

**Supplement to Fulbrook Primer  
on  
Third Party Dispute Finance**

**April 2017**

Selvyn Seidel, CEO and Chairman  
Fulbrook Capital Management, LLC  
©Copyright, 2017

## Index

I. Introduction.....	1
II. Overview and Summary .....	1
III. Discussion.....	2
A. Court Decisions .....	2
1. General .....	2
2. Champerty .....	4
3. Disclosure .....	6
4. Sanctions .....	11
5. Class Actions .....	12
6. Respondent must pay claimant’s financing fees .....	13
7. Excalibur .....	14
8. Issue in U.S. of financier Illegally Investing in a law firm .....	14
9. Financing a claim can violate an agreement to release that claim .....	15
10. <i>Ecuador class v. Chevron</i> , back yet again .....	15
11. Blairgowrie Trading Ltd v. Allco Finance Group Ltd.....	16
B. Decisions in the Pipeline: Claims asserted in the Courts, without decisions yet.....	16
C. Rules .....	17
1. In general .....	17
2. Rule-Making for claimants and defendants .....	20
D. Trends .....	21
1. Portfolio and Jumbo investments.....	22
2. “Small” investments .....	22
3. Credit Investing.....	22
4. Law firms starting to become funder-friendly or self-funder .....	23
5. Technology and math come to Dispute Finance .....	25
6. Rule-Making.....	26
7. New York University School of Law’s Center for Civil Justice .....	26
8. Burford acquires Gerchen Keller and becomes the giant in the room .....	28
9. Disclosure, an old but valid issue.....	28
10. Country Competition .....	31
11. The Trump Card .....	32
12. Media attention.....	32
13. “We hold these truths to be self-evident. . .” .....	33
IV. Conclusion.....	33
Annex .....	35

## **I. Introduction**

The Third Party Dispute Finance industry continues to develop and change, virtually daily. This, within a young, complex industry. Since circulation of the Fulbrook Primer on Third Party Financing of Commercial Claims in April 2016, about one year ago, a lot has happened. In this April 2017 Supplement, Fulbrook updates the Primer.<sup>1</sup>

The Supplement summarizes selected material events impacting the U.S. To an extent, it covers developments in foreign jurisdictions having an impact on the U.S. The industry is a global web; decisions elsewhere can impact the U.S., and the reverse. But if one had to single out the one country most active in the industry, it would be the U.S. (Within the U.S., certain jurisdictions are the most active, such as New York)

It cannot be exhaustive. Factors that make this impossible include the sweeping confidentiality in the industry, and the early, undeveloped stage of reporting in this young industry.

## **II. Overview and Summary**

Over the past five or six years, the industry has put down roots, done so rapidly, and grown like topsy. That is covered in the Fulbrook Primer.

This past year has continued apace. We have thus seen a number of Court decisions, with the promise of more to come. Most interesting cases have come and likely will come during the foreseeable future, from the United States and Europe.

Beyond this, there has been:

---

<sup>1</sup> The contents of this Supplement, as the contents of the Primer, are solely for reference purposes. They are not legal or other advice and cannot be relied on as such. Specific legal and other advice about anyone's specific circumstances should always be sought separately before taking any action, whether related to this Supplement or otherwise.

- Some Rule-Making activity;
- A changing profile of the investment community;
- Dramatic new products and emphases from the investors and for market;
- Sanctions being imposed;
- International financing going from strength to strength, particularly in international arbitration;
- Significant developments in the legal services community;
- Newer methods emerging to evaluate and reduce risk;
- Signs of competition among countries to attract dispute financing;
- Ongoing controversy in the industry on some issues, and challenges to it, led, as in the past, by the U.S. Chamber of Commerce’s Institute of Legal Reform;
- Some new countries turning to financing;
- The acquisition of the largest finance company in the world, Gerchen Keller, by the second largest, Burford, putting over \$2.3 billion under one hood — by far the most investment capital of any institutional financier in the world;
- Donald Trump’s election;
- Certain “truths” about the industry being established.

This is touched on below.

### **III. Discussion**

#### **A. Court Decisions**

##### ***1. General***

Court decisions are particularly important given that today, as discussed below, courts are for the main part the specific rule-makers in the industry.

A number of court decisions are found in the United States. (two in New York, two in California, one in Pennsylvania, one in Delaware). A similar number have come from Europe (two in the United Kingdom, two in Ireland, one in Germany, and one in the Netherlands). Another has come from Canada, and yet another from Australia.

Most decisions today are “international”; the litigants in these decisions usually come from different countries, and different laws and policies apply. This international aspect is destined not only to continue, but to grow, especially in the internet — along with and inspired by the growing number of international commercial transactions, communications, and disputes.

Arbitration decisions have less of an impact on rule making and precedents since, among other reasons, many are confidential and all are subject to contract of the parties.

An exception is arbitrations involving foreign sovereigns. Confidentiality is much less. Treaties, not contracts alone, play an important role. Here we see comparatively significant use of financing.

One important financing aspect of all international private arbitrations is that they generally are not bound by nor bind other tribunals or courts. Nor do they have a set of rules of public policy as exists with court decisions. Rather, they are a creature of contract, only loosely bound by court-like public policy. There is thus in general more “freedom” of arbitration panels to create new and different rules or guidelines than in the courts. They can learn from the court decisions, and improve them.

Decisions in one country, by courts or arbitrators, generally are not binding on tribunals in another country. The decisions still can be important and persuasive (and, in reality, decisive).

The Supplement reports on these selected court decisions. Court decisions in the last year have addressed important topics, especially champerty; disclosure; sanctions; and rule-making; with a few cases addressing other issues.

The Supplement also reports on: some of the new cases filed but with no decision yet reached; rules and rule-making; noteworthy market and industry trends; and some other developments.

## 2. *Champerty*

Two U.S. courts have recently addressed the subject of champerty.

In New York, a Court of Appeals (New York's highest court) issued a decision concerning New York's statute dealing with champerty, Judiciary Law Section 489. *Justinian Capital SPC v. West LB AG*, 28 N.Y.3d 160 (October 27, 2016). The statute exempts transactions from champerty if the claim has a "purchase price" of over \$500,000. Under the statute, financings of commercial claims are usually not subject to a charge of champerty in New York because financings of commercial claims typically involve investment amounts (or "purchase prices") of \$1 million to \$10 million, or more (although some financings are now being done at under \$1 million or even under \$100,000 in size).

Moreover, claims are exempt if the investment was *after* a litigation or arbitration was started. The statutory language covers only the making of a purchase "with the intent and for the purpose of bringing suit". This language has been held to mean what it says, which is to apply only to purchases made *before* the arbitration or litigation is started.

The *Justinian* court held (in a divided opinion) that a financing or purchase of two notes, each for \$500,000, was champertous because the "purchase" did not involve a "good faith" commitment to pay the \$500,000, but only created an obligation to pay *if* the claim won and the proceeds could be used for payment.

