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Lexology Getting The Deal Through is delighted to publish the sixth edition of Litigation Funding, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India, Japan, Luxembourg, Spain and Sweden.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.
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Introduction

Steven Friel and Jonathan Barnes
Woodsford

Welcome to the sixth edition of our global survey of the law and practice of litigation finance.

As evidenced by new chapters from India, Japan, Luxembourg, Spain and Sweden, the global business of litigation funding continues to develop and grow.

While the federal government in Australia has continued in its efforts to increase the regulatory and other burdens on litigation funders, in what many consider to be an attack on access to justice, elsewhere the growth of litigation funding continues to be widely encouraged.

In September 2020, the Commercial Court of the British Virgin Islands approved a litigation funding agreement, in the first written judgment of its kind in the BVI (In the Matter of Exential Investments Inc (In Liquidation) and In the Matter of the Insolvency Act, 2003). The Commercial Court had previously sanctioned the use of third-party litigation funding, but no written judgments confirming the Court had this power had been recorded in the jurisdiction. The court stated that ‘without the funding, the liquidators would be unable to obtain recoveries for the benefit of the creditors of the company’ and that ‘approving the funding arrangement is in the current case essential to ensure access to justice’.

There were similar developments in the Cayman Islands, which provided welcome clarity around the permissibility of litigation funding in that jurisdiction. The Private Funding of Legal Services Act 2020 was gazetted on 7 January 2021 and is set to revolutionise the litigation funding environment in the Cayman Islands. While litigation funding is not entirely new to the Cayman Islands, the Act is an important development which brings the Cayman Islands into line with other jurisdictions that have embraced litigation funding more widely and enjoyed the benefits of an active litigation funding market.

There were further pro-access to justice decisions from the English courts, including that in DAF v The Road Haulage Association and UK Trucks Claims Limited [2021] EWCA Civ 299. The Court of Appeal unequivocally confirmed that litigation funding agreements cannot be labelled ‘damages-based agreements’ and are permitted, indeed necessary, in the opt-out, collective action regime in the Competition Appeal Tribunal. The judgment is another welcome example of the most senior courts of England and Wales acknowledging that:

*Third party litigation funding is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice.*

In late June 2021, the Singapore Ministry of Law announced that its third-party funding framework would be extended to cover certain proceedings in the Singapore International Commercial Court (SICC), domestic arbitration proceedings and related mediation proceedings. As the Ministry stated:

*This offers businesses an alternative avenue to fund meritorious claims and further strengthens Singapore’s position as an international commercial dispute resolution hub.*

Singapore was the first major Asian jurisdiction to actively embrace third-party funding when it introduced a framework for the funding of international arbitration proceedings and related court and mediation proceedings in 2017. Unsurprisingly, the Ministry stated:

*Funders and the business, legal and arbitration communities ... responded positively ... and businesses have shown increasing interest in additional options for financing litigation.*

A pair of decisions from Delaware provide further comfort that litigation funders and their counterparts can engage in thorough discussions about a potential litigation without fear of discovery in the district. In United Access Techs, LLC v AT&T Corp, No. CV 11-338-LPS, 2020 WL 3128269, *1 (D Del June 12, 2020), defendants sought production of communications between plaintiff and potential litigation funders. The court held that the defendants were required, but failed, to demonstrate that the requested documents were relevant to the claims and defences of that specific case. In a second case, ELM 3DS Innovations LLC v Samsung Elecs Co, Case No. 14-1430-LPS, Dkt No. 372 (D Del Nov 19, 2020), defendants sought production of litigation funding agreements, and both pre-suit and post-suit communications with funders. The court denied the motion, finding that litigation funding agreements are not relevant to patent litigation disputes for the purposes of discovery, and that funding communications are protected work product. The court indicated that it would have rejected any argument that work product protection was waived by disclosure of the documents to a third party.

As Hon Shira A Scheindlin, a former federal judge of the US District Court for the Southern District of New York, stated in a keynote address at an industry conference in New York in September 2021:

*those who seek to restrict third party litigation funding or to cabin its effectiveness with burdensome and unnecessary regulation are, in my opinion, merely afraid of the level playing field that such funding creates. I do not think they will succeed. Litigation funding is now an accepted part of the litigation landscape and is here to stay - and that is a very good thing.*

As ever, we are grateful to all of the chapter authors, each of them experts in their particular jurisdiction, for their contributions.
Third-party funding in international arbitration

Charlie Morris and Adam Erusalimsky

Woodsford

While international arbitration spans multiple types of claims, overlapping jurisdictions and legal regimes, there are some commonalities to consider it an appropriate subject for a brief addendum within this guidebook’s framework. A practitioner considering a transaction involving third-party funding of international arbitration will need to consider multiple potentially relevant jurisdictions. For example, one might need to consider the applicable arbitral rules (if any), the law of the seat of the arbitration, the governing law of the underlying agreements, any applicable international treaties, the law of the jurisdiction in which the award will be enforced, and, potentially, the law of the parties’ counsels’ home jurisdictions. Accordingly, this addendum is necessarily limited and endeavours to highlight some of the issues and approaches that are common in the context of third-party funding and international arbitration.

Prime among these commonalities is the tremendous uptake of third-party funding in international arbitration in recent times, regardless of claim type or venue. This is hardly surprising: international arbitration generally involves complex commercial disputes with sophisticated counsel at premier international law firms. The resulting fees burden can be substantial. Moreover, many international arbitrations involve claimants who are capital constrained (often as a direct result of a respondent’s conduct) and would not be in a position to have their claims heard in the absence of third-party funding.

Third-party funding is an increasingly routine part of the landscape of international arbitration. Anecdotally, our experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding. What little public data is available tends to confirm this trend. As an example, when the International Centre for Settlement of Investment Disputes (ICSID) proposed updated rules on a variety of key topics, it included new rules on third-party funding because it had noted an ‘increased resort’ to funding, with at least 20 recent ICSID cases involving third-party funding. That number has likely grown substantially. Likewise, draft proposals to amend the Energy Charter Treaty include new provisions requiring the disclosure of third-party funding. Similarly, we understand a number of bilateral investment treaties texts under negotiation also include specific provisions requiring the disclosure of the fact of third-party funding (but not normally the funding terms).

Growing recognition of the use of funding in international arbitration

Concomitant with the increased use and availability of funding generally, there has been a gradual easing of the traditional doctrines of champerty and maintenance, which typically exist in common law (rather than civil law) jurisdictions. As is well covered in the country-specific chapters of this guide, this trend is occurring rapidly in a number of jurisdictions globally. For arbitration, this is potentially significant given that the law of the arbitral seat is most likely to govern whether or not a claimant is permitted to avail itself of funding.

Indeed, certain jurisdictions, notably Singapore and Hong Kong, have introduced legislation to expressly allow third-party funding of international arbitration. In 2017, Singapore’s parliament passed the Civil Law Amendment Act and the Civil Law (Third-Party Funding) Regulations 2017, which effectively abolish the common law torts of champerty and maintenance, and permit third-party funding in respect of international arbitration and associated proceedings (eg, enforcement and mediation proceedings). In June 2021, the Singapore Ministry of Law announced that its third-party funding framework would be extended to cover domestic arbitration proceedings and related mediation proceedings (as well as certain proceedings in the Singapore International Commercial Court). In addition to the legislative provisions, the Singapore Institute of Arbitrators (SIarb) has introduced a set of guidelines for third-party funding, with which funders will be expected to comply. It is also anticipated that the key arbitral institutions, such as Singapore International Arbitration Centre (SIAC), will amend their rules to accommodate the new legislative provisions (indeed, SIAC has already addressed third-party funding in the first edition of its Investment Arbitration Rules).

In 2013, Hong Kong’s Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitration seated in Hong Kong. This culminated in October 2016 with a recommendation to allow it. Following approval of the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2017, the Arbitration Ordinance was amended to provide, in summary, that the doctrines of champerty and maintenance no longer apply to third-party funding or related court or mediation proceedings. As is now the case in Singapore, no distinction is made in Hong Kong between domestic and international arbitration; funding is permitted in both. Along with the amendments, a code of practice has been promulgated which regulates a funder’s conduct on a variety of matters, including capital adequacy, disclosure and the funding agreement.

The trend has expanded to other jurisdictions. In Nigeria, for example, where recent amendments to the Nigerian Arbitration and Conciliation Act have been passed that would allow the costs of obtaining third-party funding to be included in the arbitration costs.

Nevertheless, some jurisdictions have been more hesitant when it comes to the current legacy of champerty and maintenance restrictions. In May 2017, delivering the judgment for Persona Digital Telephony Ltd v The Minister for Public Enterprise [2017] IESC 27, the Supreme Court of Ireland ruled the common law prohibitions on maintenance
and champerty remain in force in Ireland, thereby restricting the availability of third-party funding. While the *Persona* decision did not itself address international arbitration, the court’s decision will have implications for an arbitration seated in Ireland or if an arbitral award were to be enforced in Ireland.

By contrast, in civil law jurisdictions – which did not inherit the common law’s restrictions on maintenance and champerty, and have long permitted the alienation of litigation rights in some form – there has been predictably little discussion of the permissibility of funding whether in arbitration or litigation. That will likely soon change, given the substantial use of arbitration in many civil law countries, for example in Latin America. In this vein, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), a leading arbitration centre in Brazil, became the first arbitral centre in the region to affirmatively address the use of third-party funding, issuing guidelines regarding the disclosure of funding arrangements.

In April 2018, the long-expected International Council for Commercial Arbitration (ICCA) Queen Mary Task Force on Third-Party Funding issued its final Report on Third-Party Funding in International Arbitration, ICCA Report No. 4. Expansive in scope, the report covered a range of important topics on third-party funding from a variety of angles, and serves as a useful resource for consideration of the relevant issues and current precedents from both international and domestic sources. Further, the Task Force issued a set of Principles and Best Practices, which attempted to distil the overall conclusions of the committee.

**Disclosure and conflicts of interest**

A topic of substantial discussion in the international arbitration community has been the potential for conflicts to arise in funded cases, and whether disclosure of the fact that a party is funded and, if so, the identity of the funder is necessary to prevent such conflicts. While the same discussion has arisen in the context of litigation, the issue is perhaps more acute in the context of international arbitration, because the parties have a role in appointing arbitrators, and there is a relatively small pool of practitioners who act as both arbitrators and advocates, who themselves may be involved in funded matters. (See ICCA Report, chapter 4.)

After some healthy debate, a consensus has begun to emerge that the disclosure of a party’s funded status and the identity of the funder (but not of the terms of the funding arrangement) in an arbitration may be beneficial so as to avoid potential conflicts. Accordingly, in the last several years, a number of jurisdictions, arbitral institutions and organisations have offered specific rules of guidance on this matter, summaries of which follow.

**ICSID proposed rules**

In 2018, ICSID published a set of proposed changes designed to modernise its rules, offering states and investors an improved range of dispute settlement mechanisms. Since then, the proposed rules have been subject to comment and undergone a series of further revisions, most recently discussed in ICSID Working Paper No. 5 (June 2021). As regards funding, the proposed rules would: (1) make it compulsory for parties to file a written notice identifying the existence of funding upon registration of the request for arbitration, or immediately upon concluding a third-party funding arrangement if the arrangement is concluded after registration; and (2) empower the arbitral tribunal to order disclosure of further information regarding the funding agreement and funder. The proposed rules also define funding for disclosure purposes to include donation and grant-originated funding.

**International Court of Arbitration of the International Chamber of Commerce**

The International Court of Arbitration of the International Chamber of Commerce (ICC) addressed the issue of potential conflicts in its 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (October 2017) (paragraph 24), which noted, among other things, that ‘relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case’. When the ICC Rules were updated in 2021, an updated Note to Parties and Arbitral Tribunals was published that essentially preserves this rule (paragraph 24).

**Singapore International Arbitration Centre**

The SIAC’s Investment Arbitration Rules (IARs) specifically allow arbitral tribunals to order disclosure of the existence of third-party funding and the identity of such a funder (IAR 24(1)).

**Hong Kong International Arbitration Centre**

Article 44.1 of the Hong Kong International Arbitration Centre (HKIAC) rules, which came into force on 1 November 2018, echoes the requirement in section 98U of the Arbitration Ordinance in Hong Kong, that if a funding agreement is made, the funded party must give written notice of the fact that a funding agreement has been made and just disclose the identity of the third-party funder.

**China International Economic and Trade Commission**

The China International Economic and Trade Commission (CIETAC) mandates disclosure of third-party funding pursuant to article 27 of its International Arbitration Investment Rules (2017). Specifically, the rule provides that ‘as soon as a third-party funding arrangement is concluded’ the funded party ‘shall notify in writing and ‘without delay’ the tribunal and other parties. Such a disclosure must provide the ‘existence and nature’ of the funding arrangement and the identity of the funder. Moreover, the rules provide the tribunal shall have the power to order further disclosure as appropriate.

**The Hague Rules on Business and Human Rights Arbitration**

Article 55 of the Hague Rules on Business and Human Rights Arbitration, published in December 2019, requires any party benefitting from any form of funding to ‘promptly disclose to all other parties and to the arbitral tribunal the name and contact details of the source of funding’, although also allows a party that would otherwise have to make such a disclosure to apply for an exemption from disclosure. The rules also entitle the arbitral tribunal to take any ‘funding into account when making its determinations on costs and deposits in the arbitration’.

**Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada**

CAM-CCBC’s Administrative Resolution No. 18 (2016) ‘recommends’ the parties disclose the use of funding ‘at the earliest opportunity’.

**ICCA – Queen Mary Task Force Principles**

The Task Force Principles of the ICCA state that a party ‘should’ voluntarily disclose the existence of funding, and that arbitral institutions have the authority to request disclosure.

**IBA**

The International Bar Association (IBA) was the first organisation to take a position on funding, when it published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. The IBA Guidelines state that parties shall disclose ‘any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest.
in, or a duty to indemnify a party for, the award to be rendered in the arbitration.  

Nevertheless, such disclosure obligations should be narrowly limited to their intended purpose of avoiding conflicts, rather than an opportunity for distraction, delay or satellite litigation regarding, for example, disclosure of the terms of a funding agreement or waiver of privilege or confidentiality. As ICSID’s comments to the proposed rule make clear that its proposed disclosure requirement ‘does not create a general duty to disclose the terms of funding or the agreement itself’ as ‘this more elaborate information is not required to achieve the objective of preventing conflicts of interest’.  

EU proposals in respect of the Energy Charter Treaty  
In March 2020, the European Commission published a draft proposal to amend the Energy Charter Treaty. The suggested amendment, which remains in the draft text following four rounds of negotiations, includes new provisions requiring the disclosure to both the tribunal and the other party of the name and address of the third-party funder, as well as its beneficial owner.  

Confidentiality and privilege  
Another issue that has frequently arisen in domestic litigation in various jurisdictions around the world is whether a claimant’s sharing of confidential and privileged information with a funder might raise issues of waiver. Parties to arbitrations are similarly mindful of the issue.  

Arbitration is commonly a confidential process between the parties to the arbitration. However, the emerging consensus is that the sharing of information with a funder pursuant to a non-disclosure agreement will not result in a waiver. That said, an arbitral tribunal often has wide discretion to determine the scope of material admitted into the proceedings and application of privilege is generally determined by resort to the relevant law of the seat of the arbitration (or potentially the substantive law of the dispute).  

The rules of the major arbitral institutions do not yet, for the most part, address this issue expressly. However, the HKIAC rules, which are based on section 98 of the Arbitration Ordinance, expressly permit the sharing of confidential information with a person for the purposes of having, or seeking, third-party funding of arbitration (article 45.3(e)).  

Similarly, the Task Force Principles provide that although the existence of funding is not itself privileged, the underlying provisions of a funding agreement may be privileged and should only be ordered disclosed in ‘exceptional circumstances’. Moreover, the Task Force Principles note the disclosure of information between a party and a funder should not be a basis for privilege waiver. Further, as the comments to ICSID’s proposed rules noted at the time the proposals were being considered, parties should be able to seek appropriate confidentiality protections on privilege in the context of disclosure. This is preserved in subsequent working papers considering the rule change.  

Ultimately, while we predict that concerns over waiver will fade, those contemplating funding should still ensure that all communications with funders are made pursuant to non-disclosure agreements.  

Third-party funding and costs in international arbitration  
Another important issue is the impact of third-party funding, if any, in the allocation of costs and related costs orders.  

While arbitral panels generally have wide discretion in the allocation of costs, the principle of ‘costs shifting’ (ie, the loser pays the winner’s costs) is prevalent in arbitration in numerous jurisdictions. In general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs. (See Kardassopoulos and Fuchs v The Republic of Georgia (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010); RSM Production Corporation v Grenada (ICSID Case No. ARB/05/14), Decision on Costs (28 April 2011)).
Corporation v Saint Lucia (ICSID Case No. ARB/12/10), the tribunal made an order for security for costs, apparently on the basis of the claimant’s poor conduct during the course of the arbitration (including, for example, repeated failures to comply with the tribunal’s orders). (See also Manuel García Armas et al v Venezuela (PCA Case No. 2016-08), Procedural Order No. 9 (20 June 2018).) There is reason to suggest that RSM and García Armas may be relatively isolated cases.

Consistent with these decisions, under ICSID’s proposed rules amendments, it is contemplated that a tribunal ‘may consider’ with regard to a party’s ability to pay a costs order, but expressly cautions that ‘the existence of third-party funding by itself is not sufficient to justify’ a security for costs order.
Australia

Simon Morris, Martin del Gallego, Millie Byrnes Howe, Chelsea Payne, Matthew Harris and Christina Athanasopoulos
Piper Alderman

REGULATION

Overview

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

Third-party litigation funding is permitted in Australia. However, the environment is increasingly complex with several recent judicial and legislative developments affecting the conduct of third-party litigation funding. The developments predominantly relate to third-party litigation funding of representative proceedings, with third-party litigation funding being subjected to a degree of scrutiny not previously seen.

Maintenance and champerty are obsolete as crimes at common law (Clyne v NSW Bar Association [1960] 104 CLR 186, 203) and maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. In Queensland, Western Australia, Tasmania and the Northern Territory, the torts of maintenance and champerty have not been abolished.

Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it were found to be inconsistent with common law public policy considerations.

The High Court in Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) CLR 386 (Fostif) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact that a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers’ duties to the court and clients (conflicts, etc.).

Importantly, Fostif did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished. In Murphy Operator & Ors v Gladstone Parts Corporation & Anor (No. 4) [2019] QSC 228 Crow J ruled, in the context of a third-party funded class action being conducted in the Supreme Court of Queensland, that the torts of maintenance and champerty had not been abolished but that provisions of the Civil Proceedings Act 2011 (Qld) regulating class action procedure lay down a regime that permits class action proceedings to be funded by a commercial litigation funder. That ruling was upheld on appeal with the Court of Appeal concluding that the litigation funding arrangement was not contrary to public policy and the litigation funder was not in a substantially different position from an insurer defending a claim. The Court reasoned that where maintenance offends against the law, it can be adequately dealt with through abuse of process principles: Fostif did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished. In Campbell’s Cash & Carry Pty Ltd v Fostif, the High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact that a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers’ duties to the court and clients (conflicts, etc.).

The availability of funding has not been attributed to any overall rise in litigated matters, suggesting that litigation funding is being used cautiously to improve access to justice while bringing commercial gain and without encouraging vexatious or unmeritorious claims.

The available statistics about class action filings in the year in review demonstrate that the gradual trend of growth of funded litigation was held in relative check. Between June 1997 and May 2002, funded class actions comprised only 1.7 per cent of all class actions. In the period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court were funded. From 2013 to 2018, 64 per cent of filed class actions were funded and between March 2017 and 2018, this number increased to 78 per cent. This stabilised in 2020, with 75 per cent of filed class actions being funded. In the year ending 30 June 2021, there were at least 63 class actions filed in Australia, up from 53 in the previous year. However, only 38 per cent of those class actions were funded, down considerably from the previous financial year.

The recognisable decrease in funded class actions during 2021 may be attributable to the regulations imposed on third-party litigation funders with the introduction of the Corporations Amendment (Litigation Funding) Regulations 2020 (Regulations). Further, measures implemented for the stated purpose of providing relief to businesses impacted by the covid-19 pandemic may have limited the opportunities for funded litigation. The Corporations (Coronavirus Economic Response) Determination (No. 4) 2020 provided that entities and their officers would only be liable for breaches of continuous disclosure obligations if there was knowledge, recklessness or negligence, a higher...
Threshold for liability than previously imposed. What was introduced as a temporary covid response has now been made permanent with the passage of the Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth).

The other observable trend in funded class action filings is that the percentage of shareholder lawsuits has fallen and there has been an increase in the number of consumer class actions (arising out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry) and employment actions alleging underpayment of wages.

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

There is presently no legislation or regulation in Australia that limits the fees that funders can charge, although consultation by the Australian Government Treasury and Australian Securities and Investments Commission (ASIC) into the best way to guarantee a statutory minimum return of gross proceeds of a class action to class members has recently closed. While it is yet to be seen how any such statutory minimum return will be imposed, should it be imposed, fees and interest that funders can charge will be affected.

The High Court in Fostif held that contract law considerations such as illegality, unconscionability and public policy may still arise in relation to a litigation funding agreement but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of each particular case.

Theoretically, Australian courts can set aside a litigation funding agreement where the funder’s interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person’s inability to judge for him or herself, by reason of weakness, necessity or ignorance. Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. A bargain may be set aside as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscionable advantage of that special disadvantage.

Prohibitions against unconscionable and misleading or deceptive conduct that may apply to dealings between litigation funders and funded litigants are also reflected in general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

The Federal Court Class Actions Practice Note (GPNC-CA) requires disclosure to group members who are clients or potential clients of the applicant’s lawyers regarding applicable legal costs or litigation funding charges in class action matters, and sets out the manner in which these arrangements should be communicated. The Court must also be provided with a copy of any litigation funding agreement. Disclosure of a litigation funding agreement to other parties to the litigation is also required with the disclosure being redacted to conceal information that might reasonably be expected to confer a tactical advantage.

While not a means of formally limiting litigation funding charges, settlements in funded class actions (including the amounts allocated for the payment of a funder’s fee) are subject to approval by the court. Prior to the High Court decision in BMW v Brewster [2019] HCA 45, it was usual for courts in the conduct of funded class action litigation to make common fund orders, both as part of a class action settlement and at an early stage of proceedings. A common fund order has the effect of binding all members of the represented group to the terms of a funding agreement, not just those who have executed the agreement. The purpose of the common fund order was to equalise the distribution of damages so that unfunded claimants must also contribute to the costs of the claim, including the funder’s fee. However, in Brewster the High Court declared that common fund orders made prior to a settlement are invalid. It was held by the majority that, on a proper interpretation, neither of these statutory provisions empowered a court to make common fund orders.

While the Brewster High Court decision has ended the making of common fund orders at an early stage of funded class proceedings, there is debate whether the High Court left open whether such orders may be made at the conclusion of proceedings in the context of a settlement approval. In this regard views differ among trial judges, and the question remains unresolved by an Australian appellate court.

For example, in McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd (No. 3) [2020] FCA 461, Beach J held that discretion to make a common fund order could be enlivened by the settlement approval power. Whereas, in Cantor v Audi Australia Pty Limited (No. 5) [2020] FCA 637, Foster J concluded that he did not have power to make a common fund order at settlement.

At the appellate court level, the question of whether courts have the power to make a common fund order in a settlement context has recently been considered by the New South Wales Court of Appeal in Brewster v BMW Australia Ltd [2020] NSWSC 1261 and by a Full Court of the Federal Court in Davaria Pty Limited v 7-Eleven Stores Pty Ltd [2020] 384 ALR 650. Both appeals were resolved with the courts declining to make declarations that the power existed. Neither matter had been resolved by settlement or judgment and the courts concluded it was not appropriate to answer the question at a stage of the proceedings where there may or may not be settlement and the court did not have before it the terms of any settlement. The factual context of a settlement being presented to the court for approval was considered to be a very different situation to that at the commencement or early stage of litigation, where the court is asked to order a particular percentage or commission which a funder may extract from any eventual settlement or judgment, when that sum and the attitude of group members towards settlement are unknown. Considering these decisions, the uncertainty surrounding settlement common funds orders will likely only be answered judicially when, or if, a common fund order is applied for at the time of settlement or final judgment.

Additionally, an observable trend has been the increased prevalence of competing overlapping class actions and how the courts have sought to manage multiplicity through the application of case management principles. In 2019–20, there were at least 22 competing class actions, with an additional 11 competing claims in the year in review. A feature of these multiplicity disputes has been the courts evaluating the hypothetical returns to class members from the competing funding proposals. This increased competition has placed downward pressure on pricing.

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

In August 2020, the Regulations were introduced to require third-party litigation funders in Australia to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme (MIS) regime under the Corporations Act 2001 (Cth) if they advise about, deal in or operate a litigation funding scheme. The AFSL and MIS regimes are overseen by ASIC.

The High Court held in Brookfield Multiplex Limited v International Litigation Funding Partners Pty Ltd [2009] 260 ALR 643 that in certain circumstances a litigation funding scheme may constitute an MIS. In 2012, the federal government provided a safe harbour for persons providing financial services to a litigation scheme from all forms of
MIS regulation that apply to providers of financial services and credit facilities. On 22 August 2020, the Regulations came into force, removing the previous safe harbour for litigation funding schemes from the AFSL and MIS regimes, meaning that third-party litigation funders funding class action and multi-plaintiff actions may be required to hold, or be an authorised representative of, an AFSL. The safe harbours for insolvency litigation funding schemes and litigation funding arrangements other than in relation to class actions remain in force. However, it is currently unclear from the definition of an insolvency litigation funding scheme as to whether third-party funded claims are captured by the safe harbour. This uncertainty may soon be clarified, as new draft legislation was released by the government in October 2021 that, if passed, will remove this ambiguity in the context of class actions, with the legislation providing that any multi-plaintiff funded litigation will be classified as a managed investment scheme. The proposed legislation contains other measures including (1) an amendment to the definition of an MIS such that class action litigation funding schemes are considered MISs, (2) a cap on the allowable funding fee such that 70 per cent of any claim proceeds must go to group members, and (3) a provision that the Court only has the power to make orders extending the funding commission to group members who are a part of the funding scheme.

Litigation funding schemes that have retail clients will be required to be registered with ASIC as an MIS under Chapter 5C of the Corporations Act 2001 (Cth) and will need to be operated by a ‘responsible entity’. A responsible entity must be an Australian public company with at least two Australian directors, licensed to operate litigation funding schemes.

AFSL holders are required to abide by their licence conditions and the general conduct obligations under section 912A of the Corporations Act 2001 (Cth). AFSL holders authorised to provide financial services to retail clients are also required to become a member of an external dispute resolution scheme. ASIC has made the ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 to manage the transition to the new regulatory regime by providing relief in a number of areas of the AFSL and MIS regimes that would otherwise be unsuitable for the structure of a litigation funding scheme.

Insolvency litigation funding schemes and litigation funding arrangements that remain within the safe harbour must adopt and maintain adequate processes to manage conflicts of interest. Criminal and civil sanctions apply for non-compliance with the conflict management requirements. The conflict management requirements are policed by ASIC.

The purpose of the Regulations is to ensure that conflicts – ordinarily where the interests of funders, lawyers and claimants diverge – are appropriately managed by the litigation funder. ASIC’s Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations under the Regulations, but otherwise do not prescribe the required mechanism for compliance with the Regulations. There is a requirement that providers of litigation funding maintain adequate practices and follow certain procedures for managing conflicts of interest. However, the Regulations do not prescribe the content of the policy or the processes that a litigation funder must have in place to respond to a conflict of interest.

The Federal Court Practice Note Class Actions (GPN-CA) requires that ‘any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of “duty and interest” and “duty and duty”) between any of the applicants, the class members, the applicant’s lawyers and any litigation funder’. Similar practice notes operate in Victoria, Queensland and New South Wales.

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

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in advising clients in relation to third-party litigation funding or in funded proceedings.

Australian legal practitioners are regulated by state-based regimes prescribing professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.

The interposition of a third-party litigation funder into the lawyer-client relationship raises ethical issues around conflicts, loyalty, independence of a lawyer’s judgement and confidentiality. Legal practitioner conduct rules in all Australian jurisdictions deal with each of these concepts. The conduct rules reflect a lawyer’s fiduciary duty towards his or her client and primary duty to the court.

A practitioner (which includes a law practice) will have a conflict of interest when the practitioner serves two or more interests that are not able to be served consistently, or honours two or more duties that cannot be honoured compatibly.

The year in review has seen increased scrutiny of the conduct of lawyers and third-party litigation funders. That scrutiny has usually arisen in the context of the courts’ supervision of the settlement of class actions. Legislation regulating the conduct of representative proceedings in Australia require courts to approve settlements. Those powers provide a level of discretion in the courts to moderate the legal and other professional costs incurred in conduct of the litigation, the third-party funder fees and interest, and to enquire into the probity of the funding arrangements. An example of how the settlement approval process can expose allegations of ethical violations and professional misconduct has arisen in the approval of the settlement of a class action commenced against Banksia Securities Limited in the Supreme Court of Victoria. At the instigation of a disgruntled class member the Court has embarked on a wide-ranging enquiry into the integrity of the solicitor, client and funder relationships and the professional fees rendered. A feature of that litigation, reflected in other cases in the year in review, is the willingness of the Court to appoint contradactors and independent counsel to represent the interests of class members in the settlement approval process. Furthermore, the contradactor in the Banksia Securities class action has taken a more active role in the settlement approval trial including by cross-examining various witnesses.

While the Banksia Securities final settlement approval litigation is yet to resolve there is a likelihood that the Court will significantly moderate the professional fees that can be deducted from the settlement and that recommendations may be made by the Court that lawyers involved in the conduct of the action face disciplinary action. Another issue exposed by the Banksia Securities litigation is the Court’s willingness to protect the sanctity of the solicitor-client relationship by insisting on a clear delineation between the funder entity, the lawyers retained and the interests of the representative client. With the trial of the settlement approval coming to an end in March 2021, the Victorian Supreme Court is yet to deliver judgment in a matter that may have widespread implications for the funder-lawyer-client relationship.

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

The case management of class actions commenced in the Federal Court and other state courts involving litigation funding require at or prior to the initial case management conference that each party...
disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order.

All settlements reached in class action proceedings must be approved by the court. Where a settlement involves a funder’s success fee being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness and proportionality.

Since the introduction of the Regulations in August 2020 requiring third-party litigation funders in Australia to hold an AFSL and comply with the MIS regime under the Corporations Act 2001 (Cth), ASIC, which oversees those regimes, now has a particular interest in and oversight of the third-party litigation funding space.

