LITIGATION FUNDING 2022

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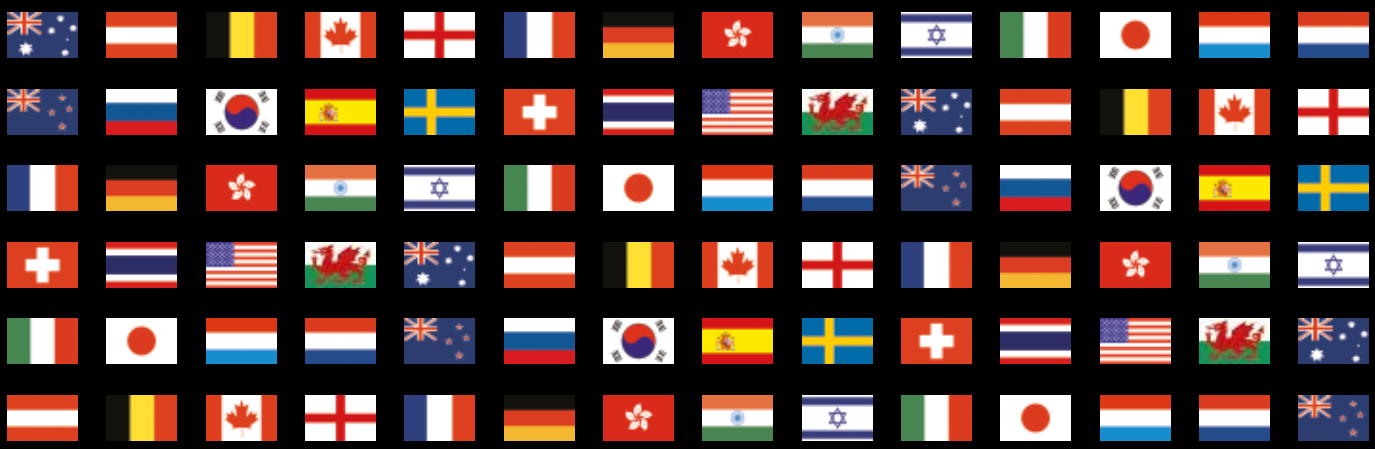

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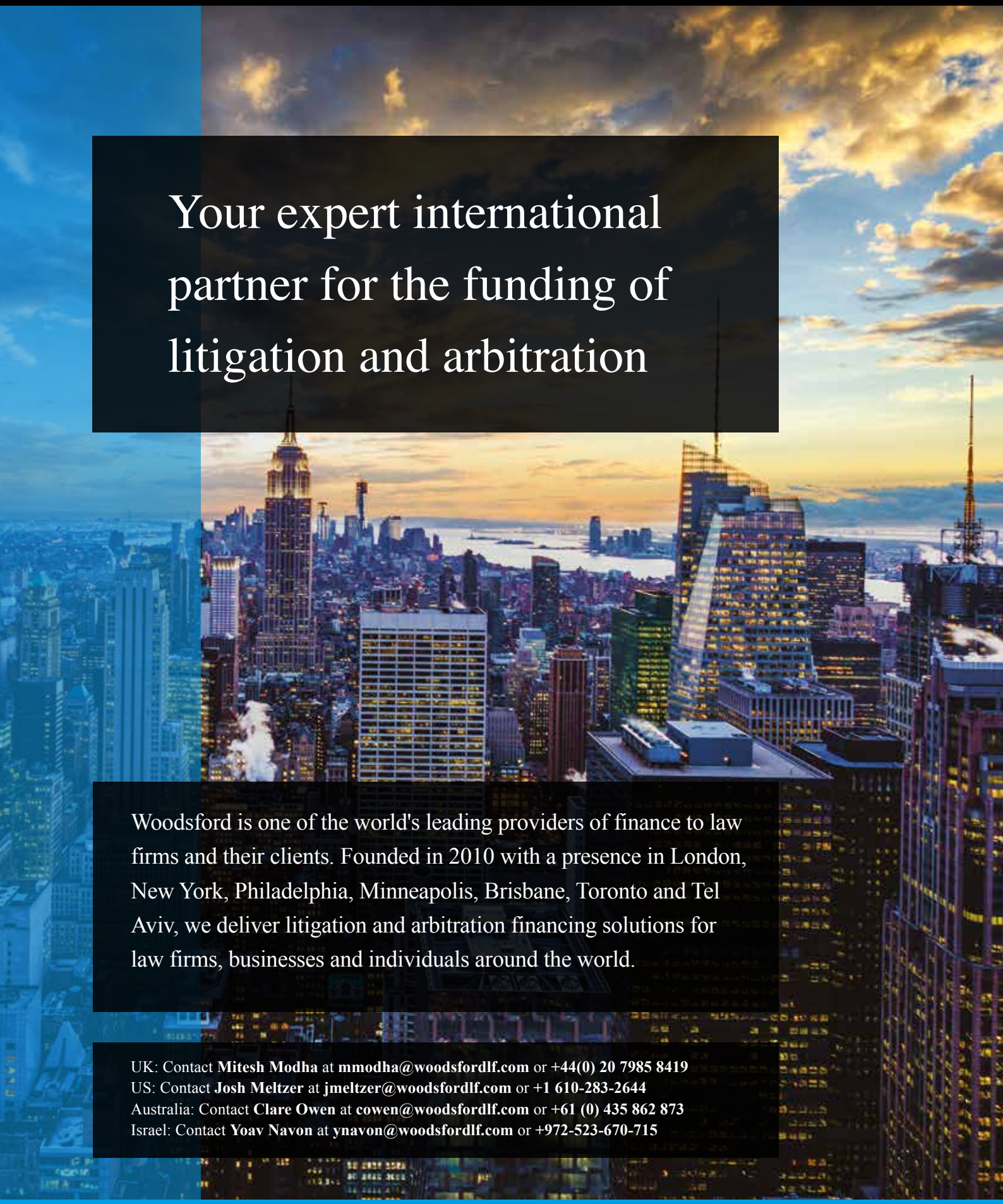

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REGULATION

Overview

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

Third-party litigation funding is permitted and endorsed by the judiciary and policymakers as a tool of access to justice. Consistent with modern public policy, English courts have a generally positive attitude to third-party funding.