The decision itself is not particularly consequential to commercial financing in that it involved a transaction of \$500,000.00, which is smaller than most financings of commercial claims. (Also, it involved a "purchase" before the litigation occurred, and many financings occur after the litigation has been started).

Actually, to listen to at least one financier, the decision was a positive development since the Court confirmed the vitality of an attractive statute giving a safe harbor from champerty to most cases of large scale. The Court actually stated explicitly that:

“The safe harbor [of the statute] was enacted to exempt large scale commercial transactions in New York’ s debt trading markets from the champerty statute in order to facilitate the fluidity of transactions in these markets [citation omitted]. The participants in commercial transactions and the debt markets are sophisticated investors who structure complex transactions . . . We emphasize that we find no problem with parties structuring their agreements to meet the safe harbor’s requirements . . .”

In Pennsylvania, in *WFIC, LLC v. LaBarre*, 148 A.3d 812 (Superior Court of Pennsylvania, September 13, 2016), a court applied champerty to invalidate an investor’s agreement to loan money for litigation expenses in return for a share of the proceeds. The court not only invalidated the loan agreement, but apparently also a contingency lawyer’s agreement to pay the lender out of a portion of its fees which were based on a percentage of the returns from the lawsuit. The entire contingency lawyer’s agreement for fees may have been invalidated, not only the portion that was to go to the lender.

The Court went on to define what it considered as “champerty”:

“In order to establish a prima facie case of champerty, the following three elements must exist: (1) the party involved must be one who has no legitimate interest in the suit; (2) the party must expend its own money in prosecuting the suit; and (3) the party must be entitled by the bargain to in the proceeds of the suit.”

In Ireland, a court held that third party finance was champertous. Although the circumstances are quite distinguishable from those in the United States and the case is on appeal, the case is worth mentioning.

In *Persona Digital Telephony v. Minister for Public Enterprise*, IESCDET 106, (July 25, 2016) the High Court in Ireland held that financing was champertous. The decision was based on a Statute which said it was champertous: Statute Law Revision Act (2007). The Court noted that

absent the Statute, third party financing could be consistent with public policy, but found that to allow it would be a matter for the legislature to amend its position, or for the appellate court to deal with. (The court covered in detail the history of champerty and maintenance in Ireland.)

The Supreme Court has agreed to hear the appeal.

### 3. *Disclosure*

Disclosure as to financing has been debated from day one. Those favoring more disclosure seem to be making some progress.

A recent and now notorious case, known as *Hulk Hogan v. Gawker*, — the official title is *Bollea v. Gawker*, and the original case in Florida was *Gawker Media, LLC v. Bollea*, 129 So.3d 1196 (District Court of Appeal of Florida, Second District, January 17, 2014) — put a match to a simmering debate about the disclosure topic. The suit was by a colorful professional wrestler, known as “Hulk Hogan”. He was caught on video in bed with the wife of his best friend. Gawker, which fancied itself an “investigative magazine,” picked up the pictures and spread the story across its pages. The judge found in 2016 that Gawker illegally invaded Hulk Hogan’s privacy. Damages were awarded for close to \$140 million. Gawker filed for bankruptcy and put itself on the sale block. The case later settled for more than \$30 million.

Disclosure became a hot topic when it was discovered Hulk Hogan’s lawsuit was being financed to the tune of \$10 million to sue. The financier was an individual, Peter Thiel. Thiel has become a billionaire by founding PayPal, and by being an early investor in Facebook.

Some years before the Hulk Hogan dispute, he had been “outed” by Gawker as being gay. He did not forget what he viewed as despicable conduct by a bullying publication. He quietly backed the Hulk. His motive was at least in part to pay the Gawker back, it is reported, but at bottom it was supposedly also to protect other potential victims.



The case and the circumstances have been a popular subject of chatter and debate about many things, but circling around disclosure.

From this, those pushing for more disclosure have possibly benefitted, at least indirectly.

A U.S. District Court in the Northern District of California held that the name of the financier must be disclosed in a class action, and the funding agreement itself produced. *Gharabe v. Chevron Corporation*, 2016 WL 4154849 (United States District Court, N.D. California, August 5, 2016). Chevron had argued that this agreement bears on the adequacy of counsel to represent the class. The class counsel conceded the relevance of the agreement and did not object to producing it. The financing agreement itself did not prohibit the production but seemed to anticipate it.

Not surprisingly, the Court ordered it produced. On its own, this decision does not seem to reach beyond its facts.

More important, the Northern District of California Committee on rule making has now adopted a revision of one of its Rules (Local Rule 3-15) that requires disclosure of litigation financiers in a class action. See e.g., footnote 3 to *Gharabe* case. It is the first non-court rule in the U.S. on disclosure. It received fanfare in the media. There is now a similar rule submitted for Federal Court consideration.

Has the fanfare been justified? Not really. It has limited application and in limited cases, class actions. Moreover, other countries' courts had ordered some disclosure before, on particular facts. (Some are discussed below).

In fact, in important ways it reflects a win for the industry. Several financiers had objected to the originally proposed rule which had extensive requirements for disclosure in all cases, not only class actions. The Court Committee apparently recognized the validity of these objections and agreed with them, leaving only a shadow of the proposal that was eventually accepted as a rule,

and relating only to class actions. Financiers are therefore not particularly troubled by the rule by itself. Many do not even fund class actions.

Is this development heralding a longer-term breakthrough for those pushing rule making? Perhaps. It could also support the current regime, preserving a system that relies on court decisions for specific rules. Time will tell.

A court in England recently required disclosure under special circumstances. *Wall v. The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm) (September 19, 2016). There the defendants requested disclosure to determine if a security for costs order should be entered against the claimant. The Court held that in light of defendant's right to apply for security of costs under a specific rule, CPR 25.14, the Court had the power and duty, and exercised its discretion, to require disclosure. It held that plaintiff:

*“provide the name an address of any party, and of all parties if more than one, that has or have contributed or agreed to contribute to Mr. Wall’s costs here for a share of any property that Mr. Wall may recover herein.”*

The decision on its own springs from English law that security for costs is under various circumstances necessary be put up by the plaintiff to protect the defendant if it wins and under UK law becomes automatically entitled to repayment of reasonable legal fees. That predicate is of course not generally applicable to a U.S. proceeding where no adverse cost rule exists. But comparable situations might exist propelling the same result.

*Persona Digital Telephony Ltd. & Anor v. Minister for Public Enterprise, Ors*, cited above in the discussion above at pages 5-6 about champerty, had a prior decision in the case which came to a similar conclusion. There, in a court in Ireland, Harbour Litigation Funding had to defend against efforts to get disclosure on the predicate that this information was necessary, as argued in the *Wall* case, for security purposes. The defendant wanted the entire financing agreement produced. The Court acknowledged the correctness of the plaintiff's position that:

*“the disclosure of the Funding Agreement could provide the State with an unfair and disproportionate litigation advantage.”*

But, to strike a balance, the Court ordered that redactions of the agreement be disclosed of:

*“(i) the funding budget; (ii) details of the timeline; (iii) the terms and circumstances on which the funder will release funding from time to time; (iv) the details of the funder’s remuneration; and (v) precise circumstances in which the funder may terminate funding.”*

The issue of disclosure has taken on particular importance, with particular urgency, in international arbitration. Lack of disclosure in some form, at the outset of the arbitration, can be explosive later in the arbitration. If some conflict relating to the arbitrator was unknown and surfaces later, it could ruin that arbitration however advanced it was. The international arbitration world has, in general, very much turned to this issue and arbitrators are demanding disclosure to thwart this possibility.

