proposed restructuring. As such, the provisional liquidator's powers may be tailored to the company's needs.

Whilst the powers of a provisional liquidator are wide-ranging and similar in some ways to those which may be bestowed on official liquidators, (unless the powers have been limited by the Court as mentioned above) the effect of a winding up order over an insolvent company is drastically different to the appointment of provisional liquidators. A winding up order would simply lead to a liquidation of the company, and in most cases a diminution in asset value, whereas provisional liquidators would attempt to restructure the debts of the company in order to potentially increase the return to creditors.

The Rise of Third-Party Litigation Funding

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It was Scott Butler from my Fellowship class who told me that in Australia, for each substantial bankruptcy claim, he would first obtain three quotes from litigation funders. This opened my eyes. Though I had come across litigation funding in one or two bankruptcies in the Netherlands, litigation funding is not nearly as common in Amsterdam as it appeared to be in Sydney.

Made in Australia

Australia is the cradle of third-party litigation funding. From there, it found its way to other common-law jurisdictions like the UK, the US, and Hong Kong. Currently, there are a number of major listed and privately funded third-party litigation funders active in common-law jurisdictions.

With Germany as the sole exception, continental Europe is lagging behind somewhat, though it seems to be rapidly catching up as lawyers join forces with capital to provide litigation funding to the continent. Germany already has a well-established third-party litigation funding market that originates from its widely established legal cost insurance business. Recently, US funder Burford Capital invested €30 million in Hausfeld Germany to fund anti-cartel cases. The rise of litigation finance in Europe seems to have only just begun.

Full disclosure: I am the managing director and co-founder of Redbreast, a recently established third-party litigation funder based in Amsterdam.[1]

Venture capitalist or contractor?

Generally, third-party litigation funders provide financing to claimants to cover the costs of litigation in return for a share of the proceeds. Financing is made available on a non-recourse basis, with the funder assuming the risk of any proceeds being insufficient to cover the costs involved.

Steinitz and Field compare litigation funders to venture capitalists, who contribute capital and often strategic know-how to a venture in exchange for a share of the value realized on exit.[2] The litigation funder's exit is the voluntary or involuntary settlement of the claim.

In civil-law countries where parties are free to agree to give the funder a larger role in the suit, the funder could also act as general contractor, who contracts the prosecution of the claim, including the management of litigation, on behalf of the client for a contingent fee. The litigation funder would then subcontract the attorneys and experts for the case directly.

In either case, the litigation funder does not purchase or assume the claim itself. If anything, it purchases only a piece of the claim's proceeds.

Litigation finance can also be used to fund the costs of defence litigation. In that case the funder's consideration is contingent on certain predefined results. Litigation finance can take the form, too, of financial leasing, when plain working capital financing is provided against a large piece of litigation.

Litigation funding in distressed situations

There is an obvious match between litigation finance and financially distressed companies with valid claims that require expensive litigation to realize their value. In fact, third-party litigation funding first emerged in Australia in bankruptcy cases.[3]

Joining forces with a specialist litigation funder might be worth considering even if cash is not the issue. An administrator with a complex but potentially valuable cross-border claim might hesitate to spend creditors' money on the venture. The creditors' committee might be even more reluctant. In such cases litigation funding can be a solution. A litigation funder can assume the risk that eventual recoveries are insufficient to cover expenses, while the creditors will still receive the majority of any surplus realized. The funder can also arrange insurance against adverse costs risk. Furthermore, using a funder in the jurisdiction where the claim is to be litigated, or an internationally operating funder with a local network, can prove helpful in understanding the merits of the case and possible enforcement issues.

The same applies to distressed companies. In a restructuring scenario, investing new money in expensive litigation might well seem less than appealing to both lenders and shareholders, even if the claim has considerable upside potential. At the end of the day, for most companies litigation is a risky investment in a non-core asset. Here, again, litigation funding might provide a solution.

Like any other parties investing in a distressed situation, litigation funders should consider how their funding arrangements and the suit might be affected by ongoing restructuring or insolvency filings.