The Competition Appeal Tribunal (CAT) recently described third-party litigation funding as 'a well-recognised feature of modern litigation' that 'facilitates access to justice for those who otherwise may be unable to afford it' (*UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others* and *Road Haulage Association Limited v Man SE and Others* [2019] CAT 26). The tribunal's view underlines how far the law has changed since the days when funding another party's litigation could constitute both a crime and a tort.

The historic, and long-abandoned, prohibition of third-party litigation funding was rooted in the ancient concepts of maintenance and champerty. Maintenance is third-party support of another's litigation. Champerty is a form of maintenance in which the third party supports the litigation in return for a share of the proceeds.

At the start of the twentieth century, maintenance and champerty were both crimes and torts. Following the Second World War, the law on funding civil litigation changed dramatically. The introduction of legal aid in 1950 created a state-funded exception to the historic prohibition on litigation funding. Further exceptions came with the growth of insurance and trade union-funded litigation. The Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty. While those principles continue to exist in the public policy relating to litigation funding, their scope has been much reduced, and they apply nowadays largely to discourage funders from exerting undue control over the litigation that they fund. 'No win, no fee' arrangements between litigants and lawyers (in effect, another form of litigation funding) were introduced in the early 1990s and substantially liberalised in 2000.

R (Factortame Ltd) v Secretary of State for Transport was a case taken against the United Kingdom's government by a company of Spanish fishermen who claimed that the UK had breached European Union law by requiring ships to have a majority of British owners if they were to be registered in the UK. The case produced a number of significant judgments on British constitutional law. In 2002, the Court of Appeal in *Factortame (No. 8)* [2002] EWCA Civ 932 explained that only those funding arrangements that tended to 'undermine the ends of justice' should fall foul of the prohibition on maintenance and champerty. In other words, reasonable litigation funding arrangements entered into with professional and reputable third-party funders who respect the integrity of the judicial process are perfectly lawful.

In its 2005 decision in the case of *Arkin v Borchard Lines and Others* [2005] EWCA Civ 655, the Court of Appeal was again sympathetic to the position of professional litigation funders as tools for access to justice. In a landmark ruling in 2016 (*Essar Oilfields Services Limited v Norscot Rig Management* [2016] EWHC 2361 (Comm)), a case funded by Woodsford, the English Commercial Court upheld the decision of an arbitrator (former Court of Appeal judge, Sir Philip Otton) to allow a successful claimant to recover its third-party litigation funding costs from the losing defendant as 'other costs' under section 59(1)(c) of the Arbitration Act 1996 (AA 1996).

In the case of *Walter Hugh Merricks v MasterCard and Others* [2021] CAT 28, the importance of litigation funding was specifically highlighted in deciding whether to grant a Collective Proceedings Order (CPO). One of the two conditions for granting a CPO is whether the applicant bringing the proceedings as the representative of the class may be authorised under Rule 78(2) of the Competition Appeal Tribunal Rules 2015. Whether a person may be authorised is contingent upon whether they can act fairly in the interests of the class and manage proceedings. Managing proceedings includes, inter alia, access to adequate funds for the proceedings. Given that the class representative had access to increased funding (following a change in litigation funder), the CAT was satisfied that the level of funding would enable the representative to sufficiently bring proceedings on behalf of the class. It is worth noting here that the CAT scrutinised the Litigation Funding Agreement between the funder and the representative for these purposes.

In March 2018, Sir Rupert Jackson, while reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime in England and Wales, noted that his proposals to:

> *[P]romote [third-party funding] and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs.*

Litigation funding is now used across a spectrum of cases in England and Wales, and Mrs Justice Knowles recently considered its use in family law proceedings (*Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam)). In *Akhmedova*, it was submitted to the court that the ban on conditional fee agreements in family proceedings should be applied by analogy to third-party funding. However, Mrs Justice Knowles was not persuaded, highlighting in respect of litigation funding that 'first-instance decisions in the Family Division have concluded that (a) it is "a necessary and invaluable service in the right case" (per Mr Justice Francis at paragraph 53 in *Weisz v Weisz* [2019] EWHC 3101 (Fam)) and (b) that nothing should be said "that makes it even more difficult for litigants to obtain litigation funding in the future, particularly given

that there is no legal aid available in this area anymore" (per Mr Justice Moor at paragraph 9 of *Young v Young* [2013] EWHC 3637 (Fam))'.

The third-party funding industry, which is arguably centred in London, has grown significantly in terms of the number of market participants, the capital available to them, the types of disputes that are funded and the size of investments made. Formed in 2011, the Association of Litigation Funders (ALF) now has 20 members and a recent analysis by RPC found that in 2019, the total value of cases and cash held by UK litigation funders was £1.9billion, up 46 per cent from 2017/18.

Restrictions on funding fees

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

Third-party funding is well established in England and Wales. There are a significant number of professional litigation funders in London, and the market is competitive. A litigant with a good case should readily be able to find litigation funding on attractive commercial terms.

Specific rules for litigation funding

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

The voluntary Code of Conduct for Litigation Funders was facilitated by the Civil Justice Council, a government agency that is part of the Ministry of Justice of England and Wales (Ministry of Justice), on 23 November 2011. This code sets out the standards of practice and behaviour required of ALF members funding litigation in England and Wales. ALF membership is voluntary; however, most of the more long-standing, professional third-party funders in the London market have joined. In *Akhmedova*, Mrs Justice Knowles specifically noted Burford's membership of the ALF, highlighting that litigation funding 'practised by a funder adhering to the Code of Conduct has been endorsed by the senior courts in robust terms'.

The ALF code of conduct includes provisions ensuring the capital adequacy of funders, the limited circumstances in which funders may be permitted to withdraw from a case, and the roles of funders, litigants and their lawyers.

In *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v Man SE and Others*, the CAT described the ALF code of conduct as 'a voluntary code', but that in their view it was 'wholly unrealistic to suppose that a leading litigation funder that is commercially active in this field would not honour these commitments to the Association of which it is a founder member, and thus place at risk the whole regime of self-regulation'.