A second category of disclosure relates not to conflicts, usually a threshold issue, but to the prosecution and resolution. For example, in settlement discussions, there is the question of who is actually calling the shots. Can decisions and supposed control over these decisions — whether and when and for how much and through what negotiations — be attacked as unlawfully being put into the hands of the third party financier, and accordingly taken out of the control of the claimant and its lawyer? What factors are important to the affected parties? Whose voice must be heard to reach a settlement?

How is the situation in international arbitration similar to that in litigation? How can the two be analyzed together?

One key consideration running throughout the debate here is whether the fear of disclosure is still justified, given the spreading knowledge and acceptance of financing. To the contrary, there is a valid question whether disclosure is actually an overall benefit to the claimant as it can encourage settlement, or at least diminish some of the improper tactics of some defendants, such as the strategy which concentrates on wearing the plaintiff down in terms of its financial ability to

fight. The real issue could be pivoting from whether there should be disclosure, to the complex issues of how much disclosure, under what circumstances, when, and to whom?

Related to any disclosure regime, there needs to be rules as to how much is disclosed — simply that the case is funded? or funded by X? or funded on these terms that have relevance? detailed terms of the funding agreement, or certain terms alone, e.g., the nature of the relationship between the funder and the claimant to the extent it might bear on the issue of various items such as “control”, or the allocation of revenues from a settlement, among the claimant, the lawyers, and the funder?

And to whom is the disclosure to be made? — the arbitrator alone? the other side as well? only the other side’s attorneys? an independent party hired for that purpose? How do the answers here impact the answers to questions about what should be disclosed?

Issues on the disclosure topic abound. What are the rules relating to litigation, and how might they bear on the issue? What about disclosure of insurance for the plaintiff, or defendant? Lending in general?

What is the purpose of the disclosure: Does “disclosure” in finance relate to, or have the purpose of, what it means in the insider trading context, or the SEC context relating to disclosure of size of ownership, or within the context of some federal or state rules (such as Florida) where liability is determined of a third party by the determination of who is in control?

What is the requirement if the claimant is a public company? and/or the defendant, and/or the financier.

The topic “disclosure” draws into it a host of other topics and issues. It would therefore be a good topic to begin with in any study of the industry in general or rules specifically.

#### 4. *Sanctions*

A few decisions were issued imposing sanctions.

The longest and loudest came, on July 22, 2016, from a U.S. District Court in Pennsylvania. *Abi Jaoudi and Azar Trading Corp. v. Cigna Worldwide Ins. Co.*, 2016 WL 3965162 (E.D. Pennsylvania, July 22, 2016). There, three financiers got together to invest \$3 million to enforce against Cigna, in a Cayman Islands Court, a Liberian judgment for \$180 million. The judgment against Cigna was for allegedly insuring against damages a Liberian company sustained during the first Liberian civil war.

The problem, in a complex financing with complex proceedings with many parties involved, was that the Pennsylvania Court had already enjoined enforcement of the Judgment.

The District Court issued a scorching decision against the financiers, holding them in contempt, and scheduling a hearing on damages. The financiers said they would appeal. The heat is still on the financiers, because they have continued to resist the Court instructions, and the Court has continued to condemn their activities in no uncertain terms.

On the other side of the coin, a claimant was held in contempt by a court in the Netherlands when he refused, after success, to pay the third party financier, Therium, and then fled to Europe. The Court sentenced the claimant to jail for 22 months. *Therium (UK) Holdings Ltd v Brooke and Others*, EWHC 2477 (Comm) (Oct. 17 2016) (The claimant was later reported, by the Daily Mail, to be “on the run, in Europe”).

Under court decisions, then, sanctions have been imposed. All participants are subject to them. Apart from court decisions, however, specific sanction rules are not yet out of the starting gate. This is discussed below in Section C.

## 5. *Class Actions*

Financing of class actions in the U.S. exists in some disputes in the United States. It also exists in Canada, perhaps in a more advanced state. In a recent Canadian decision (in Saskatchewan), the Court approved a class action *before* the defendants even knew about it, let alone had a chance to object. *Schneider v Royal Crown Gold Reserve Inc.*, 2016 SKQB 111 (CanLII 2016). Although defendants could come in later and object, it seems this procedure puts more wind into class action plaintiffs' sails. The class action, or comparable actions in the U.K. (e.g. aggregate actions) and elsewhere, are also starting to be recognized, despite continuing objections.

Australia has recognized and used financed class actions for years. In a class action case that has recently attracted media attention and comment — referred to as a “landmark decision on litigation funding in Australia” — is out of Australia. *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*, FCAFC 148 (October 26, 2016). In *Money Max*, the Federal Court of Australia held that everyone who benefits from a class action will be required to contribute to the cost of running the action. This holding allowed for a “common fund” order by the Court hearing the matter.

Previously, only those signing a financing agreement would pay the financing costs. The Court viewed its holdings as advancing “access to Justice”.

An integral part of the holding was the Court’s decision that the Court would maintain oversight of the commission, including its size and conditions.

Given the importance of Dispute Financing to class actions in Australia — it is reported by the publication CDR, cited below, that since 2003 there has been but one class action that was resolved without the involvement of a financier — the decision has particular impact.

The decision has had varied reactions. They are illustrated and reflected in an article printed in the CDR on November 6, 2016: Ben Rigby, *Money Max may mean more class actions in Australia*, CDR - (Commercial Dispute Resolution) <http://www.cdr-news.com>.

Quite recently, as discussed above, and after quite a bit of to and fro, a Court rule was enacted in California requiring disclosure of whether a class action is being funded. A similar rule is being proposed in federal jurisdictions.

So far as the U.S. Chamber of Commerce is concerned, class actions in themselves are evil, as is financing, so it has proposed a blanket prohibition of any financing of any class actions. That proposal has about zero hope of going anywhere, but it does reflect the feeling of a number of parties.

#### **6. Respondent must pay winning claimant's financing fees**

In most jurisdictions, outside of the United States, the loser in a dispute pays the reasonable fees of the winner. Before now, however, a Court had not held that the losing defendant pays the fees of the financier. This figure can be many times the standard fees.

Recently, the situation changed. A Court in England, where adverse costs rules govern, held that at least in the case of an international ICC arbitration, this is just what the respondent has to do. *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm) (September 16, 2016). This has been a shot heard by many around the world.

