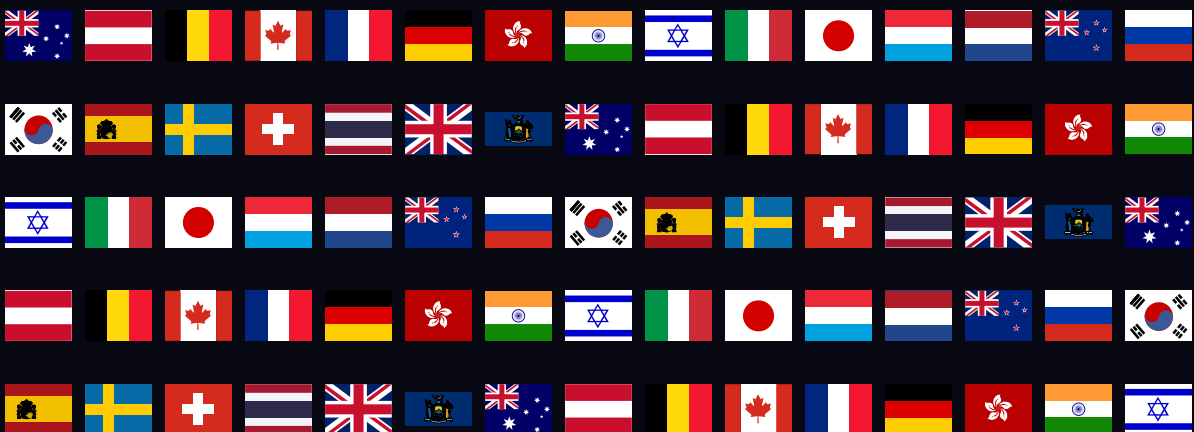


LITIGATION FUNDING

Netherlands



Litigation Funding

Consulting editors

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Woodsford

Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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REGULATION

Overview

Is third-party litigation funding permitted? Is it commonly used?

Third-party litigation funding (TPLF) is available and is legally permitted in the Netherlands – both in state court litigation and in arbitration. TPLF constitutes a growing field, especially for arbitration and mass tort claim litigation.

Law stated - 31 August 2021

Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

As Dutch law recognises the principle of freedom of contract, the parties are in principle free to agree on the fees and interests that the funder can charge. Certain limitations may be found in the general law of contracts (eg, where the agreed-upon fees and interests would contravene the rules of public policy, good morals or reasonableness and fairness). There are no precedents publicly available where courts have in fact limited or amended a funder's fees and interests on such grounds. Dutch case law has confirmed that the mere fact that a third-party funder charges a higher amount of fees and interest than other TPLF providers does not result in a violation of public policy or good morals (ECLI:NL:GHAMS:2011:BU8763).

Law stated - 31 August 2021

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

There are no specific legislative or regulatory provisions applicable to TPLF in the Netherlands.

Law stated - 31 August 2021

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

No specific professional or ethical rules apply to lawyers advising clients in relation to TPLF. Professional rules of conduct applicable to lawyers impose certain restrictions on the remuneration arrangements that may be agreed between a lawyer and their client. A 'no cure no pay' arrangement or an arrangement under which the lawyer's remuneration is defined as a part of the value of a judgment or award (quota pars litis) are generally prohibited under the Dutch professional rules of conduct for lawyers, although success fees are permitted provided they cover costs. However, such restrictions do not extend to third-party litigation funders insofar as these funders do not act as counsel representing the funded party.

Law stated - 31 August 2021

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

The Dutch Ministry of Justice and Security has taken an interest in TPLF specifically in the context of mass claim litigation, but does not exercise oversight as would a regulator. Otherwise, no public bodies in the Netherlands have expressed a particular interest in or conduct oversight over TPLF.

Law stated - 31 August 2021

FUNDERS' RIGHTS

Choice of counsel

May third-party funders insist on their choice of counsel?