In addition, following amendments in July 2020 to allow lawyers to enter into damages-based contingency fee arrangements for class actions, the court is able to grant group costs orders where appropriate or necessary. The Victorian Supreme Court plays a supervisory role in the facilitation of this new legislation, and will determine the percentage to be allocated to the plaintiff law firm that can be charged as a contingency.

Finally, there are other instances where the terms of litigation funding agreements are subject to review by the courts. In a corporate insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder to pursue recoveries on behalf of creditors.

Under the Corporations Act 2001 (Cth), a liquidator is required to seek the approval of the company’s creditors or the court’s approval, where the terms of a contract that he or she enters into will last for more than three months. This means that in many cases where a liquidator enters into a litigation funding agreement, court approval is sought.

**FUNDERS’ RIGHTS**

**Choice of counsel**

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

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist on their choice of lawyers retained. Third-party funders are invariably consulted when it comes to retaining counsel. Commonly, the funder will, pursuant to the funding agreement, appoint the lawyers to provide the legal work, and the retainee agreement between the lawyers and the funded client will be pursuant to terms agreed by the funder, subject to the lawyers’ overriding duties to act in the best interests of their client.

**Participation in proceedings**

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

Yes. It is a permissible level of control over the litigation process for the litigation funding agreement to provide that the funder has the right to give instructions to the lawyers concerning the conduct of the litigation, subject to the funded client having the right to override the funder’s instructions.

Commonly, save in respect of settlement (see below), in circumstances where a conflict arises between the lawyer’s duty to his or her client and the funder, the lawyer is required to prefer the interests of and to take instructions from his or her client. It is submitted that this level of control over the litigation process is consistent with the principles in Fostif and not contrary to public policy.

In a settlement context, funders may attend and be involved in settlement discussions. In recognition of the funder’s interest in the resolution of the litigation, where there is a difference of opinion between the funded client and the funder in respect of a settlement offer, the standard practice among funders operating in Australia and consistently with the Australian Securities and Investments Commission’s Regulatory Guide 248 is that the difference of opinion is referred to the most senior counsel acting in the matter for advice as to whether the settlement offer is reasonable in all the circumstances, and whether the parties agree to act in accordance with that advice. In the class action context, any settlement reached on behalf of the representative applicants, including the reasonableness of the funder’s commission, will be subject to court approval. The Federal Court Practice Note Class Actions (GNP-CA) sets out a range of requirements for parties to satisfy the court that the proposed settlement is fair and reasonable and in the interests of the group members.

Once a settlement has been reached, the funder will invariably be involved in the application to the Court for the approval of the settlement. This is because in the course of the settlement approval application, the plaintiff will be seeking orders providing that a certain percentage of the recovery be paid to the funder to reimburse it for the costs expended, and in its fee for funding the proceeding. This necessarily involves input from the funder, as the Court will often weigh into the appropriateness of these amounts.

In these circumstances, it is usual that the funder will retain its own independent counsel, rather than the solicitors for the group members also representing the funder’s interests. It is increasingly common for a funder to retain its own independent counsel for certain aspects of the proceedings, and the necessity may arise, for example, where the funder is making an application for a common fund order early in the proceedings.

In some circumstances, a funder’s involvement in the interlocutory steps in a proceeding can be looked on negatively by the court. In an application for the approval of an opt-out notice in *Kerry Michael Quirk v Suncorp Portfolio Services Limited*, known as the Suncorp Class Action, Justice Hammerschlag of the Supreme Court of New South Wales considered that the opt-out notice was being used by the funder to procure class members to sign up to litigation funding agreements. The proposed opt-out notice informed group members that if they did not sign a litigation funding agreement, the funding may be withdrawn and the action may not proceed. The court ordered that the opt-out notice be revised to remove these references.

**Veto of settlements**

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

In class actions, a funder cannot veto a settlement and any differences of opinion between a funder and a representative applicant regarding a proposed settlement are dealt with in accordance with the dispute process outlined in the funding agreement. Typically, the practice is that the most senior counsel retained in the matter determines the matter. For other types of funded litigation, the funder’s control over a settlement is subject to terms of the funding agreement.

**Termination of funding**

9 | In what circumstances may a funder terminate funding?

Commonly, litigation funding agreements entered into in Australia allow a funder to terminate the litigation funding agreement without cause on the giving of notice.

Usually, the circumstances giving rise to the termination of a funding agreement will relate to the commercial viability of the claim, a material change to the legal merits or to the value of the claim. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement. Contract law principles that apply to the termination of contracts generally will apply.
It is usual that the litigation funder will have responsibility to pay adverse costs and provide security of costs incurred up to the date of termination. In *Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd* [2016] WASC 159, the funder (LCM) terminated a litigation funding agreement that obliged LCM to satisfy orders for security for costs. Beech J held that under that litigation funding agreement LCM was obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

**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?

It is recognised and accepted that litigation funding plays an important role in providing access to justice. Especially in the class action context, decisions of Australian courts following *Fostif* are philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

In a number of cases where the court has considered a common fund order, or orders that could affect the funder’s interest, the courts have permitted the funder to retain its own representation and appear before the court to make submissions.

This was seen recently in the application for settlement approval in *Alison Court v Spotless Group Holdings Ltd*, in which the funders for the action, Therium and Investor Claim Partners, retained their own counsel to represent their interests. Counsel for the funders agreed to forgo A$1.5 million of the costs for which they were seeking to be reimbursed to prevent the funding commission being further reduced by the Court.

### CONDITIONAL FEES AND OTHER FUNDING OPTIONS

**Conditional fees**

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

‘No win, no fee’ conditional costs agreements are permitted in Australia. There are prohibitions on legal service providers obtaining a fee calculated by reference to the amount of a settlement or judgment, though Victorian legislation allows contingency fees to be paid to plaintiff law firms in class action proceedings commenced in the Supreme Court of Victoria. In the jurisdictions where contingency fee arrangements are prohibited, lawyers are permitted to charge an ‘uplift’ of up to 25 per cent of ‘at risk’ fees based on standard hourly rates. The permissible percentage uplift may vary from state to state.

The Productivity Commission’s Access to Justice Report (September 2014) recommended lifting the prohibition on contingency fee arrangements because they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was on the basis that comprehensive disclosure was provided as to the percentage of damages to be recovered by law firms, responsibility for liability for disbursements and adverse costs orders and capping the percentage limit on a sliding scale (to prevent law firms gouging or earning windfalls on high-value claims).

As a safeguard against contingency fees giving rise to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers’ ethical and professional obligations. The Commission’s recommendations have yet to be implemented.

The question of contingency fees was addressed in a report of the Australian Law Reform Commission and also in a report of the Victorian Law Reform Commission. Both reports recommended that the ban on solicitor contingency fee arrangements be lifted in class actions subject to limitations that included a prohibition on solicitors recovering a contingency fee if a litigation funder is also taking a percentage of the recoveries.

The Victorian Supreme Court regime permits contingency fees to be paid to plaintiff law firms in class action proceedings. The new legislation provides that the liability for the payment of legal costs must be shared among the plaintiff and group members in the class action, known as a group costs order.

The first application for a group costs order was made in *Fox v Westpac; Crawford v ANZ* [2021] VSC 573, by the plaintiffs on behalf of group members. Pending the making of a group costs order, each action was being conducted pursuant to ‘no win, no fee’ funding arrangements. In declining to make the group costs order sought by the plaintiffs, Nichols J ruled that group costs orders will only be awarded where it is ‘appropriate or necessary to ensure that justice is done in the proceeding’, having regard to the protection of group member interests.

The plaintiffs led evidence comparing the likely returns to group members under a third-party litigation funding arrangement and the proposed group costs order. However, Nichols J contended that the relevant comparator was the ‘no win, no fee’ arrangement, being the true and not hypothetical alternative. The ‘no win, no fee’ arrangement and group costs order would each provide an indemnity to the plaintiffs against adverse costs and any obligation to post security. In light of this, alongside the lack of evidence available at such an early stage of the proceedings, Nichols J was not prepared to award a group costs order. However, her Honour did incorporate in the orders that the plaintiffs could reassess their position and reapply under section 33ZDA at a later time.

In effect, the decision in *Fox v Westpac; Crawford v ANZ* may lead plaintiff lawyers and funders to revisit their early stage or interim funding arrangements to maximise the chances of obtaining a group costs order in the Supreme Court of Victoria. Contingency style payments to law firms have also been considered in the context of settlement approval hearings. In *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107, notwithstanding that a law firm may not enter into a cost agreement where the amount payable to the law practice is calculated by reference to the amount of any award that may be recovered, Lee J observed that a common fund order incorporating a contingency payment could be made and could be approved in a settlement approval. Lee J’s comments did not form part of the ratio of the decision of the Full Court.

Whilst there may be a move towards contingency payments being payable from a settlement sum, in all states except Victoria it is still in breach of the Legal Profession Uniform Law for lawyers to enter into a costs agreement that contains a contingency fee.

### Other funding options

12 | What other funding options are available to litigants?

Disbursement funding refers to the provision of finance for third-party costs that form part of any litigation, such as barrister fees, expert reports and court filing fees. Disbursement funding is commonly obtained alongside a ‘no win, no fee’ arrangement provided by a plaintiff law firm.

Portfolio funding is an alternative to case-specific litigation funding, which, in effect, provides a law firm (or corporate) with a facility of committed capital to draw on to fund more than one case in an approved portfolio of cases in the firm’s pipeline. While relatively new, we expect to see portfolio funding arrangements becoming more commonplace in the Australian litigation funding market.

After-the-event insurance (ATE), while having long been available in the UK market is relatively new in Australia. It can be purchased...
after a dispute has arisen or a proceeding is contemplated and covers a claimant’s liability to pay adverse cost orders in the event that litigation fails. When purchasing ATE insurance for use in Australian courts, it is important to understand whether the policy includes an obligation on the insurer to provide security for costs and the form in which such security will be provided, in particular, the availability of a deed of indemnity by the insurer.

On 1 January 2017, the Commonwealth Government extended funding for its Fair Entitlements Guarantee Recovery Program that is litigation funding for liquidators of companies and trustees in bankruptcy. It is focused on recovering employee entitlements paid by the Commonwealth Government to employees of insolvent enterprises. Evidence of the scheme in practice can be seen in Needham, Re; Bruck Textile Technologies Pty Ltd (In Liquidation) [2016] FCA 837.

**JUDGMENT, APPEAL AND ENFORCEMENT**

**Time frame for first-instance decisions**

13 What proportion of first-instance judgments are appealed?

It is not possible to say how long a commercial claim may take to reach a decision at first instance.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the cost-effective, efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The general rule is that the number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates are generally set as soon as possible and practicable. Unless there is good reason, the timetable provided to the legal practitioners to manage the progression of the case must be adhered to. One key objective of the state and federal regimes currently in place is to identify the issues in dispute early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. There is monitoring of the courts’ caseloads in order to provide timely and comprehensive information to judges and court officers managing cases.

The Productivity Commission’s report into Government Services 2021 set out the clearance rates for Australian courts for 2019–20. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that the Supreme Courts of each state and the Federal Court cleared around 98.5 per cent of all civil matters listed in 2019–20. However, complex commercial matters are unlikely to be resolved within one year of commencement. According to the Federal Court of Australia 2019–20 Annual Report, major causes of actions were categorised as corporates, bankruptcy, and native title matters. Of these major causes of action, 10.8 per cent took over 18 months to finalise. In 2019–20, 22.5 per cent of corporations matters in the Federal Court’s original jurisdiction were over 18 months old.

**Time frame for appeals**

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

The number and proportion of appellate proceedings commenced is dependent on many factors, including the number of first-instance matters disposed of, the nature and complexity of such matters and subsequent issues raised on appeal, and legislative provisions altering the jurisdiction of the court.

Nationally, in 2019–20, 1,263 appellate cases were filed in the Federal Court. This represents an overall decrease in the number of appeals filed from the previous year, with 1,415 filed in 2019–20. The Federal Court of Australia 2019–20 Annual Report attributes this trend to the 35 per cent decrease in the number of migration matters filed. However, there was an increase in the Federal Court’s non-migration appeals since 2018–19, particularly in the areas of taxation, administrative and constitutional law and human rights, and commercial and corporations (including commercial contracts, banking, finance and insurance and regulator and consumer protection).

In the reporting year, 1,168 appeals and related actions were finalised by the Federal Court. At 30 June 2020, most appeals (61.2 per cent) in the Federal Court’s docket were under 6 months old, and 26.5 per cent were 6 to 12 months old. Only 3.1 per cent were over 24 months old.

In New South Wales, as a further example, the Supreme Court of New South Wales Provisional Statistics (as at 14 May 2021) show that 346 cases were filed in the New South Wales Court of Appeal during the 2020 calendar year, and 382 cases were finalised. Note, where an appeal has been preceded by a grant of leave, this is counted as one continuous case, with a final disposal being counted only when the substantive appeal is finalised. For this reason, the figures for disposals of notices of appeal (and applications for relief) and disposals of applications for leave, combined, exceed the number of final disposals.

**Enforcement**

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

There is no available data showing the proportion of judgments requiring contentious enforcement processes.

Enforcement of judgments in Australia can be undertaken through insolvency mechanisms. Non-compliance with a judgment is a recognised basis for the appointment of a liquidator or a trustee in bankruptcy. Judgments may also be enforced with the assistance and supervision of the court through the issuing of writs of execution. A judgment creditor may obtain a garnishee order directing a third party who holds funds on behalf of the judgment debtor, or owes the judgment debtor funds, to pay the funds, or a proportion of the funds, to the judgment creditor. In some jurisdictions, judgment creditors have a right to secure a judgment against real and personal property of the judgment debtor through the registration of a security interest.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

Yes. Class actions are permitted in Australia and are common. Class actions can be funded by third parties. In late 2016, the Supreme Court of Queensland became the third state after New South Wales and Victoria to introduce court procedures specifically directed to the conduct of class actions in that court. Legislation was recently introduced to the Western Australian parliament in the Civil Procedure (Representative Proceedings) Bill 2019, which seeks to provide a legislative regime for the Supreme Court of Western Australia, to mirror the current Federal Court regime pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth).

Separate from the class action regime, the court also has the power to determine elements of a proceeding as a separate question where a question is common to a number of pending cases and would otherwise need to be decided more than once. This power is contained in rule 28.2 of the Uniform Civil Procedure Rules 2005 (NSW), and equivalent provisions exist in all other jurisdictions.
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. The courts in Australia have power to order that an unsuccessful party pay the costs of the successful party although the amount that may be recovered varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party’s reasonable legal costs.

There are differing regimes for the determination of the reasonable legal costs that an unsuccessful party is obliged to pay.

There is currently no case law in Australia that holds that an unsuccessful party to litigation may be required to pay the litigation funding costs of the successful party.

Liability for costs

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

Yes. That a court can order costs against a non-party was confirmed by the High Court in Knight v FP Special Assets (1992) 174 CLR 178 (Knight). In this case, Mason CJ and Deane J stated that there was a general category of cases in which an order for costs should be made against a non-party. The category consists of circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation. In these circumstances, an order for costs should be made against the non-party if the interests of justice require that it be made.

In a third-party litigation funding context, the Knight case was cited in Gore v Justice Corp Pty Ltd [2002] FCR 429 FCA 354, where Justice Corp was held liable to pay the appellants’ costs in this appeal and the costs of and incidental to the hearing of the appellants’ notice of motion in the court below.

In Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors [2016] VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (Global), Global’s sole director and company secretary of Global and shareholder. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant’s actual costs. Arguments that making a costs order against the company director was ‘piercing the corporate veil’ were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was no miscarriage of justice and the appeal was dismissed.

Legislation also confers power on the courts to make adverse costs orders against non-parties. For example, section 98 of the Civil Procedure Act 2005 (NSW) confers a general power to make costs orders against parties and non-parties alike.

Non-party costs orders have rarely been made against litigation funders because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant’s costs. However, recent cases suggest this may no longer be the norm.

In Wigmans v AMP Ltd (No 3) [2019] NSWSC 162, five competing class actions had been commenced, all with different lawyers and funders, four in the Federal Court, and one in the Supreme Court of New South Wales. There ensued a contest as to whether the litigation would be conducted in the Federal Court or the Supreme Court of New South Wales. Those applications were resolved in favour of the representative applicant in the Supreme Court action and the four Federal Court actions were transferred to the Supreme Court. Under the Civil Procedure Act 2005 (NSW) the Supreme Court did not have power to make a cost order against the Federal Court applicants. Stevenson J ruled that the Court has power to make a costs order against non-parties and held that as each of the funders stood to make a significant profit from the fruits of the litigation, in the circumstances where the applications had failed, each of the funders should pay the costs. In Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd (No. 2) [2021] NSWSC 1202, Stevenson J also ordered that a litigation funder be jointly and severally liable for the costs incurred by a defendant. In coming to this decision, Stevenson J considered five factors relevant to whether an order should be made for costs against a non-party. The factors were, whether the non-party:
1. provided funding for the litigation;
2. had a direct interest in, and entitlement to, a substantial part of the fruits of the litigation;
3. was involved in the litigation purely for commercial gain;
4. had a right to information and involvement in decision making in relation to the litigation; and
5. agreed to provide an indemnity to the unsuccessful party for any adverse costs order.

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?)

The court has the power to order a plaintiff to give security for the defendant’s cost of defending the plaintiff’s claim. The court can order a stay of proceedings until security is given and if there is persistent non-compliance, the court may dismiss the plaintiff’s claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court.

Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against it should the plaintiff’s claim fail. Orders for security for costs have been seen as necessary due to the financial benefit litigation funders stand to gain from a successful outcome in the proceedings.

In its report ‘Litigation Funding and the Regulation of the Class Action Industry’, the Australian Parliamentary Joint Committee on Corporations and Financial Services noted a submission by Dr Peter Cashman that although a litigation funder may be readily able to satisfy any costs order made against it, certain circumstances may give rise to an order for security for costs, including that the litigation funder may be based in a jurisdiction outside of Australia.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs. Courts will also consider whether there is an option for the litigation funder to cease funding during the proceedings when determining whether to make an order for security.

If recourse to the third-party funder’s balance sheet is not accepted as satisfactory evidence of the funder’s ability to meet its indemnity obligations, recognised forms of security include the payment of money into court, bank guarantees and in more recent times, ATE insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order.

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. Ordinarily, the defendant(s) will provide the court with an estimate of the costs they believe will be
incurred and this will be a matter for evidence. In complex claims, it is usual that security orders will be given in stages by reference to identified phases in the litigation.

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

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery ([Ipsos Pty Ltd v National Australia Bank Ltd [2001] NSWSC 714(a)].

In the case of Perera v Getswift Limited [2018] FCA 732, the Court observed that, ‘it is accepted that in the event that funders are using the processes of the court to procure a commercial benefit, a sine qua non of this is the provision of adequate security.’

The Australian Law Reform Commission Report also made a recommendation that there be a statutory presumption that a litigation funder will provide security for costs.

Insurance

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

ATE insurance is permitted and is commonly used, particularly in funded class action litigation.

ATE insurance policies can be put forward in the context of security for costs applications as a form of security. Judicial views on the acceptability of this have been varied.

In the matter of DIF III Global Co-Investment Fund LP (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v BBLP LLC (formerly Babcock & Brown LP)[2016] VSC 401 (DIF) the Court accepted as adequate security a deed of indemnity proffered by an overseas-based ATE insurer. In Capic v Ford Motor Company of Australia Ltd, the Court approved security for costs being provided by way of a deed of Indemnity from an ATE Insurer in the United Kingdom, together with a payment of A$20,000 into Court for the purpose of covering the enforcement costs of the deed in the United Kingdom.

In Peterson Superannuation Fund Pty Ltd v Bank of Queensland Limited (No. 3) [2018] FCA 1842 the representative plaintiff’s litigation funder sought to recover the costs of its ATE insurance premiums from the settlement sum. The representative plaintiff opposed this on the basis that the ATE insurance policy only protected the litigation funder against costs exposure. Because recovery of the ATE insurance premium was agreed in the litigation funding agreement, the Federal Court of Australia found that to prevent reimbursement would be to alter the terms of the funding agreement. However, the Court did find that ATE insurance costs were relevant to the level of risk to which the funder was exposed, and in finding that those risks were low, reduced the funder’s commission from 25 per cent to 13.7 per cent.

In Bonham as trustee for the Aucham Super Fund v Iuka Resources Ltd (Security for Costs) [2019] FCA 1693, Perram J accepted that the particular deed of indemnity proffered in this case as security for costs was sufficient. Although the insurers did not have assets in the jurisdiction, the applicant contended that additional elements of security would be put in place so that enforcement in the United Kingdom and Ireland could occur at no expense to the respondent. On the issue of whether the security of costs previously paid to court by the applicant could be replaced by the aforementioned deeds of indemnity and a lesser amount paid to court, Perram J found against the applicants. Perram J reasoned that interlocutory orders ought not to be revisited simply because one party retrospectively views the agreed upon bargain as one that is not good.

The issue was more recently considered by the Supreme Court of Queensland in Equititrust Limited v Tucker [2020] QSC 269, in which Bond J held that security in the form of a deeds of indemnity from its ATE insurer posed an ‘unacceptable disadvantage’ to the defendants. Earlier in the proceedings, Bowskill J also rejected the applicant’s application to provide a deed of indemnity as a form of security, finding that the applicant had failed to establish that a deed of indemnity was adequate.

Recently, in Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No. 3) [2020] FCA 1885, a litigation funder sought reimbursement of ATE insurance premiums together with a ‘settlement CFO’. Lee J observed, ‘If a funder wishes to defray their risk of performing that obligation it is matter for the funder but, in my view, it is not a cost that ought be passed on separately to group members when the Court controls the remuneration’, and declined to make separate provision for the reimbursement of ATE insurance premiums in parallel with the settlement CFO.

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?

For class actions commenced in the Federal Court and certain of the state courts, claimants are required to disclose the litigation funding agreement subject to redactions to conceal information which might reasonably be expected to confer a tactical advantage to another party. The commercial terms may be redacted. Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd (t/as ANZ Investment Bank) [2016] FCA 306 provides examples of terms that may be redacted.

The Class Actions Practice Note that applies to litigation in the Federal Court of Australia (CAPN), requires that prior to the first case management hearing, an applicant’s lawyersshall, on a confidential basis, disclose their costs agreement and any litigation funding agreement to the judge presiding over the first case management hearing. Similarly, the CAPN provides that no later than seven days prior to the first case management hearing, the applicant’s lawyers shall file and serve a notice in the specified form together with a copy of the litigation funding agreement.

The CAPN also covers the level of detail required in the applicant’s disclosure to the Court and to other parties (including the respondents); information regarding the amount of funding received or estimated cost to prosecute the litigation (‘war chest information’) does not need to be disclosed under the CAPN.

Litigation funding schemes that are MISs require a product disclosure statement (PDS) which is made publicly available. Consistent with the approach taken in the CAPN, the Australian Securities and Investments Commission has provided certain relief in relation to fee disclosure in the PDS, as it recognises that disclosing specific details of the funding arrangement in a public document could be detrimental to claimants.

Privileged communications

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

Some but not all communications between a litigant or their lawyers and a funder may be protected by privilege.

A claim of privilege can be made to object to the production of, or access to, documents in response to a subpoena to produce, notice
to produce or order to give discovery. In addition, privilege can be claimed to object to answering interrogatories.

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidential nature of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute. A common interest privilege may arise if two parties with a common interest exchange information and advice relating to that interest, the documents containing that information may be privileged from production in the hands of each party.

With the exception of the common interest privilege, each of these privileges was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In IOOF Holdings Ltd v Maurice Blackburn Pty Ltd [2016] VSC 311, the claimant commenced proceedings against law firm Maurice Blackburn and litigation funder Harbour Litigation Funding Ltd, seeking production of certain documents obtained during investigations in anticipation of representative proceedings against IOOF. IOOF claimed that the documents contained confidential information about it and sought to restrain the law firm and litigation funders’ use of that information. The Supreme Court of Victoria found that certain documents created by Maurice Blackburn and Harbour in their investigative process were subject to privilege, given that their dominant purpose was legal advice. Documents that were produced by Maurice Blackburn for the purposes of receiving advice from its counsel on issues of confidentiality and prospects of success in pursuing a representative action were protected by privilege, as the firm was effectively a client seeking legal advice. Documents created prior to the existence of any intention to give or receive legal advice were precluded from privileged protection. Similarly, Harbour was a client of counsel and also of Maurice Blackburn in some capacity, to the extent that both counsel and the firm gave Harbour legal advice. However, there were also certain communications with Maurice Blackburn that Harbour was required to produce, relating to proposed funding agreements for the prospective class action, as these were found to be ‘commercial negotiations’ and not documents created for the dominant purpose of legal advice. In this sense, Harbour could not claim litigation privilege in its own right.

Similarly, in Hastie Group Ltd (in Liq) v Moore [2016] NSWCA 305, the Court of Appeal considered whether an expert report provided to a litigation funder in connection with attempts to secure litigation funding was privileged. At issue was whether the expert report was prepared in connection with anticipated proceedings to be brought by the liquidators of the Hastie Group, or whether its dominant purpose was to aid the litigation funder in deciding whether to fund the prospective proceedings. Further, if the expert report was subject to privilege, it was contended that privilege was waived in circumstances where the liquidators relied on the fact that it was seeking litigation funding to obtain extensions to the time for service of the pleadings.

In circumstances where both parties accepted that the letter of engagement sent to the expert was privileged, and in light of evidence of the nature of and manner in which the report was prepared, the Court of Appeal was satisfied that the report itself was also privileged. As to the issue of waiver, the Court of Appeal was satisfied that the contents of the expert report were not relied on when seeking an extension for service, and in any event the expert report was disclosed to the litigation funder on a confidential basis and in connection with anticipated proceedings.

**DISPUTES AND OTHER ISSUES**

### Disputes with funders

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

There are numerous decisions involving challenges to the funding relationship brought by defendants to the funded litigation, but very few reported decisions in disputes between plaintiffs and their funders.

The two reported cases arose in the context of the termination of a litigation funding agreement.

In [International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) [2012] HCA 45, the funder sought payment of an early termination fee that arose as a result of a change in control transaction by the litigant. The litigant resisted the payment of the early termination fee on the basis that it had a statutory right of rescission due to the funder’s failure to hold an Australian Financial Services Licence (AFSL). The Court held that the funder was not required to hold an AFSL and the litigant could not avoid the financial consequences under the funding agreement.

[Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159, the Court considered whether a litigation funder was obligated to satisfy a staged security for costs order made prior to termination. The Court dismissed the litigant’s claim and determined that LCM was not obligated to satisfy the remaining stages of the order.

The [Banksvs Class Action](https://www.asec.gov.au/what-we-do/guidance-for-managers/tipsheet-002-disputes-and-other-issues) settlement approval process is an example of disputation between a funder and funded class members. In that matter the litigation funder along with the applicant’s counsel team are alleged to have engaged in a fraudulent scheme to enrich themselves at class members’ expense. Issues were first raised by a class member, which resulted in the Court appointing a contracitor to investigate points of dispute between the funder, lawyers and the funded parties. It is alleged that the funder and counsel breached their duty of care, skill and diligence owed to class members by seeking to deduct excessive fees from the settlement. The matter was heard in August 2020 with judgment reserved. During the hearing the counsel team abandoned their defences and consented to judgment being made against them.

In the [Arasor Class Action](https://www.asec.gov.au/what-we-do/guidance-for-managers/tipsheet-002-disputes-and-other-issues), one of the representative applicants, Caason Investments, sought legal, administrative and accounting costs that it claimed it was owed under a variation to the funding agreement. The Court ruled that Caason Investments should be paid a small percentage of its claim for out-of-pocket costs but reflecting the outcome was ordered to pay the funder’s costs of the proceeding.

### Other issues

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

Practitioners should be aware of the recent enactment of the Corporations Amendment (Litigation Funding) Regulations 2020, which require litigation funders to hold an AFSL. On 22 August 2020, the Regulations came into force, removing the previous safe harbour for litigation funding schemes from the AFSL and managed investment scheme (MIS) regimes, meaning that third-party litigation funders funding class actions and multi-plaintiff actions may be required to hold, or be an authorised representative of, an AFSL. AFSL holders are required to abide by their licence conditions and the general conduct obligations under section 912A of the Corporations Act 2001 (Cth). AFSL holders authorised to provide financial services to retail clients are also required to become a member of an external dispute resolution scheme. The Australian Securities and Investments Commission
(ASIC) has made the ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 to manage the transition to the new regulatory regime by providing relief in a number of areas of the AFSL and MIS regimes that would otherwise be unsuitable for the structure of a litigation funding scheme.

In December 2020, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) released the report of its inquiry into litigation funding and the regulation of the class action industry. The report included a number of recommendations regarding the class action regime, and indicated support for the government’s decision to remove the exemptions for litigation funding schemes from the managed investment scheme (MIS) regime and the requirement to hold an AFSL. The report did, however, note that a number of parties had expressed concerns around the suitability of the MIS regime as a mechanism for the regulation of funded class actions in Australia. The PJC recommended that the government legislate a fit-for-purpose MIS regime, tailored for litigation funders.

In this regard, Justice Beach of the Federal Court observed, during a procedural hearing in a proceeding challenging the Queensland Energy Class Action proceeding outside the MIS regime, that it was difficult to reconcile the new regulations with the class action regime. Questioning the need for a responsible entity overseeing the class action, his Honour noted that it is the representative applicant which has this role in a class action proceeding, in addition to the court’s supervisory role.

In March 2021, the High Court of Australia handed down its judgment in Wigmans v AMP Limited. The High Court, in dismissing the appeal, held that the Supreme Court had the power to grant a stay of a competing representative proceeding, and that power was not confined by a rule or presumption that the proceeding filed first in time is to be preferred. The High Court noted that litigation funding arrangements, while not a mandatory consideration in determining competing class actions, were not irrelevant.

## UPDATE AND TRENDS

### Current developments

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

The developments and trends in the Australian class actions and litigation funding space over the past 12 months have been extensive. The developments that ought to be noted include:

- changes to continuous disclosure requirements considering the covid-19 pandemic, and the subsequent impacts on securities claims;
- the ramifications of the decision of the NSW Court of Appeal, which held that the Supreme Court of New South Wales is not empowered under section 183 of the Civil Procedure Act 2005 (NSW) to make an order ‘closing’ the class in a representative proceeding prior to settlement;
- the Victorian Supreme Court’s approach to group costs orders; and
- the outcome of the judgment in Wigmans v AMP, certifying the court’s power in relation to competing class actions.

The approach of the courts to each of these topics effects how litigation funders conduct themselves in Australia, especially when funding class actions.