Will it stick? An appeal was threatened but apparently has not happened. Will it apply to litigations as well as arbitrations? That is anything but clear, although arguments could be made it should. Will this decision give added fuel to those defendants who are seeking disclosure regarding whether a case is funded, and perhaps related rules and sanctions if the knowledge is abused? Seems so.

We have not heard the last of this.

## 7. *Excalibur*

In the somewhat notorious case in the United Kingdom — *Excalibur Ventures LLC v Gulf Keystone* [2014] EWHC 3436, referred to in the Primer — we have another chapter, with a recent decision in that case by Court of Appeal. In that case, plaintiffs claimed defendants took plaintiffs’ assets, seeking damages of close to \$2 billion. Given the size of the claims and anticipated litigation fees, and that the plaintiffs had no assets, financing was obtained. The financing was so large it had to come from three different financiers. After a bitter and protracted litigation, the Court threw the case out, and imposed fees on plaintiffs and its financiers of over \$50 million.

The court issued a lengthy decision, and a scorching one, as to the worthlessness of the claims that plaintiffs’ counsel prosecuted intensively. On appeal, claimants and their counsel, received another tongue lashing. *Excalibur Ventures LLC & ORS V. Psari Holdings Limited & Ors*, [2016] EWCA Civ 144 (November 18, 2016).

The size of the fees must have set a record. (The fees and costs of the litigation may have been insured, since in the U.K. the adverse costs rule applies and insurance is therefore used on various occasions.)

The court on appeal, despite its harshness about the participants in the case, made it clear that it viewed the financing industry as one providing access to justice. It stated that “Litigation Funding is a feature of modern litigation . . . Litigation Funding is an accepted and judicially sanctioned activity perceived to be in the public interest.”

## 8. *Issue of a U.S. financier investing in a law firm*

One New York decision dealt with a newer issue in the U.S.: whether finance on a large scale relating to a law firm — of the prosecution of a claim plus also of the firm’s working capital —



coupled with an interest in a percentage of several years of the firm's profits in the future, amounts to a business entity having what in the U.S. is still outlawed: an equity interest in a law firm. (England now allows this, as does the District of Columbia in the United States). The Court held no. 48 Misc.3d 1223(A) (2016) (N.Y. Sup. Ct 2016, Justice S.W. Korneich). (The Court also found that unethical "fee splitting" did not occur).

The possibility of investing in law firms, directly or through various indirect paths and with various structures, seems a part of the future in the U.S. — despite the long, unbroken, hostility to this concept in the U.S. Competition from the U.K.—which has recently put into effect legislation allowing this — will perhaps play a role influencing the U.S.

**9. *Financing a claim by others can violate an agreement to release that claim***

A major Dutch investor, Louis J.K.J. Reijtenbagh, backed a major claim in the English Channel Island of Guernsey against Carlyle Group LP, when a fund of Carlyle collapsed in 2008. The investor backed a litigation by Court appointed liquidators where defendant was incorporated. The lawsuit seeks \$1 billion. The investor supposedly put (estimated) tens of millions of dollars behind the case. He could recover hundreds of millions.

Carlyle sued him in Delaware for providing the financing. It alleged, among other things, that Reijtenbagh had released his own claims against Carlyle Group LP, and that his financing the Liquidators' claims amounted to a breach of his release. As to this issue, the Court agreed. See *Carlyle Investment Management et al v. Louis J.K.J. Reijtenbagh, et al*, 2015 WL 5278913 (May 1, 2015), and Court Order, 2016 WL 614487 (February 11, 2016).

**10. *Ecuador class action v. Chevron, back yet again***

A claim in Canada by a class of plaintiffs against Chevron sought to enforce a \$9.5 billion judgment from an Ecuador Court against Chevron. This claim has been controversial in the industry,

for years. The U.S. courts have found the judgment was obtained by fraud and other misconduct. The Wall Street Journal has referred to this matter as the “Legal Fraud of the Century.” The Court in Canada refused to enforce such a judgment.

**11. *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed (In Liq) (No 3) [2017] FCA 330.***

In this decision, Judge Jonathan Beech presided over a case which involved a \$40 million settlement. It was financed. It was a liquidation case, where courts are given special approval and other powers. He held:

*“If it is necessary to say so, I consider that as part of any approval offer. . . I have power in effect to modify any contractual bargain dealings with the funding commission payable out of the settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V (2); for present purposes, it is not necessary to invoke s 32Z. I am empowered to make ‘such order as are just with respect to the distribution of any money paid under a settlement’” (at page 101).*

Judge Beech has been active in this area. Not long before the Blairgowrie case, he approved another settlement (this one for \$45 million), finding that the funding was fair and reasonable.

*Newstart 123 Pty Ltd v. Billalong International Ltd* [2016] FCA 1194 (at 51 -54). This case was a class action where courts are also given special approval and other powers. And, in a case decided 20 days later, he was on the bench which decided *Money Max*, another class action, and referred to in subsection 5 above.

**B. Decisions in the pipeline: Claims in the Courts, without decisions yet**

Cases in the pipeline involving Dispute Finance — started, but without a decision yet — are visible to an extent, and reflect what likely lies ahead. Many more must exist, but are flying below the radar. Illustrative visible ones are:

- SEC v. Ron Dersovit and RD Legal Capital. An SEC suit in the federal district court of New Jersey, against a financier. The financier has moved to dismiss on constitutional grounds.
- A large antitrust claim filed against a few credit card companies, alleging antitrust violations. Quinn Emanuel is the prosecuting law firm. It was funded by Gerchen Keller (before Gerchen Keller's acquisition by Burford) for about \$50 million.
- Quinn Emanuel are also the prosecuting attorneys in securities claims filed in Germany against Volkswagen. This is financed, it seems.
- A number of competition claims have been filed by the Haussman law firm in Germany. These and other competition claims in Germany are financed by Burford, for over \$50 million.
- IMF Bentham is financing a case involving 16 investors in the Netherlands, who lost a sizable amount of their investments. The claimants are suing the Royal Bank of Scotland.
- Other suits are pending v. RBS. A district Court in California now has before it a class action where, as noted above, the local Court Rules Committee adopted a litigation financing disclosure rule requiring disclosure in a class action.
- These, and other cases will in the future be issuing decisions and laying down a number of rules and regulations.

## C. **Rules**

### 1. ***In General***

Rule-making activity in the U.S. by the government as to commercial Dispute Finance is not visibly active. In 2015, a Senate Committee was formed under Senator C. Grassley that has looked at the area to an extent. It sent questionnaires to some in the industry, and received responses. Beyond this, the committee has not visibly acted, although it might be acting in ways not visible.

In Hong Kong, a Consulting Committee was formed to study finance of international arbitration and make a recommendation. About a year ago, it published its report, and recommended that

the legislature enact rules in the area. That has happened. Financing of international arbitration is being supported, if not encouraged.