Legal advice

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

The Solicitors Regulation Authority (SRA) Standards and Regulations are made up of the SRA Principles, which comprise the fundamental tenets of ethical behaviour that underpin all areas of legal practice for solicitors and the SRA Codes of Conduct for solicitors and firms. The code of conduct for solicitors applies to UK practitioners, registered European lawyers and registered foreign lawyers, and establishes a framework for ethical and competent practice to which individual practitioners are personally accountable for compliance with the code. The code of conduct for firms describes the standards and business controls expected of firms authorised to provide legal services. The codes contain a number of provisions relevant to solicitors and firms advising on funding. These include sections relating to 'Maintaining trust and acting fairly', 'Service and competence', 'Conflict, confidentiality and disclosure' and 'Referrals, introductions and separate businesses'. Solicitors should advise litigants on all reasonable funding options, including insurance and third-party funding. A failure to do so could result in sanction by the SRA, and, potentially, also liability for professional negligence.

Regulators

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

The ALF, founded in November 2011, is an independent body charged by the Ministry of Justice with delivering self-regulation of disputes whose resolution is to be achieved principally through litigation procedures in the courts of England and Wales.

The ALF administers self-regulation of the voluntary code of conduct for Litigation Funders that are ALF members and it also maintains the complaint procedure to govern complaints made against members by funded litigants.

In addition to ALF membership, several funders in England and Wales (including Woodsford) are now also members of the International Legal Finance Association (ILFA), formed in September 2020. ILFA members must agree to uphold the association's 'Best Practices', which include avoiding conflicts of interest and a commitment to maintaining appropriate capital adequacy.

Most professional litigation funders in London are staffed by solicitors and other professionals (eg, chartered accountants) who will ordinarily be regulated by their professional bodies.

Also, litigation funding necessarily exists in the context of litigation or arbitration proceedings, in which the involvement of the court can provide an additional source of oversight. By way of example, in collective proceedings in the CAT, funding arrangements are likely to be reviewed and scrutinised by the tribunal as part of the certification process. This was the case in *Walter Hugh Merricks v MasterCard and Others* [2021] CAT 28.

In January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that the market for third-party litigation funding continued to develop well and that he had no concerns about the activities of litigation funders. While the UK government continues to keep the industry under review, it remains of the view that the ALF voluntary code of conduct works well, and that there is no need for statutory regulation for third-party litigation funding.

FUNDERS' RIGHTS

Choice of counsel

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

When deciding whether to fund a case, third-party funders consider numerous factors including the expertise of the litigant's choice of counsel. If a funder does not think that the litigant's legal team is suitable, the funder can choose not to fund. Alternatively, it is open to the claimant to change its legal team to persuade a funder to invest.

Once invested in a case, a third-party funder must not exercise undue control over the litigation, including making demands as to the choice of counsel. To do so would risk offending the remaining vestiges of the principles of maintenance and champerty and render the litigation funding agreement unenforceable by the funder. This point is reflected in clause 9.3 of the Association of Litigation Funders (ALF) code of conduct, which provides that members of the ALF must not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

Participation in proceedings

7 | May funders attend or participate in hearings and settlement proceedings?

Subject to objections from the judge, tribunal or mediator with authority over the relevant proceedings, it is perfectly lawful for funders to attend hearings and proceedings, and there are often good reasons why they should do so. Just as it has long been accepted that insurers and reinsurers with a financial interest in proceedings should be welcome to attend mediations and other settlement discussions, it is becoming increasingly common for third-party funders to also attend.

Veto of settlements

8 | Do funders have veto rights in respect of settlements?

The voluntary ALF code of conduct states that the litigation funding agreement must note whether (and if so, how) the third-party funder may provide input into the litigant's decision in relation to settlements. It is standard for English litigation funding agreements to provide that third-party funders will be kept abreast of settlement discussions and offers, and some agreements will also provide that settlement offers within a pre-agreed range will be considered reasonable and should be accepted.

Termination of funding

9 | In what circumstances may a funder terminate funding?

For members of the ALF, the only permissible circumstances for terminating funding are set out at clause 11.2 of the voluntary Code of Conduct for Litigation Funders, as follows:

- where a third-party litigation funder reasonably ceases to be satisfied on the merits of the dispute;
- where the funder reasonably believes that the dispute is no longer commercially viable (eg, where costs have escalated significantly, or the likely recovery has reduced significantly from what was anticipated at the outset); and
- where the funder reasonably holds the view that there has been a material breach of the litigation funding agreement by the funded litigant.

Clause 12 of the Code provides that, in the absence of the circumstances described in clause 11.2, the litigation funding agreement must make clear that there is no discretionary right for a funder to terminate the agreement.

In circumstances where the Code does not apply, for example, because the funder is not an ALF member, the principles of maintenance and champerty may apply to prohibit the funder from using the threat of terminating funding as a means of exercising control over the litigation.

In *Harcus Sinclair (a firm) v Buttonwood Legal Capital Limited* [2013] EWHC 1193 (Ch), the court held that a litigation funding agreement had been validly terminated pursuant to a clause that allowed for termination if, in the funder's reasonable opinion, the claimant's prospects of success had dropped below a prescribed level.

Other permitted activities

10 | 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?

In a February 2016 publication, *International Arbitration: 10 trends in 2016*, the arbitration team at international law firm Freshfields Bruckhaus Deringer LLP stated that third-party litigation funding 'is here to stay, and not just for small or cash-strapped claimants . . . [T]he involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments'.

This comment reflects the maturity of the litigation funding market in London, even five years ago. While the early discussions about litigation funding, informed by the outdated principles of maintenance and champerty, tended to focus on how to limit the funder's involvement in the litigation process, it has come to be recognised that, in addition to financial assistance, funders can also bring a lot of professional expertise to the proceedings.

It remains the position in English litigation that funders should not exercise undue control over the proceedings, but it is nonetheless acceptable that they provide input. Mrs Justice Knowles recently stated that a 'funder of litigation is not forbidden from having rights of control but is forbidden from having a degree of control which would be likely to undermine or corrupt the process of justice' (*Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam)).

On the issue of control, Mr Justice Snowden recently considered the modern view of champerty, highlighting that the approach of the court is to consider 'whether the non-party can exercise excessive control or influence over the conduct of the proceedings in such a way as, for example, to suppress evidence, influence witnesses, or procure an improper settlement' (*Davey v Money* [2019] EWHC 997 (Ch)). Further to this, in the case of *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404, upon review of the funding agreement (between the defendant and the funder), the court found that the funder exercised a 'massive' degree of control over the litigation. As such, the court used its discretion under section 51 of the Senior Courts Act 1981 to grant a non-party costs order against the funder.