### Changes to continuous disclosure requirements

The Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth) makes permanent once-temporary amendments to the Australian continuous disclosure regime. The continuous disclosure obligations in the Corporations Act 2001 (Cth) that apply to Australian listed entities require that those entities disclose price-sensitive information on a continuous basis. Prior to the temporary amendments, a listed entity would contravene its continuous disclosure obligations if it:

- had information that was not generally available;
- the information was such that a reasonable person would expect it to have a material effect on the price or value of the entity’s securities if it were generally available; and
- the entity failed to notify the market operator or the Australian Securities and Investments Commission (ASIC) of the information.

The now permanent changes require that the state of mind of the disclosing entity be taken into account when determining whether it contravened the continuous disclosure obligations, adding an additional element: the entity knows, or is reckless or negligent with respect to whether the information would have a material effect on the price or value of the entity’s enhanced disclosure securities.

The effects of the additional ‘knowledge’ element to continuous disclosure on securities class actions have not yet materialised.

### Class closure orders prior to settlement

Class closure orders prior to mediation have historically been a useful tool in the context of settling large, open class actions. Generally, class closure orders limit the settlement entitlement to only those group members who have registered their interests to receive a settlement sum, though they are binding on all group members. Class closure orders allow the parties to negotiate on behalf of a defined class of group members and, in particular, assist defendants in providing certainty as to who will be bound by any settlement that is reached.

There then developed a distinction between ‘hard’ class closure orders, meaning that failing to register extinguished a group member’s rights for the remainder of the proceeding (ie, until conclusion of the matter at trial), and ‘soft’ class closure orders, meaning the group member is excluded for a certain period of time such as until mediation, but if no settlement is reached at mediation will again be allowed to participate in the proceedings (and receive any benefit arising out of a judgment or any future settlement).

In the 2019 decision of Gill v Ethicon Sari (No. 2) [2019] FCA 177, Justice Lee described hard class closure orders as ‘wholly inappropriate’, however, his Honour considered that soft class closure orders could be adapted to facilitate settlements.

In April 2020, the New South Wales Court of Appeal in Haslehurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2020] NSDCA 66 ruled that class closure orders that extinguish unregistered group members’ rights cannot be made under section 183 of the Civil Procedure Act 2005 (NSW) prior to a court-approved settlement or judgment. The Court held that extinguishing the group members’ rights was inconsistent with the legislative framework and was not appropriate or necessary to ensure that justice was done.

Haslehurst was followed by a number of Federal Court of Australia decisions which were of similar effect. In Owners – Strata Plan No. 87231 v 34 Composites GmbH (No. 3) [2020] FCA 748, Justice Wigney held that the Court did not have power under section 33ZF of the Federal Court of Australia Act 1976 (Cth) to make such an order, particularly in light of the High Court decision in Brewster. The Court of Appeal in Wigmans v AMP again found that the Court lacked the power to make class closure orders in contemplation of settlement discussions, finding that this was contrary to the essence of Australia’s opt-out regime. Most recently, in the On The Run class action, Funnell & Ors v Shahin Enterprises Pty Ltd, the Federal Court rejected an application by the lead applicants for soft class closure orders, finding that the Court did not have the power to make the orders sought, and relied upon the recent authorities.

These decisions do not appear to impact the Court’s power to make class closure orders after a settlement pursuant to sections 33V and
33ZB of the Federal Court of Australia Act 1976 (Cth) (FCAA). It must also be noted that this decision does not place a limit on every type of procedural tool available that affects class composition, but does raise difficulties for defendants as there is less certainty regarding the number of group members and the amount of their claims before settlement or judgment.

It is also worth noting that this area may be the subject of legislative development in light of the Parliamentary Joint Committee on Corporations and Financial Services (PJC) recommendations in its 2020 report. The PJC concluded that class closure orders are ‘integral to facilitating settlements in open class proceedings’, and recommended that Part IVA be amended to include an express power to make class closure orders.

Contingency arrangements and group costs orders

Group costs orders are only available in Victoria. While the first application for a group costs order in *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 was unsuccessful, guidance can be taken from the decision.

First, the provision was considered to be comparable to section 33ZF of the FCAA in that the widest possible power is conferred on courts to do what is appropriate to achieve justice, as enunciated by Nettle J in the *Brewster* High Court decision. However, unlike section 33ZF, the provision is not a supplementary or gap-filling power.

Second, Nettle J considered the factors contemplated by courts when determining applications for common fund orders to be instructive, notwithstanding that not all would apply. In the context of common fund orders, the Federal Court has taken into account:

- the litigation risks of funding, assessed avoiding hindsight bias and recognising that the funder took on those risks at the commencement of the proceeding;
- the quantum of adverse costs exposure that the funder assumed at the commencement of the proceeding;
- the legal costs expended, and the security for costs provided;
- a comparison of the funding commission with commissions in other group proceedings and the market;
- pre-existing funding arrangements, including group members’ likelihood to make a recovery; and
- the quantum of any settlement or judgment.

Third, Nettle J was careful to emphasise that, while determining what was ‘appropriate and necessary’ to see justice in these proceedings was whether the group members would be financially ‘better off’ with a group costs order in place, this will not be the relevant enquiry in all section 33ZDA applications.

Predictive modelling was employed to compare the outcomes under different funding arrangements. It was thus relevant to identify in each proceeding the ‘ tipping point’, being the settlement or judgment amount at which the outcome to the group would be the same under a group costs order or alternate funding arrangement, and below which it would be better off with the proposed group costs order.

However, the relevant comparator was in dispute. The contradpector submitted that the relevant comparator was, collectively, the ‘no win, no fee’ funding arrangements that, properly construed, were not made on an interim basis. The plaintiffs submitted that the existing arrangements included a ‘contractual fall-back’ facilitated by the opportunity to negotiate third-party litigation funding, being the relevant comparator.

Notably, the plaintiffs observed that the practical effect of accepting the contradpector’s submission would be commercially unworkable for plaintiffs, law practices and litigation funders, and contrary to the policy behind section 33ZDA. In effect, applications for group costs orders would only be successful if:

- retainers between law practices and plaintiffs were conditional and terminated in the event that a group costs order was unsuccessful; or
- plaintiffs, law practices and litigation funders spent considerable time and resources negotiating short-lived funding agreements that would become redundant upon the making of a group costs order.

Further, it would not be practicable to inform a potential representative plaintiff that a law practice is prepared to act on their behalf, but that it would cease acting if a group costs order is not obtained. Few, if any, individuals would take on the burden of being a representative plaintiff in such circumstances.

The appropriate comparator was the ‘no win, no fee’ arrangement. Nichols J acknowledged that while the broad policy considerations enunciated by the plaintiffs had some attraction, the difficulties of accommodating a genuinely interim arrangement in contractual terms may have been overstated. Accordingly, *Fox v Westpac; Crawford v ANZ* serves as a cautionary tale to representative law firms and funders to give careful consideration to their funding arrangements early on, as the availability of a group costs order may heavily rely upon it.

Fourth, and finally, the application for a group costs order in *Fox v Westpac; Crawford v ANZ* ultimately failed due to the lack of evidence available to determine which funding arrangement was preferable to group members, including as to the prospects of success, quantum of any award or settlement, legal fees and returns to group members. The lack of evidence was attributed to the very early stage of the proceedings. This may be problematic, given that Nichols J considered there to be ‘clear contextual indicators’ that a section 33ZDA application be made at an early stage of proceedings.

It remains to be seen whether Nichols J’s interpretation of section 33ZDA will be applied in subsequent applications for group costs orders. Further, whether other Australian jurisdictions will introduce a similar statutory power remains uncertain at this stage.

Competing class actions

In *Wigmans v AMP Limited* [2021] HCA 7, the High Court dismissed an appeal from the NSW Court of Appeal (by a three-to-two majority) concerning the power and methodology of a court dealing with competing class actions. The High Court ruled that the ‘multi-factorial’ approach endorsed by the NSW Supreme Court was a valid method to determine whether a/which competing action be stayed indefinitely. In a multi-factorial approach, the following factors are taken into account:

- the competing funding proposals, costs estimates and net hypothetical return to group members;
- the proposals for security for costs;
- the nature and scope of the causes of action advanced;
- the size of the respective classes;
- the extent of any bookbuild;
- the experience of the legal practitioners and availability of legal resources;
- the state of progress of the proceedings; and
- the conduct of the representative plaintiffs to date.

Further, in considering a court’s discretion to quell controversy surrounding competing class actions, the High Court ruled that there is no ‘first in time’ rule that an earlier-filed class action ought to prevail over proceedings commenced later unless those proceedings offer some sort of ‘juridical advantage’. Multiplicity of proceedings may be dealt with by numerous case management tools in addition to, or in the alternative to, staying all but one proceeding. There is no ‘one size fits all’ approach.

The High Court also provided a recommendation that appointed referees or contradectors are possible ways in which conflicts of interest may be managed during a ‘beauty parade’.

Relevantly, the High Court found that while consideration of litigation funding arrangements is not mandatory, examining each
Managing issues arising from competing class actions through existing mechanisms

Reflecting some level of concern with substantive rights being determined through the use of procedural case management powers, to address complexities associated with competing class actions, the Australian Law Reform Commission (ALRC) report ‘Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders’ has recommended that Part IVA of the FCFA should be amended to give the Court an express statutory power to resolve competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage issues arising from competing class actions through existing case management powers.

Regulation of litigation funders

On 9 July 2021, ASIC released Consultation Paper ‘Litigation funding schemes: Guidance and relief’ (CP 345), which outlines ASIC’s proposed changes aimed at providing greater clarity on the meaning of key provisions in the Corporations Act and their application to litigation funding schemes. CP 345 also sets out ASIC’s position in relation to various relief instruments that currently apply to funded class actions. As at the date of writing, no response has been provided by ASIC following submissions by industry.

On 30 September 2021, the government released draft legislation to amend Chapter 5C of the Corporations Act to implement recommendations contained in the PJC’s December 2020 Report and the Corporations Regulations to include new conditions on Australian Financial Services Licence (AFSL) holders.

In summary, issues which might arise under the draft legislation include that:

- the definition of ‘managed investment scheme’ contained in section 9 of the Corporations Act will be amended to confirm that class action litigation funding schemes are managed investment schemes;
- there be a presumption that a fair and reasonable minimum return to group members is not less than 70 per cent of the total claim proceeds;
- the Court does not have power to make orders that extend the funder’s commission to group members who are not members of the litigation funding scheme, meaning the Court will not have the power to make a common fund order. In essence, this will require class actions to be run as closed class actions;
- the Court must have regard to the report of a fee consultant and a contradictor representing the interests of the scheme’s general members, the fees of which are to be met by the funder;
- lawyers providing services in relation to class action litigation funding schemes must ensure they do not have a material financial interest in the scheme. It is a condition of an AFSL licencee that if a lawyer providing services for the scheme does have or obtains a financial interest in the scheme, then the AFSL holder must ensure the lawyer stops providing services or relinquishes that interest.

The Explanatory Memorandum accompanying the draft legislation notes that the measures are aimed at ensuring the distribution of proceeds arising from a class action is fair and reasonable, and that group members provide consent to become members of a class action litigation funding scheme before a funder can impose a fee or commission on them.

The government provided stakeholders with the opportunity to provide submissions on the draft legislation.

On 27 October 2021, the government introduced the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 into Parliament. On 28 October 2021, the House of Representatives referred an inquiry into the Bill to the PJC for report by 19 November 2021. The PJC held a public hearing about the Bill on 12 November 2021.

Common fund orders

By majority ruling of five to two, the High Court of Australia found in BMW v Brewster [2019] HCA 45 that the Federal Court and the Supreme Court of New South Wales had no power to make a common fund order in a representative proceeding. A common fund order is usually made at an early stage in a class action and it provides for the litigation funder’s remuneration to be a fixed sum of the total amount received by the group members at the conclusion of a proceeding or settlement. The majority held that, on their proper interpretation, neither section 33ZF of the Federal Court of Australia Act 1976 (Cth) nor section 183 of the Civil Procedure Act 2005 (NSW) empowered a court to make a common fund order, because after taking into account ‘text, context and purpose’, a conclusion arises that it is inappropriate and unnecessary to ensure that justice is done in a proceeding for a court to make a common fund order.

However, it remains to be seen whether common fund orders can be made at the conclusion of proceedings in the Federal Court ([Davaria Pty Limited v 7-Eleven Stores Pty Ltd [2020] 384 ALR 650] and Supreme Court of New South Wales ([Brewster v BMW Australia Ltd [2020] NSWCA 272]).
Austria

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REGULATION

Overview

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

Third-party funding is permitted in Austria. The Austrian Supreme Court approved litigation funding by third parties in a 2013 decision (OGH, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants’ objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted practice and has been judicially endorsed by the Austrian courts. Although the courts did not comprehensively cover all aspects involved, they established an unquestioned and favourable environment for third-party litigation funding in Austria.

Compared to other jurisdictions, third-party litigation funding has had a late start in Austria. Recently, it has started to become an established litigation tool, but with regard to the potential market size, it might still be an exaggeration to declare third-party litigation funding to be of common use in Austria.

Restrictions on funding fees

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

There is no explicit limit on what is an acceptable compensation for the funder’s services. However, as a general rule, a third-party funding agreement – as any other agreement under Austrian law – must not constitute profiteering (ie, exploitation of a person in need; article 1 of the Act against Profiteering).

Specific rules for litigation funding

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

There are no specific provisions in Austrian legislation.

Lawyers’ professional conduct in Austria does not allow for lawyers to be paid only on the basis of contingency fees (section 16 of the Lawyer’s Ordinance (RAO) and section 879 II of the Austrian Civil Code, so any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer violates these provisions.

Legal advice

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

Lawyers’ professional conduct in Austria is provided by the RAO. In light of the RAO, the lawyer’s independence in acting on behalf of the litigant is crucial, and this also applies to cases involving a third-party funder.

However, by a clear separation of the roles between the lawyer and the funder, in principle, a lawyer who advises their clients in relation to a funder has no conflict of interest.

Regulators

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

As at the time of writing, neither the Austrian financial regulator nor any other governmental body has any known interest in overseeing litigation funding.

FUNDERS’ RIGHTS

Choice of counsel

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

Independence in acting on behalf of the litigant is an important principle of the lawyer’s professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant’s lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder’s right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace their lawyer, funding will only be further granted if the new lawyer is accepted by the funder.

Participation in proceedings

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

In domestic litigation, court hearings are generally public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite their funder to participate in such proceedings.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it has to be kept in mind that the majority of cases funded by third-party funders in Austria so far have been carried out without disclosing the funder’s engagement. As such, the relevance of the funder’s permission to attend or participate is limited.

Veto of settlements

8 Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in a funding agreement. This is, in general, permissible.
under the Austrian Civil Code and does not interfere with the independ-
ence of the litigant’s lawyer or with any other provision of Austrian law.
Moreover, it is common for litigants and funders to agree in advance on
certain minimum and maximum amounts concerning the limitation of
the funder’s veto right and their right to oblige the claimant to accept a
particular settlement.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circum-
stances that might terminate funding. Usually, such circumstances fall
into two categories. On the one hand, there are events that are deemed
to have a major effect on the risk of the proceedings, which often include:
- a court or authority decisions that result in a full or partial dismissal
  of the claim;
- the disclosure of previously unknown facts;
- a change in case law that is decisive for the current litiga-
tion process;
- a loss of evidence or evidence that is accepted and tends to be
  negative; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the
funding agreement and bear any costs incurred or caused until the
termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from having to continue
funding legal proceedings that appear reasonably unpromising, a
second category involves breaches of obligations by the litigant under
the funding agreement. In such cases, the funder can usually terminate
the funding after due notice and is not obliged to cover the outstanding
costs of the proceedings. On the contrary, given these circumstances,
the litigant is usually obliged to reimburse the funder for its costs
and expenses.

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 light of the independence of the claimant’s lawyer from the third-
party litigation funder, a funder is not allowed to instruct the lawyer
during the proceedings. The lawyer would violate professional conduct
rules as provided by the Lawyer’s Ordinance if their actions were based
on a funder’s, rather than on their client’s instructions. Therefore, any
rights and actions the funder intends to exercise during the course of
the litigation have to be agreed with the claimant in the litigation funding
agreement. This includes any information rights, access to documents
produced during the litigation and any rights to veto the actions a liti-
gant is usually free to take.

Consequently, the litigant is usually obliged not to conclude or
revoke any settlements, to waive any claims, to initiate any additional
proceedings in connection with the funded claim, to adopt any legal
remedies, to expand the claim or to otherwise dispose of the funded
claim without written permission of the funder. Since there are no
specific legislative or regulatory provisions applicable to third-party
litigation funding, funders only need to take an active role as provided
by the litigation funding agreement. In addition, the involvement of a
litigation funder is not disclosed to the court nor the counterparty in the
majority of the cases, which also considerably limits the funder’s role
within the litigation.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

The lawyer’s professional conduct prohibits fee agreements in which
the lawyer’s fee entirely depends on the outcome of the case. Hence,
pure contingency fee arrangements are not permitted. Only if the lawyer
charges a basic fee (flat or on an hourly basis) for the services that
cover the actual costs of the lawyer’s practice are they allowed to agree
on a premium in the event of a successful outcome.

Consequently, the litigation funding agreement must not directly
or indirectly provide a model resulting in a conditional or contingency
fee for the lawyer. However, it is permissible to add a success fee for
the lawyer within the limits described above in the funding agreement.

Other funding options

12 | What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent
and limits of coverage depend upon the specific policy, as this kind
of insurance usually only covers the costs of certain types of claims.
Furthermore, the insurance policy usually has to be arranged before a
person or entity becomes aware of the need to litigate. After-the-event
litigation insurance is not common in Austria.

A claimant may also seek legal aid if they lack the financial
resources to fund the proceedings and if the case does not seem devoid
of any chance of success. However, both conditions are handled rather
strictly by Austrian courts. Legal aid can comprise an exemption from
the obligation to pay an advance on costs, to pay court costs and to
provide security. It can also comprise the appointment of a lawyer by the
court if this is necessary to protect the rights of the party. Since 2013,
legal aid has also been available to companies with financial constraints
if the claim does not seem devoid of any chance of success.

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?

In general, a commercial litigation before a court of first instance in
Austria takes between 12 and 18 months. If the case is rather complex
or if the court accepts an extended range of evidence to be heard, the
litigation process may take considerably longer. In domestic arbitration,
the duration is normally between one and three years.

Time frame for appeals

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

There is a considerable difference in the respective practice of the
various states of Austria. As a general rule, approximately half of the
judgments are appealed before the second instance of the respective
state. On average, the second instance takes between 12 and 18 months.
Only a small proportion of these judgments are appealed before the
Austrian Supreme Court. There, an average appeal takes approxi-
ately one year.
**Enforcement**

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Austrian judgments is governed by the Code of Civil Procedure and by the provisions of the Austrian Enforcement Regulation. A judgment rendered by an Austrian court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or if it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Austria is not seen as particularly burdensome, expensive, or unpredictable.

**COLLECTIVE ACTIONS**

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

Apart from the joinder of parties, Austrian law does not provide for specific collective redress. However, a class action mechanism has nevertheless been part of Austria’s civil procedural law practice for more than 10 years. This particular instrument, often referred to as ‘class action Austria-style’ is based on the combination of several elements of the Code of Civil Procedure. In principle, a claim can be asserted by the original owner of a claim and a third party to whom the claim has been assigned. Furthermore, if a plaintiff asserts several claims against the same defendant, they can bundle all claims into a single set of proceedings. Finally, if the assignee and class action claimant happen to be a specific association (eg, a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court, regardless of their individual claim size. The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in the 2013 Austrian Supreme Court decision. Subsequently, third-party funders have shown increasing interest in funding Austrian-style class actions, which has gained public interest. Cases include those against VW, a trucks cartel, GIS and AWD.

**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?

As a general principle, court fees as well as all other expenses arising from the litigation, including the opposing lawyer’s fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionately between the parties. In the event of a settlement, the costs are incurred by the parties according to the terms and conditions of the settlement agreement.

The Austrian courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before the state courts and the Austrian Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party, although section 41 of the Code of Civil Procedure (CCP) would provide the basis for a rather broad spectrum of costs compensation in favour of the successful party.

**Liability for costs**

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

The CCP does not provide a basis for the court to order or find liable a third-party funder to pay adverse costs. In practice in Austria, a funder’s contractual obligation towards the claimant to cover the costs of the litigation does not apply to the opposing party.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns their claim against the funder to cover the adverse costs imposed on them by the court to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the enforcement order that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

**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?)

There are two different types of security for costs that Austrian courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs. In addition, the claimant must advance the costs for taking the evidence they requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party’s costs if the claimant has no residence or registered office in Austria. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Austria has entered into a treaty that excludes such security.

The CCP does not provide a basis to request such security from the funder of a claim and there have been no cases reported where Austrian courts considered such a request.

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

In most of the cases funded so far by third-party funders in Austria, the funder’s engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts determined advances and securities solely based on the claimant’s status and did not take the existence of the third-party funder into account.
Insurance

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

ATE litigation insurance is not common in Austria. Although no legal or regulatory restrictions limit the respective product, there is currently no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases in Austria.

By contrast, legal costs insurance is commonly used in Austria. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually it is limited to certain types of claims.

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?

The Code of Civil Procedure (CCP) does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that they are supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

Whereas some authors have argued that a litigant might have such an obligation in domestic arbitration under specific circumstances, there have been no cases reported where a litigant had to disclose the litigation funding agreement in an Austria-based arbitration.

Privileged communications

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

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders are not protected by legal privilege. Confidentiality can be provided, however, by way of non-disclosure agreements between a funder, lawyer and client.

However, there have been no cases reported where such communications had to be disclosed by order of an Austrian court.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No disputes between litigants and funders have been reported in Austria so far.

Other issues

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

Yes.

UPDATE AND TRENDS

Current developments

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

The Austrian Supreme Court declared permissible the sale of insolvency avoidance claims, and thus overruled the view of scholars in Austria, which has prevailed for decades (OGH 17 June 2019, 17 Ob 6/19k). This opens up new possibilities for third-party funders to finance avoidance claims in insolvency proceedings, and will give insolvency administrators a valid new option to pursue claims, which was previously not possible due to a lack of assets. The creditors in insolvency proceedings will ultimately benefit from this development. The Austrian Supreme Court also determined that the doctrine of pactum de quota litis (creditor promises a portion of a sum to a party recovering that amount) does not apply to third-party funding as – in contrast to legal counsel – funders do not provide legal advice to a party (OGH, 23 February 2021, 4 Ob 180/20d). The court noted that funders must not exert influence on the proceedings and need to remain independent from the funded party.
Belgium

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REGULATION

Overview

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

So far, the admissibility of third-party litigation funding has never been reviewed by the Belgian courts, which creates an uncertainty detrimental to its development. However, it is commonly accepted by legal scholars and practitioners that third-party litigation funding is valid and permitted under Belgian law.

Nevertheless, the use of third-party litigation funding has remained relatively limited, which might be because its admissibility has not yet been judicially confirmed. Moreover, the costs of Belgian judiciary proceedings are relatively low compared to the legal costs incurred in other jurisdictions. Similarly, the proceeds resulting from litigation or arbitration proceedings under Belgian law tend to be lower than in other – particularly common law – jurisdictions, since concepts such as punitive damages are not available under Belgian law. Consequently, third-party litigation funders have shown a relatively modest interest in the Belgian market so far, which prevented litigants from making vast use of third-party litigation funding.

Restrictions on funding fees

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

There are no specific rules regarding the acceptable amount of the funder’s return. As a general rule, the funder’s profit should not exceed the litigant’s share of the proceeds.

Typically, the funder’s share is calculated based on a multiple of the funds contributed, a percentage of the proceeds or a combination thereof. In practice, the funder’s success fee commonly ranges between 20 and 50 per cent of the net proceeds (with caps in the event of high amounts in dispute to make sure the funder’s success fee remains reasonable).

Specific rules for litigation funding

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

The Belgian legislator has not yet enacted a specific law designed to regulate the practice of third-party litigation funding. However, such legislative intervention could prove useful for the provision of legal certainty and the creation of a legal framework relating to third-party litigation funding. Moreover, it would be in line with the declared intention of the Belgian government to undertake substantial reforms of the Belgian judicial system to enhance access to justice.

In the context of international arbitration, the recently revised ICC Rules of Arbitration foresee the obligation of the parties to disclose the intervention of third-party funders. A similar duty of disclosure of a non-party’s direct economic interest in the outcome of a dispute is suggested by the Guidelines of the International Bar Association on Conflicts of Interest in International Arbitration.

Legal advice

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

Lawyers are subject to rules contained in the Code of Ethics (Lawyer’s Code of Ethics), which determines the information that is deemed confidential, and hence may not be disclosed to any third party, including the funder. The rule of confidentiality applies, inter alia, to the correspondence exchanged between the lawyer and the client and any written material drafted for the client. These documents benefit from a legal privilege and may not be disclosed by the lawyer to the funder without prior consent of the client. The funder’s information rights regarding privileged information must, therefore, be precisely defined in the litigation funding agreement. In practice, such clauses are typically included in the litigation funding agreement and ensure that the disclosure of information to the funder is in accordance with Belgian Law and the Lawyers’ Code of Ethics.

According to the 17 March 2008 Regulation of the French and German-speaking Belgian Bar governing the relation between lawyers and third parties (Regulation of the Belgian Bar), professional secrecy does not prevent the lawyer from sharing with the third-party funder the client’s legal position and objectives, the strategy they intend to follow, as well as the means envisaged to reach their objectives, provided that the exchange of such information has been previously agreed by the lawyer and his or her client.

Regulators

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

Since third-party litigation funding is not regulated under Belgian law, it generally escapes any type of supervision by public bodies. However, depending on the structuring of the funding agreement, it cannot be excluded that a specific funding model may be considered as a regulated service falling under the supervision of the Belgian financial regulator.

Typically, third-party litigation funding differentiates itself from most of the financial services regulated under Belgian law:

• It is not a loan or a credit agreement because the funded party has no mandatory duty to repay the provided funds to the funder but only an obligation to share potential proceeds with the latter.

Similarly, third-party funders cannot be seen as credit institutions since they do not publicly collect refundable deposits, nor make available credit facilities for their own account.
• It is not a legal protection insurance since in a litigation funding agreement – unlike under an insurance policy – no premium for the coverage of a future litigation risk is paid.

Funds providing litigation funding may, in some cases, fall within the scope of the EU Alternative Investment Funds Managers Directive (AIFMD) implemented under Belgian law by the AFIM Act. The AIFM Directive defines the alternative investment funds as any collective investment that raises capital from a number of investors to invest it in accordance with a defined investment policy for the ultimate benefit of the investors.

FUNDERS’ RIGHTS

1. Choice of counsel

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

As a matter of principle, the litigant’s lawyer is independent from the third-party funder and must be able to act freely from any instructions from the latter. However, the third-party funder will only invest funds in a process that is conducted by a competent and duly specialised lawyer. The third-party funder will thus carefully examine the qualifications of the envisaged lawyer and the reasonableness of the proposed fees and only provide funding if the litigant’s choice of counsel can be approved.

2. Participation in proceedings

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

The third-party litigation funder’s role and the funder’s rights of information and participation are typically determined in the litigation funding agreement. Accordingly, a litigant might invite the third-party funder to participate in a court or an arbitral tribunal’s hearing or settlement discussions on the basis of a respective clause in the litigation funding agreement, provided that this is in line with the envisaged litigation strategy and the counterparty does not object to it. Even if there is no respective clause in the funding agreement and the counterparty has not been informed about the funder’s presence, a third-party funder may attend a court hearing since state court hearings are open to the public in Belgium.

3. Veto of settlements

8 Do funders have veto rights in respect of settlements?

It is common practice to include a funder’s veto right relating to a potential settlement in the funding agreement. This is to ensure that the third-party funder has the possibility to oppose to a settlement which is considered unreasonable on the basis of the funder’s evaluation of the prospects of the case. That said, in practice, the interests of the funded party and the third-party funder are almost always aligned.

4. Termination of funding

9 In what circumstances may a funder terminate funding?

Third-party funders and litigants are free to agree on various grounds that give reason to terminate the funding agreement. In practice, funders can typically terminate the funding agreement for the following reasons:

• a change of circumstances having a material impact on the chances of success of the funded case;
• a material breach of the litigant’s contractual obligations;
• the insolvency of the litigant (it should be noted in this context that the trustee in bankruptcy decides whether the funded procedure may be continued or not); and
• the insolvency or a major change in the creditworthiness of the opposing party.

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?

Any rights and actions the third-party litigation funder wishes to exercise during the course of the funded proceedings must be determined in the funding agreement. This includes any information or participation rights, access to documents and any right to reject actions a litigant is usually free to take. Outside the scope of the funding agreement, there is no requirement for a third-party funder to take any active role in the funded proceedings.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

5. Conditional fees

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

Belgian law prohibits contingency agreements under which the determination of the lawyers’ fee depends exclusively on the outcome of the case to be litigated (see article 446-ter of the Belgian Judicial Code (BJC)). Conversely, lawyers can be partly remunerated by a success fee defined as a percentage of the amount recovered by their clients. As a consequence, Belgian lawyers may enter into contingency fee agreements provided that their success fee is limited to a reasonable amount and that the fee arrangement agreed upon with their clients provides for a minimal remuneration independent of the outcome of the case.

6. Other funding options

12 What other funding options are available to litigants?

The following options are available:

• Legal assistance insurance: pursuant to the Belgian Insurance Act (Insurance Act), the insurer has to bear the costs incurred in connection with the court proceedings of the insurance holder (legal fees and expenses, bailiff’s fees, procedural indemnities, costs of technical advice, expert’s fees, etc) but has no interest in the financial outcome of the litigation.
• Loan or credit facility agreement: the debtor must repay to the creditor the funds placed at its disposal.
• Assignment of claims: the original creditor assigns the claim for less than its original worth to an assignee in exchange for an immediate payment from the third-party debt collector who becomes the holder of the claim and a party to the pending or forthcoming litigation proceedings.
• Belgian state legal aid: under strict conditions a litigant may obtain legal aid from the state. Legal aid exempts the litigant in whole or in part from having to contribute to the costs of the proceedings.
• After-the-event (ATE) insurance: since third-party litigation funding agreements do not always cover the procedural and legal costs the litigant may be ordered to pay to the opposing party, the funded party frequently enters into an ATE insurance contract to have these costs covered.
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?

Depending on the complexity of the case and the territorial jurisdiction, it will take approximately one year following the submission of the claim for a decision to be rendered by a first instance court in a commercial dispute.