A similar committee was formed in Singapore, an arbitration center but known to consider Dispute Finance to be champertous. Competitively, however, it was in a poor spot if it did not, like Hong Kong, become more funder friendly. It did. It appointed its own Committee, and that Committee also recommended explicit authorization. It passed legislation authorizing finance of international arbitrations with institutional funders. (The financing is restricted to financing from institutional financiers only, such as IMF)

Paris, the center of the international arbitration world according to many, has just had its Bar Council passing a resolution confirming that Dispute Financing is positive for access to justice in international arbitration and is not contrary to French law. The resolution also (1) recommends procedures for lawyers to adopt to guard the relationship with the client, and set roles for all participants in the financing; and (2) recommends encore claimants to disclose financing at the start, and thus encourage transparency and try to avoid conflicts.

Australia, the oldest jurisdiction in the world with modern financing, has various rules, such as those to regulate conflicts. But its legislative regulation is not yet comprehensive.

The United Kingdom has a voluntary regulatory body, made up of financiers who operate in the U.K. It enacted voluntary rules about five years ago, and amendments recently. How those rules have performed is unclear. They have had their challenges and have been called “fundamentally flawed.” They are now being investigated.

Their enactment has, without more, been significant — maybe a game changer. That is so regardless of whether, as some believe and are investigating, a good deal could be done to improve them.

While this is happening, what might be termed non-legislative rule making, is occurring. That is so on several fronts.

Court rule making is the most serious front. Court decisions set important rules, binding or persuasive. Courts in the U.S. and worldwide continue to issue decisions, as illustrated above.

Also, informal specific rules are being enacted as bar associations issue opinions, such as the ABA. Certain influential State and City bar associations are doing the same — like the New York City Bar Association which issued a comprehensive, important opinion in 2012. See also the resolution passed by the Paris Bar Association, on financing, and referred to elsewhere.

Beyond this, scholars and other interested parties have an ongoing impact through writings and otherwise.

General rules also regulate Dispute Finance. For example, the SEC regulates public companies who seek funding; corporate governance is alive and applicable; and the federal and state common law (as to fraud, as an illustration) of course also applies to Dispute Finance.

The industry therefore is not without or above the law, as is too often the accusation.

In fact, various laws and rules can in a number of ways be helpful to the industry. An example would be a rule which set various requirements, which, if met, would allow the sale or transfer of control of a claim. Another example, discussed immediately below in Subsection 2, is making various rules as to Claimants, and as to defendants. That would be helpful to the industry.

According to some, rules are inevitable. Indeed, some of these voices, like Fulbrook's, have said various rules should be championed by the industry, at least if they are coupled with good regulators, and the industry participates in the drafting.

Self-rule will grow, particularly in arbitration which is particularly subject to it. A vital question here is: what provisions in the arbitration clause or contract can address issues up front by agreement and contract and thus prevent the issue from ever seeing the light of day. Such provisions should and will find their way into contracts and see frequent use.

## **2. *Rules for Claimants and Defendants***

The topic on many lips is and always has been “rules” for the industry. What about rules for the defendants, and rules for the claimants? This topic has been on no one’s lips. That is indefensible.

In fact, rules for the industry itself cannot be properly addressed without also discussing rules for the defendants and the claimants. The web here, as in many other aspects of Dispute Finance, is seamless.

For example, should there be a rule stating that if a defendant challenges financing on some ground such as champerty, and loses, the defendant must pay the claimant’s attorneys fees as to the challenge? Can there not be basic rules set for the claimant and financier, requiring a minimum of disclosure at the outset for conflict and other purposes, and at the same time requiring specified disclosure as the litigation goes forward as to material substantive decisions such as for settlement?

Countless illustrations of potential rules for claimants or defendants can be given. For example, if a claimant were punished when it misled a funder into furnishing funding — such as by a rule imposing treble damages if the deceit were intentional and double damages if unintentional but negligent, or otherwise sanctioned if the claimant did not have in its case the positive ingredients represented — that would make life easier and better for the industry and the defendants. Similar sanctions could be imposed on a defendant who attacks the financing on grounds of champerty, or otherwise, but has no adequate grounding and is seeking to discourage the financier and the claimant.

The focus of the past needs to change. That focus has been on rules for the financiers alone. (The U.S. Senate Committee now examining the industry is a good example, asking what rules are useful as to the financiers. The proposed rules as to international arbitration does the same. The U.K. Code of Conduct is another example. Hong Kong and Singapore and Australia have followed suit.)

The industry, market, and defendants, live under the same roof. What regulates one has an impact on what does or should regulate another. Focusing only on one stakeholder, the investor, is a mistake.

For an article on this topic this, see a four-part series run by The Litigation Finance Journal, Selvyn Seidel, *Commercial Dispute Finance Rulemaking: what about the Defendants, what about the Claimants?* (2017)

An overarching issue is how rule-making from various sources should be coordinated. Two key sources are: one, the obvious one, legislative rules and voluntary rules and the like; and two, the courts. Should the former await further advances in the latter? The opposite? Or should both just go ahead, and the rest will take of itself.

Regardless, in today's context, more “rules” are in the wind. If guided properly, this can be a true plus for the industry, and its stakeholders. If not, it can be a disaster.

#### **D. Trends**

The industry and market are changing dramatically. What they were six years ago is markedly different from what they were only a year ago, when the Primer was circulated. What they were about a year ago are significantly different today.

The Primer identified a number of trends. Many have proven themselves out. New ones have appeared in the last year. Important recent ones are identified below.

## **1. *Portfolio and Jumbo Investments***

One key difference is the development of big-ticket investments, in the range of \$50 million and more. We see this in at least two forms. One is an investment in a portfolio of cases. Thus, as noted above, Burford has recently committed about \$50 million to a portfolio of claims that the Haussman law firm has or will have in Germany in the competition practice area (comparable to antitrust claims in the U.S.). It has also invested the same amount and more supporting claims of a large company. Further, it has just acquired Gerchen Keller, which, also as noted above, previously had backed Quinn Emanuel for another \$50 million in its antitrust suit for billions against a few credit card companies. In its latest annual report, Burford says that most of the money it has invested has been into these types of jumbo claims.

The concept of investing in a portfolio of cases rather than a single case, has, if the financier can do it, various advantages. Diversity is one obvious advantage. A large investment also has the advantage of enabling the financier to earn more on a single investment while not having to spend proportionately more time than is needed on a much smaller claim.

The law firm and claimant and financier need to have the capacity to play in this stratosphere, it is true. But there are some institutional ones that can — Burford now has about \$2.3 billion under its hood — and a number of situational financiers who can.

## **2. *Small Investments***

On the other side of the coin, we also see green shoots as to small claims, those of \$100,000 to \$500,000 or less, requiring investments of \$100,000 or less. A few online services have entered the space, and some others who can be found as well.

## **3. *Credit Investing***

Another significant difference relates to the creation of a newer product, a “credit” product rather



than an “investment” product. Here the pool of capital which advances the money might do more of a credit type check of the commercial claims and where those claims pass the test, is willing to advance capital for a “junk bond” type of interest, somewhere in the range of 18% to 24 or 25% IRR. The advance of capital may even be coupled with a recourse and secured obligation that clicks in at a certain point.