In *Excalibur Ventures LLC v Texas Keystone Inc and Others* [2016] EWCA Civ 1144 (18 November 2016), the Court of Appeal endorsed the first instance judge's determination that a responsible funder is expected to carry out a 'rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate levels' and that such steps would not be champertous. This decision makes it clear that funders should take an active role in conducting thorough due diligence prior to funding the litigant and maintain a robust process for reviewing the litigation as it proceeds. Importantly, the Court of Appeal correctly pointed out that none of the litigation funders in this case were ALF members and the court drew the crucial distinction between 'professional funders' and 'the funders [in this case] [who] were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case'.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

11 | May litigation lawyers enter into conditional or contingency fee agreements?

Yes. Conditional fee agreements (CFAs) have been permitted since the 1990s. Since the 1990s, there have been significant developments in the law of contingent fees, including in 2013, the implementation of rules permitting and governing the use of damages-based agreements in contentious work.

In a CFA, some or all of the lawyer's fees are conditional on success. In the event of a success, the solicitor is entitled to payment of the conditional fees, plus a further uplift.

The maximum uplift is 100 per cent of base rates and the success fee payable under a CFA made after 1 April 2013 is not recoverable in the litigation.

In *Global Energy Horizons Corporation v The Winros Partnership (formerly Rosenblatt Solicitors)*, the court considered three CFAs each of which contained an 'Advance Fee' payable to the solicitors, regardless of the outcome in the case. While noting that the CFAs were 'poorly drafted', Master James held that as a result of the Advance Fees, all three CFA's provided for a success fee that could theoretically exceed 100 per cent of base rates. Master James accordingly declared the CFAs to be in breach of section 58(2)(b) of the Courts and Legal Services Act and thereby unenforceable. The Law Society publishes a model CFA and related guidance.

The recent case of *Farrar v Miller* [2021] EWHC 1950 (Ch) concerned an assignment of claim from a claimant to his law firm. The assignment stated that the client did not have adequate funds to continue pursuit of his claim, hence the assignment. The law firm had previously been acting under a CFA and had already accrued significant work in progress on the matter. The judge made clear that if fee agreements were not within the statutory scheme of CFAs and DBAs (discussed below), the agreement would be held champertous. In this instance, the judge found the replacement of the CFA with an assignment to undermine the purity of justice. This emphasises the importance of respecting statutory schemes for remuneration.

Damages-based agreements (DBAs) were introduced in England as part of the Jackson Reforms in 2012. DBAs are similar to the United States' concept of contingency fee agreements. In a DBA, if the case is successful, the lawyer's fee is calculated as a percentage (capped at 50 per cent in commercial cases) of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer.

DBAs are currently governed by the Damages-Based Agreements Regulations 2013 (SI 2013/609) (the DBA Regulations) which came into force on 1 April 2013. Professor Rachael Mulheron of Queen Mary University and Nicholas Bacon QC have prepared a redrafted set of regulations as part of their independent review of DBAs, the conclusion of which has been delayed by the covid-19 pandemic.

DBAs were envisaged by Sir Jackson in his report 'Review of Civil Litigation Costs' (December 2009) as an important litigation funding option. They have, however, been used relatively infrequently. The lack of popularity relates in part to the slow speed at which lawyers adopt new business models, and in part because of uncertainty as to how the rules governing DBAs apply in practice. More recently, Sir Jackson stressed the importance of regulatory change to allow for hybrid DBAs which he suggests 'are an obvious way of promoting access to justice'. Hybrid DBAs would allow for lawyers to act on a partially speculative basis, charging a reduced fee which could be made whole in the event of a successful outcome.

The recent judgment in *Lexlaw Ltd v Zuberi* [2020] EWHC 1855 (Ch) has provided some much-needed clarity to the subject of DBA termination provisions. Pursuant to the DBA regulations, a DBA may not provide for any payment except for one calculated in accordance with Regulation 4. This prohibition caused some to question whether a DBA that provided for payment to the lawyer on early termination might offend this regulation and be rendered unenforceable. The court initially held that such a provision did not breach Regulation 4(1) of the regulations – a welcome clarification for practitioners. The matter was appealed (*Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16) and the court unanimously dismissed it, agreeing that the meaning of 'DBA' should be interpreted narrowly.

The High Court judgment in *Tonstate Group Limited v Wojakovski and Others* [2021] EWHC 1122 (Ch) also helped to provide clarity on DBAs as it was ruled that to be enforceable a DBA must provide payment to the legal representative from the amount recovered by the client in the proceedings. This means that DBAs cannot be used by defendants unless they are bringing a counterclaim.

In June 2019, the Competition Appeal Tribunal (CAT) heard applications in two claims where Collective Proceedings Orders are being sought. In *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v Man SE and Others*, applications were made seeking determination of preliminary issues regarding the applicant's funding arrangements. One of the issues for determination concerned whether the funding agreements should be characterised as DBAs. If so, they were subject to the DBA regulations, which provide that DBAs are unenforceable in opt-out collective proceedings. Ultimately, the Tribunal found that funding agreements were not DBAs and that 'the regime of collective proceedings . . . is dependent on [third-party litigation funding] for its success since there will be few cases where the class members will themselves be able to fund their claims'. This was reiterated in *PACCAR Inc and Others v Road Haulage Association Limited and Others* [2021] EWCA Civ 299 where the CAT opined that litigation funding agreements (LFAs) are not DBAs.

Practitioners await Professor Rachael Mulheron and Nicholas Bacon QC's supplementary report.

Other funding options

12 | What other funding options are available to litigants?

The availability of legal aid has been significantly restricted in recent years. However, it is still available for some types of litigation, including judicial review. Litigants who are members of a professional body or a trade union may benefit from a legal assistance scheme. And various insurance policies (eg, home or car insurance policies) contain legal expenses coverage.

In recent years a small number of litigants have used crowdfunding to raise money for their legal fees where there is a public interest in the case and other funding avenues are not available. In 2015, Mr Beavis utilised crowdfunding to take a parking dispute to the Supreme Court (*ParkingEye Ltd v Beavis* [2015] UKSC 67).

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

While recently describing a 22-month delay between trial and judgment as 'inexcusable', the Court of Appeal emphasised the maxim that '[j]ustice delayed is justice denied' (*Bank St Petersburg PJSC and Another v Arkhangelsky and Another* [2020] EWCA Civ 408).

