

Using dispute finance to derisk recoverability in the construction sector

Construction disputes are often complicated, costly and slow to resolve. For long-suffering claimants, the expectation is that the short-term financial pain will be “worth it” when they finally win an award. But what happens when the respondent doesn’t pay? No company wants to “throw good money after bad”. In this article we explain why construction companies are uniquely exposed to recoverability risk and how dispute finance can mitigate this risk.

The following issues frequently emerge:

WHERE THE EMPLOYER IS THE STATE

In many emerging economies, attempting to recover award monies from the State through its own courts can be a futile exercise. In practical terms, this means that any enforcement strategy must focus on commercial assets outside the State in enforcement friendly jurisdictions. Sovereign asset tracing is a sophisticated discipline and it should not be assumed that such assets can be located and seized.

WHERE THE EMPLOYER IS A QUASI-STATE ENTITY

Sometimes it will not be obvious that the Employer is the State. It might be a mixed private-public entity with no assets outside of the project jurisdiction.

LOCAL SUBCONTRACTORS AND SUPPLIERS

Projects in emerging economies often depend on locally procured supply chains and subcontractor relationships. What happens if local subcontractors and suppliers underperform? Will they have the financial means to pay an award? Enforcement may be confined to the local court jurisdiction where the subcontractor benefits from “home ground advantage”.

COUNTERPARTY INSOLVENCY

Construction companies are particularly exposed to economic factors like inflation, interest rates, supply shortages and the cost of labour. In recent years we have seen a significant increase in construction sector legal assets left in the hands of insolvency practitioners. A key, but often overlooked, issue to consider, both during project procurement and when commencing proceedings, is whether the counterparty is a solvency risk and, if so, how will that impact the prospects of recovery?

These issues are complex and can leave an international contractor exposed to liability.

A photograph of a cable-stayed bridge under construction, showing the concrete pylon and the steel deck with a crane on top, set against a blue sky with light clouds.

Recoverability risk in the construction sector

Over the last ten years, significant economic growth in emerging jurisdictions has dovetailed with major infrastructure investment programs like the Belt and Road initiative and increased project funding through Multilateral Development Banks such as the International Finance Corporation and Asia Development Bank. International contractors from China, Korea and Japan have been at the forefront of this infrastructure boom. On paper, these projects look attractive, with potential for high profit margins. They also involve additional risks. One particularly pertinent risk that is often overlooked at the contracting stage, and even when the decision is made to initiate dispute proceedings, is this risk of not being able to recover a favourable adjudication or arbitration award from the counterparty.

Using dispute finance to mitigate recoverability risk

Dispute finance is non-recourse. This means that the funder shoulders the risks of the claim, including recoverability risk, and only realises a return if money is recovered from the counterparty. With an industry leading team of asset tracing professionals and enforcement lawyers, Omni Bridgeway is well placed to assess and develop strategies to mitigate recoverability risk at the outset of any dispute it finances.

The following funding structures can be used:

STANDARD FUNDING MODEL

The funder invests early in the dispute and typically pays for the costs of the proceedings (eg. legal and expert fees, arbitration costs, enforcement proceedings). In addition to derisking recoverability, the funding improves the company's cash flow and profitability for the duration of the dispute.

ENFORCEMENT FUNDING AND MONETISATION

If the company already has a favourable award or judgment, Omni Bridgeway can fund the costs associated with enforcement proceedings and recovery action on the same non-recourse basis (solving the "good money after bad" dilemma). Alternatively, Omni Bridgeway may offer monetisation by purchasing all or part of the award or judgment. More information about enforcement funding and monetisation can be found [here](#).

ASSET TRACING AND MONITORING

Whether or not the standard funding model is desired or appropriate, Omni Bridgeway can provide asset monitoring services before or during the merits phase of the proceedings, assisting with asset identification and preservation before providing enforcement funding when the award is issued and the counterparty refuses to pay. More information about this funding model can be found [here](#).

Case examples:

Omni Bridgeway has derisked recoverability for many companies including a wide range of construction companies, from small subcontractors to major tier one contractors and a variety of employers. Recent examples include:

RECOVERING DEBTS FROM UZBEKISTAN GOVERNMENT FOR A TURKISH CONSTRUCTION COMPANY

This involved funding to enforce an ICC Award for a Turkish construction company from the Republic of Uzbekistan over non-payment for an irrigation construction project. Through multi-jurisdictional enforcement proceedings and subsequent negotiations, settlement was reached to the satisfaction of the company.

ENFORCEMENT OF A CONSTRUCTION COMPANY'S AWARD AGAINST AN AFRICAN STATE

This involved funding enforcement proceedings against an African state. The underlying dispute concerned the breach of a contract to reconstruct a highway between two major cities. Omni Bridgeway devised and executed a recovery strategy involving jurisdictions in Europe, the UAE, Africa and North America, resulting in a negotiated settlement.

FUNDING AN ARBITRATION FOR A MAJOR KOREAN COMPANY AGAINST AN AFRICAN STATE

Omni Bridgeway is currently funding a well capitalised Korean company in high value arbitration proceedings against an African state. One of the main reasons why the company is using dispute finance is to derisk recoverability.

FUNDING MULTI-JURISDICTIONAL ENFORCEMENT CLAIMS FOR A MAJOR WESTERN EUROPEAN CONSTRUCTION COMPANY AGAINST EASTERN EUROPEAN FOOTBALL CLUB

This involved funding claims against a football club for non-payment of instalments for the construction of a football stadium. Omni Bridgeway traced and seized strategically significant assets across Europe, forcing a settlement of the award debt.

More information about our construction expertise can be found [here](#).



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Omni Bridgeway is the global leader in legal finance and risk management, providing dispute and litigation finance from case inception to post-judgment enforcement and recovery. Listed on the ASX, Omni Bridgeway operates in over 20 international locations.

Curious to know more?

We would be delighted to explore tailored solutions to unlock value for your business.

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