Under Dutch law there are no specific provisions governing the relationship between the third-party funder, the party seeking funding and their legal counsel. The parties are free to agree on the terms and conditions of their cooperation in the funding agreement, including whether the third-party funder may insist on its choice of counsel for the matter that is to be funded.

Law stated - 31 August 2021

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Hearings in Dutch state courts are generally open to the public. Funders are therefore free to attend such court hearings. However, only the parties and their legal counsel may actively participate at the hearing. A funder is allowed to participate in the event it has become a formal party to the proceedings following assignment of the claim.

Arbitral proceedings may be confidential. Whether funders are allowed to attend an arbitration hearing will depend on the applicable arbitration rules and specific arrangements agreed between the parties or ordered by the arbitral tribunal.

Whether a funder may attend or participate in hearings and settlement proceedings in a specific case will also depend on the specific agreement reached between the funder and the party seeking funding. The funding agreement will usually govern the participation rights of the funder in respect of the proceedings, including the right to attend any hearings and settlement discussions.

Law stated - 31 August 2021

Veto of settlements

Do funders have veto rights in respect of settlements?

Dutch law does not contain statutory provisions that bar a funder's veto rights in respect of settlements. The funder and the party seeking funding are free to make arrangements regarding decisions to be taken in respect of the funded proceedings, including settlements, as they deem fit. The funding agreement typically contains explicit provisions in this respect.

Law stated - 31 August 2021

Termination of funding

In what circumstances may a funder terminate funding?

The relationship between the third-party funder and the party seeking funding is primarily governed by the funding agreement. The funding agreement typically specifies in what circumstances the funder has the right to terminate funding. These circumstances may include a breach of the terms of the funding agreement by the party seeking funding or the occurrence of a material adverse change.

If the funding agreement is governed by Dutch law, the general rules of contract under Dutch law will be applicable. As a result, certain statutory grounds for termination apply, provided these have not been contractually excluded. Such statutory grounds include the right to nullify a contract on the basis of error or fraud (article 3:44 of the Dutch Civil Code (DCC) and article 6:228 DCC), and the right to rescind a contract following a breach of that agreement by the other party (article 6:265 DCC). Certain statutory grounds are mandatory and cannot be contractually excluded, such as nullification on the basis of fraud. A contractual exclusion may be ignored, if maintaining such exclusion would be unacceptable in light of the general principles of reasonableness and fairness (codified in article 6:248 DCC). Conversely, the principles of reasonableness and fairness may preclude a party from successfully invoking a contractual termination clause, or may allow a party to do so only subject to a notice period or to a compensation payment.

Law stated - 31 August 2021

Other permitted activities

In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The funder's role and involvement in the proceedings are typically laid down in the funding agreement. Some funding agreements require the funder to actively manage the proceedings, whereas other funding agreements do not. Dutch law does not require a funder to take an active role in the litigation process.

Law stated - 31 August 2021

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Litigation lawyers may enter into conditional or contingency fee agreements, albeit within certain limits. 'No cure no pay' or quota pars litis agreements are generally not allowed, and lawyers need to ensure that the fees charged constitute a reasonable compensation for their services.

Within those parameters, litigation lawyers are able to enter into conditional, contingency or other fee arrangements, for example, by taking a lower hourly rate or fee as a starting point that can be increased upon achieving a certain result (including by reference to the value of that result). While hourly rates are still commonly used, alternative fee arrangements, such as fixed and capped fees as well as success fees, are increasingly and broadly applied in the Netherlands.

Law stated - 31 August 2021

Other funding options

What other funding options are available to litigants?

Litigation insurance, which covers the costs of litigation for the insured against payment of a premium, is commonly used in the Netherlands, both among companies and individuals. Such insurance is typically only available when the events giving rise to the litigation have not yet occurred. As such, it will not always constitute a feasible alternative for third-party litigation funding (TPLF). This type of insurance, depending on the agreed terms and conditions, may also set further restrictions. These may relate to the threshold that is applied to determine whether a claim is considered to be suitable for pursuit in court or through arbitration, or the extent to which the insured party can freely elect its own counsel.