The time taken for a claim in the courts of England and Wales to reach a decision at first instance will vary greatly according to the complexity of the issues in the case, the urgency of its determination and the caseload of the court in question. The Civil Justice provisional statistics for the second quarter of 2021, the most recent period available, stated there was an average of 49.2 weeks for a small claim to reach trial from issue and for a fast and multi-track claim (ie, higher value claims) it was 71.1 weeks.

Time frame for appeals

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

There are no accurate, up-to-date statistics on the proportion of first-instance judgments that are appealed. However, the Civil Justice Council's provisional statistics for the first quarter of 2021 stated that the Court of Appeal Civil Division had 730 appeals filed in 2020, down approximately 6 per cent on 2019.

The length of time from the date an appellant's notice is issued in the Court of Appeal to the date the appeal is likely to be heard

varies from two months in urgent matters to around 18 months in very complex, non-urgent matters. The majority of appeals are resolved within nine months.

Enforcement

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

There are no statistics on the proportion of High Court judgments or arbitration awards that require contentious enforcement proceedings. However, the Civil Justice Council's provisional statistics for the first quarter of 2021 recorded that there were 68,000 warrants (one of the methods of enforcing money judgments) issued in January to March 2021, a decrease of 37 per cent on the same quarter in 2020. It is relatively easy to enforce judgments or awards against defendants within the jurisdiction of England and Wales. Civil Procedure Rule (CPR) 70 contains general rules about enforcement of judgments and orders. The methods of enforcement available to a judgment creditor include:

- seizing a judgment debtor's assets;
- third-party debt orders;
- charging orders;
- attachment of earnings;
- insolvency proceedings;
- appointment of a receiver;
- writs of sequestration; and
- orders of committal.

COLLECTIVE ACTIONS

Funding of collective actions

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

Yes. In English litigation, there are a number of ways in which multiparty claims can be pursued. The following procedures are covered by Part 19 of the Civil Procedure Rules (CPR):

- multiple joint claimants can proceed using a single claim form where their claims can be 'conveniently disposed of in the same proceedings';
- multiple claims can be managed under a group litigation order where the claims have 'common or related issues of fact or law' (group litigation orders remain relatively rare with only five having been made since 2018 and none so far in 2021); and
- representative actions are permitted where one or more claimants can represent other claimants with the same interest (eg, beneficiaries of a trust).

Representative actions under Part 19.6 of the CPR are, as of late, also becoming a popular mechanism by which non-competition class actions may be brought on an opt-out basis – especially those concerning data protection breaches. In *Lloyd v Google LLC*, the Court of Appeal held, inter alia, that a claim could be brought under CPR 19.6, as the users Mr Lloyd sought to represent were identifiable and had the 'same interest' (a key component under this Part of the CPR). The Court also held that it could exercise its discretion to allow this claim to proceed under CPR 19.6. The decision was seen as exciting and providing an alternative route to collective actions. This decision was appealed by Google and recently heard by the UK Supreme Court in April 2021. The decision, anticipated for autumn 2021, was eagerly awaited.

There is no direct equivalent in English law to the US shareholder class action, but the Companies Act 2006 introduced changes to directors' duties and the derivative claims that may be brought against them. Changes to English competition law in 2015 gave rights to individuals (consumers and businesses) to bring private damages actions and to allow authorised class representatives to bring collective proceedings on their behalf, either on an opt-in or an opt-out basis, in the Competition Appeal Tribunal (CAT). Collective proceedings may be continued only on the basis of a Collective Proceedings Order (CPO). In August 2021, the CAT approved the first application for a CPO in *Walter Hugh Merricks v Mastercard and Others*. The CPO was granted after the application was turned down by the CAT in 2017, followed by a number of appeals. This decision is anticipated to provide hope and guidance for future CPOs. On 27 September 2021, a second CPO was granted by the CAT in *Justin Le Patourel v BT Group Plc and British Telecommunications Plc.*

At the time of writing, a number of other CPO applications have been heard in 2021:

- *Road Haulage Association Limited v Man SE and Others*;
- *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others*;
- *Justin Gutmann v London & South Eastern Railway Limited* (funded by Woodsford) along with *Justin Gutmann v First MTR South Western Trains Limited and Another*;
- *Michael O'Higgins FX Class Representative Limited v Barclays Bank Plc and Others*; and
- *Mr Phillip Evans v Barclays Bank PLC and Others*.

All of the above types of action may be funded by a third-party litigation funder.

COSTS AND INSURANCE

Award of costs

17 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?

Yes. Under Civil Procedure Rule (CPR) 44.2, the court has a wide discretion as to whether costs are payable by one party to another, the amount and when they are to be paid. However, if the court decides to make an order in relation to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to some exceptions. There are a number of circumstances the court will have regard to, including the conduct of the parties.

In relation to domestic English arbitrations, the tribunal is under no duty to make an award as to costs, subject to any agreement between the parties. However, in practice, it is generally accepted that the tribunal should, unless the parties agree otherwise. If a cost award is made, unless otherwise agreed by the parties, section 61(2) of the Arbitration Act 1996 provides that the tribunal shall award costs on the general principle that costs should follow the event, subject to circumstances where this is not appropriate. That is, the unsuccessful party pays the costs of the successful party as well as its own.

Most forms of arbitration permit a successful party to recover its funding costs, following the 2016 decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Ltd*. In light of the defendant's behaviour in the arbitration, the Commercial Court upheld the decision of an arbitrator to allow a party to recover its third-party funding costs as 'other costs' under section 59(1)(c) of the Arbitration Act 1996. There is no equivalent procedure for litigation but under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, parties are expressly unable to recover the success fee payable under a conditional fee agreement or the premium due to an after-the-event (ATE) insurer.

Liability for costs

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

In English litigation, yes, but not in arbitration.