This product — which differs from and is generally significantly lower in cost than the more conventional formulas using a multiple of the capital invested, plus a percentage of the recovery — can be attractive to both the claimant and the pool of capital.

A few institutions are making it available.

Such advances may trigger allegations that other laws that relate to loans apply here, such as usury, or lender liability, laws.

It should also be noted, that Burford has fairly recently issued 10 year bonds, reportedly at an interest rate of 6%, to obtain hundreds of millions of dollars for investment. This reflects a growing confidence in the industry. It could signal other changes, such as lowering the costs of Dispute Financing to the claimant through, say, receiving a credit line while maintaining or enhancing the profitability to the investor.

#### **4. *Law firms starting to become funder friendly or self-funder***

Another developing phenomenon is the increased interest by law firms in this and related financing areas. Some large law firms which never before would have considered acting on a contingency basis, are becoming partial contingency firms. Others, such as Capital Law in the U.K., are segregating a pool of capital, like \$50 million, to self-fund. As noted above, some are taking on a lot of capital from a third party, to finance a law suit or many suits. Still other law firms are simply becoming funder-friendly, studying or promoting use of funding as a competitive advantage.

The U.K recently legalized businesses and others investing in law firms, and/or partnering with law firms. The U.S. opposes this, except in the District of Columbia. In this connection, as reported above, an investor in the New York case referred to above, advanced capital which entitled it to some share in the firm's profits. This was challenged as an illegal investment in the firm. The court rejected that claim under the structure involved.

At least one financier in the past, Juridica (which is winding down after 10 years), formed its own outside law firm. Another, Burford, has recently done the same. Such a structure can have benefits for everyone. It can also carry some potential headaches for everyone, such as conflict issues.

All this involvement is dramatically different from just six years ago. Then, most law firms either did not know about finance, or knew about it but stayed arms-length from it for fear of champerty or some other supposed prohibition. At that time, law firm economics were also in better shape in that the global economic downturn was still young. Law firms were therefore, as a population, a bit allergic to financing. Herbert Smith was an important exception.

The landscape has changed. The threat of champerty in commercial financing has generally faded or disappeared. Courts and Judges, especially in the U.K., have stated that Dispute Financing accesses Justice. With the economic distress period, law firm and client economics have gone through a bad period. Clients are pushing hard against what they consider to be too high prices. That favors growth in the industry, especially with law firms. Actually, with the spread of awareness of the Dispute Financing industry, a movement is beginning which sees law firm clients who can afford the costs of the lawsuit, nonetheless turning to funding for the various advantages it offers.

Law firms are thus becoming more comfortable with Dispute Financing. Times have changed.

This change is especially important in an industry where the lawyer is at the hub of the industry. In this industry, and for a host of reasons, the lawyer is "the straw that stirs the drink".

## 5. *Technology and math come to Dispute Finance*

The search for the holy grail in Dispute Finance, as is the case in law and otherwise, is the search for that which allows one to measure risk. This is the crystal ball allowing a look into the future, seeing it more clearly, predicting it better.

Unlike many such looks, this exercise in the Dispute Financing industry has the advantage of being based in good part on what has gone on before.

Beyond this, the use of mathematics and technology is today entering the field, as opposed to or in addition to the “manual” estimates done before. Thus, we see that one company has just started which claims to be able to use algorithms to predict results. Another, Lex Machina, has started to offer its technology to perform various projects, such as identifying lawyers who have had particular success in a practice area or before a particular court, or showing how different judges have tended to decide cases in specific circumstances, and so on. This type of technology makes Big Data more manageable. A third, Metonymy Labs, specializes in Artificial Intelligence. It recently received media coverage and praise when it formed an alliance with Fulbrook focusing on financing of patents. Game Theory experts will become a part of the industry. Individuals like Professor Kathryn Spier at Harvard Law School are studying and reporting on game theory as it relates to litigation. Also, another Harvard Law Professor, James Greiner, is studying Dispute Finance within a wider study of Access to Justice. As a last illustration: a few Litigation-Risk individuals and their entities are available.

Investments in a portfolio of claims, as opposed to individual claims, is itself reducing risks according to those investors who maintain that portfolios and diversity reduce risks. That, coupled with the newer tools to determine and manage risk better, is a powerful partnership.

And so, it goes. In the process, the reputation of litigation as being inherently unpredictable, is being slowly defanged.

Throughout, of course, the human element is indispensable. That feature, especially when experience is involved, will continue to be essential if not pivotal.

Where this will go specifically, is unclear. But this trend, overall, has to yield benefits and industry improvements. That much is clear.

## **6. *Rule-Making***

As discussed above, specific rule-making is going on as we sit here. Courts are making rules through decisions. Government and other organizations are issuing rules, compulsory or voluntary. Bar associations are issuing reports and opinions. Scholars and others are writing papers, conferences and lectures are taking place.

General rules are being applied to the industry.

The industry is alive with rules and rule making.

## **7. *New York University School of Law's Center on Civil Justice***

The industry is a special blend of law, business, and finance, as key ingredients, among others. It could easily become a distinct profession in itself, with related adornments, such as academic degrees, licenses, needs to register, coupled with fiduciary and ethical duties imposed on members of the industry, and others. This should happen before the day is done.

There is a corresponding duty of schools — principally: law, business, and finance — to teach it, and otherwise pay attention to it. See, e.g., Selvyn Seidel, “The Lawyer’s Duty-to-Know and Duty-to-Tell in Third Party Funding,” *Corporate Live Wire* (July/Aug.2012), <http://www.fulbrookmanagement.com/the-lawyers-duty-to-know-duty-to-tell-in-third-party-funding-a-time-to-recognise-respect-these-obligations/>

Yet, we do not even see any of the professional schools — such as law and business schools — paying serious enough attention to it. There is some teaching, some lectures, and some writing, but not that much, and nowhere near enough. The industry needs this support, to improve and to gain credibility.

A major exception comes from the New York University’s School of Law’s Center on Civil Justice. The Center — with Peter Zimroth as its Executive Director (formerly a Professor of law at the Law School, and currently also a Partner at Arnold, Porter, Kaye Scholer and court appointed monitor for the New York Police Department) —has, after comprehensive study, chosen the Dispute Finance industry as one of its few projects to analyze and report on. As what might be termed its formal kickoff, the Center held in November 2015 a well-received Conference on the industry — “Third Party Funding, the Basics and Beyond” — and is proceeding from there.

One of its early key projects creating a library on and for the industry. That, in itself, will be an invaluable gift to the market and industry, whatever else the Center may do.

The Center is a serious, objective, acclaimed academic and practical institution coupled with an Olympic-level law school. Its attention to this industry is and will be a benefit the industry, the market, the courts, and other regulators. Much more will follow.