In addition, natural persons with limited financial means may be eligible for state-financed legal aid for certain categories of disputes. Given the eligibility criteria, this will not constitute a feasible alternative for TPLF in most cases.

Law stated - 31 August 2021

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

The average duration of first-instance proceedings in commercial cases in the Netherlands, as reported by the Dutch judiciary, is nine months. This does not include any preparation time prior to the initiation of the proceedings. Depending on the procedural complexities, such as the number of submissions, motions and time limit extensions, the proceedings could take longer.

Law stated - 31 August 2021

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

Approximately 12 per cent of first-instance judgments in commercial cases in the Netherlands are appealed. On average, the appeal proceedings in commercial cases take 15 months, as reported by the Dutch judiciary. As with first-instance proceedings, the timelines for more complex litigation proceedings could be longer.

Law stated - 31 August 2021

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

Dutch court decisions are directly enforceable (article 430 of the Dutch Code of Civil Procedure (DCCP), in Dutch). If a losing party does not comply with the decision voluntarily, the prevailing party may instruct a bailiff to execute the judgment, including by attaching and selling assets.

In principle, foreign court decisions can only be enforced in the Netherlands following recognition proceedings (article 431 paragraph 2 DCCP). Court decisions from European Union member states constitute a notable exception. Such

decisions can be enforced directly on the basis of the Brussels I Recast Regulation (Regulation (EU) No. 1215/2012). Various multilateral and bilateral treaties that the Netherlands has entered into may also facilitate recognition of foreign court decisions.

Recognition proceedings for foreign court decisions are in principle limited in scope, as the Dutch state courts will generally refrain from assessing the underlying case. The Dutch state court will instead assess whether the proceedings leading up to the foreign court decision meet certain basic requirements, including that (1) the jurisdiction of the foreign state court has a basis that is generally accepted according to international standards, (2) the foreign decision came into being through a judicial procedure that meets the requirements of a proper administration of justice offering sufficient safeguards, (3) recognition of the foreign decision does not violate Dutch public policy, and (4) the foreign decision is not irreconcilable with another decision rendered between the same parties by a Dutch state court, or with an earlier decision of a foreign state court rendered between the same parties in a dispute that concerned the same subject matter and the same cause, provided that the earlier decision may be recognised in the Netherlands. Upon receipt of a request for recognition, the court will schedule a hearing at which both the requesting party and the counterparty are summoned to appear.

Arbitral awards require enforcement or recognition proceedings, or both. The scope of such proceedings depends on the seat of the arbitration. Enforcement proceedings of domestic arbitral awards (ie, arbitrations seated in the Netherlands) are *ex parte* and are ordinarily completed within a matter of days without a hearing (article 1062 DCCP). Proceedings for the recognition and enforcement of arbitral awards seated outside the Netherlands largely follow the same procedure as recognition proceedings of foreign court decisions (articles 1075 and 1076 DCCP). Such proceedings are often governed by the New York Convention 1958, to which the Netherlands is a party.

Law stated - 31 August 2021

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

Third-party litigation funding (TPLF) is increasingly used in the context of mass claims in the Netherlands.

The Dutch Civil Code (DCC) provides an explicit statutory basis for mass claims. Article 3:305a DCC provides that a Dutch claim vehicle in the form of a foundation or association may represent class litigants in order to protect their common interests. Claim vehicles are frequently financed by third-party funders. If the claim vehicle is able to agree on a collective settlement, the Amsterdam Court of Appeal may declare such a collective settlement binding on all of the aggrieved parties on an opt-out basis, pursuant to the Dutch Collective Settlement of Mass Claims Act (WCAM). Since 1 January 2020, Dutch claim vehicles may also bring mass claims for damages on the basis of the Act on Redress of Mass Damages in a Collective Action (WAMCA).