In the case of *Arkin v Borchard Lines*, the claimant had owned a shipping line that he said had been forced out of business by anticompetitive and unlawful behaviour. Third-party funding was obtained, with the funder to receive 25 per cent of the recoveries up to £5 million and 23 per cent thereafter. The claimant lost. The claimant was impecunious and not in a position to pay the defendants' costs. The role of the third-party funder, in particular the funder's liability to pay the defendants' costs, came to be considered by the Court of Appeal. It is an established principle of English law that costs follow the event. It was held 'unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action'. However, the Court of Appeal was concerned that there would be a denial of access to justice if this principle were taken too far. If a professional funder who had undertaken to fund a discrete part of litigation were potentially liable for all the costs of all the opponents, then no professional funder would be likely to undertake the risk. The Court of Appeal's solution was that a professional funder who finances part of a litigant's costs of litigation should be potentially liable for the costs of the opposing party to the extent of the funding provided (commonly known as the '*Arkin* cap'). In this case, the funder had spent £1.3 million on experts and supporting services, and would be ordered to contribute the same sum to opponents' costs.

Through recent case law, the concept of the '*Arkin* cap' has evolved significantly and the certainty it once appeared to offer has been thrown into doubt.

Following *Arkin v Borchard*, further guidance on the Arkin cap was given by the Court of Appeal in *Excalibur Ventures LLC v Texas Keystone Inc and Others*. In this decision, the judge upheld the Commercial Court's decision that stated the *Arkin* cap should be calculated not only by reference to the amount a litigation funder provided in respect of the funded litigant's costs but also the amount provided by way of security for costs. The court found that the money the litigation funders advanced to Excalibur to enable it to provide security for costs was an investment in the claim just as much as the money provided to pay Excalibur's own costs. The Commercial Court and the Court of Appeal agreed that both are components to be included in arriving at a figure for the *Arkin* cap. Therefore, payment of security for costs is simply part of the costs required to be met in order to be able to pursue the action. In *Excalibur*, the court found that litigation funders are liable to pay indemnity costs awarded against the claimant. The court's reasoning was that a litigation funder cannot dissociate itself from the conduct of those whom the litigation funder relies to make a return on its investment. Litigation funders, absent any extenuating circumstances, 'follow the fortunes of those from whom [they] hoped to derive a small fortune' and, in this case, that meant being held jointly liable for the indemnity costs ordered against Excalibur.

In *Davey v Money*, a judgment of great significance for the funding industry, the court chose not to apply the *Arkin* cap at all and awarded indemnity costs against the commercial funder of the claim. In his judgment, Mr Justice Snowden noted that the litigation funding industry had moved on significantly since *Arkin* and that the courts had never intended the *Arkin* cap to be an automatic rule. Mr Justice Snowden described the intention behind the *Arkin* cap as having been to create an approach for consideration as a means of achieving a just result in all the circumstances of a particular case.

The Court of Appeal recently upheld the court's first instance decision (see *Chapelgate Credit Opportunity Master Fund Ltd v Money and Others* [2020] EWCA Civ 246) with Lord Justice Newey agreeing that he did 'not consider that the *Arkin* approach represents a binding rule'. Lord Justice Newey highlighted the discretion retained by judges who, depending on the facts, 'may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding'. This was most recently affirmed in *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404 (Ch), where the Court of Appeal opined that the *Arkin* cap did not apply when making a third-party costs order against the funder.

As a result of *Chapelgate*, funders are likely to insist upon claimants obtaining ATE insurance (many already did) but it is worth noting that in *Chapelgate*, the claimant was obliged under the funding arrangements to procure ATE insurance but failed to do so. The funder's willingness to waive that requirement exposed the defendant to significant costs risk and the Court of Appeal held that the Court at first instance had been right to take the waiver into account.

In *Sharpe v Blank and Others* [2020] EWHC 1870 (Ch), a group litigation order claim brought against Lloyds Bank in respect of its acquisition of HBOS, the court found that the funder's liability for adverse costs was joint and several with the claimants and was not contingent on the claimants failing to discharge the costs order.

Arbitration is a consensual process, founded in the contractual arbitration agreement between the parties in dispute. An arbitral tribunal has jurisdiction to make orders only in respect of the parties to the arbitration agreement. This is unlikely to include a third-party funder.

Security for costs

19 | 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?)

Security for costs by a claimant

An English court may order a claimant to provide security for costs. Pursuant to CPR 25.13, the court may make an order for security for costs if it would be just to do so and one or more of the following conditions apply:

- the claimant is resident in a jurisdiction where it would be difficult to enforce a costs order;
- if the claimant is a corporate entity, or acting on behalf of another as a nominal claimant (other than a representative claimant under Part 19 of the CPR), and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
- the claimant has withheld or changed his or her address with a view to evading the consequences of the litigation; or
- the claimant has taken steps in relation to his or her assets that would make it difficult to enforce an order for costs against him or her.

Section 38(3) of the Arbitration Act 1996, and the rules of most arbitration institutions based in common law jurisdictions, including England, expressly provide that arbitrators may order security for costs. While, technically, CPR 25.13 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to above.

Security for costs by a funder

CPR 25.14(2)(b) allows an English court to make an order for security for costs to be given by any party who 'has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings'. This definition is likely to cover many litigation funding arrangements.

In *Rowe v Ingenious Media Holdings PLC* [2020] EWHC 235 (Ch), the court ordered Therium, a litigation funder and founding Association of Litigation Funders (ALF) member, to provide security for costs. Therium's position as a founder member of the ALF was not sufficient to

persuade the court that it would be in a position to meet a costs order and in his judgment, Mr Justice Nugee described it as 'striking' that no actual financial information about Therium was adduced in evidence.

Interestingly, while finding that Therium should only provide security in respect of those claims it was funding (some claimants are self-funding the proceedings), Mr Justice Nugee noted that 'it is in theory possible that Therium might behave in such a way as to render itself potentially open to an order for costs even in relation to the self-funded claimants', albeit noting that would be fairly unusual. In respect of cross-undertakings, upon appeal, Lord Justice Popplewell opined that it should only be in a rare and exceptional case that the court would require a cross-undertaking in favour of a commercial litigation funder. There were a number of reasons for this, including the fact that commercial litigation funders ought to be properly capitalised (in order to be able to meet an adverse costs order if a claim fails). This is indeed one of the tenets of the Code of Conduct of the Association of Litigation Funders. As such, Lord Justice Popplewell stated that it would not be appropriate or fair that a litigation funder should seek to impose the cost of arranging funding upon the security defendants, through the mechanism of a cross-undertaking in damages.