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

There are no official statistics on the number of judgments that are appealed in Belgium. Appeal proceedings are however very frequent. Such proceedings may last between one and three years depending on the complexity and importance of the case and the court that exercises jurisdiction.

As regards arbitral awards, the parties – by an express statement in the arbitration agreement or by a subsequent agreement – may exclude any application to set aside the award if none of them is either a natural person having Belgian nationality or its domicile or habitual residence in Belgium, or a legal person having its registered office, principal place of business or branch office in Belgium. In addition, awards rendered by an arbitral tribunal having its seat in Belgium may only be challenged for limited grounds exhaustively mentioned in the Belgian Judicial Code (BJC). Challenges to an arbitral award generally last between one to two years.

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

There is no official statistics on enforcement proceedings. As a rule, judgments are immediately enforceable even if appeal proceedings are pending or may still be brought. In the absence of voluntary payment from the debtor, the intervention of a bailiff will be necessary to proceed to enforcement measures, such as the attachment and the sale of the debtor’s property or other assets, garnishment of the debtor’s receivables and bank accounts, etc.

As arbitration proceedings are based on the mutual consent of the parties, arbitral awards require less often enforcement proceedings, although such proceedings are not unusual. Arbitral awards, whether foreign or domestic, may only be enforced after the competent court of first instance has granted enforcement following an ex parte application of the award creditor. The grounds for refusal of recognition and enforcement of arbitral awards are exhaustively listed in article 1721 of the BJC.

COLLECTIVE ACTIONS

Funding of collective actions
16  |  Are class actions or group actions permitted? May they be funded by third parties?

On 28 March 2014, a Belgian Act on class actions was introduced in the Belgian Code of Economic Law (CEL). The relevant provisions of the Act came into force on 1 September 2014. However, the scope of actions for collective redress has remained limited. These proceedings may only be brought before the Brussels Commercial Court by a group of consumers or SMEs represented by non-profit organisations or public bodies against a company, and on the ground of an alleged violation of Belgian and European rules expressly provided for in the CEL.

Third-party funding of class actions is not prohibited under Belgian law. Yet, such funding should be disclosed at an early stage of the proceedings so that the judge may rule on its adequacy. Despite its admissibility, third-party litigation funding seems to be of limited interest in the context of class actions, since the CEL provides that a court-appointed administrator must pay any compensation obtained directly to the members of the group under the court’s supervision without any possibility for the third-party funder to receive a share of this compensation. This implies that a third-party funder could, in principle, not take a share of the proceeds resulting from the collective action. However, in practice, there might be possibilities to structure a funding agreement in such a way as to overcome this obstacle.

In November 2020, the EU issued a new Directive on representative actions for the protection of the collective interests of consumers. This Directive, which must be transposed by December 2022, also provides the possibility for member states to foresee third-party funding of class actions provided that a number of safeguards are put into place. At first glance, the Belgian Act on class actions seems to meet most of the requirements set forth in the Directive. However, as the Directive leaves considerable leeway to the member states, it remains to be seen how the Belgian legislator will transpose the Directive into national law.

Besides class actions, Belgian law also allows for other instruments of collective redress, in particular actions where (1) numerous claimants act together and unite their claims in one single procedure, or (2) instances in which a third-party purchases various claims and initiates proceedings on behalf of the former claimants. In such proceedings, claimants and third-party funders may enter into litigation funding agreements and share the proceeds of the procedure.

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?

The costs of the proceedings that courts may order the losing party to pay to the successful party are exhaustively enumerated in article 1018 of the Belgian Judicial Code (BJC). The principal costs of the proceedings are the following:

- costs of service, filing and registration with the court registry; These costs are fixed and depend on the nature of the writ filed with the court and on the amount in dispute;
- costs of judicial expertise and other measures of investigation;
- a registration fee of 3 per cent on behalf of the tax authorities if the losing party is ordered to pay an amount exceeding €12,500, and
- a procedural indemnity that is a flat-rate contribution in the lawyers’ fees. Its amount is set by the law and adjusted from time to time to account for inflation. Since 1 June 2021, the basic indemnity ranges from €195 to €19,500 for claims that can be appraised in monetary terms. If the claim cannot be appraised in monetary terms, the basic amount of the procedural indemnity is €1,560. These amounts may be decreased (to a minimum of €97.50) or increased (to a maximum of €39,000) by the court under specific circumstances, depending on different criteria, such as the financial capacity of the unsuccessful party, the complexity of the case, existent contractual compensation for the successful party, blatant unreasonable submissions (see article 1022, §3 BJC).

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As a consequence, courts may not order the unsuccessful party to pay the litigation funding costs of the successful party. Nevertheless, the intervention of a third-party funder could indirectly be taken into account by courts when fixing the procedural indemnity on the basis of the above-mentioned criteria.

With regard to arbitration proceedings, article 1717, §6 BJC provides that the final award must fix the costs of the arbitration and decide which party shall bear what proportion of said costs. According to the above-mentioned provision, these costs include arbitration costs as well as party costs, defined as 'the fees and expenses of the parties’ counsel and representatives’ and ‘all other expenses arising from the arbitral proceedings’ (unless otherwise agreed by the parties). It is generally considered that such costs must be reasonable. We are not aware of any arbitration proceedings having their seat in Belgium in which the unsuccessful party was ordered to pay the funding costs of the successful party. As article 1717, §6 BJC is drafted in general terms, one could, however, argue that funding costs should be taken into consideration in the allocation of costs by the arbitral tribunal.

**Liability for costs**

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

A third-party funder does not become a party to the proceedings as a consequence of the funding agreement. Accordingly, a court or an arbitral tribunal may not directly order a funder to pay for adverse costs. However, provided that the litigation funding agreement contains an obligation of the third-party funder to cover the adverse cost risk, which is common practice for Continental European funders, the unsuccessful funded litigant has an enforceable claim against the funder for the payment of adverse costs.

**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?)

Courts may only order a foreign claimant to provide security for the costs and damages potentially arising from the proceedings, if the security is requested by a Belgian defendant (see article 851 of the BJC). This cautio judicatum solvi is aimed at protecting Belgian litigants against pecuniary losses that may be caused to them by foreign claimants who do not offer enough securities in Belgium to ensure the payment of costs and damages that may result from the proceedings they have introduced. However, the Belgian Constitutional Court has qualified the granting of such security as discriminatory because it may only be requested from foreign claimants and the relevant provisions of the BJC must be modified on this point.

The relevant provisions of the BJC relating to arbitration proceedings do not address the issue of security for costs. It is, however, generally assumed that security for costs may be ordered by arbitral tribunals as part of interlocutory measures that arbitrators may adopt on the basis of article 1717, §1 BJC.

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

Prior to the above-mentioned decision of the Belgian Constitutional Court, security for costs could only be ordered by Belgian courts if requested by a Belgian defendant against a foreign claimant. The existence of a third-party funding agreement was therefore not a criterion for the granting of security for costs under the relevant provision of the BJC.

In arbitration proceedings, it is generally considered that the existence of a third-party funding agreement may not in itself justify an order for security for costs by the arbitral tribunal.

**Insurance**

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

After-the-event insurance is admitted and frequently used. It is usually offered by foreign insurance companies. However, if the funder has an exclusive solution for the coverage of adverse costs by way of ATE insurance on offer, ATE insurance can also be included in the litigation funding agreement.

Additionally, insurance for legal costs linked to potential liabilities is well instituted and very common in Belgium. Such insurance is often part of other insurances (e.g., automobile liability insurance, household insurance, etc).
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?

In the absence of any act on third-party litigation funding, no legal provision imposes an obligation on the funded party to disclose the existence of a funding agreement. However, it is considered that in specific circumstances the principle of procedural loyalty justifies that the funded party discloses the existence of a funding agreement to the opposing party and to the court. Such disclosure would notably be necessary to ensure that there is no conflict of interest involving the third-party funder. Moreover, the disclosure of a funding agreement may be ordered by a court if the conditions required for the production of documents under article 877 Belgian Judicial Code (BJC) are met, namely the existence of serious, precise and concordant presumptions that a party or a third-party is in possession of a document containing evidence of a relevant fact. This scenario, however, seems rather unlikely in relation to a funding agreement.

As far as arbitration proceedings are concerned, it is considered that the principle of fairness of the debates enshrined in article 1699 BJC, imposes a duty on the funded party to disclose the existence of a third-party funder, should the party be aware of potential conflicts of interest between the funder and one or several arbitrators. Potential conflicts of interest occur more frequently in arbitration proceedings since arbitrators may have worked before with third-party funders when acting as a lawyer.

Privileged communications

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

Communications between litigants and their lawyers are considered privileged. Consequently, they will not be allowed as evidence by the courts or arbitrators and disclosing such information may constitute an offence that could be criminally prosecuted.

The above does not apply to communications between litigants and their funders. As a consequence, the confidentiality of communications and documents exchanged between litigants and third-party funders must be provided for in the funding agreement.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

To our knowledge, there are no reported disputes between litigants and third-party funders in Belgium.

Other issues

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

Third-party funding is still relatively rarely used in Belgium and there is no established rule or case law regarding this topic. Therefore, many questions remain unanswered. It is thus crucial that a clear and transparent contract be drawn up between the funded party and the third-party funder to cover all the relevant aspects of the funding relationship, including the interactions between the third-party funder and the litigant’s lawyer.

UPDATE AND TRENDS

Current developments

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

With the increase of collective and follow-on actions and a growing interest in the enforcement of arbitral awards against sovereign states in Belgium, it is likely that third-party funding will develop over the next few years with the intervention of Continental European and British funders.
Litigation funding is permitted across Canada, and the courts have demonstrated an openness to it, particularly where funding is seen to promote access to justice. This includes the Supreme Court of Canada, which recently considered a litigation funding agreement in 9354-9186 Québec Inc. v Callidus Capital Corp.

For over a decade, litigation funding has been used to advance class actions, and more recently parties are making use of funding in commercial litigation and arbitration matters, including breach of contract, intellectual property and other business disputes. In the context of class actions and insolvency matters, court approval is generally required, but not where funding is employed for business disputes, where it has been considered a private commercial financial arrangement.

With respect to class actions, judicial approval of funding arrangements has become relatively straightforward, and the practice is developing whereby funding is approved on the written record, without opposition.

There is increasing variety in the types of agreement approved. In the early years of class action funding, the funder provided an adverse costs indemnity and a minimal amount of disbursement funding (see, eg, Dugal v Manulife Financial Corporation and Trustees of the Labourers’ Pension Fund of Central and Eastern Canada v Sina-Forest Corporation). More recently, courts have approved far more significant funding amounts, of the magnitude required to advance complex and costly matters (see, eg, David v Loblaw and Difederico v Amazon.com).

Approved class action funding arrangements have also expanded to include legal fees (in addition to disbursements and costs protection). In the 2019 case, JB & M Walker Ltd v TDL Group, the funder paid all legal fees and disbursements as the case progressed. In 2020, in Drynan v Bausch Health Companies Inc., the funder paid 80 per cent of the legal fees, as well as covering disbursements and the costs indemnity. In these cases, the court was principally concerned with the fairness of the total fee to be paid by the class – that is, the joint fee between the funder and the lawyers, at the conclusion of the case. In Drynan, the court initially expressed concern about the arrangement, but approved it once there was an aggregate cap of 33.3 per cent of the proceeds.

Restrictions on funding fees

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

As with other forms of investment finance, there are no legislative limits on the fees for litigation funding. Some Canadian courts have used the contingency fee regulations as a guideline for suitable fees where the courts have been required to consider a funding agreement. For example, in Schenk v Valeant Pharmaceuticals, the Ontario Superior Court held that a funder could charge up to 50 per cent of the proceeds of the claim, which is consistent with the contingency fee regulations in Ontario.

Recourse funding with an interest component must avoid running afoul of provisions in the Criminal Code of Canada regarding criminal rates of interest, but most dispute finance is non-recourse and therefore not captured by lending regulations.

Specific rules for litigation funding

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

For Ontario class actions, a third-party funding agreement is subject to the approval of the court, obtained on a motion of the representative plaintiff made as soon as practicable after the agreement is entered into, with notice to the defendant. In order to be approved, the court must be satisfied that the agreement is fair and reasonable, will not impair the solicitor-client relationships, and that the funder is able to satisfy an adverse costs award. The process and criteria are set out in section 33.1 of the Class Proceedings Act.

There are no other specific legislative or regulatory provisions governing litigation funding, and this legislation reflects general principles from case law that would have relevance in other parts of Canada.

Legal advice

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

No specific rule covers lawyers advising their clients about third-party funding. However, lawyers owe a duty of candour to their clients on matters relevant to the retainer, which would include potential fee arrangements. In the class action context and as part of section 33.1 of the Ontario Class Proceedings Act, courts consider that the representative plaintiff’s receiving independent legal advice with respect to the funding agreement forms part of the basic procedural and evidentiary requirement that should be met.

Regulators

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

No public body has expressed any particular interest in or oversight of litigation funding. However, to the degree that a litigation funder is also providing insurance to a client, insurance regulators such as Ontario’s Financial Services Regulatory Authority or the Financial Institutions Commission of British Columbia may have oversight of the arrangement.
FUNDERS’ RIGHTS

Choice of counsel
6 | May third-party funders insist on their choice of counsel?
No. Choice of counsel is always the client’s exclusive decision.

Participation in proceedings
7 | May funders attend or participate in hearings and settlement proceedings?
Anyone may attend a public hearing. With respect to confidential hearings (which are rare in Canada) or settlement proceedings, a funder who has agreed to abide by confidentiality obligations may attend with the consent of the parties. The standing of a funder to participate in hearings will generally be circumscribed by the matters at issue in the hearing. Where the subject pertains to details in the funded litigation, the funder will not in the ordinary course have standing. Where the subject pertains more directly to interests of the funder, as, for example, in a motion for the approval of a funding agreement, the funder may seek to participate in hearings.

Veto of settlements
8 | Do funders have veto rights in respect of settlements?
No. Settlement is always the client’s exclusive decision. However, funders typically have a right to be informed of settlement negotiations and may offer their input on the merits of the proposed settlement. There are also often contractual safeguards to protect the funder against a client making a commercially unreasonable decision. These may include a requirement that the funder and the client engage in good-faith negotiations on settlement offers or a dispute resolution clause.

Termination of funding
9 | In what circumstances may a funder terminate funding?
Termination rights may be negotiated in each funding agreement. The courts have approved agreements for funding of class actions where the funder may terminate its funding with court approval where there has been a breach of the agreement, the lawyers withdraw as counsel or the funder reasonably considers that the proceedings are no longer commercially viable.

With respect to commercial litigation, in Schenk v Valeant the Ontario Superior Court found that a funder’s right to terminate an agreement where it reasonably ceased to be satisfied about the merits or commercial viability of the case did not restrict the plaintiff’s ability to remain in control of the litigation. The Quebec Superior Court reached the same conclusion in Arrangement relatif à 9354-9186 Québec Inc. (Bluberi Gaming Technologies Inc.) and Ernst & Young Inc., 2018 QCCS 1040 (aff’d by 9354-9186 Québec Inc. v Callidus Capital Corp., 2020 SCC 10).

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?
Funders are never required to take an active role in the litigation process, but where a funder has legal expertise, it may offer strategic input, as requested by the client.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees
11 | May litigation lawyers enter into conditional or contingency fee agreements?
Ligation lawyers may enter into conditional or contingency fee agreements, except in criminal or family law matters (some provinces, including British Columbia, allow contingency fee agreements in family law matters with court approval). In July 2021, amendments to the Solicitors Act came into effect in Ontario. They include a requirement to use a standard form contingency fee agreement, and expand the application of contingency fee rules to paralegals.

Other funding options
12 | What other funding options are available to litigants?
Litigants can negotiate alternative fee arrangements with their counsel. The provinces of Ontario and Quebec have limited public funds available to cover limited disbursements and legal fees in class actions which meet prescribed criteria, including that the matter be in the public interest.

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?
Statistics suggest it typically takes two to three years for a commercial claim to reach a decision at first instance.

Time frame for appeals
14 | What proportion of first-instance judgments are appealed? How long do appeals usually take?
There are no recent pan-Canadian statistics on appeal rates. In some cases, leave to appeal is required, but others may be appealed as of right. The appeal process typically takes roughly one year where filing an appeal as of right, or after leave if granted.

Enforcement
15 | What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?
There is no public data on the proportion of judgments requiring contentious enforcement proceedings when a judgment debtor is either unable or unwilling to satisfy a judgment. Enforcement can be expensive and time consuming, and can require coordination in multiple jurisdictions. Some of the tools available to assist with enforcement include writ of seizure and sale, garnishment and the appointment of a receiver.

COLLECTIVE ACTIONS

Funding of collective actions
16 | Are class actions or group actions permitted? May they be funded by third parties?
Class actions are well established as a means of advancing a claim where there is a common issue between many plaintiffs. They are frequently used in Canada including in relation to securities, consumer protection, human rights violations, employment, franchise and product liability.
A law firm may choose to pay the costs of the litigation and defer its fees, in exchange for a contingency fee upon success. Class actions can also be financed by funders, and much of the early case law regarding litigation funding developed in this context. When litigation funding was first used in class actions, the law firms often deferred their fees and paid many of the out-of-pocket expenses, and the funder provided only an indemnity for any adverse costs award. Since that time, practice and jurisprudence have evolved and it is now common for the funder to pay significant amounts to fund case disbursements, as well as pay for all or a portion of the legal fees, in addition to providing costs indemnity.

**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?

In most provinces, the unsuccessful party has to pay a portion of the legal fees and disbursements incurred by the successful party. In Quebec, these costs are quite limited, but in the common law provinces they can be significant.

Some provinces’ class proceedings regimes – British Columbia, Newfoundland and Manitoba – have a ‘no costs’ rule, where no costs are awarded to either party, in relation to the certification, the common issues trial or appeals.

To date, a court has not ordered an unsuccessful party to pay the litigation funding costs of the successful party.

**Liability for costs**

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

In Ontario, the court has inherent jurisdiction to award costs against a non-party to the litigation. However, the courts have cautioned that the right must be exercised ‘sparingly and with caution’, where the non-party commits an abuse of process. Funding litigation – as long as the claim was not vexatious or spurious – does not meet that criterion (*Davies v The Corporation of the Municipality of Clarington*).

Where a funder has provided an indemnity to a representative plaintiff under an approved funding agreement, the defendants can recover directly from the 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?)

Yes, courts may exercise their discretion to require a claimant provide security for costs. In Ontario, a defendant may apply for security for costs if:

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has another proceeding for the same relief pending in Ontario or elsewhere;
- the defendant has an order against the plaintiff for costs in the same or another proceeding that remains unpaid in whole or in part;
- the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff or applicant has insufficient assets to pay the costs of the defendant;
- there is good reason to believe that the action is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant; or
- a statute entitles the defendant to security for costs.

The order is discretionary, and may not be awarded if the plaintiff can show that it has sufficient assets in Ontario, or that it is impecunious and that an injustice would result if it were not allowed to proceed with its claim.

In Ontario, the Class Proceedings Act provides that the defendant is entitled to obtain security for costs from the funder, subject to the terms of the LFA, if: (1) the funder is ordinarily resident outside of Ontario, (2) the defendant has an order against the funder that remains unpaid in whole or in part, and (3) there is good reason to believe that the funder has insufficient assets in Ontario to pay the costs.

The amount and form of security and the time for paying into court or otherwise giving the required security is determined by the court. In the *David v Loblaw* class action, the court permitted the funder to post security for costs by way of an undertaking given directly to the defendants.

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

To date, there has not been any indication that the existence of a funder would influence the court’s decision on security for costs.

**Insurance**

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

After-the-event insurance is permitted, and its use is expanding. Other products, such as before-the-event insurance and legal expense insurance are also used by some clients. The market for these products is not as developed as in some other jurisdictions, such as the UK.

**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?

In the class action and insolvency contexts, where the funding will affect the interests of parties who are not signatories to the funding agreement, the agreement must be disclosed to the court. In some provinces (eg, Ontario, British Columbia), the motion for approval must be made on notice to the other party, and in other provinces (eg, Alberta, Nova Scotia) the agreement may be approved ex parte.

In private commercial litigation, there is no requirement to disclose to the court or to the opposing party. In Seedlings *Pfizer*, the Federal Court explained that ‘the manner in which [a plaintiff] chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant’.

In cases where funding is disclosed and approved, courts have consistently protected the commercial details and allowed the defendants to view only a redacted version of the funding agreement, as full disclosure would compromise the plaintiffs’ interests.

**Privileged communications**

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

Longstanding legal principles in Canada protect communications between litigants/their counsel and funders. First, litigation privilege attaches to all types of communication exchanged between a client/its counsel and a third party when the communication is made for the
dominant purpose of litigation. Communications with a funder – which are by definition shared for the dominant purpose of litigation – are captured by this privilege.

Second, solicitor-client privilege protects communications between a lawyer/client and third parties where the communications are ‘essential to the maintenance and operation of the solicitor-client relationship’. Documents, discussions and analysis with a funder would directly support or enable the solicitor-client relationship, and should therefore be covered by this privilege as well.

Third, sharing privileged communications with a funder would not be considered a waiver of any privilege, as it would fall within the ‘common interest’ defence against waiver. That is, where the client and the funder have a common interest in the litigation, or in a proposed commercial transaction (sometimes called ‘deal privilege’), the privilege is not waived.

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

To date, there have not been any reported disputes between litigants and their funders.

**Other issues**

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

There are different considerations for funding related to the commercial/insolvency space, in contrast to consumer funding or litigation lending, which focuses primarily on personal injury claims. An informed lawyer will be alive to the different issues at play.

**UPDATE AND TRENDS**

**Current developments**

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

While most reported case law on litigation funding pertains to the funding of class actions, there is considerable use of funding in the commercial and arbitral space, which is not the subject of court approval and therefore not generally public. Nevertheless, anecdotal reports and funders’ experience confirm that use of litigation funding by commercial parties has been enjoying increased popularity, both among claimants with limited resources and those that are well resourced.
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 Arkiv 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 \textit{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 £1.9 billion, up 46 per cent from 2017/18.

**Restrictions on funding fees**

\textbf{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**

\textbf{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 v 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**

\textbf{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**

\textbf{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 \textit{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**

\textbf{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 litigator’s choice of counsel. If a funder does not think that the litigator’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 Winsor 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 Wojakowski 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 ‘[u]justice delayed is justice denied’ (*Bank St Petersburg PJSC and Another v Arkhangesky 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 a return on its investment 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, 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 this 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] EWHC 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] EWCH 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 insurance 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 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 that the funder had 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 confirmed 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 Chapellegate 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

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

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.
The legality of third-party litigation funding is well established in France. Nevertheless, the French market for third-party litigation funding is still comparatively small. Among other factors, this may be attributed to the fact that French law traditionally did not recognise class actions or punitive damages and that civil and commercial courts generally grant only limited cost awards for legal fees.

However, recent practice shows that third-party litigation funding has increased in specific market segments, such as antitrust damages litigation or small mass consumer claims.

In addition, the resort to third-party funding has grown significantly in the field of international arbitration over the past 10 years. Professional organisations support this evolution. The Paris Bar Council has explicitly endorsed the use of third-party funding, noting that third-party funding 'is favourable to the interest of litigants and attorneys of the Paris Bar, particularly in international arbitration' (Paris Bar Council, Resolution dated 21 February 2017, the Paris Bar Council Resolution or the Resolution).

Restrictions on funding fees

There are no explicit limits on the fees and interest funders can charge. The determination of fees and interest is therefore subject to the parties' freedom of contract. That said, limited case law suggests that if seised of a dispute over a funder’s remuneration, French courts may reduce the contractually agreed funder’s fee if the fee is considered disproportionate or excessive in comparison to the services rendered by the funder. The French Court of Cassation has previously held that the agreement to pay a physical person funder 30 per cent of all net amounts recovered in an inheritance dispute could, in principle, be subject to judicial reduction if found to be disproportionate (Cass. 1ere civ., 23 November 2011, No. 10-16.770). In that case, the Court of Cassation quashed a decision by the Versailles Court of Appeal, which had refused to reduce the contractually agreed remuneration of 30 per cent. The Court of Cassation remanded the matter to the Paris Court of Appeal, which ultimately reduced the remuneration to 15 per cent, taking into account the relatively short duration of the proceedings and the reduced scope of the service rendered by the funder (Paris Court of Appeal, Pole 3, 1st chamber, 17 October 2012, No. 11/22443).

Specific rules for litigation funding

There are no specific legislative or regulatory provisions applicable to third-party funding. Third-party funding agreements are therefore governed by the general law of obligations. That said, French courts are not bound by the qualification given by the parties to a third-party funding agreement. They have the power to requalify a contractual relationship whenever the actual relationship between the parties is found to resemble that of a contract governed by a specific legal regime, such as an insurance contract, a banking contract or a partnership agreement. In the case of a requalification, the funding agreement would be subject to the relevant specific legal regime and the applicable regulatory provisions governing such contracts.

In addition, the specific rules of professional conduct that govern the attorney-client relationship will impact (at least indirectly) the third-party funding relationship.

Lastly, there is quite a substantial amount of soft law and legal doctrine pertaining to third-party litigation funding in France (see, eg, Club des Juristes, Commission financement de procès par les tiers, Rapport sur le financement du procès par des tiers, June 2014; Barreau de Paris, Le financement de l’arbitrage par les tiers (third-party funding), 21 February 2017 (the Paris Bar Association Report)).

Legal advice

Attorneys advising clients in relation to third-party funding must abide by the rules of professional conduct that govern the exercise of the legal profession in France (ie, Law No. 71-1130, dated 31 December 1971 as amended by Law No. 90-1259, dated 31 December 1990 and implementing Decree No. 91-1197; Decree No. 2005-790, dated 12 July 2005, and the National Internal Regulations adopted by the National Council of French Bar Associations, the CNB).

The rules that are most relevant to advising clients in relation to third-party funding include the duty of professional secrecy, the duty of independence and the prohibition to charge contingency fees in litigation and domestic arbitration.

Under French law, the duty of professional secrecy is a rather broad one. It applies to any type of communication (written or oral) or information exchanged between an attorney and her client. It is a mandatory rule that may neither be waived by the client nor otherwise derogated from. Violation by the attorney is subject to disciplinary and criminal sanctions. A client is, however, free to independently communicate documents or information received from attorneys to third parties, including third-party funders.
Attorneys also have a duty of independence to their clients. This duty applies to any strategic decision throughout a proceeding, including the choice of whether to settle or withdraw an action. An attorney may thus not receive instructions from a third-party funder, as explicitly reiterated by the CNB in its Resolution relating to third-party litigation funding, dated 20-21 November 2015. This duty also implies that an attorney advising a financed party may not simultaneously advise the funder. For the avoidance of doubt, French law allows for third-party funders to pay attorney fees directly to the funded party’s attorney. This does not impact the attorney-client relationship.

Moreover, French law prohibits attorneys from charging fees on a full contingency basis. This restriction is not considered to apply to international arbitration.

In addition to the aforementioned rules of professional conduct, the Paris Bar Council Resolution specifically addresses attorneys advising clients in relation to third-party funding by making various recommendations. In particular, the Paris Bar Council Resolution:

- reiterates the prohibition for attorneys advising a financed party to provide legal advice to the funder;
- emphasises the prohibition for attorneys to communicate documents or information directly to third-party funders (without, however, prohibiting clients from sharing any documents, including legal advice received, with their funder) and notes that attorneys should avoid any meeting with the third-party funder without the funded client present;
- advocates in favour of revising the rules that govern disputes with respect to attorney fees (ie, articles 174 et seq of Decree No. 91-1197 dated 27 November 1991), such as to extend these rules explicitly to third-party funders who would then be considered subrogated to the rights and obligations that funded clients may have vis-à-vis their attorneys. This recommendation is based on the Paris Bar Association Report (which provided the basis for the Paris Bar Council Resolution) and which observed that the applicability of articles 174 et seq of Decree No. 91-1197 to third-party funders could also potentially be provided for in the funding agreement;
- invites attorneys advising clients in arbitration to encourage them to disclose the existence of third-party funding and advise them with respect to the consequences that could potentially arise in the absence of a disclosure (notably the potential setting aside of an arbitral award and potential impediments relating to its execution in the event that links between the funder and an arbitrator are subsequently discovered); and
- invites attorneys to recommend to their clients that the management of the third-party funding agreement, the distribution of costs and fees and the recovery of any monetary awards in their favour be done with the aid of the Caisse des Règlements Pécuniaires des Avocats, an entity established within each French bar association, which monitors the payment of attorney fees.

**Regulators**

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

At present, there is no public body with any particular interest in or oversight over third-party litigation funding.

**FUNDERS’ RIGHTS**

**Choice of counsel**

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

In principle, clients have the freedom to select an attorney of their choice. In practice, it is accepted that a third-party litigation funder may present a funded party with its choice of counsel if the funded party is not yet represented and requests advice from the funder in that respect. By the same token, whenever a third-party funder is dissatisfied with a party’s choice of counsel, the funder is under no obligation to enter into a funding agreement.

**Participation in proceedings**

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

In domestic litigation, court hearings are generally open to the public, which means that third-party funders are free to attend without special permission. However, absent instances in which the parties to an arbitration agree for the hearings to be public, arbitration hearings are generally confidential. The participation of third-party funders is, therefore, subject to the prior agreement of the opposing party. The same principle applies to the participation of third-party funders in settlement meetings.

**Veto of settlements**

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

It is common practice for third-party funding agreements to address questions such as the initiation of settlement negotiations and the acceptance of a settlement. Moreover, litigants and funders quite frequently agree in advance on certain minimum and maximum amounts for potential future settlements.

This said, if seized, a French court retains the power to cancel a settlement agreement or requalify the agreement if the court finds that a funded party’s freedom to enter into a settlement agreement was infringed upon.

**Termination of funding**

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances in which funding may be terminated.

A first category of circumstances includes pre-defined events that are likely to have a major effect on the risk presented by the proceedings. These include:

- a court or regulatory decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown detrimental facts;
- a change in the case law that has a decisive impact on the ongoing proceeding;
- a loss of evidence or the appearance of detrimental evidence; and
- a major change in the creditworthiness of the respondent.

Under such scenarios, a funder would typically be entitled to terminate the funding agreement and would bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

A second category of circumstances involves breaches of the funding agreement by the financed party. In such a case, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, in light of the existence of a contractual breach, the litigant might be obliged to reimburse the funder for its costs and expenses.
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?

As a corollary of their duty of independence, attorneys advising a financed party may not take any instructions from the party’s funder. Likewise, in accordance with their obligation of professional secrecy and confidentiality, attorneys may not meet with their clients’ funder in the client’s absence. When there is a conflict of interest between the client and funder, the attorney has to follow the client’s instructions.