The WAMCA lays down further criteria for such a claim vehicle, including sufficient funding and expertise. The claim vehicle must not only be able to prove that it has sufficient means to bear the costs of initiating proceedings, but also that it has sufficient control over the collective action. The third-party litigation funder may not have a decisive influence over the claims or control over the lawsuit. Individual board members, as well as their lawyers and other service providers, should function independently from the external funders. (A currently pending legislative proposal to implement Directive 2020/1828 on representative actions for the protection of the collective interests of consumers adds that funding cannot be used for claims against the funder's competitors or persons the funder is dependent on.) Furthermore, board members of the claim vehicle may not have a profit motive in the collective action. A court may request to see the funding agreement to ensure the independence of the organisation is sufficiently warranted. The Dutch legislator has pointed out that it may not always be necessary that the funding agreement is also disclosed to the opposing party (Parliamentary Papers II 2016-2017, 34 608, No. 3).

Discussions on the proper reimbursement of litigation funders are particularly prevalent in mass claim settlements. The Amsterdam Court of Appeal has held that lawyers' fees amounting to 20 per cent of the total amount of the settlement were not unreasonable, also taking into account the standards developed in US case law on what is common and reasonable (ECLI:NL:GHAMS:2012:BV1026).

It is also possible for the companies to start an action outside the scope of article 3:305a DCC on an opt-in basis, for example, through the assignment of claims to a special purpose vehicle.

Law stated - 31 August 2021

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation?
May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Under Dutch law, the unsuccessful party in the proceedings pays the court fees and costs of representation of the successful party (article 237 of the Dutch Code of Civil Procedure (DCCP)). However, these costs are awarded on the basis of a fixed scale that does not cover the actual costs incurred but only a significantly lower amount, most often totalling no more than a few thousand euros. Only in very exceptional circumstances may the legal costs incurred be compensated in full. This may happen in certain disputes relating to intellectual property rights, or in the case of an abuse of process by one of the parties. In such rare cases, it is not impossible that the courts order the unsuccessful party to pay the litigation funding costs of the successful party. However, we are unaware of any example in which that has happened.

The Netherlands Arbitration Act does not contain provisions on the recovery of costs. Unless the parties have agreed on arrangements in this regard, the arbitral tribunal may allocate costs in the way it deems fit. By way of example: the arbitration rules of the Netherlands Arbitration Institute (NAI) provide that the unsuccessful party shall be ordered to pay the costs of the arbitration, except in special events at the arbitral tribunal's discretion (article 57(2) of the NAI Arbitration Rules).

Law stated - 31 August 2021

Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

Dutch law does not contain statutory provisions relating to a third-party litigation funder's liability for adverse costs. Unless the funding agreement stipulates otherwise, the third-party litigation funder will not be liable for such costs. In practice, given the relatively low costs involved, third-party funders may well agree to cover adverse costs for Dutch state court proceedings in the funding agreement.

Law stated - 31 August 2021

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Dutch law provides that a court may order a claimant to provide security for costs (article 224 DCCP). However, the practical implications of this provision are limited, given that it only applies to claimants who reside in a state that does not have a treaty regime for the enforcement of Dutch state court judgments, who will likely have insufficient assets in the Netherlands to cover an adverse costs order, and whose access to court is not effectively precluded by an order for security for costs. Dutch law does not provide a basis to order a third party, such as a third-party litigation funder, to provide security for costs.

Dutch law does not provide any specific rules on the provision of security for costs by arbitral tribunals. The Netherlands Arbitration Act grants the tribunal wide-ranging authority to order interim measures (article 1043b DCCP), which includes the possibility to request security for the costs of proceedings and legal assistance. The Netherlands Arbitration Act does not prescribe any conditions that must be fulfilled in order for an order for security for costs to be granted. In their decisions on requests for security for costs, tribunals have assessed the following three factors: whether the other party's financial situation has deteriorated (or is expected to deteriorate) since the conclusion of the arbitration agreement, whether this deterioration occurred wilfully or not, and whether the applicant no longer has the security that it previously had (see, for example, NAI 30 August 2013, Case No. 4025, Tijdschrift voor Arbitrage 2015/24, paragraph 41). An additional factor that tribunals should, in our view, take into account is whether the order for security for costs effectively precludes the claimant from presenting its claim to the tribunal, that is, whether the claimant can reasonably comply with the order.