Considerations when entering into a funding agreement

Maintenance and champerty

In some common-law jurisdictions the doctrines of maintenance and champerty are still a hurdle for third-party litigation funding agreements. In essence, these doctrines prohibit a third party from giving assistance to a litigant in

1 Redbreast Associates N.V., www.redbreast.com.

2 Maya Steinitz and Abigail Field, "A Model Litigation Finance Contract", *Iowa Law Review*, 99 (2014), pp. 711-772, University of Iowa Legal Studies Research Paper No. 13-32. Electronic copy available at http://ssrn.com/abstract=2320030 [last accessed 14 December 2015].

3 The abbreviation in the name of Australia's biggest listed litigation funder, IMF Bentham, which today is best known for its funding of class actions, stands for Insolvency Management Fund.

return for a share of the proceeds of the suit.[4] While no longer a real issue in Australia,[5] the US, and the UK,[6] in Hong Kong litigation funding is potentially still a crime. However, Hong Kong courts seem consistently to make an exception for litigation funding used by administrators in bankruptcy cases.[7]

Control

In common-law jurisdictions, the parties to the litigation funding agreement should be careful to avoid granting the litigation funder control over the suit. Though in general the funder may be given some say in important decisions, control should predominantly remain with the litigant. However, there are major differences between jurisdictions. Australian courts have taken a very liberal approach, permitting situations in which the liquidator had to obtain the funder's approval before applying for a trial date, briefing counsel on the trial, settling or discontinuing the claim, or appealing against a final judgment.[8] English courts are much more restrictive.[9]

Joint interest

Given that the claimant and the litigation funder are in a sense joint venture partners that need each other to achieve the best possible result, it is crucial that the funding agreement ensures the parties maintain a joint interest in the outcome of the litigation throughout the process. In jurisdictions where non-privileged communications are discoverable, the parties should furthermore ensure that communications with the funder fall under client-attorney privilege, for example by entering into a joint interest agreement early on.

Civil-law jurisdictions

In most jurisdictions in continental Europe litigation funding is plainly allowed. The issue of control over the suit also seems to be less precarious in civil-law countries, perhaps, in the Netherlands and Germany for example, owing to the widespread use of premium-based legal costs insurance. Legal cost insurers have long required certain rights of control in the proceedings of which they carry the costs, and this is generally not regarded as an issue.[10]

Conclusion

Once an exclusively Australian bankruptcy affair, litigation funding is rapidly finding its way to jurisdictions and other areas of law across the globe. Third-party litigation funding is such an obvious solution to the problem of funding the prosecution of large claims in cash-stripped bankruptcies that it can only be a matter of time before mainland European lawyers, follow Scott Butler's suit and first obtain three quotes from litigation funders before litigating a large bankruptcy claim.

4 Steinitz and Field, "A Model Litigation Finance Contract", and Marco de Morpurgo, "A Comparative Legal and Economic Approach to Third-Party Litigation Funding", *Cardozo Journal of International and Comparative Law*, 19 (2011), pp. 343-412, p. 389, summary at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167802 [last accessed 27 January 2015]. Lord Mustill in *Giles v Thompson* [1994] 1 AC 142.

5 In a landmark decision in 2006 in the *Fostif* case, Australia's High Court overruled objections based on maintenance and champerty legitimizing litigation funding in a class action. See *Campbells Cash and Carry v. Fostif* [2006] HCA 41.

6 In the UK, Lord Jackson, in his *Review of Civil Litigation Costs*, the report that preceded the so-called Jackson reforms, recognized that third-party litigation funding promotes access to justice and that it even benefits opposing parties as it tends to filter out unmeritorious cases. *Review of Civil Litigation Costs: Final Report* (London, 2009), at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf [last accessed 13 December 2015].

7 *In re Po Yuen (To's) Machine Factory Limited* [2012] HKCU 816; *in re Cyberworks Audio Video Technology Limited* [2010] HKCU 974; Berman v SPF CDO I Ltd [2011] HKCU 522.

8 *In re Elfic Ltd & Ors v. Macks & Ors* [2001] QCA 219 (6 June 2001).

9 *In re Oasis Merchandising Services Limited* [1998] Ch 170.

10 In fact, Dutch bar rules explicitly take into account the possibility that counsel is acting both for the insurer and the insured, notwithstanding the fact that they might have partially diverging interests.