With respect to the conduct of the proceedings, any rights and actions the funder intends to exercise in the course of the litigation have to be contractually agreed with the client. This typically includes the funder’s right to receive certain types of information, access to documents produced during the proceedings and the right to be consulted on important procedural decisions, such as the conclusion of settlement agreements, the waiver or withdrawal of claims, or the initiation of parallel or additional proceedings.

Moreover, the funding agreement will also typically stipulate the types and extent of the funder’s obligations.

Otherwise, there is no requirement for third-party funders to take any active role outside of the specific context of the funding agreement.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

Aside from international arbitration, French law prohibits attorney remuneration on a full contingency basis (National Internal Regulations adopted by the National Council of French Bar Associations, article 11). However, attorneys may agree to a partial contingency fee. Such a partial contingency fee must be agreed to in advance.

Other funding options

What other funding options are available to litigants?

Other funding options available to litigants include legal cost insurance and legal aid.

Legal cost insurance is widely available and frequently used in France. Legal cost insurance contracts are agreements entered into to cover the costs of legal proceedings before the need to litigate arises. The extent and limits of coverage will depend on the specific insurance policy, which will typically be limited to specific types of claims. In addition, after-the-event litigation insurance contracts may be concluded after a dispute arises, in view of covering a potential adverse cost award in the event of an unfavourable outcome.

Legal aid is a measure of state-funded support that may cover part or the totality of a litigant’s cost and fees in court litigation. Legal aid is available to physical persons only and requires a demonstration of insufficient financial resources. Legal aid may be requested before or after the initiation of a legal proceeding. The request is submitted to the court adjudicating the dispute.

In international arbitration, the law firm can fund the case through a contingency fee agreement. In all other cases, only partial contingency fee agreements are allowed.

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?

According to the latest statistics available from the French Ministry of Justice, commercial courts of first instance reached decisions over an average duration of 5.5 and 5.4 months in 2017 and 2018, respectively. Depending on the complexity of a matter, the duration may be longer.

In domestic or international arbitration, the duration is normally between one and three years, depending on the complexity of a case.

Time frame for appeals

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

According to the latest statistics available from the French Ministry of Justice, litigants appealed 14.8 per cent of commercial court decisions of first instance in 2017. The average duration of appeal proceedings was between 13.3 and 13.5 months in 2017 and 2018, respectively.

Domestic arbitration awards are not subject to appeal, unless the parties agreed otherwise (Code of Civil Procedure, article 1489). No information is publicly available as to the number of appeal proceedings against arbitral awards rendered in domestic arbitrations. Domestic arbitration awards may be subject to set-aside proceedings.

As regards international arbitration awards, a set aside proceeding is the only remedy available to attack the award (Code of Civil Procedure, article 1518). No publicly available information exists as to the number of set aside proceedings against arbitral awards rendered in France (whether domestic or international). Our research suggests that courts rule on approximately 20 set-aside applications per year.

Enforcement

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings.

In principle, a judgment rendered by a French court is enforceable, provided that it is final and binding and that the rendering court has not suspended its enforcement. Decisions of courts of first instance are provisionally enforceable by law unless the law or the issued decision provide otherwise. In the event of an appeal, a party may apply to stop the provisional enforcement of the decision where there is a serious argument for annulment or reversal and where enforcement is likely to lead to manifestly excessive consequences. If a court of appeal reverses a first-instance judgment, the party who had enforced the judgment must not only return what it had obtained from the counter-party, but also compensate the counter-party for any loss suffered.

In general, the enforcement of a final judgment or arbitral award in France is rather inexpensive and expedient. Most notably, the presentation of an enforceable judgment recognising a claim will generally suffice to obtain the attachment of the judgment-debtor’s assets located in France (save for assets owned by a foreign state, which are subject to a specific legal enforcement regime or if the debtor is insolvent).
COLLECTIVE ACTIONS

Funding of collective actions

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

French law introduced class actions in 2014 with respect to matters of consumer protection (see Law No. 2014-344, dated 17 March 2014, which modified the French Code of Consumption). Subsequent amendments have broadened the scope of class actions to include matters of health, data protection, environmental law and discrimination (see Law No. 2016-1547 dated 18 November 2016). According to a report by the French National Assembly, 21 class actions have been introduced in France between October 2014 and June 2020.

Third parties face no restrictions on funding class actions. However, regarding class actions relating to consumer protection, the French Code of Consumption provides that the consumer association, which initiated the legal action for the indemnification of aggrieved consumers must immediately pay any sum it receives in litigation into an account with the Caisse des dépôts et consignations. This is a specific bank account which can only be debited to pay out sums due to the interested parties (Code of Consumption, article L-423-6). According to commentaries, it is doubtful whether a direct payout of proceeds to a third-party funder is permitted under this provision. The relevant funding agreement(s) should, therefore, be worded accordingly.

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?

The French Code of Civil Procedure provides that the losing party will be ordered to bear all legal costs (Code of Civil Procedure, article 696). Legal costs include, among others, court fees, translation fees and expert fees, as well as attorney fees to the extent they are regulated (Code of Civil Procedure, article 695). However, French courts may also order the successful party to bear part or all of the legal costs (Code of Civil Procedure, article 696).

In addition, courts have discretion to order the losing party to bear any other sums not included in the regulated legal costs as defined under article 695 of the Code of Civil Procedure, such as additional attorney fees, which exceed the regulated fee in a given dispute (Code of Civil Procedure, article 700). We are not aware of any cases in which such other sums would have included litigation funding costs of the prevailing party. In any case, costs under article 700 are usually not awarded on the basis of the actual costs incurred by a party but on a discretionary basis. As a result, they usually represent only a fraction of the actual attorney fees incurred by the prevailing party.

In domestic and international arbitration, the tribunal has the discretion to order the parties to pay costs and, if so, in which proportion. This could potentially include third-party funding costs of the prevailing party.

Liability for costs

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

If the third-party funding agreement provides for the funder to cover adverse costs, which is common practice for Continental European funders, the funder has a contractual obligation to hold the unsuccessful funded party harmless for adverse costs. The successful adverse party, however, has no enforceable right against the funder (no reflex effect of the contractual obligation towards the funded party).

In the absence of a contractual commitment to that effect, there is no independent legal basis under French law for courts to order a third-party funder to pay for adverse costs.

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?)

The Code of Civil Procedure does not explicitly provide for the possibility to order a claimant or a third-party to provide security for costs.

However, in practice, parties to domestic litigation may succeed in obtaining an order for the provisions of security for costs against the opposing party – but not against a third party – a provision ad item, by making a request for interim measures to that effect. For such an order to be granted, the requesting party bears the burden of proving that the substantive obligation that is the subject of the dispute is undeniable.

Likewise, parties to international arbitration proceedings have succeeded in obtaining orders of security for costs against a funded claimant by filing a request for interim measures. For such remedies to be successful, the requesting party must demonstrate that security for costs is urgently required under the circumstances of the case and that the requesting party would incur irreparable harm in the absence of such an order.

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

We are not aware of state court proceedings in which the presence of a third-party funder triggered a request for security for costs.

As regards domestic and international arbitration proceedings seated in France, the presence of a third-party funder may potentially have an impact on the evaluation of a security for costs request. However, in practice, the existence of third-party funding is not as such considered sufficient to justify an order for security for costs.

Insurance

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

ATE insurance is not necessarily common in France. Although no legal or regulatory restrictions limit this type of product, there is currently no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases. Moreover, if the funder has an exclusive solution for the coverage of adverse costs by way of ATE insurance on offer, ATE-insurance can also be included in the litigation funding agreement (one-stop-shop).

By contrast, legal cost insurance is commonly used in France. It is arranged before the need to litigate arises and provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.
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?

In principle, French law does not oblige a party to a domestic litigation to disclose a funding agreement to the opposing party or the court. Likewise, there is no legal basis for courts to order such a disclosure.

With regard to arbitration proceedings, the Paris Bar Council Resolution provides that attorneys of funded parties must encourage their clients to disclose the existence of third-party funding to the arbitral tribunal to allow arbitrators to identify potential links with the funder.

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

Any communication between an attorney and her client is privileged and must not be disclosed to outside parties. In contrast, communications between funded parties or their attorneys and third-party funders are not covered by attorney-client privilege. It is standard practice for such communications to be covered by a contractual duty of confidentiality in the funding agreement.

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

We are not aware of any disputes between litigants and their funders. There is, however, at least one reported dispute in which a successful respondent initiated an action against the funder of the unsuccessful claimant, attempting to enforce a costs award against the claimant in its capacity as a third-party beneficiary to the funding agreement [see, Versailles Court of appeal, 1 June 2006, 12th chamber, No. 05/01038, Société Foris AG v SA Veolia Propreté]. While the lower court had decided to grant the claim and to order provisional enforcement agreement, that ruling was overturned by the Versailles Court of appeal for lack of jurisdiction.

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

No.

UPDATE AND TRENDS

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

The uncertainty and challenges that came with the covid-19 crisis have increased the demand for third-party litigation funding in France and throughout Europe and sparked an interest in less common and more sophisticated funding products, such as portfolio funding, claim or award monetisation, and the funding of defence cases.
Third-party funding was launched in Germany in 1999 and the overwhelming majority of the legal community welcomed the idea. Litigation funding closed the gap between credit facilities provided by banks, which are typically not granted without securities being provided by the claimant, and the prohibition of lawyers providing legal services whose remuneration is based solely on a successful outcome of the case. Commercial litigation funders do not – and are not allowed to – provide legal services. Therefore, statutory limitations on providing funding in return for a share of the proceeds do not apply in their case. Since 2010, conditional fee agreements may be concluded, pursuant to section 4a of the German Law on the Remuneration of Attorneys, but only in limited cases.

Today, third-party funding is widely known and accepted. A small number of court decisions have also confirmed its legal structure as a partnership organised under the laws of the German Civil Code between claimant and funder. The courts' attitude ranges from neutral to positive, with no negative decisions against professional funders being known. This is different in cases in which lawyers try to use their own funding firms with the intention of acquiring clients and therefore funding their own mandates. Such practices trigger conflicts of interest and accordingly constitute infringements of the German lawyers’ code of conduct, the Federal Regulations for Practising Lawyers.

Although litigation funding in Germany has so far never been legally challenged there, the latest regulatory developments at national and international level are noteworthy. However, none of the existing initiatives to further regulate litigation funding have yet been implemented. The present contribution, therefore, still reflects the current legal situation.

### Restrictions on funding fees

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

When it comes to determining a reasonable share of the proceeds for which a funder may ask, very few court decisions have been delivered so far. The standard terms and conditions often call for a 30 per cent share of proceeds amounting to €500,000, and a 20 per cent share for any proceeds in excess of this amount. However, the share of the proceeds varies depending on the individual case. The Higher Regional Court of Munich confirmed in one case that a share of 50 per cent was justified because the funder stepped in after the first-instance hearing had already been lost. A good rule of thumb is that a share of 50 per cent is safe, but any share higher than that would, in all likelihood, and unless fully justified, go against public policy. Whether this rule of thumb still apply after a more detailed regulation of litigation funding is as yet unknown. In any event, and as a matter of principle, the market regulates the share amounts to be agreed in litigation funding.

German funders do not charge interest. They prefer to structure their remuneration either as a percentage of the amount actually recovered or as a multiple of the amount invested. A hybrid model equipped with a cap or a floor is also a conceivable structure, for example, in international arbitration.

### Specific rules for litigation funding

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

Because third-party funders are not qualified as banks nor insurers, neither legislative nor regulatory provisions apply.

### Legal advice

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

The BRAO stipulate professional and ethical rules and regulations for lawyers; however, no specific rules regarding third-party funding exist. In accordance with various regulations and confirmed by innumerable court decisions, lawyers are obliged to advise their clients comprehensively and impartially. There have been no court decisions to date obliging lawyers to advise a client specifically about litigation funding and its options.

However, various contributions to the legal field champion a duty of enabling the clients to choose whether they would like to take on the cost risk themselves or whether they would like to pass it on to a litigation funder. Because lawyers are already obligated to inform their clients about the possibility of obtaining litigation protection insurance, they are well advised to cover litigation funding, too, when informing their clients. This obligation has been recently confirmed by a decision of the Higher Regional Court of Cologne.

### Regulators

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

Financial institutions such as banks and insurance providers are regulated and supervised by the Federal Financial Supervisory Authority, located in Bonn. Commercial litigation funders are neither qualified as banks nor insurance providers, which is why they are not under the oversight of any public authority.
FUNDERS’ RIGHTS

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

Most cases are referred to the funders by lawyers; the latter have assessed the claim’s prospects of success and are aware if their clients do not want to fund or cannot afford to pursue legal proceedings. Funders are thus well advised to not interfere with the already existing lawyer-client relationship. If they did, and if that course of action became public knowledge, they would irreparably damage their main sales channel.

Hence, funders take into account the lawyer’s quality and willingness to cooperate in their own overall assessment of a claim, and they will rather forego offering funding than demand an alternative lawyer. Only where the claimant has not yet retained counsel do funders normally recommend lawyers to their clients. Of course, all funders have their own network of lawyers and specialists.

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

This is handled differently depending on the funder. Some like to be involved to a higher degree and some prefer to remain in the background. However, all funders share the general conception of themselves as being more than just a cash provider and have a preference for taking on an advisory role during the funding process. However, litigation funders are generally aware of the fact that the appointed lawyers are responsible for the legal assessment, and thus provide the legal services to the clients. The advisory role of the litigation funder is therefore mainly to function as a ‘sparring partner’ during the funding and litigation process.

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

All litigation funding contracts provide for this key issue. In principle, and as long as no legal rules prescribe otherwise, a settlement usually requires the approval of both the claimant and the funder. If one party would like to settle and the other does not, the party willing to settle has a contractual right to terminate the funding contract. This has a twofold effect:

- the terminating party has the right to receive the share agreed for the case of a settlement being reached; and
- the party unwilling to settle at the offered terms proceeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

In practical terms, funders and clients are almost always able to come to a mutual understanding on whether a given settlement offer is to be accepted or denied. The most sensible course of action is for the funder and client (together with the lawyer) to work as a team. Should one party decide to leave the team, this weakens the remaining players, at the very least, and increases the risk for the party proceeding with the case (eg, the funder).

Termination of funding
9 | In what circumstances may a funder terminate funding?

The commercial funder may terminate a funded case at any time and at its sole discretion should the chances of a successful outcome become substantially impaired. This may be because of new court rulings to the detriment of the claim, financial problems of the defendant, or new facts that have come to light during the proceedings that materially negatively influence the assessment of the claim. If, however, the funder terminates the funding contract, it is contractually obligated to carry all costs that have already been triggered in the course of the action (yet limited to those necessary to stop the case as quickly as possible). The funder further loses its right to receive a share of the proceeds. It retains, however, the right to have its investment refunded, provided the claimant finally succeeds on his or her own and receives payment.

This, however, is an ugly situation for a funder. Terminating the funding for an ongoing case, therefore, is always a funder’s last resort. In a negative assessment of the case, the funder will have contemplated the case thoroughly and extensively and will also provide reasons for such an assessment.

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?

As a general rule, German funders see themselves as active partners in a team that includes the claimant and the lawyer. They look at and check all writs and communication, and assist in analysing the best strategy and tactics before the case is officially pursued and also throughout the whole process. The funders’ representatives usually join meetings and take part in settlement discussions. It is also common that the funders’ in-house lawyer who is responsible for the case to be present in court or arbitration hearings. Because of the confidentiality of the funding, the lawyer’s identity will, of course, not be disclosed. The defendant will only be informed of it if a disclosure strengthens the claimant’s position (eg, in settlement negotiations).

Because class actions are gaining in relevance for business, litigation funders are book-building ever more cases. This means that the funder is active very early in the process and this, in turn, leads to the funder being heavily involved in the later proceedings as well, which then also includes choosing lawyers and experts. There are, however, no requirements in place for funders to take on an active role, but more than 19 years of experience in professional litigation funding in Germany shows that funders are well advised to do so.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

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

After the latest amendment of section 4a of the German Law on the Remuneration of Attorneys which entered into force on 1 October 2021, lawyers are allowed to work for a partly success-based fee in the cases of attachable monetary claims up to a maximum amount of €2,000, out-of-court collection services and in judicial dunning or enforcement proceedings. In a break from the past, the agreement of a success fee should also be possible if the client, on reasonable consideration, would be deterred from pursuing legal action without the agreement of a contingency fee. Therefore, the economic situation of the client should no longer be decisive, as was previously the case. The scope of this new regulation has, however, not yet been clarified. Up until the newest modification, only a few lawyers – mostly those from big international firms – used the opportunity to agree on partly success-based fees over and above the minimum fees under the tariff system. Limited as they are to their own fees being increased in case of success, these firms and lawyers are not direct competitors for litigation funders. To the contrary, funders make use of this circumstance to diversify the risk
by agreeing on a lawyer’s fee that is (at least partially) contingent on a successful outcome.

Other funding options

12 | What other funding options are available to litigants?

If a creditor does not qualify for legal aid in accordance with section 114 of the German Code of Civil Procedure, which applies only to a very limited range of people, and if the claim cannot be sold, which is common for disputed claims, litigation funding is the only remaining possibility to enforce a claim. Some funders offer what is called ‘monetarisation’ or ‘monetisation’ and buy the claim for a portion of its value.

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?

One needs to distinguish between the nature and the complexity of the claims. A comprehensive construction claim always takes longer than a claim based on a standard agency contract because of the necessity of obtaining expert reports in almost all cases. In any case, the majority of first-instance decisions are taken within one to two years, but the length of the proceedings differs from court to court.

Time frame for appeals

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

About one-third of first-instance judgments are appealed, of which appeals about 50 per cent are successful. This can mean a partial change, a settlement, or an overturn. Under normal circumstances, an appeal takes at least another year or two. Difficult cases may continue for years. A third instance needs the approval of the court of appeals, which is delivered along with the decision. Today, only a few appellants move on to the Federal Court of Justice (BGH). If the court of appeals denies its approval, the unsuccessful party may bring a complaint against the refusal to grant leave to appeal on points of law directly with the BGH, but only about 5 to 10 per cent of complainants succeed in doing so.

Enforcement

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

Only a minority of judgments rendered in Germany require enforcement proceedings. Because of Germany’s long-lasting relative economic stability, non-payment of awards appears to be a negligible problem. Enforcement actions are triggered through the local courts. Court bailiffs work on a tariff system and have to take various legal limitations into account. They usually work slowly, but they do work. The defendant has a certain number of legal remedies at his or her disposal by which to hinder enforcement. As in almost all countries around the world, enforcement is an unpleasant and unsatisfying task.

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions as such, as they are customary in the US legal system, are unknown in Germany. It is however possible to combine claimants through a bundling of claimants, but the legal framework is unclear and jurisdiction is colourful. A bundling of five to 10 claimants in one suit seems possible, provided their claims have the same legal basis and the individual taking of evidence (eg, hearing the individual parties) is not necessary. The handling differs from court to court and there is a risk of the court breaking up the suit into its individual, original cases. Apart from these procedural problems, class actions can be funded.

In any case, the lack of class-action regulations (apart from a special vehicle for the finance market called Kapitalanleger-Musterverfahrensgesetz (Act on Model Case Proceedings in Disputes under Capital Markets Law)) still limits a wider use, but consumer protection is on the agenda of the government and Brussels. The European Commission published the ‘New deal for customers’ in April 2018, and on 1 November 2018, the German government decided to establish a special kind of class action (Musterfeststellungsklage – the model declaratory action). It is expected that we will see further significant developments in the coming years in view of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/29/EC, dated 24 November 2020. The Directive provides the potential for more comprehensive collective consumer lawsuits in Germany. Following the Directive, the EU member states are required to translate it into national law and implement an effective procedural mechanism that will allow ‘qualified entities’ to commence representative lawsuits on behalf of consumers.

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?

In accordance with section 91 of the Code of Civil Procedure, the unsuccessful party always pays the costs of proceedings. These include court costs, expert costs (if ordered by the court), and the adverse costs in accordance with the German tariff system, but no costs beyond these. If the defendant, for example, incurred costs in excess of those stipulated by the German tariff system, or if the defendant provided a private expert opinion, those costs are generally not refundable. In the case of a partial loss or win, costs are apportioned in the corresponding ratio. Because of the tariff system, court costs and those of lawyers can easily be calculated in advance; well-functioning calculators are available free of charge on the internet.

Court decisions or orders that additionally refund the litigation funding costs, these being the funder’s share in the proceeds, do not exist. Theoretically, a claimant would have to prove that his or her ability to enforce his or her claim depended solely on the support by a professional litigation funder (in return for a share in the proceeds). German courts are reluctant to expand access to damages and evidence hurdles are high. Premiums paid for litigation protection insurance are, for example, not accepted as damages (and after-the-event (ATE) insurance is unknown).
**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?

No. The disclosure of litigation funding is not required by law or by jurisprudence. As a matter of principle, litigation funding is confidential and will not be disclosed to the opponent unless advantageous (eg, in settlement negotiations).

**Disputes and Other Issues**

**Disputes with funders**

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

Disputes between commercial funders and their clients are rare. Limited attempts at challenging funding agreements as such have all failed.

**Other issues**

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

The developments within the European Union on collective redress, and initiatives to regulate third-party funding over the coming years, will play an important role; also, topics that are currently not an issue might become one and new discussion points may occur. The next few
years will be interesting for litigation funding in Europe in general, and in Germany in particular.

**UPDATE AND TRENDS**

**Current developments**

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

The entry of more and more UK and US funders into the German funding market, announcing their intentions to invest hundreds of millions of euros in the German litigation market, has reawakened the old fear of bringing the ‘American litigation style’ to continental Europe – a development that is broadly disliked. In the autumn of 2018 and in the spring of 2019, the highest civil court of Germany, the Federal Court of Justice, ruled that the funding by a professional litigation funder of a claim brought by a consumer organisation is illegal. The decision was met almost exclusively with criticism by lower courts as well as by various scholars. However, it shows that Germany is not as easy to ‘conquer’ as some might think. Unfortunately, this trend was continued in 2020 with various lower courts handing down negative decisions in follow-on cartel damages ‘class actions’ (which are, in fact, mostly bundled single claims that were assigned to a Special Purpose Vehicle). If investment announcements locally are considered threats, those releases related to marketing and sales may have various negative effects – with regard to individual decisions as well as the reputation of the industry as a whole.

Fortunately, this negative trend has come to an end. The German Federal Court of Justice upheld, in its landmark judgment of 13 July 2021 re Airdeal, a mass claims collection model that was primarily directed at enforcing group claims in court, rather than out of court. Contrary to the lower courts, the German Federal Court of Justice argued that the assignment of multiple claims to a Special Purpose Vehicle does not violate the German Legal Services Act, the Rechtsdienstleistungsgesetz (RDG). This decision is in line with the RDG reform that entered into force on 1 October 2021. The German legislator has confirmed that debt collectors are entitled to enforce bundled claims in court also.
Is third-party litigation funding permitted? Is it commonly used?

Third-party funding is not generally permitted for litigation in the Hong Kong courts. Such funding is considered infringement of the doctrines of champerty and maintenance, which prohibit any party without a legitimate interest in the action from assisting or encouraging a party to that action in return for a share in the proceeds if the claim succeeds. Champerty and maintenance are both torts under Hong Kong law. They are also indictable offences at common law, punishable under section 1011 of the Criminal Procedure Ordinance by imprisonment and a fine.

There are three limited exceptions to the general prohibition on litigation funding, namely the:

- ‘common interest’ cases, involving third parties with a legitimate interest in the outcome of the litigation;
- where ‘access to justice considerations’ apply; and
- a miscellaneous category, including insolvency proceedings.

These exceptions were set out in Unruh v Seeberger [2007] 10 HKCFAR 31. Where one of the exceptions applies, litigation funding will be permitted.

Litigation funding is most commonly used in Hong Kong in respect of the third category: insolvency proceedings. Hong Kong courts will permit a funding agreement where it includes an assignment of a cause of action by a liquidator (In re Cyberworkses Audio Video Technology Ltd [2010] 2 HKLRD 1137). The liquidator’s right to assign causes of action is conferred by section 199(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), which empowers liquidators to ‘sell the real and personal property and things in action of the company by public auction or private auction’. This includes a cause of action.

Section 199(2)(a) does not require the liquidator to seek the court’s consent to the funding arrangement. In practice, however, the liquidator may choose to do so (eg, Chu Chi Ho Ian v Yeung Ming Kwong [2014] HKEC 1901).

Even where a claim falls outside the section 199(2)(a) exception to champerty and maintenance, Hong Kong courts have been willing to facilitate litigation funding in the insolvency context, as long as there is a ‘legitimate commercial purpose’ (Jeffrey L Berman v SPF CDO I Ltd [2011] 2 HKLRD 815; In re Po Yuen (To’s) Machine Factory Ltd [2012] 2 HKLRD 752).

As of 1 February 2019, third-party funding is also allowed for arbitration proceedings in Hong Kong. Following a lengthy consultation period and legislative process, the government introduced amendments to the Arbitration Ordinance (Cap 609) to provide that third-party funding of arbitration and related mediation and court proceedings is not prohibited on grounds of champerty and maintenance. Similar amendments to the Mediation Ordinance have been drawn up, but are not yet in force.

Hong Kong’s Secretary for Justice has also issued a Code of Practice for Third-Party Funding of Arbitration. More recently, on 16 August 2021, the Department of Justice launched a two-month public consultation to seek views on a draft Code of Practice for Third-Party Funding of Mediation, which is largely based on the Code of Practice for Third-Party Funding of Arbitration save for a couple of different provisions. The draft Code sets out the practices and standards that third-party funders are ordinarily expected to comply with in carrying on activities in connection with third-party funding of mediation in Hong Kong. It is likely that the Code will come into effect later this year.

As funding is only permitted in limited circumstances, it is not commonly used in Hong Kong litigation. However, we are aware of some litigation funding activity, particularly for insolvency proceedings. We have seen increased interest in funding Hong Kong arbitrations, and expect levels of funding activity to increase steadily in that area.

Restrictions on funding fees

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

Fees and interest are matters for agreement between the funder and the funded party. Hong Kong law does not impose specific limitations on the amounts that third-party funders can charge.

Specific rules for litigation funding

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

Part 10A of the Arbitration Ordinance permits third-party funding of arbitration and related court and mediation proceedings in Hong Kong, as well as funding of work done in Hong Kong on arbitrations and related proceedings outside Hong Kong.

Third-party funding of mediations that are not related to an arbitration will be permitted under Part 7A of the Mediation Ordinance, but the relevant amendments are not in force as at September 2021.

Lawyers and law firms are prevented from funding cases by the Legal Practitioners’ Ordinance and by Hong Kong professional conduct rules. With respect to arbitration, section 980 of the Arbitration Ordinance expressly prohibits lawyers (regardless of where they are based or qualified) from funding cases in which they act for any party in relation to the arbitration.

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Legal advice

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

Professional conduct rules currently prevent Hong Kong lawyers and registered foreign lawyers from entering into conditional or contingency fee arrangements to act in contentious business. This prevents lawyers, or their firms, from funding clients’ claims in litigation or arbitration through such fee arrangements. However, we are not aware of any rules that prevent lawyers from advising their clients on using third-party litigation funders, selecting funders or working with the funders during the proceedings. Indeed, the Third-Party Funding Code of Practice requires funders to take reasonable steps to ensure that a party knows it is entitled to seek independent legal advice before it enters into a funding agreement.

Regulators

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

Section 98X of the Arbitration Ordinance empowers the Secretary for Justice to appoint an ‘authorised body’, which may issue a ‘code of practice setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration’. Section 98Q sets out a number of criteria that the code of practice might include.

The same section authorises the Secretary for Justice to appoint an ‘advisory body’ to monitor and review the operation of the Funding Ordinance, including the Code of Practice.

On 18 May 2018, Hong Kong’s Department of Justice appointed Ms Teresa Cheng SC, Secretary for Justice, as the authorised body with a remit to draw up the Code of Practice.

The advisory body is composed of three senior, Hong Kong-based lawyers: Kathryn Sanger, Edward Liu and Victor Dawes SC.

On 7 December 2018, the Secretary for Justice issued the Code of Practice for Third-Party Funding of Arbitration. The Code applies to any funding agreement commenced or entered into on or after 7 December 2018. Failing to comply with the Code of Practice does not, of itself, give rise to civil or criminal liability. However, the Code is admissible in evidence before a court or arbitral tribunal, which may take into account any failure to comply with it, if such failure is relevant to a question that court or tribunal is deciding (section 98S of the Arbitration Ordinance).

On 16 August 2021, the Department of Justice launched a two-month public consultation to seek views on a draft Code of Practice for Third-Party Funding of Mediation, which is largely based on the Code of Practice for Third-Party Funding of Arbitration.

In addition, to the extent that funders raise capital in Hong Kong, those activities could arguably be regulated by the Securities and Futures Commission, if the sources of funds amount to a ‘collective investment scheme’ under the Securities and Futures Ordinance. If the funds provided by a funder are considered a loan, the funder might be considered a ‘money lender’ under the Money Lenders’ Ordinance and require a licence to conduct business with the funded party. However, most of the funding structures of which we are aware are unlikely to fall within either of these statutes.

Where funders operating in Hong Kong, but based elsewhere, belong to a regulatory body, such as the United Kingdom’s Association of Litigation Funders, they will typically adhere to that regulator’s requirements when funding proceedings in Hong Kong.

FUNDERS’ RIGHTS

Choice of counsel

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

In practice, yes, through their decision whether to fund the claim. Funders may decline to offer funding for a number of reasons, including that they are not happy with the party’s choice of counsel. Where the funder is involved in the case before counsel is selected, the funder will generally be involved in the selection process.

Participation in proceedings

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

Funders of arbitration proceedings may attend hearings, if the tribunal and all parties agree. Court hearings in Hong Kong are generally open to the public (apart from arbitration-related proceedings, which are not open to the public, unless one or more parties apply to be heard in open court and can satisfy the court that there is good reason), meaning that representatives of a funder may attend if they wish. In neither case is it usual for funders’ representatives to take an active part in the proceedings.

Funders may attend mediation or other settlement negotiations if the parties (and any mediator or other third-party facilitator) agree.

Veto of settlements

8 Do funders have veto rights in respect of settlements?

A funder’s rights to approve or reject a proposed settlement will depend on the terms of the funding agreement. In practice, the funded party will be guided by the terms of the funding agreement in deciding what to accept in settlement negotiations. This is because any settlement must allow the funded party to pay the funder its agreed share of the settlement amount or percentage of the funding amount (depending on the terms of the funding agreement).

