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Litigation Funding and Other Monetization Tools for Israeli Innovators and Investors

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Protecting the value of Israeli businesses involved in cross-border legal disputes may require aggressive assertion of rights in claims against joint venture partners, distributors, licensees, customers, or infringers of intellectual property. However, the high cost of international litigation may act as a barrier to recovery, especially for early stage companies lacking the revenue or access to capital necessary to cover legal costs. Litigation funding and alternative fee arrangements are tools that can help such companies leverage value from their cross-border legal claims.

Unlike traditional contingency fee arrangements, third-party litigation funding can cover a broader range of expenses including, in some instances, ongoing business costs unrelated to the litigation. As with contingency fee arrangements, litigation funders invest in the litigation in exchange for a share in the outcome, which can be structured as a percentage of the eventual return, a multiplier on the amount invested, or a variety of other arrangements. Funding is usually non-recourse, meaning that there is no recovery except from the proceeds of the litigation. While funders are typically entitled to receive information about the case, they are not allowed to control it.

The Funding Process

Funding is available for a variety of high-value claims, including patent infringement and other intellectual property claims, as well as trade secret, breach of contract, licensing, joint venture, fiduciary duty, insolvency, and other cross-border business disputes, whether litigated in court or decided in arbitration. The funding process typically entails (1) the identification and valuation of claims, (2) presentation to the litigation funder, (3) the identification of appropriate funders, (4) presentation to funders under a non-disclosure agreement (NDA), (5) a deep due diligence process by the funder, (6) the negotiation of the funding terms, and (7) ongoing monitoring by the litigation funder.

To maximize the chance of successfully obtaining funding, it is important to “package” claims with the assistance of counsel. That includes:

- Identifying the legal claims to be asserted, their strengths and weaknesses, and the evidence available to support them;
- Developing a litigation strategy, including assembling a legal team of both Israeli and cross-border lawyers;
- Assessing the value of claims, and the various “exits,” or paths to recovery such as settlement or recovery at trial;
- Identifying risks, including any key events in the litigation process that may impact the likelihood of success; and
- Developing background materials to help explain the case to the funder.

Negotiating appropriate terms for litigation funding requires preparing the client with a strong understanding of the litigation process, the risk profile, and potential outcomes. For example, there may be a substantial opportunity for early resolution before substantial expenses are incurred, or for partial resolution with certain parties. Funding terms should balance risks and reward appropriately between the litigation funder and client.

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