Law stated - 31 August 2021

If a claim is funded by a third party, does this influence the court's decision on security for costs?

The mere fact that a claim is funded by a third party is by itself not a relevant consideration in the context of the court's decision on security for costs. Article 224 DCCP only provides for the possibility to order security for costs against claimants who reside in a state that does not have a treaty regime for the enforcement of Dutch state court judgments, who will likely have insufficient assets in the Netherlands to cover an adverse costs order, and whose access to court is not effectively precluded by an order for security for costs.

Law stated - 31 August 2021

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is available in the Netherlands. However, it is rarely used, as the potential costs associated with an adverse cost order in Dutch court proceedings are limited.

A more popular type of insurance – mainly among consumers – is legal expenses insurance. This type of insurance covers the costs of legal proceedings, and usually covers costs of future disputes only and is, therefore, contracted before a dispute has arisen.

Law stated - 31 August 2021

DISCLOSURE AND PRIVILEGE

Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Dutch procedural law does not require a litigant to disclose the funding agreement to the court or to the opposing party. However, in the context of mass claims, a court may request to see the funding agreement to ensure the independence of the claim vehicle is sufficiently warranted. More generally, Dutch procedural law provides for a limited disclosure process (article 843a of the Dutch Code of Civil Procedure (DCCP)).

Law stated - 31 August 2021

Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

The scope of legal privilege is the subject of a number of recent court decisions. Recent case law includes Supreme Court rulings ECLI:NL:HR:2020:600, ECLI:NL:HR:2021:273 and, among others, the following decisions from District Courts ECLI:NL:RBROT:2019:7856 and ECLI:NL:RBROT:2021:527.

Dutch law recognises one type of legal privilege: attorney-client privilege. Concepts of 'without prejudice privilege' or 'litigation privilege' are not as such recognised under Dutch law, although Dutch courts may uphold claims to foreign types of privilege.

Under Dutch law, it is the lawyer who holds the privilege, not the client (article 165 DCCP paragraph 2 sub b). Accordingly, it is the exclusive right of the lawyer to waive such privilege. The client may refuse to comply with a request for information if this request pertains to communications exchanged with its lawyer in his or her professional capacity.

Communications between litigants and their lawyers are subject to attorney-client privilege. Communications between litigants, third-party litigation funders and lawyers may be covered by legal privilege depending on the structure and scope of the engagement of counsel by the litigant or funder.

The concept of waiver of privilege is as such not recognised under Dutch law. The mere sharing of privileged information with a third party does not necessarily dispose of the privileged status of the information. The Dutch Supreme Court has confirmed this principle explicitly with respect to the exchange of privileged information with regulators. No definitive ruling has been rendered as of yet regarding the status of information exchanged with other third parties, such as certain types of service providers.

In view of the evolving case law, it is in any case recommended that litigants conclude non-disclosure agreements with potential third-party litigation funders in order to ensure that the latter treats the information received in a confidential manner. A confidentiality agreement will not create a right of legal privilege for the funder.

Law stated - 31 August 2021

DISPUTES AND OTHER ISSUES

Disputes with funders

Have there been any reported disputes between litigants and their funders?

Reported disputes between litigants and their funders are rare. A decision from the Amsterdam court of appeal of December 2011 (ECLI:NL:GHAMS:2011:BU8763) constitutes a noteworthy exception. In this case, the litigant challenged the validity of the funding agreement due to the high interest claimed by the funder (40 per cent excluding

VAT, after subtraction of costs). The court of appeal dismissed the challenge, considering that the mere fact that a third-party funder charges a higher amount of fees and interest than other third-party litigation funding providers does not result in a violation of public policy or good morals.