Termination of funding

9 In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding are a matter for agreement between the funder and the funded party, and should be recorded in the relevant funding agreement. Examples include the assessment of the merits becoming significantly worse during the case or the funder becoming aware of wrongdoing by the funded party.

In respect of arbitration, paragraph 2.13 of the Code of Practice requires funding agreements to state ‘whether (and if so, how) the third-party funder may terminate the funding agreement’ if the funder:

- reasonably ceases to be satisfied about the merits of the arbitration;
- reasonably believes there has been a material adverse change to the funded party’s prospects of success, or recovery on success; or
- reasonably believes that the funded party has committed a material breach of the funding agreement.

This list is exhaustive. The Code of Practice stipulates that funding agreements ‘may not establish a discretionary right for a third-party funder to terminate the funding agreement in the absence of the circumstances described in paragraph 2.13’.
**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?

Hong Kong’s Code of Practice (paragraph 2.3(3)) requires funding agreements to ‘set out and explain clearly the key features and terms of the proposed funding and the funding agreement’ including ‘the degree of control that third-party funders will have in relation to an arbitration’. The Code prohibits funders from seeking to influence the funded party, or its lawyers, ‘to give control or conduct of the arbitration or mediation to the third-party funder except to the extent permitted by law’. It also requires the funder not to take steps that cause, or are likely to cause, the funded party’s legal representatives to breach their professional duties, and not to seek to influence the arbitral tribunal or institution (see paragraph 2.9 of the Code).

In practice, some funders take a much more active role than others. At minimum, funders generally require regular updates from counsel on the progress of the case. They may also ask for updates on an as-needed basis, or when there is a significant development in the case. Funders may also advise counsel and the funded party on aspects of the case. In England and Wales, it is generally accepted that funders must not control the conduct of the case; such control remains with the litigation. Funders in other jurisdictions, notably Australia, exercise a higher degree of control. For example, some funders are known to have placed a representative within the counsel team for the duration of the case.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

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

No. Hong Kong solicitors and barristers may not enter into conditional or contingency fee arrangements for acting in contentious business. The same restriction applies to foreign lawyers who are registered to practise in Hong Kong.

The restriction derives from section 64(1) of the Legal Practitioners Ordinance, Principle 4.17 of the Solicitors Guide to Professional Conduct, paragraph 9.9 of the Bar Association Code of Conduct, and the common law. It is confirmed by section 980 of the Arbitration Ordinance (Cap 609). These restrictions prevent law firms from acting as funders in Hong Kong, other than where they are providing third-party funding at arm’s length in relation to a matter in which they do not act for any party.

In December 2020, the Hong Kong Law Reform Commission launched a public consultation on whether to permit ‘outcome related fee structures’, including conditional and contingency fees, for Hong Kong arbitration and related proceedings. The Law Reform Commission is expected to issue its final report at the end of 2021.

**Other funding options**

12 What other funding options are available to litigants?

Litigants may fund proceedings using a bank loan, obtained on an arm’s-length basis. However, a significant number of claimants who seek funding are impecunious, and may have difficulty obtaining a loan.

There is anecdotal evidence in Hong Kong of third parties who wish to fund a litigation, in which they have no legitimate interest, acquiring shares in the claimant entity, in order to create an interest and avoid liability for champerty and maintenance.

**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?

According to the statistics on Ten Years’ Implementation of the Civil Justice Reform released by the Judiciary of Hong Kong covering the period from April 2009 to March 2019, claims at first instance take an average of two to two-and-a-half years from commencement to trial. The accumulative average time from commencement to trial for the past 10 years is 855 days with 1,728 trial hearings in total. Anecdotal evidence suggests that it can take anywhere from three to six months before judgment is handed down after trial, but this can vary depending on the judge in question and general workload levels.

**Time frame for appeals**

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

Data from the Hong Kong Judiciary Annual Report 2020 (the 2020 Report) shows that only a small proportion of first instance judgments under the civil jurisdiction are appealed to the Court of Appeal, despite the fact that leave is not required in every case (generally, only in the case of interlocutory judgments) to make an appeal from the Court of First Instance to the Court of Appeal. According to the 2020 Report, only an estimated 3 per cent of first instance civil judgments were appealed to the Court of Appeal recorded in the 2020 Report has doubled since the 2017 Report. The 2020 Report recorded 85 days (ie, close to three months) as being the average waiting time for civil cases at the Court of Appeal from application to fix a hearing to the hearing date, which represents a 24 per cent improvement from the time reported in 2015 (ie, 112 days).

**Enforcement**

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

These statistics are not available. Whether or not a judgment may easily be enforced in Hong Kong depends on various factors, including the following:

- the availability of assets within the jurisdiction;
- the accessibility of assets that may be available;
- the type of judgment being enforced;
- whether a party is seeking to enforce a domestic or a foreign judgment; and
- in the case of a foreign judgment, whether there is a reciprocal enforcement arrangement between that country and Hong Kong.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

At present, there is no class action regime in Hong Kong. The only avenue that is currently available for multi-party litigation is by way of a ‘representative action’ brought by a party on behalf of a group of others who have the same interest in the proceedings. The ‘representative action’ framework, however, is inadequate for dealing with large-scale multi-party situations, and courts in Hong Kong have had to proceed on an ad
hoc basis without rules designed to deal specifically with group litigation. Representative actions are not common in Hong Kong. Where they do occur, third-party funding is, in principle, permitted, where one of the recognised exceptions to champerty and maintenance applies.

In May 2012, the Law Reform Commission published a report recommending the introduction of class actions in Hong Kong with a number of key features, including:

- the regime is implemented on an incremental basis, beginning with consumer cases (ie, tort and contract claims by consumers);
- such actions may only proceed with certification by the court;
- one of the criteria of the certification should be a representative plaintiff's financial ability to satisfy an adverse costs order, which should also be required to prove to the court's satisfaction that suitable funding and costs-protection arrangements are in place at the certification stage;
- an 'opt-out' approach be adopted as the default position for local parties and an 'opt-in' approach be adopted for overseas parties; and
- a general class actions fund be established in the long term to help fund eligible impecunious plaintiffs to pursue class actions, and the Consumer Legal Action Fund be expanded in the short term to fund class actions arising from consumer claims.

The Department of Justice, in response to the report, established a working group to consider the details of the proposed regime and make recommendations to the government. Several years after its formation, on 31 December 2020, the working group announced its intention to commission a consultancy study on the economic and other impacts on Hong Kong if a class action regime was to be introduced. The working group has started drafting a consultation paper.

### 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?

Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the Hong Kong courts to order costs for or against any party to the proceedings, or a non-party, including a third-party funder. This is usually referred to as an ‘adverse costs order’. The courts also have the discretion to order the extent to which the costs are to be paid. Usually the courts order that costs 'follow the event' (ie, that the unsuccessful party must pay to the successful party costs that were necessary to pursue or defend the action). It is exceptionally rare for a successful party to recover all of its costs in litigation. In practice, a party can expect to recover about 25% of its successful party costs that were necessary to pursue or defend the action. It is exceptionally rare for a successful party to recover all of its costs in litigation. In practice, a party can expect to recover about 25% of its successful party costs that were necessary to pursue or defend the action.

In Hong Kong litigation, Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the courts to order any third-party, including a third-party funder, to pay costs. The court's order is known as an 'adverse costs order'. In the recent Hong Kong decision of Re A [2020] HKCFI 493, Marlene Ng J stated that the novelty of commercial litigation funding in Hong Kong means the effectiveness of safeguards against the litigation funders (eg, adverse costs orders) is as yet untested. Even if these measures are applicable in Hong Kong, their vitality turns on whether there is adequate disclosure to the opposing parties and the court about the litigation funding, which is also untested in Hong Kong.

In arbitration, the funder is generally not a party to the arbitration agreement. As a result, the tribunal lacks jurisdiction over the funder and cannot order it to pay adverse costs. Instead, the tribunal may make the adverse costs order against the funded party. Whether the funder will fund (or reimburse) the funded party in respect of any adverse costs paid will depend on the terms of the funding agreement. Paragraph 2.12 of the Code of Practice requires funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for adverse costs. Many professional funders routinely accept liability for adverse costs, but approaches among smaller or individual funders may vary.

### 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?)

Order 23, Rule 1 of the Rules of the High Court provides that the court can order security for costs against the plaintiff only. The court has no power to order security for costs against a third-party funder. However, the funding agreement can provide for the funder to reimburse the plaintiff for any amount paid into court in compliance with a security for costs order. This is a matter for agreement between the funder and the funded party. In Re A [2020] HKCFI 493, Marlene Ng J stated that security for costs against a third-party funder in Hong Kong is arguably not an available procedural safeguard to withstand potential abuse of third-party litigation funding. This lacuna in the Hong Kong procedural rules in fact highlights the importance of regulation over litigation funders' capital adequacy requirements.

In relation to whether courts typically order security for funded claims in Hong Kong, the market in this area is not mature and cases dealing with this issue are rare. The recent decision of Natural Dairy...
(NZ) Holdings Ltd (in provisional liquidation) v Chen Keen [2020] HKCFI 2491 is the first case in Hong Kong in which an after-the-event (ATE) insurance policy (used to reimburse parties for litigation costs and disbursements) was raised as an answer to an application for security for costs. The plaintiff submitted that its ATE insurance constituted adequate security for the defendant’s costs. Several English cases on point were considered. From the analysis, it appears that the answer in each case would depend on the actual terms and conditions of such a policy, in particular the likelihood of the insurance cover being eroded. However, in practice, since insurance policies are voidable by the insurers and subject to cancellation for many reasons (none of which are generally within the control or responsibility of the defendant), it is likely that in most cases an ATE policy is unlikely to provide such good security as a payment into court.

Unless the parties agree otherwise, arbitral tribunals sitting in Hong Kong can order security for costs against a party to the arbitration (section 56(1)(a) of the Arbitration Ordinance). The tribunal has no jurisdiction to make such an order against a third-party funder. In practice, arbitration funding agreements will typically provide that a funder will pay any security for costs order, because, if such order is not paid, the claim will not proceed. Paragraph 2.12 of the Code of Practice requires funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for security for costs orders made against the funded party.

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

As far as we are aware, this question has not arisen in funded litigations in Hong Kong. Arbitral tribunals sitting in Hong Kong may order the claimant to give security for the costs of the arbitration. However, they may not make such an order only on the grounds that the claimant is not based in Hong Kong (section 56(2) of the Arbitration Ordinance). These decisions are usually confidential, so it is not possible to say whether a tribunal is likely to be influenced by the existence of third-party funding in deciding whether to order security for costs.

Insurance

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

There is no legislative or regulatory prohibition on ATE insurance in Hong Kong. However, third-party funding is a nascent market in Hong Kong. We are not aware that ATE or any other type of insurance are commonly used at present, but this is likely to change.

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?

Where the funded party voluntarily seeks the court’s approval of the funding arrangement, the court and other party will become aware that the arrangement exists and (possibly) learn the funder’s identity. However, there is no general obligation on a funded litigant to seek the court’s approval of the funding arrangement, nor is there a general obligation to disclose details of the funding arrangement to the court or the opposing party.

In June 2016, a Hong Kong court ordered plaintiffs to disclose details of the court’s earlier approval of their litigation funding arrangements, which were these contained in evidence filed in support of the plaintiffs’ ex parte applications to extend time for service of legal proceedings (Enrich Future Ltd v Deloitte Touche Tohmatsu HCCL 10/2011, 22 June 2016). The judge acknowledged that disclosure of the funding arrangement might put the defendant at an advantage, in particular by giving it an understanding of the plaintiffs’ litigation ‘war chest’. However, he considered that the principle of open justice prevailed over any concern about giving one party a tactical advantage. In accordance with that principle, the plaintiffs were entitled to know in full the evidence that had been presented to the court to obtain ex parte relief against them, including the evidence regarding the funding arrangements.

Section 98U of the Arbitration Ordinance (Cap 609) requires a funded party to give written notice of the fact that a funding agreement has been made, as well as the name of the funder. The notice must be given to each other party to the arbitration, and to the arbitral tribunal, court or mediator (as appropriate). The funded party must also give notice if the funding agreement ends, other than because the arbitration has ended.

Privileged communications

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

The right to assert legal professional privilege is enshrined in Hong Kong’s Basic Law. Article 35 provides that Hong Kong residents shall have the right to ‘confidential legal advice’.

To maintain privilege in any communication under Hong Kong law, the communication must remain confidential. Assuming that communications between a funder and the funded party are confidential (either pursuant to a confidentiality agreement or otherwise), they should be protected by litigation privilege. Litigation privilege protects communications between a lawyer, the lawyer’s client and any third party, where litigation is pending or in reasonable contemplation, and the communications are made for the ‘sole or dominant’ purpose of preparing for or dealing with the litigation. (For the purposes of this test, ‘litigation’ includes both litigation and arbitration proceedings.)
In the context of arbitration, section 98T of the Arbitration Ordinance permits a party to disclose information relating to the arbitration to a person without losing confidentiality in the information, for the purpose of having or seeking third-party funding from the person. However, the person to whom the information is disclosed may not communicate it further, subject to certain exceptions.

Common interest privilege may also apply between the funder and the funded party, since they will have a common interest in the outcome of the proceedings. Common interest privilege is not a freestanding form of privilege, as it relies on the existence of a communication or document that satisfies the test for either legal advice privilege or litigation privilege. For common interest privilege to apply, the purpose of the communication must be for the parties to inform each other of the facts, issues or advice received in respect of a legal issue, or to obtain or share legal advice in respect of contemplated or pending litigation.

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

We are not aware of any such disputes.

**Other issues**

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

There are no other issues.

**UPDATE AND TRENDS**

**Current developments**

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

The Hong Kong Law Reform Commission has recently conducted a public consultation on whether to permit ‘outcome related fee structures’, including conditional and contingency fees, for Hong Kong arbitration and related proceedings. The consultation period ended in March 2021, and the Law Reform Commission is expected to publish its report at the end of 2021.
Is third-party litigation funding permitted? Is it commonly used?

There is no express statutory or regulatory bar to third-party funding (TPF) of litigation in India. Though no formal legislation expressly legalises or regulates TPF in India, judicial precedents indicate its permissibility, albeit with certain caveats and conditions. The concept of ‘financer’ of a suit has been referenced in amendments made to Order XXV, Rules 1 and 2 of the Indian Code of Civil Procedure 1908 (Code), by certain states such as Maharashtra, Madhya Pradesh, Orissa and Uttar Pradesh. Further, provisions have been made where the funder may be added as party to the suit, and in certain circumstances the court may demand security from the funder to cover a defendant’s costs.

The existing jurisprudence has evolved from Indian courts’ decisions since 1876 that have considered validity, scope and applicability of TPF. Most recently, in 2017, the Supreme Court of India in Bar Council of India v AK Balaji (2018) clarified that TPF arrangements are not barred in India and the only restriction that appears to exist is for a lawyer to fund his or her client’s case. TPF arrangements may be examined by the courts for being extortionate, unconscionable and against public policy. The first known legal precedent on TPF is from 1876, where the Privy Council in Ram Coomar Condoo v Chunder Canto Mukherjee (1876) analysed its legality and upheld the TPF arrangement. The Privy Council also stated that a TPF arrangement would be considered illegal if it is demonstrably unconscionable, or extortionate, or entered into for an improper object or to foment litigation that is unrighteous. Later, in 1955, the Supreme Court of India in Re: Mr ‘G’, a Senior Advocate (1955) held that the rigid English law rules of champerty and maintenance do not apply in India, and further held that ‘A contract where one party agrees to fund litigation for certain benefits would be legally unobjectionable if no "lawyer" was involved and it was between third parties’.

A 2017 report by a high-level committee set up by the Government of India to review the institutionalisation of arbitration mechanism in India endorsed TPF of arbitrations. However, the Arbitration and Conciliation Act 1996 (Arbitration Act) does not specifically provide for TPF. In the absence of specific legislation and judicial pronouncements concerning TPF in arbitration, the same considerations that apply to TPF in litigation are expected to apply.

Restrictions on funding fees

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

In India, there is no specific legislation that regulates the fees and interest a funder can charge for TPF arrangements. All TPF arrangements would be subject to Indian law, specifically the Contract Act 1872 (Contract Act). Courts may scrutinise the TPF agreement to test its validity and legality, and to ascertain if it is unconscionable, extortionate or opposed to public policy (for example, made with an improper object such as gambling on litigation or abetting an unrighteous suit). In a TPF litigation arrangement where the funder’s share was three-quarters of the claimant’s property on successful outcome, the Andhra Pradesh High Court (in Nuthaki Veukataswami v Katta Nagireddy (1962)) rejected it as unreasonable, unfair and ex facie extortionary.

Specific rules for litigation funding

Specific legislative or regulatory provisions applicable to third-party litigation funding?

In a few Indian states – Maharashtra, Gujarat, Madhya Pradesh, Orissa and Uttar Pradesh – third-party ‘financer’ of litigation has statutory recognition through amendments to the Code. Besides this, there are no specific legislative or regulatory provisions that regulate TPF arrangements in litigation (or arbitration) across India.

Legal advice

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

There are no specific professional or ethical rules that apply to lawyers advising clients in relation to cases with TPF. The professional conduct rules, namely, Bar Council Rules, Part VI, Chapter II on Standards of Professional Conduct and Etiquette (Bar Council Rules) framed by the Bar Council of India (BCI) under section 49(1)(c) of the Advocates Act 1961 that are applicable to all ‘advocates’ in India, restrict advocates from:

- acting or pleading in a matter in which they have pecuniary interest (Rule 9);
- fomenting litigation (Rule 19);
- seeking fee contingent on outcome of litigation or sharing proceeds of any litigation (Rule 20);
- buying, trafficking, stipulating for, or agreeing to receive any share or interest in any actionable claim (Rule 21); and
- participating in bids in the execution of decrees or orders in any suit or proceeding in which they are professionally engaged (Rule 22).

In Bar Council of India v AK Balaji (see above), the Supreme Court observed that even practices that are performed outside a court setting (eg, client counselling, drafting legal opinions and instruments etc) and tendering advice to clients will also be governed by the Rules framed by the BCI.
Regulators

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

There are no specific public regulatory bodies in India that have oversight of or known interest in TPF of litigation. However, in instances where one of the parties to the TPF arrangement is a foreign entity, TPF transactions would understandably involve inflow and outflow of foreign exchange/investment, so the Foreign Exchange Management Act 1999 (FEMA) would be applicable and the Reserve Bank of India (RBI) would have regulatory oversight. Such TPF arrangements and transactions must comply with the provisions of FEMA. TPF agreements may also attract the oversight and scrutiny of Indian courts if they are in contravention of the Contract Act.

FUNDERS’ RIGHTS

Choice of counsel

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

At present, there is no legislation or judicial dictum that prohibits third-party funders from choosing counsel in a proceeding. The choice of counsel, being a critical decision, may be negotiated between the third-party funder and the funded party, so long as the third-party funding (TPF) arrangement is in compliance with Indian law. It must be ensured that the counsel selected does not have any financial interest in the outcome of the proceeding, or conflict of interest with the parties or arbitrators (or both).

Participation in proceedings

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

By and large, most court hearings and proceedings in India are open to the public, and can be attended by any person including funders. This is also true with the rise of video-conferencing and live-streaming of court proceedings.

Under Indian law, only parties to a lawsuit have the right to participate. For states like Maharashtra and Gujarat with amendments to the Code, third-party funders may be impleaded as a party to the proceeding in civil causes of action. In other states, third-party funders may be impleaded as a party whose presence before the court is necessary to enable the court to effectively adjudicate the case. However, the court will have to be convinced that the funder is either a proper or necessary party to the case.

The situation with regard to arbitral proceedings is more stringent as it is a confidential process. Typically, only parties to the arbitral dispute are permitted to participate and attend the hearing/settlement meetings. Section 42-A of the Arbitration and Conciliation Act 1996 mandates the arbitrators, arbitral institution and the parties to maintain confidentiality of the proceedings, except in cases where award is required to be disclosed necessarily for enforcement. Third-party funders may not be permitted to either attend or participate in arbitral proceedings (and/or underlying settlement proceedings) unless the parties consent to it.

Veto of settlements

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

This will be the subject matter of inter se contractual agreement between the funder and the funded party. Funders may have a specific contractual right of veto in respect of settlements in the TPF agreement, subject to validity of the TPF agreement under Indian law.

Termination of funding

9  | In what circumstances may a funder terminate funding?

The grounds permitting termination of a TPF agreement would depend upon the TPF agreement itself, subject to its validity under Indian law.

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?

Since there are no regulatory laws in India that rigidly prescribe what a third-party funder can and cannot do during litigation or arbitration, it is all the more important for funders to have a robust contractual arrangement. The contractual arrangement will, however, always remain subject to the Contract Act 1872 and the judicial precedents that have struck down TPF agreements for being extortionate, unconscionable and against public policy.

Funders may attend court proceedings and hearings. In Indian states that permit funders to be impleaded as parties, they may even participate in such hearings as a party. Terms in the TPF agreement may be included to enable them to prepare and liaise with counsel on the progress and overall strategy of the case.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Lawyers in India are forbidden from entering into conditional or contingency fee agreements. The code of conduct and practice of lawyers in India is regulated by the Bar Council of India, which under section 49(1)(c) of the Advocates Act 1961 has framed rules by which advocates ought to conduct themselves. Rule 9 of the Bar Council Rules, Part VI, Chapter II on Standards of Professional Conduct and Etiquette prohibits an advocate from acting or pleading in a matter in which he or she has a pecuniary interest. Similarly, Rule 20 precludes an advocate from seeking fees contingent on the outcome of a litigation or sharing in the proceeds of any litigation. Rule 21 prohibits advocates from receiving shares or interest in all actionable claims, and Rule 22 expressly prevents advocates from participating in bids in the execution of decrees and orders.

Even courts in India have held contingency fee agreements to be void for being in violation of public policy and the standards of professional conduct of lawyers, amounting to professional misconduct (Re: Mr ‘G’, a Senior Advocate (1955); B Sunitha v The State of Telangana (2017)). The bedrock of this approach is the fiduciary nature of the relationship between a lawyer and client, which requires a high degree of fidelity and good faith, and an absence of conflicting interests.

Other funding options

12 | What other funding options are available to litigants?

In relation to contractual disputes, pre-litigation funding options are not well known. Typically, the beneficial provisions on funding would be present in statutes that are beneficial, namely, for protection of certain citizens’ rights. For example, under section 125(3) of the Companies Act 2013, the legal expenses incurred in class action lawsuits under sections 37 and 245 by members, debenture holders or depositors (as sanctioned by the National Company Law Tribunal) may be reimbursed from the Investor Education Protection Fund managed by the Central Government of India.
The most widely accessible form of funding available to litigants is through the state. The Constitution of India recognises the concept of free legal aid. Article 39A directs the state to provide and ensure equal opportunity for all to be represented in the legal system. The provision directs the state to enact legislation to provide free legal aid so that no citizen is denied by reason of economic hardship, and this was achieved through the Legal Services Authorities Act 1987. The right to free legal services and aid is also recognised as an essential, fundamental right guaranteed under the right to life and personal liberty under article 21 of the Constitution of India. The Supreme Court in *MH Hoskat v State of Maharashtra* (1978) opined that providing free legal aid is the state's duty.

The provision of free legal aid currently only applies to conventional litigation, and there are no mechanisms for the provision of legal aid to indigent persons who have agreed to resolve their disputes via alternative mechanisms such as arbitration. Currently, a case titled *Rishabh Dheer v Union of India* (Writ Petition (C) No. 11085/2019) is pending before a single-judge bench of the Delhi High Court, with the prayer seeking extension of the benefits of legal aid services to those parties who are engaged in arbitration.

Recent trends indicate that there has been an increase in crowdfunding of litigation in India, as an alternative to private and state funding. Based on the information available in the public domain, it is unclear whether crowdfunding platforms for litigation finance cover alternative dispute resolution mechanisms as well.

At present, there is limited meaningful insurance protection that can cover litigation expenses for individual litigants across India for conventional or alternative dispute resolution proceedings. For commercial and professional entities, legal expenditure could be covered under liability insurance, where coverage is provided for third-party loss or damage caused unintentionally by the policyholder.

### 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?

The commercial courts in India adjudicate most commercial disputes between parties, as defined under the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act 2015 (CC Act). The CC Act provides for strict, specific timelines for the entire lifecycle of the commercial claim, including for statutory appeals. For example, a maximum of five months' timeline is provided for the mandatory pre-institution mediation and settlement mechanism. If a claim proceeds before the commercial court, its trial is statutorily required to be completed within six months from the first case management hearing. The court is required to pronounce its judgment within 90 days of conclusion of arguments.

Typically, the timeline for a commercial claim to reach a decision at first instance is six months to two years and would primarily depend on the claim's nature and complexity, the number of parties involved, the court/forum where it is filed and the court's/forum's workload and pendency.

As per the World Bank’s 'Doing Business' report for India in 2020, it used to take 1,095 days in completion of trial and pronouncement of judgment of commercial disputes (for Delhi and Mumbai). However, in 2021, as per a report published by the Department of Justice in the Law Ministry, the number of days in disposal of commercial disputes has reduced to 434 in Delhi and 597 in Mumbai.

In arbitrations seated in India, section 29A of the Arbitration and Conciliation Act 1996 (Arbitration Act) requires awards to be made within 12 months from the date on which the arbitral tribunal is constituted. The 12-month timeline is extendable to 18 months with the parties' consent. The CC Act is also applicable to arbitration-related litigation instituted before commercial courts.

#### Time frame for appeals

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

In India the law provides for right of appeal to parties, against the court of first instance's order, under the Code of Civil Procedure 1908 (Code). In commercial matters (which also includes arbitration-related litigation), the statutory timeline for filing appeals against first-instance judgment is within 60 days. The CC Act provides for a six months' timeline for disposal of appeals. Such statutory right to appeal is almost always exercised by the losing party.

There is limited scope for challenge to final arbitral awards rendered by arbitral tribunals under the Arbitration Act. Typically, the timelines for challenge/appeals would be governed by the CC Act.

The timelines provided under the Code and the CC Act would not apply to other exclusive fora, which have their own similar appellate procedures and timelines.

Typically, the timeline for a commercial claim to reach a decision at the appellate stage is six months to three years and would primarily depend on its nature and complexity, the number of parties involved, the appellate court/forum where it is filed and such appellate court's/forum's workload and pendency.

#### Enforcement

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

Indian law is a pro-enforcement regime for both court-rendered judgments and arbitral awards. The Code, read with the CC Act, provides for enforcement or execution (or both) of court-rendered judgments in India. The recognition and enforcement of foreign judgments and decrees in India are governed by section 44-A read with section 13 of the Code. A foreign judgment that is conclusive under section 13 of the Code may be enforced by instituting execution proceedings under section 44-A in the case of reciprocating territories (declared by the Central Government of India), or by instituting a civil suit on the judgment in the case of non-reciprocating territories.

The Arbitration Act, under sections 49 and 58, provides for enforcement of foreign awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Geneva Convention respectively. Under sections 48 and 57, enforcement and execution of a foreign award can be challenged on limited grounds, such as:

- the parties to the agreement were under some incapacity;
- the parties were unable to present their case;
- the award was beyond the scope of the arbitration agreement;
- the composition of the tribunal was not in accordance with the arbitration agreement; and
- the subject matter of difference is not arbitrable.

As regards domestic awards, under section 36(1) of the Arbitration Act an award may be enforced in accordance with the provisions of the Code as if it were a decree of the court, once the time for making an application to set aside the arbitral award under section 34 of the Act has expired. Domestic awards can be set aside only on the grounds of:

- incapacity of a party;
- inability to present one's case;
- no proper notice of appointment of arbitrator was given;
- arbitral award being beyond the scope of arbitration agreement;
• composition of arbitral tribunal is not in accordance with the procedure contemplated by the parties;
• subject matter of dispute is incapable of settlement by arbitration;
• arbitral award is in conflict with the public policy of India; and
• the award (in an arbitration other than international commercial arbitration) is vitiated by patent illegality.

Whether a judgment would involve contentious enforcement proceedings would depend upon the facts and circumstances of the case.

### COLLECTIVE ACTIONS

#### Funding of collective actions

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

India has several legal provisions for filing class or group actions. The following are some of the legal sources available:

1. Order I, Rule 8 of the Code of Civil Procedure 1908 allows a ‘representative suit’ to be filed, namely, where several persons have similar interests in prosecuting or defending a civil proceeding, any two or more persons may file/defend the said civil proceeding with the permission of the court.

2. Section 245 of the Companies Act 2013 prescribes class action by shareholders against the company, its directors, auditors, experts, advisors etc. It allows a minimum prescribed number of members or depositors to file a class action suit if they are of the opinion that the management or conduct of the affairs of the company is being carried on in a manner prejudicial to the interests of the company or its members or depositors. However, this provision does not apply to banking companies.

3. Section 35 of the Consumer Protection Act 2019 allows numerous consumers having the same interest to file a complaint in relation to any goods sold or service provided, with the permission of the District Commission. Thus, the deficiency in the good or service as identified by all the consumers must be the same or similar.

4. Articles 32 and 226 of the Constitution of India allow filing of public interest litigation (PIL) before the Supreme Court and High Court respectively, for enforcement of the fundamental rights guaranteed under Chapter III of the Constitution. The import of PIL is wide, as the petitioner or the person filing the PIL need not necessarily possess the locus standi or be aggrieved by the issue in the PIL.

There is no restriction on third-party funding (TPF) of these collective actions recognised under statutory provisions or by judicial precedent, subject to the TPF arrangement itself being legal and valid.

### COSTS AND INSURANCE

#### Award of costs

| 17 | May the courts order the unsuccessful party to pay the costs? |

Courts in India have the discretion to award, inter alia, (1) ‘general costs’ in civil proceedings based on the facts and circumstances of each case, (2) ‘compensatory costs’ against a party if the court is satisfied that the litigation was frivolous and vexatious, and (3) costs for causing delay at any stage of proceedings. The general rule applicable is ‘costs follow the event’, namely, the unsuccessful party is to pay the costs of the successful party. If the court orders that costs should not follow the event, it must record its reasons for doing so. The court is also empowered to decide the quantum of costs and when the costs will be paid. However, courts in India do not often grant adverse costs and parties are made to bear their own costs.

An illustrative list of heads is provided for under section 35(4) of the Code of Civil Procedure 1908 (Code), which may be interpreted to cover litigation funding costs. In Salem Advocate Bar Association v Union of India (2005), the Supreme Court of India held the costs to include time, transport, lodging etc., other than the litigation costs.

In India, arbitral tribunals have the discretion to award costs, their quantum and the timeline for payment. The general rule is ‘costs follow the event’, and deviation from this rule must be followed by reasons. The term ‘costs’ is defined under section 31(8) of the Arbitration and Conciliation Act 1996 (Arbitration Act) to include ‘any other expenses incurred in connection with the arbitral proceedings and the arbitral award’, which may be interpreted to include funding costs.