Harvard Law School is making inroads, mostly through a recent course created by Professor James Greiner, titled “Access to Justice.” This fascinating course, which covers many topics, devotes one of its classes to Dispute Financing.

As noted elsewhere, this industry can ultimately look forward to classes of and studies on it, in law schools, business schools, and other schools; becoming a distinct but integrated profession with distinct rules, including fiduciary and ethical rules; and requirements for certifications and licenses.

**8. *Burford acquires Gerchen Keller, and becomes the giant of the industry***

Burford, the second largest institutional funder in the world (in terms of capital), has just acquired Gerchen Keller, the largest institutional funder in the world. Together they have about \$2.3 billion. That is by far the largest such fund anywhere. This combination holds promise for the market, the industry, and the combined entity.

**9. *Disclosure, an old and valid issue***

Pressing and current questions are on many lips relating not only to whether there should be disclosure, but when? for what purpose? how much? to whom? and in what way? The basic topic is referred to above.

Why not have the disclosure itself protected, so that perhaps it only goes to the arbitrator in camera, or to the lawyers, or to a designated party and under seal, or otherwise limited?

What rules exist? Who is making them? What lessons might be learned from disclosure rules for Dispute Finance that have developed in litigation? Can they be replicated in the arbitration arena?

Answers to such questions are at the heart of the industry's culture and operations. They will lead to answers in other various integrated considerations in the industry.

One threshold issue is whether there should be disclosure at all, ever? That question remained a live one for many years. The current growing attitude seems to be asking: How much disclosure of detail about the funding relationship is needed to determine a particular issue in the prosecution? Does it not depend on the specific issue, and what is necessary to resolve the issue? Does this disclosure ever bump into the attorney - client privilege?

The disclosure issue has sparked heavy debate about whether the financing should be disclosed, at least the basic fact of its existence, from the outset. The Institute for Legal Reform of the U.S. Chamber of Commerce has cited the issue as an illustration of how harmful industry practice and lack of rules is. Indeed, the Chamber has long attacked the industry on the ground that it operates in the shadows and without rules and regulations, and is thus particularly toxic.

Disclosure has in the past been resisted by the industry. The industry has argued that the cases it finances and the details of the financing involve information that is highly confidential and sensitive, and is irrelevant or immaterial.

Moreover, the industry has emphasized that its members and its clients have been burned badly when defendants got wind of the claimant being financed. Many defendants have launched many satellite and baseless “motions” to challenge the claim — e.g., that is champertous and illegal as well as unethical — designed to make it more and needlessly costly and difficult, if not impossible, to pursue the claim.

The industry has developed a fear, as have its claimants, that if the fact of the financing becomes known that this in itself will inspire improper attacks to sidetrack or even derail the claims — satellite claims and motions without real merit that third party finance is illegal, unethical, or otherwise bad; discovery of the communications between the financier and the claimant and claimant's lawyer, even attorney-client information; allegations of “conflict” issues when there are none; asserting embarrassing claims re the claimant’s finances; and so on.

With this, the industry has grown gun-shy.

The industry has thus sought confidentiality cover as to the fact of financing, as well as to details. The industry has argued, for example, that it is not any more the business of the defendants where claimant gets its money from than when it sources bank financing.

An attitude is growing, however, that disclosure actually can help the financed plaintiffs and financier, and sometimes the defendants also, when the defendant learns the case is financed. For example, it tells the defendant that the defendant is not going to win the case by outspending the plaintiff, and also that an independent third party expert has evaluated the case as a winning one, and is putting its money behind that belief. Such information can and should lead to more and quicker and fairer settlements.

Three particularly important factors as to disclosure are:

- (1) The industry has quickly gone from a young struggling industry that was mightily challenged with various issues — like champerty which spurred accusations of illegality, ethics violations, and even criminal conduct — to an industry which has successfully withstood the challenge, and;
- (2) At the same time, the industry has grown and become more known and accepted, while being used more frequently;
- (3) Courts have, particularly in the U.K., more and more explicitly recognized that the industry improves access to justice.

Today, the environment for disclosure is thus more welcoming. Some defendants are studying the industry and how it works so they can better protect themselves in a financed case. Some claimants are urging disclosure to enhance the capacity to settle.

Some defendants also point out that, in a litigation, they are often required to disclose insurance. Does not the rationale behind this requirement justify defendants seeking some disclosure in financing? What if, as discussed below, there were stiff sanctions established for defendants abusing the disclosure?

As noted above, a Court Committee in California just adopted a rule requiring disclosure of financing in class actions. A similar rule has been proposed for a federal rule.



In the international arbitration world, a number of proposals for disclosure are being made, and in draft form. Arbitrators in particular are insisting on disclosure, regardless of any “rules”, particularly at the threshold so that the issue of a possible conflict of the arbitrator can be learned early and remedied, rather than being learned later and ruining the arbitration at that point. We also see, discussed above, the recent Bar Association resolution in Paris, referred to above, supporting this disclosure in international arbitration.

It would seem that the industry should enter the discussions actively, and have their say if rules are going to be passed, what those rules should be. Otherwise, rule making may roll over them.

#### **10. *Country competition***

Country competition to attract Dispute Finance is starting.

What has recently been happening in international arbitration provides excellent illustrations. We see Singapore spurred to enact legislation to allow financing of international arbitration, so it can keep up with Hong Kong. Without Dispute Finance, and even though it is currently a center for international arbitration, Singapore’s role will wane.

In London, an effort has been launched to make that city the best venue in the world for international arbitration. New York has challenged London, saying no, New York is going to be the best venue in the world. Both jurisdictions support Dispute Finance. That support will grow alongside of and supporting the growth of international arbitration.

The Bar Association in Paris has just issued its resolution supporting financing, referred to above.

We can expect to see this competition spreading among a number of countries. Canada, Brazil, the Netherlands, Switzerland, Sweden, India, South Korea, and China, are good candidates if not already in the mix.

## **11. *The Trump Card***

Trump himself will of course spell change. With his administration only hovering around the 100-day period, the jury is naturally still out. This change could be positive for the market and industry, in view of Trump's affinity for and ability to cause disputes and bring claims, and his disposition to take steps which encourage international disruptions. His Vice President's knowledge of and leanings towards Dispute Finance also seems at first blush, a positive.

If his impact turns out to be neutral or even negative — for example, his being the subject of so many claims himself could make him negative, as could other factors — it should not threaten the viability of the market and industry. It is hard to see how that will slow a train which is picking up momentum the way Dispute Financing is.