In the case of *Walter Hugh Merricks v Mastercard and Others* [2021] CAT 28, it was considered whether the applicant would be able to satisfy an order for costs – given that costs were more than likely to be very substantial. The defendant sought an undertaking from the litigation funder that it would discharge any liability for costs ordered against the applicant. This was because the litigation funding agreement (LFA) between the representative and the funder expressly excluded any third-party rights to enforce the LFA that might normally arise under the Contracts (Rights of Third Parties) Act 1999. The Competition Appeal Tribunal considered the defendant's position to be 'understandable'.

Given the contractual basis of arbitration, an arbitral tribunal may order a party to pay security for costs only if that party enters into the arbitration agreement pursuant to which the arbitration proceeds. A third-party litigation funder is unlikely to do so.

Method and amounts

In court proceedings, security for costs usually takes the form of a payment into court or the provision by the claimant of a bond. Other alternatives available in litigation, and also in arbitration, include payment into an escrow account, bank guarantees, parent company guarantees, a solicitor's undertaking or, in some circumstances, an ATE insurance policy. (See *Premier Motorauctions Ltd and Another v PricewaterhouseCoopers LLP and Another* [2017] EWCA Civ 1872.)

The amount awarded is usually calculated by reference to the amount of costs the defendant would likely be awarded in the event that the claimant's case is unsuccessful. In arbitration, security may also be ordered in respect of arbitrators' fees.

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

The fact that a claim is funded is not, in itself, a ground on which a court may make an order for security for costs against a claimant under CPR 25.13. A defendant may seek to argue that the fact that the claimant is funded is evidence that the claimant will be unable to pay the defendant's costs if ordered to do so, which is a ground on which a court may make an order for security for costs against a claimant under CPR 25.13(c). However, while many claimants who seek third-party funding are impecunious, many others are not, and the mere fact of litigation funding would not be sufficient. Such a fact should not, in itself, influence the court's decision.

Under CPR 25.14, the court has the jurisdiction to make an order for security for costs against someone who has contributed to the claimant's costs in return for a share of any proceeds recovered in the proceedings, where the court is satisfied it is just to do so. This potential exposure of litigation funders to orders for security for costs against them does not, of course, of itself mean that an order for security for costs should be granted. In the High Court decision of *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), the court examined factors it might consider in exercising its discretion, under CPR 25.14, as to whether or not to order security for costs against funder. These factors included:

- the motivation of the funder to be involved;
- the risk of non-payment by the funder;
- the link between the funding and the costs;
- the funder's understanding of the liability for costs; and
- other factors, including delay in bringing the application for security for costs, such as to tip the overall balance against making an order.

While, technically, CPR 25 does not apply to arbitration, an English tribunal is likely to be guided by the English court's approach referred to above.

Insurance

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

Yes. ATE is both permitted and commonly used. There is a well-established and competitive market for ATE in respect of litigation and arbitration alike.

Because London is arguably the centre of the global insurance market, it is perhaps unsurprising that there are many other insurance products related to litigation and arbitration, including insurance for lawyers acting on contingency fee agreements, which covers the lawyers' fees in the event that the claim is lost, and judgment default insurance, which covers the risk that the defendant does not comply with a judgment against it.

As a general rule, London insurers will consider insuring any high-value risk relating to litigation or arbitration. There are specialist brokers who can liaise between litigants and insurers.

In *Premier Motorauctions Ltd*, the Court of Appeal held that an appropriately framed ATE insurance policy could, in theory, answer an application for security for costs, but only if the ATE policy provided 'sufficient protection' to the defendant for the claimant being unable to meet the defendants' costs. Whether an ATE policy would provide that protection will depend upon the terms of the particular policy. In this case, the court held that the ATE cover provided did not give sufficient protection to the defendants because the policy could be avoided by the insurer. The ability for the insurer to avoid the policy led the court to conclude that there was reason to believe that the claimant would be unable to pay the defendants' costs and security for costs was granted. It should be noted that the court considered the ATE policy as part of its determination of whether it had jurisdiction to grant the order for security for costs (ie, whether there was reason to believe the claimants would not be able to pay the defendants' costs), and not as part of its discretion to grant or refuse an order for security once jurisdiction had been established. As to discretion, the court noted that once it is satisfied that the claimants are insolvent, that there was jurisdiction to order security for costs, and that an order would not stifle the claim, it is normally appropriate to order security.

The court recently echoed some of these concerns in *Ingenious,* where Mr Justice Nugee highlighted that in general, ATE policies are not designed to provide security for costs and cited his concerns about a 'real, and not a fanciful risk, that the ATE policies will not respond in full'. Mr Justice Nugee did not write off the potential that sufficient protection could be provided by ATE and encouraged litigation funders and ATE

insurers to 'develop a form of policy that could both act as insurance for claimants and sufficient protection for defendants'.

Concerns about avoidance by the insurer were also recently cited in *Hotel Portfolio II UK Ltd (In liquidation) v Ruhan* [2020] EWHC 233 (Comm) and *Apollo Ventures Co Ltd v Manchanda and Others* [2020] EWHC 2206 (Comm), both of which resulted in security for costs being ordered despite the existence of ATE policies.

In *Recovery Partners GB and Another v Rukhadze and Others* [2018] EWHC 95 (Comm), the High Court held that an ATE policy could be sufficient security, when accompanied by a deed of indemnity from the ATE insurer (ie, when the deed constituted a separate promise by the insurer to pay the defendant's costs, which was not subject to the same avoidance rights as the ATE policy itself).

In addition to ATE, some legal insurers now offer damages-based agreements (DBAs) policies to law firms. If a firm is acting under a DBA and the claim is unsuccessful, the DBA insurance pays out a proportion of the law firm's work in progress, thereby hedging the firm's downside risk of acting under a DBA. If the claim is successful, the law firm pays a premium to the insurer – much like a claimant's ATE policy.

DISCLOSURE AND PRIVILEGE

Disclosure of funding

22 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?

There is no general requirement for a litigant to disclose a litigation funding agreement to any opposing party or to the court.

A litigant may, of course, voluntarily choose to do so. The fact that a professional third-party funder has agreed to back a litigation or arbitration may send a strong signal to the defendant both that the litigant has financial backing to bring the case through to trial, and that an objective third party believes the claim to be strong.

