimates to budgets?”, he replied: “I’m not paid to look backwards.”

With facilities and portfolios, is that providing funding for a series of cases?

Yes. With facilities, we are now funding law firms that say they’ve got a series of smaller cases with similar types which we can provide on a delegated authority basis once parameters have been agreed. We want to see the track record so we can see what the budgets were and how the budgets compared with the ultimate costs. Typically, it is where the law firm is doing a group of cases on risk for a client and wants monies to lay off their WIP risk or the client has a group of cases it is seeking to get funded or if their clients have a portfolio of cases, say eight IP cases.

“There’s still too much squeamishness about having blunt conversations about value.”

There’s been talk for years of extending funding to large companies defending claims. Is that happening?

It’s an option, but it is not such an obvious solution as claimant funding. As a defendant, if I am going to save £100m and the funder is going to pay £5m to help you defend, do you want to pay the funder £15m for saving me £85m? They’d rather spend the £5m defending their position.

Isn’t the attraction getting it off balance sheet? You’ve got certainty.

That’s the spiel, but we don’t see it happening very often.

Looking ahead, many are expecting it will be a busy disputes market. What’s your gut telling you?

Insolvency is going to take a lot longer to get going than people think, for obvious reasons around legislated moratoriums. Some are gearing up and there are some that pre-date the current legislation. We’re having lots of conversations. What we are told is that the banks were very twitchy in the early days of lockdown and then calmed down. Then there’s the force majeure issues going on because people are having to cancel contracts. But if those contracts are cancelled, it’s probably because the defaulter is struggling so may not be able to pay any amount claimed, so I am not sure how many of those types of disputes will have legs. Even more than ever, the focus of the funder is not if the dispute is good – it’s whether the other side has any money. I’m still staggered by how often when we ask how the other side can pay and they say: “I don’t know but it’s a good case.”

I look back at 2008 – it took a really long time before we started seeing enquires for funding, it was probably 2012. We might see some of the insolvency-related stuff in the second half of 2021, but in terms of non-insolvency, I don’t think we’ll see that until 2023 or 2024, when you have six years to bring most claims.

What are you expecting the busiest areas of disputes will be over the next three years?

We have been funding in Brazil for the past two years. That looks likely to increase. State-related litigation is going to be big – it takes longer to get those claims up and running, but once a few have started there tends to be an uptick after the first pioneers have shown it works.

Does Harbour fund much arbitration?

We do, with mixed results. Because you can’t appeal, the mixed result is the end result. To date, we have had better outcomes in the courts, but we continue to fund arbitrations.

What will be the hottest markets for the disputes Harbour and your peers will be funding?

We have differing views about how European countries are going to develop as places to fund litigation. There is still a lot of learning for us about the European jurisdictions and case outcomes. I am an unabashed fan of the England and Wales jurisdiction.

Can London’s position be sustained globally over the next five to 10 years?

When I look at how this jurisdiction has dealt with the pandemic, and we fund a lot of cases around the world, this jurisdiction is ahead of all others in responding to online trials, etc. We funded claims against Hiscox for non-payment of business interruption

claims and the speed that case went through all three tiers of the courts was quite extraordinary. It was issued in June and we had a decision from the Supreme Court in January. I'm not sure that could happen anywhere else.

Looking three to five years ahead, what role should funders be looking to carve out?

It's still difficult to make meaningful inroads into corporates for discussions about funding, going through their law firms remains the most efficient route. Law firms will need to get better about how they collect and analyse their data. If firms were in command of their own data they could be more in command of their own destinies about how they resource, allocate and charge.

How much scope do you see for radical change in commercial disputes?

What's been really interesting is when you look at some of the fantastic stuff GCs have done when they've worked together on Black Lives Matter, #MeToo and diversity, they show they can galvanise themselves for these fantastically important social issues. We might expect them to do the same about how they are charged. That should mean the opportunity is there for different types of firms and models, rather than a flight to old ways.

This is part of a series of 30 interviews with senior in-house counsel and other leading figures from across the global disputes industry. You can find the other interviews, as well as insights from our expert litigators, at:

www.hfw.com/litigation

HFW LITIGATION

HFW has one of the most active disputes practices in the market, covering litigation, international arbitration and alternative forms of dispute resolution.

We have more than 350 specialist disputes lawyers across the Americas, Europe, the Middle East and Asia-Pacific, handling high-value, complex, multi-party and multi-jurisdictional disputes, including fraud and asset recovery, insolvency, class actions, and enforcement actions.

Our expert lawyers frequently litigate on behalf of clients in courts around the world.

To find out more about our leading disputes offering, contact:

NOEL CAMPBELL

Global Head of Litigation

T +852 3983 7757

M +44 (0)7774 964184/+852 6113 9280

E noel.campbell@hfw.com

NICOLA GARE

Disputes PSL

T +44 (0)20 7264 8158

M +44 (0)7795 612270

E nicola.gare@hfw.com

DAMIAN HONEY

Head of International Arbitration

T +44 (0)20 7264 8354

M +44 (0)7976 916412

E damian.honey@hfw.com

SEAN TWOMEY

Director of Business Development

T +44 (0)20 7264 8546

M +44 (0)7976 282592

E sean.twomey@hfw.com

Find us on LinkedIn at www.linkedin.com/company/hfw or search for #HFWlitigation.