Law stated - 31 August 2021

Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

The Dutch legal market is internationally oriented, and the practice of litigation funding is no exception. While the Netherlands harbours a number of domestic funders, multiple international funders actively participate in the market as well.

Funded cases in the Netherlands are often international in scope. International arbitrations are frequently seated in the Netherlands, one or more parties reside in the Netherlands, or enforcement is sought against assets located in the Netherlands. Other types of litigation that frequently involve third-party funding, such as mass claims and IP disputes, also typically contain an international dimension. Parties often benefit from the efficiency of the Dutch state courts and the wide network of international treaties when enforcing Dutch state court judgments abroad, such as in EU member states by virtue of the Brussels I Recast Regulation.

The Dutch judiciary has traditionally catered to international litigations, most recently with the establishment of the Netherlands Commercial Court (NCC) in 2019, which allows international parties to conduct proceedings in English. The NCC is intended to further enhance the status of the Netherlands as a venue for resolving international disputes, including where such disputes do not involve Dutch parties and are not governed by Dutch law. The jurisdiction of the NCC is based on a choice of forum by parties to a contract or by the parties selecting the court on an ad hoc basis (which can also include alleged tort claims). The NCC has its own procedural rules, which are tailored to the complex international disputes it aims to resolve.

Third-party funders can finance a claim by acquiring the claim from the creditor. In such case, the claim will be assigned by the creditor (assignor) to the funder (assignee). The claim can be transferred to the funder without actual knowledge of the debtor by means of a notarial deed or a deed that is registered with the Tax and Customs Authority. If so, the debtor is still entitled to make a settling payment towards the claim to the assignor, unless the debtor is aware of the assignment (article 3:94 of the Dutch Civil Code). Third-party funders may consider to agree on sufficient contractual security in relation to the assignor to recover payment with preference over other creditors of the assignor to ensure that any settling payments by the debtor to the creditor or assignor would subsequently be used to settle other debts of the creditor or assignor with preference over its obligations in relation to the funder.

Law stated - 31 August 2021

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

The already frequent use of third-party litigation funding in the context of mass tort claims has received a further boost through the recent enactment of the Act on Redress of Mass Damages in a Collective Action (WAMCA). Combined with the possibility to conduct proceedings in English before the Netherlands Commercial Court and subsequently to enforce judgments in other EU member states by virtue of the Brussels I Recast Regulation, this development is expected to make the Netherlands an increasingly attractive forum for international mass claims.

Directive 2020/1828 on representative actions for the protection of the collective interests of consumers further facilitates the presentation of mass claims by claims organisations operating within the EU, also on a cross-border basis. The Directive contains a number of provisions relevant for third-party litigation funders, relating to the independence of the claim organisation and the transparency of its financing. Most of these provisions are already reflected in Dutch law. A legislative proposal implementing the Directive is currently in the consultation phase. It is expected to be implemented by the end of 2022.

Arbitrations and arbitration-related court proceedings, such as setting aside and enforcement proceedings, have continued to expand in the Netherlands over the past decade. The Netherlands is not only widely recognised as an attractive and neutral seat for commercial and investor–state arbitrations, it also constitutes the seat of holding companies for many of the world's largest corporates and foreign state-owned enterprises. This makes the Netherlands an attractive venue for enforcement proceedings, particularly in view of the robust legal framework for asset attachments.

Law stated - 31 August 2021

Jurisdictions

	Australia	Piper Alderman
	Austria	Nivalion AG
	Belgium	Nivalion AG
	Canada	Omni Bridgeway
	France	Nivalion AG
	Germany	Omni Bridgeway
	Hong Kong	Herbert Smith Freehills LLP
	India	Khaitan & Co
	Israel	Woodsford
	Italy	Fideal S.R.L
	Japan	Miura & Partners
	Luxembourg	Nivalion AG
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	South Korea	KL Partners
	Spain	Procurator Litigation Advisors
	Sweden	Nivalion AG
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