Pursuant to rule 78(3) of the Competition Appeal Tribunal Rules 2015, when considering whether to authorise an applicant to act as the class representative, the tribunal must consider any plan for the collective proceedings, including in relation to costs and fees. This will usually include the tribunal reviewing the litigation funding agreement and any other funding arrangements. Rule 101 of the Competition Appeal Tribunal Rules sets out the process for providing documents on a confidential basis. In the High Court case of *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm), the claimant was ordered to reveal the identity of third-party funders for the defendant to consider an application for security for costs against the funder. The court held it has the power to order the claimant to disclose the identity of its litigation funder and determine whether the litigation funder would share in the proceeds of the litigation. However, this power could not be used as a 'fishing expedition' and such a disclosure would only be granted if there is good reason to believe the claimant is in receipt of litigation funding and an application for security for costs would have reasonable prospects of success. The court concluded the facts of *The RBS Rights Issue Litigation* case met this test and ordered the relevant disclosure.

In the case of *In the Matter of Edwardian Group Limited* [2017] EWHC 2805 (Ch), the High Court rejected an application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.

A defendant might also seek disclosure of a funder's identity following trial as relevant to the issue of adverse costs. In *Global Energy Horizons Corporation v Gray* [2019] EWHC 3295 (ChD), the claimant had been ordered to make a payment on account of the defendant's costs. When making the Order, Arnold LJ included a provision that if the claimant failed to make the payment as required then the identity of any third party that had funded the claim would have to be disclosed to the defendant.

In *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), disclosure was sought of documents relating to the funding provided by Burford Capital. Mrs Justice Knowles said that had that application not been withdrawn, she would have rejected it on the basis that the funding arrangements, being agreements between Mrs Akhmedova's solicitors, PCB and Burford Capital, were not in her control.

Privileged communications

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

In an unreported judgment in *Excalibur Ventures LLC v Texas Keystone Inc and Others*, Mr Justice Popplewell held that legal advice privilege may apply 'insofar as the disclosure of the funding arrangements would or might give the other side an indication of the advice which was being sought or the advice which was being given', but that not all documents brought into existence for the purposes of actual or contemplated litigation will be protected by litigation privilege. Popplewell J agreed with previous authorities that it is the 'use of the document or its contents in the conduct of the litigation which is what attracts the privilege'. The judge endorsed the principle stated in *Dadourian Group International Inc and Others v Paul Simms and Others* [2008] EWHC 1784 (Ch) that:

> *Litigation privilege . . . can include a communication between a client and his lawyer or between one of them and a third party which comes into existence after litigation is commenced or contemplated for the dominant purpose of obtaining information or advice in connection with such litigation or of obtaining evidence (or information which might lead to evidence) for use in the conduct of such litigation.*

In *Excalibur*, Popplewell J held that the funding arrangements were directly relevant to the claims and defences pleaded in that case and as a result, the defendants were granted copies of Excalibur's funding agreements that were found not to be privileged. The court was content for certain terms (including the success fee, settlement and termination provision) to be redacted to avoid any tactical advantage the defendants may get from reviewing the terms.

In the *Matter of Edwardian Group Ltd* [2017] EWHC 2805 (Ch) confirmed that a litigation funding agreement will be privileged where it 'gave a clue to the advice given by the solicitor (*Lyell v Kennedy* (No. 3) (1884) 27 Ch D 1), or betray[ed] the trend of the advice which [the solicitor] is giving the client' (*Ventouris v Mountain* [1991] 1 WLR 607).

Subject to *Excalibur* and *Dadourian*, the dominant view of practitioners appears to be that the litigant's privilege is protected in communications with a third-party funder by the common interest doctrine. A third-party funder may also be appointed as the litigant's agent for the limited purpose of reviewing and funding the case, which may add an additional layer of protection for the litigant's privilege.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There have been remarkably few publicly reported disputes between litigants and their funders.

In *Harcus Sinclair v Buttonwood Legal Capital Limited and Others* [2013] EWHC 1193 (Ch), there was a dispute in relation to the termination of a litigation funding agreement. The High Court held that the

funder validly terminated the agreement under a clause that allowed for termination if, in the funder's reasonable opinion, the claimant's prospects of success were 60 per cent or less.

In *Therium (UK) Holdings Limited v Brooke and Others* [2016] EWHC 2421, a litigant was sentenced to prison for contempt of court after failing to obey court orders that arose from his alleged failure to pay his litigation funder a success fee following the settlement of his litigation.

In October 2018, the High Court handed down its decision in *Vannin Capital PCC v RBoS Shareholders Action Group Ltd and Another* [2018] EWHC 2821 (Ch) in relation to an application for summary judgment made by Vannin. Vannin seeks £14 million it alleges it is entitled to under litigation funding agreements entered with a claimant action group established by shareholders in the *RBS Rights Issue Litigation*. The application for summary judgment was dismissed by the court as the issues in dispute were too extensive to resolve. Vannin was effectively asking the court to conduct a 'mini-trial', which was inappropriate and not the object of summary judgment applications.

In the recent case of *Singularis Holdings Limited (In Official Liquidation) v Chapelgate Credit Opportunity Master Fund Limited* [2020] EWHC 1616 (Ch), a dispute arose concerning the calculation of the funder's share of the damages. The court was asked to determine whether the sum due to the funder (a percentage of the claimants' proceeds) should be calculated by reference to the damages before or after a deduction for the claimant's contributory negligence. Interpreting the funding agreement, the court found that the funder's share was to be calculated by reference to the damages after the deduction for contributory negligence.

The Association of Litigation Funders (ALF) has a procedure for complaints against its members. While there have been a small number of references, none have been upheld.

Other issues

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

Litigants and their instructed lawyers would be well advised to do business only with professional, regulated and properly capitalised funders (eg, funders that are ALF members). ALF members have committed to comply with the ALF voluntary Code of Conduct, which sets out clear and important rules governing the relationship between a funder and its client and provides significant benefits to both parties, including clarity on issues such as case control, settlement and withdrawal.

UPDATE AND TRENDS

Current developments

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

The International Legal Finance Association (ILFA), an international trade body that was founded by some of the most well-established global funders, including Woodsford, is the only global association of commercial legal finance companies and is an independent, non-profit trade association promoting the highest standards of operation and service for the commercial legal finance sector.

The ILFA's mission is to engage, educate and influence legislative, regulatory and judicial landscapes as the global voice of the commercial legal finance industry.

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