In both litigations and arbitrations, the quantum of costs awarded is at the discretion of the court or tribunal and is subject to the proof presented by the relevant party.

#### Liability for costs

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

The liability of the third-party funder to pay adverse costs would depend on the terms of the agreement between the funder and the funded party. Indian law does not proscribe the payment of adverse costs, if the agreement so provides. However, the liability to pay the adverse costs would be inter se the funder and the funded party, unless the funder is party to the litigation.

#### 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?) |

Under Order XXV of the Code, the courts in India may order the plaintiff to provide security for costs. Order XXV, Rule 1 provides that at any stage of a suit, the court may, either of its own motion or on the application of any defendant, order the plaintiff to provide security for the payment of all costs incurred and likely to be incurred by any defendant. Such an order for security for costs is to be made mandatorily by courts in the case where a plaintiff resides abroad and does not possess any or sufficient immovable property in India. Furthermore, some states (eg, Uttar Pradesh) also mandatorily require the plaintiff to furnish security for costs in the case where the plaintiff is being financed by a person who is not a party to the suit. In other states (eg, Maharashtra and Madhya Pradesh), after impleading a funder, courts may, on their own motion or on application of a defendant, require the plaintiff to furnish security for costs. In some states, including Andhra Pradesh, Tamil Nadu and Orissa, if an element of champerty or maintenance is proved, the court may, on an application by the defendant, order the plaintiff to furnish security for the estimated costs of the defendant.

Only some courts in India can order the third-party funder itself to provide security for costs. In this regard, some states, including Madhya Pradesh, Bombay, Madra and Nagar Haveli, Goa and Daman and Diu, have inserted a new rule which prescribes that the court may order a third-party funder (of a plaintiff) to be made a co-plaintiff to the civil suit if it consents to this. If such a third-party funder declines to become a co-plaintiff, the court may on its own motion implead it as a defendant. Once impleaded, the court may order such funder either of its own motion or on the application of any party, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. Moreover, if the funder does
not furnish the security, the court may make an order dismissing the suit so far as the funder’s right to, or interest in, the property in suit is concerned, or declaring that the funder shall be debarred from claiming any right to, or interest in, the property in suit.

Therefore, in conclusion, courts in some states may order security for costs mandatorily upon becoming aware of the third-party funding (TPF) arrangement, while courts in other states may consider the TPF arrangement as a factor in ordering security for costs. Depending on the rule prevailing in the given state, the demand for security for costs may be from the plaintiff or the funder.

Section 9 of the Arbitration Act allows the courts to grant interim measures before or during the arbitral proceedings or once the final award has been issued but not yet enforced. Section 9(ii)(b) of the Act provides that an interim measure may be ordered for ‘securing the amount in the arbitration’. This includes the power to grant security for costs. Furthermore, section 17(ii)(b) provides that an interim measure may be granted by an arbitral tribunal for ‘securing the amount in dispute in the arbitration’. This provision thus also allows the arbitral tribunals to order security for costs.

The quantum of security to be awarded would depend on the discretion of the court or tribunal, to be exercised on the basis of the facts and circumstances of the case.

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

Yes, if a claim is funded, courts in some states are required to mandatorily order security for costs. By contrast, in other states funding of claims by a third party may be a relevant factor in favour of ordering security for costs (see above).

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

The legality or permissibility of ATE insurance has not been tested in India. Since TPF itself is a nascent concept in the country, the financial viability of ATE is still too much of an unknown for major insurers to offer ATE policies.

However, under the current insurance framework, liability insurance policies for directors, employees and industries are available. These insurance products, which cover advocate fees and litigation expenses, provide before-the-event liability insurance cover.

At present, there is limited meaningful insurance protection that can cover litigation expenses for individual litigants across India for conventional or alternative dispute resolution proceedings. For commercial and professional entities, legal expenditure could be covered under liability insurance, where coverage is provided for third-party loss or damage caused unintentionally by the policyholder.

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?

Third-party funding arrangements remain largely unregulated in India. The legislation does not explicitly oblige funded parties to disclose the identity of the third-party funder or the funding arrangements to the courts of law, arbitral tribunals or opposing parties.

However, the courts and arbitral tribunals are competent to adjudicate upon and compel disclosure of funding arrangements, should a party file an application for disclosure of the funding arrangement or the court (on its own motion) require any party to make such disclosure. The extent of disclosure of the funding arrangement has not been judicially reviewed as yet.

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

Section 126 of the Indian Evidence Act 1872 recognises attorney-client privilege and protects the information shared inter se between an advocate and a party, during the course and for the purpose of the advocate’s employment. However, there is no corresponding protection offered to the third-party funder and the funded party’s relationship. It follows that confidentiality should be protected by entering into non-disclosure agreements, and strict protocols may be devised to ensure conditions of disclosure are specifically formulated.

DISPUTES AND OTHER ISSUES

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

Disputes between litigants and their funders, if any have occurred, are not available in the public domain. Even as third-party funding (TPF) agreements gain more visibility as a viable form of litigation finance, TPF agreements themselves are likely to contain non-disclosure terms that govern disputes between litigants and funders. Hence, it is difficult to ascertain the existence of any disputes.
Other issues

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

The TPF regime in India remains a largely green field, with jurisprudence evolved through judicial precedent. As a result of the lack of a codified form of regulation, several issues may arise. For instance:

- since there is no established definition of unconscionability and no standards of extortionate proceeds for TPF arrangements, their validity hangs in the precarious balance of the courts; and
- there is a lack of clarity on the treatment of funds deployed by foreign funders directly in India and their legal treatment under the Foreign Exchange Management Act 1999.

Thus, there is need for a clear law providing for the TPF arrangements that are valid and legal, and prescribing the mechanism of deployment and implementation.

UPDATE AND TRENDS

Current developments

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

There is a growing interest in the third-party funding of Indian disputes, specifically arbitration. A lot of movement in the space can be seen in the form of academic webinars, information series and launches of products that support ‘interim finance’ of insolvency proceedings, and by assignment of ‘actionable claims’ through restructuring of corporate entities. So far, no active challenge to these has been reported publicly.
Overview

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

Third-party funding of litigation and arbitration is permitted in Israel and has received positive judicial endorsement. In Benny Bachar Zoabi Construction company vs Bank Hapoalim, LF 29526-10-16 (Nazareth District) (published in Nevo, 26 October 2017), the vice-president of Nazareth district court, Judge Attif Ailablouni, while holding that a litigation funding agreement was valid, also encouraged the use of such funding agreements in liquidation cases:

Finally, there is a fund that is willing to examine potential claims with professional eyes, and where the prospects of the claim look good, will be willing to fund the costs of the claim, while taking the risk that if the claim is rejected, there will not be indemnity on the funding costs, and if it succeeds, the fund will be indemnified and will receive additional returns. There is no doubt that we should bless the establishment of the fund and even say that it is a shame that it did not arise before. The idea underlying the establishment of the fund would enable the right of choice of the insolvency firm, if it so wishes, to use funding to file a claim and prevent a situation in which justified claims are waived only because of a shortage of funds. It is also necessary to encourage officeholders to apply for the services of the fund where it appears that there is a justified claim that has no sources of funding.

Today, third-party funding for litigation in Israel is an accepted part of the litigation landscape and has been judicially endorsed by the Israeli courts in recent years. Although the courts have not provided comprehensive rulings on the Israeli court’s approval regarding all of the issues relevant to litigation funding, the courts have, through positive endorsement of funding, established a favourable environment for litigation funding in Israel.

The use of third-party litigation funding in Israel has grown significantly over the past five years. While most of the positive judgments regarding litigation funding in Israel have related to liquidation cases, the courts have also endorsed funding in general litigation.

Restrictions on funding fees

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

There are no specific statutory limitations on the fees or the interest a funder can charge, but according to the professional regulations governing lawyers in Israel, Bar Association Law, 5721-1961, the courts have the right to alter and reduce a lawyer’s contingency fee arrangements if they are held to be excessive. Also, in liquidation cases, a liquidator requires the court’s approval to enter into a funding agreement and the court may review the terms of that funding agreement to determine whether entry into a funding arrangement is in the best option available to the company in liquidation.

Specific rules for litigation funding

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

Presently there are none.

Legal advice

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

In Israel, a lawyer’s conduct is governed by the lawyer’s Bar Association Rules (Professional Ethics), 5746-1986 and Bar Association Law, 5721-1961. There are no specific professional or ethical rules applicable to a lawyer’s advice in respect of third-party litigation funding, but general professional or ethical rules do apply: lawyers are obliged to act in the best interest of their clients; all information a lawyer obtains in relation to a case is confidential; lawyers are prevented from sharing their fee income with a third party (unless the third party is a lawyer); and lawyers are prohibited from soliciting work from their clients (either directly or through a third party).

Regulators

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

At present, no public bodies have a specific interest in or oversight over third-party litigation funding, apart from in a liquidation context, in which a liquidator is required to seek the court’s approval when entering into a funding agreement with a third-party funder.

Funders’ Rights

Choice of counsel

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

There is no specific prohibition on a third-party funder insisting on a choice of counsel, and the courts have not yet considered the issue.

Participation in proceedings

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

Court hearings are generally public (unless the court holds differently) and funders can attend without having to obtain permission. The court
will usually set out the names of those in attendance at the hearing in the protocol (that is the transcript of the proceedings). In arbitrations or settlement proceedings, the parties usually have the right to decide who will attend on their behalf.

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

A funder’s rights to approve or reject a proposed settlement will depend upon the terms of the funding agreement. There are no specific restrictions on these rights under Israeli law.

Termination of funding
9 | In what circumstances may a funder terminate funding?

The funder’s right of termination will be a matter of contract to be addressed in the funding agreement. There are no specific restrictions on this under Israeli law.

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?

The level of involvement the funder takes in the litigation process will be determined by the terms of the funding agreement. There are no specific restrictions on this under Israeli law.

Conditional fees and other funding options
Conditional fees
11 | May litigation lawyers enter into conditional or contingency fee agreements?

According to the Bar Association Law, 5721-1961 and the Bar Association Rules (Professional Ethics), 5746-1986, lawyers may enter into conditional or contingency fee arrangements, except in criminal cases. However, lawyers are not permitted to make payments for clients’ expenses (such as court fees or expert costs) on their clients’ behalf or to provide their clients with guarantees.

Other funding options
12 | What other funding options are available to litigants?

In several types of class action, where the case is of public and social importance, the Ministry of Justice or the Israeli Securities Authority may support the claimant with funding from dedicated funds. Also, litigants may ask for an exemption from the payment of court fees when they are unable to meet those costs, or where the claim relates to bodily injury matters. Various insurances may also contain legal expenses coverage.

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?

According to the 2020 Israeli Judiciary Report, an average civil procedure in the district court will take 19.5 months (including compromises and withdrawals).

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, according to the 2020 Israeli Judiciary report, 913 civil appeals were filed to the Supreme Court in 2020, seven fewer than in 2019. Also, according to the report, an average civil appeal in the Supreme Court took 15.5 months (including compromises and withdrawals).

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

There are no statistics available measuring the proportion of judgments which require contentious enforcement proceedings. The enforcement process is regulated by the Execution Law, enacted in 1967. A judgment rendered by an Israeli court is, in general, enforceable if it is final and binding and if the court or the chief enforcement officer has not suspended its enforcement. In general, the enforcement of an enforceable judgment or arbitral award in Israel is not yet seen as particularly burdensome. The methods of enforcement available to the judgment creditor include:

- seizing a judgment debtor’s assets;
- third-party debt order;
- insolvency proceedings;
- appointment of a receiver;
- attachment of earnings; and
- preventing the debtor from leaving the country.

Collective actions
Funding of collective actions
16 | Are class actions or group actions permitted? May they be funded by third parties?

Class actions are permitted in Israel. The Israeli Class Action Law came into force in 2006, and formally regulates the proceedings applying to class actions in Israel. Since the advent of that Law, class actions have become a favoured path of pursuing litigation. The majority of class actions filed in Israel are consumer claims against corporate entities, and there have also been a significant number of securities and anti-trust claims. The Ministry of Justice or the Israeli Securities Authority may fund the claim when it is of public and social importance. There is no prohibition on funding a class action.

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?

The court will usually order the unsuccessful party to pay some of the costs of the successful party. The amount will usually be significantly lower than the costs that are incurred by the successful party. To date, the courts have not been asked to rule on whether an unsuccessful party should pay the litigation funding costs of the successful party. Given the relatively low amounts that are often granted to a successful party in respect of its legal costs, it is unlikely, at least in the near future, that the courts would order an unsuccessful party to meet such a cost.
Liability for costs

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

No. According to the Civil Procedure Regulations, 5744-1984, only the party to the litigation can be liable for adverse costs.

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?)

The Civil Procedure Regulations, 5744-1984 and the Companies Law 5759-1999 allow the court to order a claimant to deposit security to meet the defendant’s costs. When the claimant party is a limited company, the normal position is that the claimant is required to deposit security with the court (clause 353a of the Companies Law 5759-1999 (when the company is established outside of Israel the chance of security being granted is even higher)). If the claimant is a natural person, the normal position is that he or she will not be ordered to deposit a security. The main reason for this difference is that courts want to prevent claimants from hiding behind the legal personality of a company to avoid paying the expenses incurred by the defendants. The court might depart from the default position, if the financial strength of the company is insufficient or the claimant’s claim is particularly strong.

Although the court is not able to order a third-party funder to provide security for costs, there have been cases in which a funder has voluntarily provided security on behalf of the claimant to allow the claim to continue. The calculation of security varies from case to case, but could be up to 2.0-2.5 per cent of the claim value. The most common means in which security is provided is a payment of cash into court, but in some circumstances a bank guarantee will be permitted.

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, itself, a ground upon which the court may make an order for security for costs. In a recent case, the existence of a third-party funder tipped the balance in favour of the court ordering security for costs.

Insurance

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

There is no statutory prohibition on the use of ATE insurance; however, ATE insurance is not commonly used in Israel. Defendants’ costs are sometimes paid by insurances, such as professional negligence or directors’ duties cases.

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. However, if the court finds the agreement relevant to the dispute, it can compel disclosure of a funding agreement. Further, in liquidation cases the liquidator will have to obtain the court’s approval to engage in a funding agreement, and as part of this procedure the liquidator is likely to be ordered to disclose the agreement to the court and possibly to the creditors and shareholders.

Privileged communications

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

Unlike communications between litigants and their lawyers, the communications between litigants (or their lawyers) and funders are not protected by privilege in Israel. In the few decisions that have dealt with the communications between litigants and funders, the courts did not order disclosure of the funding agreement (on the basis that it was not relevant to the dispute). In addition to ‘litigant-client privilege’, protecting communications between a lawyer and client there is also a privilege in Israel in respect of any information regarding ‘preparation for trial’, but once a party argues for such a privilege, that party cannot then use that information during the trial.

Disputes and Other Issues

Disputes with funders

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

There are no such disputes reported that we are aware of.

Other issues

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

Practitioners of litigation funding should be aware that while Israeli lawyers’ costs are relatively low in comparison to some jurisdictions (and contingency fee arrangements are possible), there is a mandatory court fee of 2.5 per cent of the claim value (up to 25 million shekels; 1 per cent of the sum above that), where half of the fee should be paid when the claim is filed, and the second half when the trial begins. Also, lawyers in Israel are not allowed to pay the litigant’s costs, such as court fees, expert’s fees, security etc. The litigation funding industry is in its developing stages in Israel, and considering the increasing number of cases that are funded, we might see in the future more court decisions...
that will determine the rules on matters such as the limits on the fees and interest a funder can charge, the legality of veto rights and the privilege in the communications between litigants and funders.

**UPDATE AND TRENDS**

**Current developments**

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

No updates at this time.
Italy

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REGULATION

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

Third-party litigation funding is permitted in Italy as an instance of application of the principle of freedom of contract as set forth in article 1322, paragraph 2 of the Civil Code, which states that: ‘[Parties] may . . . conclude contracts that do not belong to the categories that have a particular discipline, provided they are aimed at achieving interests worthy of protection according to the legal system.’

This economic-juridical operation is still largely unknown, although some legal-market operators have established first relationships with litigation funds and started to use it in Italy.

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

No. Since litigation funding agreements are an expression of the freedom of contract, the setting of funding fees is a matter of free bargaining.

Generally, the sum that is due to the funder is determined as a percentage of the sum actually made over to the funded party. However, the sum may be determined in other manners (eg, as a multiple of sums invested, as a fixed fee, etc).

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

No. In Italy, there are no applicable legislative or regulatory provisions. This legal institution is governed by the general legal rules of contracts and by those rules that govern certain types of contract (eg, mortgage contracts, insurance contracts).

There is an EU project for regulating this tool – European added value assessment (EAVA) accompanies a resolution based on a legislative initiative report prepared by the European Parliament’s Committee on Legal Affairs (JURI), presenting recommendations to the European Commission on the responsible private funding of litigation. The main purpose of EAVA is to identify the possible gaps in European Union legislation. The various policy options to address this gap are then analysed and their potential costs and benefits are assessed.

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

However, given the principles of freedom, autonomy and independence of lawyers during their activities, it is advisable – or it is indeed even mandatory – that lawyers and funders have no interests in common.

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

No, at present there is no supervisory body or other entity that has interests in third-party litigation funding.

FUNDERS’ RIGHTS

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

Usually, parties requesting funding are free to select their lawyer autonomously, and the funder does not impose one of their own choosing.

However, litigation financing agreements may in any case provide for acceptance or approval clauses applicable to the lawyer chosen by the applicant. These clauses or indications could determine the granting or denial of litigation funding.

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

The funder may freely attend the open court hearings and, provided the adverse party approves, the informal hearings.

In neither case can the funder actively participate in proceedings.

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

Litigation funding contracts commonly include the provision that acceptance or rejection of a settlement agreement requires the funder’s consent.

Moreover, it is common for litigants and funders to agree in advance on certain minimum and maximum amounts concerning the limitation of the funder’s veto right and their right to oblige the claimant to accept a particular settlement.

Termination of funding
9 In what circumstances may a funder terminate funding?

There are no specific rules governing litigation funding and there are no standard instances of contract termination. Such rules may, therefore, be agreed upon by the parties when bargaining.
In general, the causes of early discontinuance of funding may be of two types. On the one hand, events may significantly affect litigation risk, such as:

• the emergence of previously unavailable information;
• a case law (or even legislative) change, which decisively affects the outcome;
• loss of conclusive evidence, or acquisition of conclusive evidence, working against a satisfactory outcome of litigation; and
• changed economic conditions of the parties to litigation or their being subject to insolvency procedures.

On the other hand, the funded party may fail to perform in accordance with the contractual terms and conditions.

In the latter case, the said party may be obliged to repay to the funder the expenses and costs sustained up to the point of termination.

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?

The funder cannot take an active role in the litigation process, which is the prerogative of the party’s lawyer, who must act freely, autonomously and independently.

Therefore, any rights and actions the funder intends to exercise during the course of the litigation have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation, and any rights to veto the actions a litigant is usually free to take.

All in all, considering that the involvement of a litigation funder is not disclosed to the court or to the counterparty, in the majority of the cases the funder’s role within the litigation is very limited.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

In Italy, the stipulation of lawyer’s fees is free: time-based agreements are allowed, on a lump sum basis, by agreement concerning one or more business, based on the performance and timing of provision of the service, by phases or services or for the entire activity, as a percentage of the value of the deal or how much the recipient of the service is expected to benefit from. However, the lawyers’ ethics code prohibits the ‘quota lite’ pact, which is the pact by which the lawyer receives as remuneration, in whole or in part, a portion of the object of the claim or of the litigious reason. In other words, in Italy contingency fee agreements are prohibited.

Consequently, the litigation funding agreement must not directly or indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer within the limits described above in the funding agreement.

Other funding options

12 | What other funding options are available to litigants?

The Italian legal system foresees alternative forms of litigation funding, such as the following:

• Defence funded by the state. This institute applies only to the less well off (persons with earnings that are below a legally fixed threshold value). In any case, such funding by the state cannot cover sums that the party thus assisted may be ordered to make over to a victorious counterparty.
• Services provided by trade unions to their members concerning litigation regarding labour issues, and services provided by benevolent institutions to pensioners who intend to take legal action in respect of pension issues.
• Legal expenses insurance. The extent and limits of insurance cover are contractually stipulated. This cover is normally only provided for certain types of litigation.
• Funding of natural persons or corporations by accredited intermediaries.

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?

Regarding the length of civil trial, Italy ranks lowest in the EU. The Directorate-General for Statistics and Organisational Analysis of the Ministry of Justice reports that the average length of a first-instance civil trial is two and a half years.

Time frame for appeals

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

There are no official statistics available on the percentage of how many first-instance judgments are appeals. On the other hand, again according to the Directorate-General for Statistics and Organisational Analysis of the Ministry of Justice, the average length of appeal proceedings in Italy is about three and a half years.

Enforcement

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. The enforcement of Italian judgments is governed by the Code of Civil Procedure. A sentence rendered by an Italian court is, in general, immediately enforceable. There are also other judicial titles that can be declared enforceable by the court. The court could suspend the enforceability of a sentence in the event of an appeal and for good reasons.

Italian civil enforceable proceedings have variable duration and costs.

COLLECTIVE ACTIONS

Funding of collective actions

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

Group actions are permitted in Italy and they can be funded by a third party. For example, several group actions against truck cartels and group actions against the forced liquidation banks in the northeast area are pending.

Class actions are regulated by Law No. 31/2019, published in the Gazzetta Ufficiale No. 92 of 18 April 2019. The new rules did not enter into force immediately but did so on 19 May 2021. Therefore, the
provisions of this Law are applicable to the illegal pipelines carried out after the date of its entry into force, while the illegal pipelines carried out before the date of its entry into force continue to be regulated by the Consumer Code.

In the near future, therefore, the class action could be a concrete financing opportunity for funders. Indeed, the first initiatives and the first requests for funding have already been recorded.

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?

According to article 91 of the Italian Civil Procedure Code, the judge, with the sentence that closes the trial, condemns the losing party to reimburse the expenses in favour of the other party and liquidates the amount together with the defence fees. These include court costs, expert costs (if ordered by the court), and the adverse costs in accordance with the Italian tariff system, but no costs beyond these.

As litigation financing is not yet commonly used in Italy and that litigation financing agreements are confidential and not disclosed, it is not possible for a court to order the losing party to pay the costs of the financing.

Liability for costs

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

No. Since judicial measures have effect only upon the parties to the case, the liability of the funder for costs sustained by the counterparty is not foreseen.

This aspect, however, is one that lies at the heart of litigation funding agreements, according to which funders may assume wholly or in part the risks of loss of the case, including a possible order that the loser is to make over costs to the counterparty.

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?)

In the Italian legal system, there is no general regulation of security for cost.

Special rules, particularly in precautionary proceedings, allow the judge to order the party, not third parties, to provide security for costs.

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

No, the litigation funding agreement couldn’t influence the court decision on security for costs because it is an agreement between the parties and it is not disclosed to a third party.

Insurance

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

Despite the absence of legal or regulatory restrictions, currently there is no standard offering available on the Italian insurance market and after-the-event insurance is not used.

By contrast, legal costs insurance is used in Italy, although it is not common. This product provides costs coverage to the extent of the specific policy, but it is usually limited to certain types of claim.

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?

No, the disclosure of litigation funding is not required by law or by jurisprudence. The litigation funding agreement is usually confidential and will not be disclosed to the opponent.

In any case, a litigant might have such an obligation to disclose litigation funding in domestic or international arbitration. For example, the new regulation of the Milan Arbitration Chamber provides that the litigant has specific obligations to disclose the financing agreement.

Privileged communications

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

Yes. Communication between litigants or their lawyers and funders is protected by privilege, and can only be waived under the indication of regulatory or supervisory authorities to which either the litigants, their lawyers or funders are subject, or pursuant to any court order or order by another competent authority or tribunal.
DISPUTES AND OTHER ISSUES

Disputes with funders
24 Have there been any reported disputes between litigants and their funders?
No. To date, no disputes between litigants and their funders have been noted.

Other issues
25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?
Not at present. Litigation funding will certainly become a much more widespread practice in the near future, especially considering the planned justice reform which is aimed at cutting the length of lawsuits and increasing the predictability of their outcome.

UPDATE AND TRENDS

Current developments
26 Are there any other current developments or emerging trends that should be noted?
The reform of the Italian justice system stands at the very core of the Italian Restart and Resiliency National Plan (PNRR) – that is, the set of measures funded with the money coming from the Next Generation EU plan. One of the main goals of the justice reform is a 40 per cent cut in the length of civil lawsuits (which should be achieved by 2026), together with a general rationalisation of the system. On 21 September 2021, the Senate approved the part of the reform relating to civil justice. This climate is likely to increase the appeal of litigation funding options, because it will lower or remove some of the main obstacles that have historically discouraged major players from investing in the Italian system. In order to seize this opportunity, FiDeAL – the first Italian provider specialised in litigation investment solutions – has scaled up its efforts to penetrate the Italian market. It has recently partnered with 4cLegal to raise its legal tech profile, and is in talks with a number of major funds.
Is third-party litigation funding permitted? Is it commonly used?

All references to Japanese legislation and rules in this article are translations provided by the Japanese government (at http://www.japaneselawtranslation.go.jp/law/search_nm/?re=02) or the Japan Federation of Bar Associations (at https://www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf).

The current situation in Japan

Although contingency fees are permitted and regularly used for litigation and other types of dispute resolution in Japan, the issue of whether third-party funding is permitted under Japanese law remains uncertain. While the common law doctrines of champerty and maintenance do not exist under Japanese law, no explicit law approves or prohibits third-party funding in Japan. Nonetheless, some Japanese companies have used third-party funding in international arbitration cases outside Japan. Because of the uncertainty regarding the legality of third-party funding, it is seldom used for proceedings in Japan. No court decision dealing with this issue has been officially reported there.

Alongside the increased attention from Japanese companies towards international arbitration in recent years, the Japanese government has provided support for developing and promoting international arbitration in its own jurisdiction. For example, in parallel with conducting a discussion on the Reforms of Arbitration Act, the government supported the establishment of the first international arbitration facilities in Japan in 2018. The government taskforce’s report specifically pointed out that ‘[the government] should consider how to utilize and regulate third-party funding in which third parties cover the costs of arbitration proceedings as a measure for responding to the demand for supporting the cost of arbitration in the private sector’.

We anticipate developments in this area in the coming years. In this chapter, we will outline the set of provisions and restrictions commonly discussed regarding third-party funding under current Japanese law: the Attorneys Act, the Trust Act and the Basic Rules on the Duties of Practicing Attorneys. If some forms of third-party funding arrangements are understood as a form of loan, then financial regulations, including the Money Lending Business Act and the Interest Rate Restriction Act, may apply. In such cases, the arrangements can be subject to administrative or criminal sanction if they violate these regulations (eg, by exceeding the statutory limitation on interest rates). However, third-party funding is not likely to be considered a loan agreement, because the funded party is not required to repay the money to the funder irrespective of the outcome of litigation.

Article 73 of the Attorneys Act

Article 73 of the Attorneys Act provides that: ‘No person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediation, conciliation or any other method.’ This provision specifically prohibits any person from taking over the rights of another person and enforcing those rights through court proceedings or any other dispute resolution mechanism. However, the provision is not intended for regulating third-party funding. In order to avoid the possibility of violating article 73 of the Attorneys Act, third-party funders and their users should not make any arrangements that include the assignment of claims.

Article 72 of the Attorneys Act

Article 72 of the Attorneys Act provides that: ‘No person other than an attorney or a legal professional corporation may, for the purpose of earning compensation, engage in [legal] services such as provision of an expert opinion, representation, mediation, or settlement of [a] case for which an appeal is filed with [an] administrative authority, including a request for administrative review, objection, request for re-examination or other general legal cases, or may engage in mediation services related to these cases; provided, however, this does not apply if otherwise provided in this Act or other laws.’

Examining the language of article 72, a third-party funder is prohibited from, among other things, engaging in legal services or mediation services (in relation to legal services) for compensation. For example, if a third-party funder gives a concrete opinion on a claim (eg, the probability of success in an arbitration case) in the funded party’s interest instead of, or in addition to, conducting due diligence in its own interest, such arrangements might constitute legal services under article 72. ‘Mediation services’ in this article refers to activities wherein a person facilitates the establishment of representation or other relevant relationship between a party of legal proceedings and a person (eg, a lawyer) who provides expert opinions, represents a party in dispute or facilitates settlement. If, therefore, a third-party funder acts as an intermediary to facilitate representation of the funded party by a lawyer, the funder may face the risk of violating article 72. Under typical third-party funding arrangements, the roles of lawyers representing the parties and those of third-party funders are clearly separated. If the service provided by a third-party funding arrangement is limited to paying the legal costs associated with legal proceedings in exchange for receiving a fee from the proceeds of the outcome of the proceedings, it is unlikely that providing the service is against article 72 of the Attorneys Act.

Article 10 of the Trust Act

A similar restriction is found in the Trust Act. Article 10 states that: ‘No Trust is allowed to be created for the primary purpose of having another person conduct any procedural act.’ In a case where a claim is transferred to a third-party funder, the transfer of the claim may arguably constitute a trust in which the primary purpose is to have the third-party...
funder conduct legal proceedings, and therefore such arrangements would be restricted by this provision. However, a typical third-party funding arrangement in which the third-party funder receives a contingency fee in exchange for providing the claimant with the funds to cover legal costs does not transfer the claim from the claimant to the funder. Therefore, such arrangements would not fall within the scope of this restriction.

The Basic Rules on the Duties of Practicing Attorneys
The Basic Rules on the Duties of Practicing Attorneys, established by the Japan Federation of Bar Associations, is a set of ethical rules governing the Japanese legal profession. Its purpose is to regulate the conduct of attorneys, some of which may be relevant for certain forms of third-party funding. For example, article 12 prohibits those in the legal profession from dividing the fees for services with any person other than a lawyer or a legal professional corporation. In this regard, to avoid any unnecessary concern about the applicability of article 12, a third-party funder should receive its fees from the litigant, not through the legal counsel of the funded party.

As another example, the Basic Rules on the Duties of Practicing Attorneys prohibit members of the legal profession from taking cases referred from someone in a non-legal profession who illegally engages in legal services or falsely indicates that they are qualified to engage in legal services, thereby violating articles 72 to 74 of the Attorneys Act. The provision of article 11 of the Basic Rules on the Duties of Practicing Attorneys is as follows: ‘An attorney shall not accept a referral of a client from a person who violates the provisions of Articles 72 to 74 of the Attorney Act (Act No. 205 of 1949) or a person who [is reasonably] suspected [of violating] these provisions, [shall not] use [the services of] such [a] person or [shall not] allow such [a] person to use [the attorney’s] name.’ As long as a third-party funder does not engage in activities that go against the Attorneys Act, a lawyer who receives a referral from the third-party funder will not be in violation of article 11 of the Basic Rules on the Duties of Practicing Attorneys.