## **12. *Media attention***

The media is covering the industry more, and generally positively. We thus see respected media professionals from respected publications interested in and covering the area, such as: Ashley Jones, Chair Legal, and Sara Randozza, a journalist, both of the Wall Street Journal; various people of the American Lawyer and American Lawyer Daily; Chris Hanby, (a Pulitzer prize winner) of Buzz Feed; Neil Rose, a highly regarded journalist in the legal service and Dispute Finance worlds, in his publication Legal Futures; Varun Marwah of Bar & Bench (of India); Samson Habte of Bloomberg BNA; various people of Forbes; the Litigation Finance Journal (a recent entrant); the Litigation Funding magazine in the U.K., which is published by the bar association; the Daily Blog of the Institute for Legal Reform of the U.S. Chamber of Commerce, (an entity which, as noted above, represents the defendant community, and other constituents); various people of Leaders League the global leader in ranking lawyers, investment banks, and other professionals, particularly its founder and CEO, Pierre-Etienne Lorenceau; and, the ever present, Google. On TV, Alexis Weed, a skilled TV reporter, produced a segment for CNN relating to certain important aspects of Dispute Finance.

At the end of the day, any coverage is helpful to the industry, even criticism, since it not only can cause improvement in the industry, but it raises awareness. Lack of awareness and information is the industry's biggest enemy. Those who support the industry generally believe that so long as the information gets out, the true story shines through and is positive.

**13.     *“We hold these truths to be self-evident . . .”***

Although the industry is still young, certain core “truths” about it have emerged that seem self-evident:

- A commercial claim is an asset comparable to a share of stock or security.
- As such, it can be valued, pledged, traded, and otherwise used as a private share of stock or a public security — and eventually, will under appropriate rules, be allowed to do so.
- If dispute financiers act with integrity and quality, they serve civil and commercial justice.

These truths will assure the industry's future in the U.S.

**IV.     Conclusion**

The stakeholders in the market and industry can be proud of what is happening. Advances are, on the whole, being made. Opportunities are being opened.

The stakeholders, by the way, include the community of defendants. This is especially the case through the communities' irrepressible representative, the Institute of Legal Reform of the U.S. Chamber of Commerce. The Institute has, with its constant challenges and comments, contributed in real ways to real improvements for its constituency, and others. It would be nice to see the Chamber and the industry actively working together to address actual or perceived issues.

What can be said about the future? We can expect the recent developments, outlined in this Supplement, to continue. We can also expect the developments summarized in the Primer, to continue.

We can of course also expect the unexpected. Each chapter in this industry's story carries with it changes and various surprises. But they seem to have been successfully addressed regardless of whether they were expected.

This should all add up to ongoing advances and opportunities. That is the hope and that is the expectation.



ANNEX

Bios for Fulbrook Capital Management, LLC

and

Selvyn Seidel

Fulbrook occupies a special space in this industry, basically acting as an investment advisory firm in the industry. It represents claimants who need assistance in: evaluating their claims or portfolios of claims; preparing and/or improving the claims for investment, and prosecution; and/or sourcing capital – where Fulbrook identifies and attracts potential investors for the claimant and its claim, from (a) the institutional dedicated financing providers, as well as (b) from individual investors interested in committing only a portion of their capital into Dispute Finance (e.g., a family office, pension fund, hedge fund, or a private equity entity).

It represents investors in similar activities, but also in attracting and vetting claims, and assisting to determine if the claims or portfolio of claims are fund worthy, and in overseeing prosecution.

If needed and acceptable within a jurisdiction's rules, Fulbrook will assist in buying, selling, or otherwise trading the claim or the claimant itself.

Fulbrook has recently also entered a new specialty that it has designed: evaluating claims and defenses for purposes of trying to resolve disputes. This is a space in need of help, Fulbrook believes, because others, like lawyers and law firms, cannot or will not act in the area. This specialty can assist claimants and/or defendants, as well as courts, arbitrators, mediators, and others, in that it provides an independent objective view of the claims and defenses and tries with that to encourage settlement.

Fulbrook emphasizes certain areas, particularly: patents and other IP; international litigation and arbitration; insolvency, and other serious financial distress situations; mediation and in general high stake disputes. In special circumstances, it will also work on other meritorious claims, such as those involving oil and gas, antitrust, securities fraud and other fraud, insurance and reinsurance, whistleblowers, and serious breach of contract claims.

Overall, Fulbrook emphasizes teaching about the industry and how it works, and might be improved. Learning about the industry, with accurate objective information, is at the center of all that Fulbrook does.

In a Report by two think tanks that discussed Dispute Finance, Fulbrook was identified along with four other entities, as among the “prominent third-party funders” in the industry worldwide. Additionally, Fulbrook has been recognized for being the leader in various aspects of the Dispute Finance industry in the world, in the U.S., in N.Y., and in various other venues, by over 50 polls and citations since its inception of operations in 2013. The most recent award came from the National Law Journal, a respected publication in the U.S., which ranked Fulbrook second in the country (behind Burford, founded in 2009, which Mr. Seidel co-founded and chaired, and is quite a bit older than Fulbrook).

Selvyn Seidel In 2007, and before Fulbrook or Burford, Mr. Seidel founded and chaired Burford Advisors, an expert advisor in Dispute Finance. The entity was similar in operation to Fulbrook. As noted above, he then (in October of 2009) and chaired Burford Group Ltd., the investment manager for Burford Capital, LLC. Burford Capital was taken public on the U.K. Aim market of the London Exchange. Burford is now the largest — with about \$2.3 billion under management — and most respected institutional financing providers in the industry in the world.

Mr. Seidel is recognized in the industry as a pioneering voice. He was described in the report referred to above as “probably the frontrunner in the industry.” He is often described as a leader or pioneer, or *the* leader or pioneer, in the industry.

Before Burford and Fulbrook, Mr. Seidel practiced as a litigation attorney for over 40 years in complex litigations and arbitrations, specializing in international disputes. In 1985, he co-founded the New York office of Latham & Watkins (now the largest among over 40 offices), a premier international law firm (which was recently recognized as the most profitable law firm in the world). Until December 31, 2006 and for almost 25 years, he was a senior litigation partner at Latham and was, at different times, the Chairman of the firm’s International Practice; the founder and Chairman of Latham’s International Litigation and Arbitration practice; and the Chairman of its New York Litigation practice.

Mr. Seidel has been and is an active educator. He was for ten years an Adjunct Professor of Law at the New York University School of Law, teaching courses related to litigation and arbitration. Since 1980, he has been an Alumnus Lecturer at Linacre College, Oxford University. He has



Chaired the Advisory Board of Oxford Law Alumni of America. He is the past chairman of the Advisory Board of the Center for International Commercial and Investment Arbitration Law of Columbia University Law School. He lectures on Dispute Finance and participates, globally, in conferences and presentations at various law schools in the U.S. and UK (including Harvard Law School, Columbia Law School, Oxford Law, New York University School of Law, and the University of Iowa Law School), and at various Institutes (such as the RAND Institute of Civil Justice, and at LEXIS NEXIS programs on litigation costing and funding).

He has authored many articles and papers in the industry, including a Primer on Dispute Investing in Commercial Claims (April 2016), and a Supplement to the Primer (April 2017).

He has a B.A. in economics from the University of Chicago, a J.D. with honors from the Berkeley School of law (University of California), and a Diploma of Law from the University of Oxford, England.

(April 10, 2017)