Restrictions on funding fees
2 Are there limits on the fees and interest funders can charge?
There are no specific regulations limiting the fees and interest that funders can charge. If fees and interest are found to be excessively high, the arrangements may be invalid because such arrangements are considered to be against public policy, pursuant to article 90 of the Civil Code. Article 90 of the Civil Code states: ‘A juridical act that is against public policy is void.’

If some forms of third-party funding arrangements are understood as a form of loan, financial regulations including the Money Lending Business Act and the Interest Rate Restriction Act may apply. In such cases, the fees and interest shall not exceed the statutory limits on interest rates mandated by the Money Lending Business Act and the Interest Rate Restriction Act. For example, the maximum interest rate permitted by the Interest Rate Restriction Act is between 15 and 20 per cent per year, depending on the amount of the principal.

Specific rules for litigation funding
3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?
There are no specific legislative or regulatory provisions drafted for the purpose of regulating third-party funding in Japan. If some forms of third-party funding arrangements are understood as a form of loan, financial regulations including the Money Lending Business Act and the Interest Rate Restriction Act may apply.

Legal advice
4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?
Yes. The Attorneys Act and the Basic Rules on the Duties of Practicing Attorneys are the principal rules that govern the activities of the legal profession in Japan. If lawyers advise their clients in relation to third-party funding, they are required to comply with these rules. The relevant rules, among others, are articles 72 to 74 of the Attorneys Act and articles 11 and 12 of the Basic Rules on the Duties of Practicing Attorneys.

Regulators
5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?
Yes. The Ministry of Justice has the power to regulate matters regarding the Attorneys Act, which is currently the most relevant legislation regarding third-party funding. It is still unclear if future legislation will categorise third-party funders as a type of financial institution. If it becomes the case, the Financial Services Agency would acquire the power to regulate third-party funders.

FUNDERS’ RIGHTS
Choice of counsel
6 May third-party funders insist on their choice of counsel?
There is an argument that such an arrangement might be found to violate the Attorneys Act or the Basic Rules on the Duties of Practicing Attorneys. With the lack of specific legislation on third-party funding in Japan, it is uncertain if the relevant authority (e.g., the Ministry of Justice or Japan Federation of Bar Associations) would find that by insisting on a certain counsel for the specific third-party funding case, a third-party funder indirectly provides legal services, which is not allowed.

Participation in proceedings
7 May funders attend or participate in hearings and settlement proceedings?
In general, the courts have the authority to allow a third party to attend hearings and settlement proceedings. For example, article 169.2 of the Code of Civil Procedure provides that: ‘The court may permit the attendance of a person it considers appropriate, provided, however, that the court shall permit the attendance of any person a party requests, unless that person’s attendance would be detrimental to the conduct of the proceedings.’ Since the current Code of Civil Procedure does not recognise third-party funding, it is still unclear how the court would deal with this issue.

Veto of settlements
8 Do funders have veto rights in respect of settlements?
Funders who want to have veto rights in respect of settlements should be aware of the risk that such arrangements may be found to violate the Attorneys Act or the Basic Rules on the Duties of Practicing Attorneys. If funders have such rights in a specific claim, the relevant authority may find that the funders having control over the claim implies that the funders are providing legal services to the litigant, or the funders have received the assignment of the claim.
Term of funding

9 | In what circumstances may a funder terminate funding?

Until new legislation clarifies the standards or regulations on third-party funding, the conditions remain unclear.

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?

Until new legislation clarifies the standards or regulations on third-party funding, the role of funders remains unclear.

Conditional fees and other funding options

Conditional fees

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

Yes. Contingency fee arrangements are permitted in Japan and are commonly used for contentious matters. As the standard fee arrangement for lawyers, the standard fee table of the Japan Federation of Bar Associations adopted a combination of the up-front fee and contingency fee arrangements. The standard fee table was abolished in 2004, after the Japan Fair Trade Commission warned that using the standard fee table may constitute a cartel among the legal profession, but some litigation lawyers in Japan have continued using the fee table after 2004 voluntarily.

Other funding options

12 | What other funding options are available to litigants?

One option available is the Japan Legal Support Center, which provides legal aid to individuals who are not able to afford legal services or the costs for initiating litigation. The Japan Legal Support Center is a government-funded entity that makes necessary payments on behalf of a user in need, if the user meets certain criteria. The user is required to repay the costs unless the Center waives the obligations based on the financial requirements.

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?

According to the Annual Report of Judicial Statistics Overview, 2020 edition, volume 1 (Civil Cases) published by the Supreme Court of Japan, a commercial claim usually takes about nine months to reach a decision at the court of first instance. In 2020, almost all civil proceedings were suspended because of the effects of covid-19. The average duration for reaching a decision was slightly longer in 2020 than usual. Court proceedings returned to the normal schedule in 2021.

The statistics reported above include cases determined via default judgment or settlement. At the court of first instance, approximately 20 per cent of claims are decided via default judgment. Furthermore, approximately 40 per cent of claims are settled in the process of litigation. It would therefore take longer than nine months if the case is going to receive final judgment. In our experience, a large and complex case usually takes from 18 to 24 months to reach final judgment at the court of first instance.

Time frame for appeals

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

According to the Annual Report of Judicial Statistics Overview, 2020 edition, volume 1 (Civil Cases) published by the Supreme Court of Japan, approximately 20 per cent of first-instance judgments are appealed. It takes approximately five months on average for proceedings at the appellate courts. Because of the effects of covid-19, it took approximately seven months on average in 2020 for proceedings at appellate courts to reach a decision.

Enforcement

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

According to the Annual Report of Judicial Statistics Overview, 2020 edition, volume 1 (Civil Cases) published by the Supreme Court of Japan, the courts enforced approximately 65,000 judgments in 2020. The report does not include the statistics on the portion of judgments that required contentious enforcement proceedings.

As long as the judgment creditor can identify the assets of the judgment debtor, the enforcement process in Japan does not take long. The enforcement process usually ends within a few months and may take up to six months. The reform of the Civil Execution Act came into force in 2020. The reform implemented a more serious penalty for non-compliance by the judgment debtor in the Property Disclosure Procedure. The judgment creditor may apply for the Property Disclosure Procedure in the court, where the judgment debtor is obliged to disclose its assets at the hearing pursuant to the Civil Execution Act. Before the reform, the sanction for non-compliance with the process was an administrative fine. Under the new law, non-compliance would lead to a criminal charge of imprisonment for up to six months or a fine of up to 500,000 yen. The number of applications increased sevenfold from 2019 to 2020. Around 500 applications were made in 2019, and around 4,000 applications were made in 2020.

Collective actions

Funding of collective actions

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

New legislation that came into force in 2016 allows a registered consumer protection organisation to claim damages from business providers in a form of class action. The Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers provides the basis for initiating the proceedings. However, due to the stringent criteria for making the claims, although the first action based on the new Act commenced in 2018, there have been only four reported cases as of March 2021.

There are no specific rules prohibiting or approving use of third-party funding for these class actions.
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?

Articles 61, 64 and 68 of the Code of Civil Procedure provide that the courts may order the unsuccessful party to pay the costs of the court proceedings. The Code distinguishes the costs to be paid to the courts (eg, the filing fees) and the costs associated with each party’s activities (eg, the fees of legal counsel). The courts have the power to order the unsuccessful party to pay the first set of costs, but do not have the power to order the unsuccessful party to pay the latter.

The courts do not have power to order the unsuccessful party to pay the costs associated with the successful party’s legal costs (eg, the attorney’s fees, and transportation costs) pursuant to these articles of the Code of Civil Procedure. In practice, in tort cases, the court tends to award the successful party the legal costs as part of the damages. In other types of claims (eg, contract claims), this does not apply.

If the courts find that some portion of the litigation funding costs is to be considered as the costs to be paid to the courts, the courts may order the unsuccessful party to pay that portion of litigation funding costs of the successful party. As there is no reported case in Japan on this issue yet, it is unclear how the courts will decide.

Liability for costs

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

This issue is still unclear because the Code of Civil Procedure does not yet recognise third-party funding. Under the current Code of Civil Procedure, it is unlikely that the court will directly order a third-party funder to bear adverse costs. The Code of Civil Procedure provides that the courts may order the unsuccessful party, not a third-party, to pay the costs of the court proceedings.

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?)

The courts may order a plaintiff, but not a third party, to provide security for costs under certain circumstances stipulated in the Code of Civil Procedure. Article 75.1 of the Code of Civil Procedure provides that ‘[i]f a plaintiff is not domiciled in Japan or does not have a business office or other office in Japan, at the petition of the defendant, the court shall issue a ruling ordering the plaintiff to provide security for court costs’. In such a case, the amount of security will be calculated based on the total amount of court costs that the defendant would need to pay for all instances. The plaintiff shall deposit the security based on the court order at a depository/deposit office or by other method provided by the court rules unless the parties agree otherwise pursuant to article 76 of the Code of Civil Procedure.

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

Since a funded party is not required to disclose the fact that they received funding, the court might not notice that the party has been funded by a third party. Litigants in Japan are unlikely to be funded by a third party under the current conditions.

Insurance

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

The Insurance Act does not recognise after-the-event insurance. Article 2.1 of the Insurance Act provides the definition of insurance. It states: ‘insurance policy: a contract, whether it is called as an insurance contract or mutual aid contract or by any other name, under which one of the parties promises to provide property … on the condition of the occurrence of a certain event, and the other party promises to pay insurance premiums … according to the likelihood of such event occurring’. It is considered that after-the-event insurance does not fall within this definition of insurance under Japanese law. In 2019, a business entity began providing the service of bearing legal costs in a form similar to after-the-event insurance, but this form of business is not considered as an insurance service under Japanese law.

Insurance for attorneys’ fees is available in Japan. Some insurance policies, such as for automobile insurance, can include coverage of attorneys’ fees.

Another type of insurance covering legal costs is Legal Expense Insurance. The German Rechtsschutzversicherung is the model for this type of insurance. This insurance has been available in Japan since 2000. The insurance policy covers the legal costs if the insured event occurs.

In both types of insurance, the main users are individuals.

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?

No. There are no specific requirements to disclose a litigation funding agreement to the opposing party or to the court in Japan. The opponent of the funded party may make a request to the court for a document production order against the funded party to submit the funding agreement in a litigation pursuant to article 220 of the Code of Civil Procedure. The court has powers to order disclosure of documents if the request meets certain requirements pursuant to articles 181 and 220 of the Code. It is unlikely that the court would order the funded party to disclose the funding agreement, because the court would not find that the funding agreement is ‘necessary evidence’ to examine the underlying dispute. In this regard, article 181.1 of the Code provides that: ‘The court is not required to examine evidence offered by a party which the court considers to be unnecessary.’

Privileged communications

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

No. In Japan, the legal concept of attorney-client privilege is not recognised in civil proceedings.

However, as lawyers have a confidentiality obligation to their client pursuant to article 23 of the Attorneys Act, the communication between the client and the lawyer would be protected by the confidentiality obligation. On the other hand, communication between the funders and the lawyers of the funded party is not directly protected by the confidentiality obligation under article 23 of the Attorneys Act.
**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

No. There have been no reported disputes between litigants and their funders. It remains rare for litigants to use any kind of litigation funding for domestic disputes.

**Other issues**

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

In 2019, a business entity in the private sector began providing funds for litigants in a form similar to after-the-event insurance. The uncertainty surrounding the legality of third-party funding will remain until either new legislation acknowledges that such services are permitted, or any court decision endorses that current Japanese law does not prohibit third-party funding. Until then, a potential third-party funder that wishes to provide its services in Japan may want to make a request to the relevant regulatory body (e.g., the Ministry of Justice) to clear its concerns pursuant to article 7 of the Act on Strengthening Industrial Competitiveness. This process is called the ‘request for the clearance of a Gray-zone’. Article 7.1 of the Act provides: ‘[a] person that intends to start new business activities may ask for confirmation from the competent minister regarding the interpretation of provisions of Acts and orders based on Acts ... that provide for regulations on the new business activities and business activities related thereto and the applicability of those provisions to the new business activities and related business activities...’.

**UPDATE AND TRENDS**

**Current developments**

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

While the uncertainty surrounding the legality of third-party funding still exists in Japan, this funding option has been receiving increasing attention, especially among large companies which are potential users of third-party funding. Since 2017, the Japanese government has implemented its initiative to elevate the status of Japan as a forum for settling international commercial disputes. As part of this initiative, the government has finally begun a discussion on how to tackle the issue of third-party funding. As recent legislation in Singapore and Hong Kong ended the uncertainty on this issue, a legislative response in Japan also is awaited.
REGULATION

Overview

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

There are currently no specific rules concerning the financing of a dispute by a third party. Furthermore, the admissibility of third-party litigation funding has never been, as such, reviewed by the Luxembourg courts. However, recent practice shows that third-party litigation funding is in fact increasing in Luxembourg.

Restrictions on funding fees

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

Due to the lack of legislative or regulatory provisions in the field of third-party funding, explicit limits on the fees and interest funders can charge do not exist. Indeed, the determination of fees and interest is subject to the parties’ freedom of contract.

However, French case law, to which Luxembourg judges often refer in contractual matters, considers that funders run the risk that courts could eventually reduce the contractually agreed funder’s fee if the fee is considered excessive or disproportionate in comparison to the services rendered.

Specific rules for litigation funding

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

In Luxembourg, there are currently no specific regulatory or legislative provisions applicable to third-party funding. The general law of contracts therefore governs third-party funding agreements. Furthermore, specific rules of professional conduct governing the attorney-client relationship affect the third-party funding relationship.

Legal advice

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

Attorneys in Luxembourg must carry out their activities in compliance with the very strict ethical rules laid down by both the amended law of 10 August 1991 on the legal profession and the ethical rules provided by the Bar.

In that regard, the prohibition on charging contingency fees, the duty of professional secrecy and the duty of independence are the most relevant in regard to advising clients in the field of third-party funding.

The duty of professional secrecy applies to any type of communication (written or oral) or information exchanged between an attorney and his or her client. It is an absolute rule. Thus, the duty of professional secrecy can be considered as a public freedom participating in the democratic state of law, the violation of which, moreover, constitutes a criminal offence.

However, the amended law of 10 August 1991 on the legal profession allows, under certain conditions, the attorney to disclose information covered by professional secrecy. Furthermore, a client is also free to independently communicate documents or information received from attorneys to third parties, including third-party funders.

The funder’s information rights regarding privileged information should, however, be precisely defined in the litigation funding agreement.

Thus, attorneys also have a duty of independence to their clients. This means that an attorney must have all the means and freedom to determine what must be done to effectively carry out his or her functions of assistance, advice and defence in the service of the client. This duty applies to any strategic advice throughout a proceeding, including the choice of whether to settle or withdraw an action.

Regulators

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

At present, since third-party litigation funding is not regulated under Luxembourg law, third-party litigation funding generally escapes any type of supervision by public bodies.

However, it cannot be excluded that in future, depending on the structuring of the funding agreement, a specific funding model may be considered as a regulated service falling under the supervision of the Luxembourg financial regulator (CSSF).

Furthermore, since the financing of a dispute by a third party is indirectly subject to compliance with the attorney’s ethical or legal obligations, the Bar Council too could be considered as a competent regulator.

FUNDERS’ RIGHTS

Choice of counsel

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

In principle, clients are completely free in regard to their choice of counsel. In practice, however, it is accepted that a third-party funder may present a funded party with its choice of counsel if the funded party is not yet represented and seeks advice from the funder in this regard. Also, it is common practice to stipulate in the funding agreement that funding is only granted for a specific attorney accepted by the funder or that, if the litigant intends to replace his or her attorney, funding will only be further granted if the new attorney is approved by the funder.

Since there are no explicit rules on third-party litigation funding, the choice of counsel is therefore subject to the parties’ freedom of contract.
As a matter of principle, the litigant’s attorney should however be independent from the third-party funder and must be able to act freely of any instructions from the latter.

Participation in proceedings

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

In principle, court hearings are public. As such, every person, including a representative of a funder, has the right to attend a trial.

To the contrary, arbitration hearings and settlement meetings are generally confidential. The participation of funders is in those cases subject to the prior agreement of the other party.

Veto of settlements

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

Since there are no explicit rules on third-party funding, veto rights are subject to the parties’ freedom of contract. Thus, it is common practice to include in the funding agreement a funder’s veto right relating to a potential settlement. Thereby, the parties often agree in advance on certain minimum and maximum amounts limiting the funder’s veto power. Similarly, funding agreements typically provide for an exit mechanism if the claimant and the funder fail to reach an agreement regarding a specific settlement. There has been no decision handed down yet by a Luxembourg court confirming the validity of such a clause.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances in which funding may be terminated. These often include a major change in the creditworthiness of the opponents, a change of circumstances having an impact on the chances of success of the funded case or the insolvency of the litigant.

In addition, the termination of a funding agreement could be triggered in the case of a contractual breach of the funding agreement by the funded party. In that case, the funder would have the option to terminate the funding after due notice and would not be obliged to cover the costs of the ongoing proceedings. Given these circumstances, the funded party might even be obliged to reimburse the funder for its costs and expenses.

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?

There are no explicit rules as to the role a funder has in an ongoing litigation. The determination of such role is therefore subject to the parties’ freedom of contract. Any rights and actions the funder wishes to exercise during the funded proceedings must therefore be determined in the funding agreement. This includes any information or participation rights, access to documents and any right to reject actions a litigant is usually free to take. Outside the scope of the funding agreement, there is however no requirement for a third-party funder to take any active role in the funded proceedings.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

In Luxembourg, attorneys’ fees are not subject to any tariff. In principle, attorneys charge their own fees. The rule is provided by article 38 of the amended law of 10 August 1991 on the legal profession, which states that the attorney shall determine his fees and bear his professional expenses. In exercising this option, however, the attorney must show moderation in order to be socially acceptable and avoid abuses. Consequently, various elements must be taken into account, such as the importance of the case, the degree of difficulty, the result obtained and the wealth of the client.

Contingency fees are prohibited in Luxembourg. If, on the other hand, the attorney has achieved the desired result, the attorney is allowed to claim an additional fee. The right of an attorney to claim such a success fee does not have to be provided for by any agreement.

However, the attorney must not exaggerate when determining the success fee, otherwise he or she risks a reduction of it – in the context of a taxation procedure by the Luxembourg Bar or in court – and may even be subject to disciplinary proceedings.

Thus, the success fee must not be disproportionate in relation to the fees claimed and obtained by the attorney for the work performed. Accordingly, the courts have the power to reduce even a success fee that was initially agreed, when it appears to be exaggerated in relation to the service rendered. Also, the success fee must not be unreasonable in relation to the client’s expectations. Indeed, the latter should not be surprised, at the end of the process, by a success fee that he or she could not have expected.

Other funding options

12 | What other funding options are available to litigants?

Other funding options available to litigants include legal protection insurance and legal aid.

Legal protection insurance is widely used in Luxembourg. It is a contract by which the insurer undertakes, within the contractual limits, to pay the costs of an expert, bailiff, attorney, etc – in the event of a dispute or litigation opposing the insured party – to third parties and to assert certain of the insured party’s rights. The types of dispute covered are defined in the contract and vary according to the needs of the insured.

Legal aid is a measure of state-funded support that may cover part or the totality of a litigant’s costs and fees. This assistance is only provided for people without sufficient funds to ensure them access to legal redress, and includes the right to be assisted by an attorney and any other ministerial officer, such as a notary or bailiff, whose assistance may be necessary. Legal assistance is granted in both judicial and extrajudicial matters, with respect to both litigation and non-contentious matters, and whether the person in question is the plaintiff or the defendant. It applies to any matter brought before a judicial court or administrative court.
**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?

In our experience, the average duration of proceedings on the merits from the date of the summons to a first-instance judgment is one to two years.

The significant variance in the duration of claims is due to the difference in the proceedings initiated. For example, civil proceedings consist in a written procedure that requires more time, especially in the context of complex cases, whereas oral proceedings are considerably faster.

In domestic or international arbitration, the duration is normally between one and three years, depending on the complexity of the case.

**Time frame for appeals**

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

No statistics exist indicating the proportion of first-instance judgments that are appealed.

The length of proceedings increases significantly when the parties to the dispute lodge an appeal. On average, it takes more than two years from the act of appeal to the judgment for decisions on the merits of the case.

No publicly available information exists as to the number of set aside proceedings against arbitral awards rendered in Luxembourg.

**Enforcement**

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

No statistics exist indicating the proportion of judgments that require enforcement proceedings.

Yet, Luxembourg law contains a number of provisions that facilitate the enforcement of judgments in the case of a final and enforceable decision (such as a garnishment). In principle, however, it should be noted that a judgment given by a Luxembourg court is enforceable without a visa or pareantis, provided that it is final and enforceable and that the rendering judge has not suspended its enforcement.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

Class actions are currently not part of Luxembourg law. However, class actions in consumer law are on their way to being introduced in Luxembourg.

Related actions may under certain conditions be grouped together for a joint judgment of the court. However, as a matter of principal under current Luxembourg procedural rules, a claimant can only sue for his or her own personal benefit to recover a loss personally suffered. Unlike class actions, the parties to the joinder may not, in other words, seek damages on behalf of others who have not joined the proceedings. Accordingly, funding of such litigation processes by a third-party funder is comparable to the funding of individual claims.

Despite the absence of a legislative text providing for class actions, a few judgments have recognised that certain legal entities might be entitled to bring claims on behalf of their members.

Indeed, in 2007 the Court of Appeal held that unions are entitled to defend the interests of their members through court actions. Furthermore, the District Court of Luxembourg decided in 2005 that a legal entity would have standing to claim damages on behalf of its members on the condition that its Articles of Association authorise the entity to defend, through court proceedings, the interests of some or all of its members.

A few organisations are also expressly authorised by law to lodge claims for damages in criminal proceedings where the collective interests defended by these organisations are at stake (for instance, in the areas of animal rights and preservation of the environment).

**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?

Under Luxembourg law, any person who mandates an attorney to defend his or her interests in legal proceedings must in principle pay the attorney's fees in full.

Nevertheless, the judge may order the unsuccessful party to pay a procedural indemnity under certain conditions. The judge may only make such an order if the party that wins the case has made a request to that effect, expressly asking for the opposing party to be ordered to pay a procedural indemnity of a specified amount, either in the document initiating the proceedings (petition, summons or writ of summons) in the case of the plaintiff, or in the course of the proceedings in the case of the defendant.

If such a request has been made, it is for the judge to assess whether it is well grounded. Thus, article 240 of the New Code of Civil Procedure provides that the judge may order a party to pay a certain amount ‘when it seems unfair to leave the other party to pay part of the sums it has incurred and not included in the expenses’. The sums concerned are mainly lawyers’ fees and costs but may cover other costs such as travel to court. Only the successful party can obtain compensation for the proceedings. The judge will also consider whether the successful party has taken prior steps to avoid court proceedings, and may take into account the good or bad faith of the losing party. It is therefore not enough to be entitled to obtain this procedural indemnity, which is left to the judge’s discretion. In any event, the procedural indemnity is only symbolic and only covers a part of the lawyer’s fees (the procedural indemnity often ranges from €500 to €5,000).

Unlike attorneys’ fees and expenses, the costs directly incurred by the plaintiff to initiate the proceedings (such as bailiff’s fees and translation costs) can be recovered from the unsuccessful party, provided this party is solvent. No specific request in regard to these fees is needed; the judge must, however, expressly specify who has to bear the costs.

**Liability for costs**

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

Since third-party funders are not a party to the proceedings, no legal basis exists that could be used by courts to order a third-party funder to pay for adverse costs (or more specifically the procedural indemnity as stated above).

If the funding agreement provides for the funder to cover adverse costs, the funder has a contractual obligation to pay for them. The successful adverse party, however, has no enforceable right against the 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?)

In Luxembourg, a defendant cannot request the court to order the plaintiff to provide security for costs. However, when the plaintiff resides in a foreign country that is not a member of the European Union, or that has not signed a specific convention with Luxembourg, the defendant may request the court to order the deposit of a certain sum of money (caution judicatum solvi) with the Caisse de Consignation. The amount of the deposit is calculated after an assessment of the costs of the proceedings and the potential damages, and usually remains low to ensure that the right to access to justice is preserved.

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

As there is no requirement to inform the courts of the existence of a funding, the courts are usually unaware of such funding. In any event, as the amount of the caution judicatum solvi must be determined in compliance with the criteria determined by the law, the existence of a funder should remain without consequence on the court’s decision.

As there is no such requirement under the New Code of Civil Procedure for arbitration either, the same would apply. However, if specific arbitration rules apply (e.g., IBA, ICC, Luxembourg Chamber of Commerce), it would be necessary to determine if there are specific provisions provided by such rules, and if so, to apply them.

Insurance

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

ATE insurance is not commonly used in Luxembourg, although no legal or regulatory restrictions limit this type of product. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases. Moreover, if the funder has an exclusive solution for the coverage of adverse costs by way of ATE insurance on offer, ATE insurance can also be included in the litigation funding agreement (‘one-stop shop’).

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?

In principle, Luxembourg law does not oblige a party to a domestic litigation to disclose a funding agreement to the opposing party or the court. One could argue that the disclosure of a funding agreement could be ordered by a court if the conditions required for the production of documents are met. This seems very unlikely to happen, as the defendant would need to prove that the funding agreement may have an impact on the decision of the judge on the merits.

As there is no such requirement under the New Code of Civil Procedure for arbitration either, the same would apply. However, if specific arbitration rules apply (e.g., IBA, ICC, Luxembourg Chamber of Commerce), it would be necessary to determine if there are specific provisions provided by such rules, and if so, to apply them.

Privileged communications

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

Subject to legal privilege, the attorney may not disclose any information entrusted to them by their client. Any breach of privilege may result in criminal or disciplinary proceedings.

Communications between litigants and their attorneys will therefore not be allowed as evidence by the courts or arbitrators. This does not apply, however, to communications between litigants and their funders. Consequently, the confidentiality of information exchanged between a litigant or his or her attorney and a third-party funder must be provided for in the litigation funding agreement.

Obviously, the fact that a litigant or his or her attorney shares certain information with a third-party funder cannot be considered as a waiver of the attorney-client privilege by the litigant.
DISPUTES AND OTHER ISSUES

Disputes with funders

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

To our knowledge, there are no published decisions regarding disputes between litigants and third-party funders in Luxembourg.

Other issues

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

Practitioners should be aware that third-party funding is not regulated in Luxembourg. Consequently, many issues remain unresolved. It is therefore vital that a clear and transparent contract is drawn up between the funded party and the third-party funder to cover all relevant aspects of the funding relationship, including the interactions between the third-party funder and the litigant’s attorney.

UPDATE AND TRENDS

Current developments

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

With the growing interest in the enforcement of arbitral awards against sovereign states in Luxembourg, it is clear that third-party funding is developing further in Luxembourg and in the European Union. Indeed, at European level, the first incentives are being taken. For example, in June 2021, the European Parliament’s Legal Affairs Committee published a draft report containing recommendations to the Commission on responsible private funding of litigation.

At the start of the covid-19 crisis, a state of emergency was declared for three months in Luxembourg, and during this period the judicial system came to a standstill.

In addition to the €8.8 billion of aid implemented to protect the Luxembourg economy from the effects of the health crisis linked to the covid-19 epidemic, other key measures were decided by the government council. In particular, a grand-ducal regulation drawn up by the Ministry of Justice suspended, as a first step, time-bars in judicial matters and adapted certain other procedural modalities.

Since June 2020 and after the adoption of two laws providing a continuous legislative framework dealing with the covid-19 situation after the end of the state of emergency, the Luxembourg judicial system has nevertheless resumed its normal functioning. In order to reduce the number of people in the corridors and courtrooms, different measures were introduced (for instance, the summonses for the hearings were issued on an advanced schedule, which means that the parties, their attorneys, witnesses and experts are asked to appear at the exact times indicated on the summons).

Although we consider that covid-19 has not had a significant impact on the cases currently dealt with by written procedure, we note, however, that all the measures taken due to the pandemic did have an impact on oral proceedings – as such oral hearings were not held during the state of emergency. This created a delay in the handling of the oral proceedings.

A positive effect of the crisis is, however, that it clearly contributed to the digitalisation of the Luxembourg judicial system. Indeed, at the start of the covid-19 crisis, the digitalisation of the procedure had not been completed, making exchanges between the judiciary and litigants difficult or even impossible. The players in the judicial world then mobilised strongly to find solutions quickly, thereby accelerating the digitalisation of information vectors for judges. Thus, for example, the joint circular of the Luxembourg District Court and the Luxembourg Bar Association of 12 March 2020 and the joint circulars of the Superior Court of Justice and the Luxembourg Bar Association of 18 March and 2 April 2020 developed the process of electronic communication with judicial institutions. These measures are intended to remain in place for the duration of the exceptional circumstances.

Designed to ensure the health security of the judicial actors and to avoid a complete blockage of the judicial institutions, many hope, however, that these measures will continue to be implemented after the crisis because they clearly allow for better time management and a reduction in costs.
Netherlands

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REGULATION

Overview

1. 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.

Restrictions on funding fees

2. 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).

Specific rules for litigation funding

3. 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.

Legal advice

4. 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.

Regulators

5. 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.

FUNDERS’ RIGHTS

Choice of counsel

6. 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.

Participation in proceedings

7. 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.

Veto of settlements

8. 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...
Termination of funding
9 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.

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?

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.

Conditional fees and other funding options

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

Ligation 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.

Other funding options
12 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.

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?

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.

Time frame for appeals
14 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.

Enforcement
15 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
Funding of collective actions

The Dutch legislator has pointed out that it may not always be necessary to initiate collective action. A court may request to see the funding agreement to ensure that the funder's liability for adverse costs. Unless the funding agreement stipulates otherwise, the third-party litigation funder will not be held 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.

Security for costs

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 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.

COLLECTIVE ACTIONS

Funding of collective actions

16 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.

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?

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).

Liability for costs

18 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 held 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.

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?)

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
Disclosure of funding

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.

Insurance

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.

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.

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)).

Privileged communications

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


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.

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.

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.

**UPDATE AND TRENDS**

**Current developments**

26 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.
New Zealand

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REGULATION

Overview

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

Third-party litigation funding is permitted. Although the common law torts of maintenance (assisting a party in litigation without justification) and champerty (assisting in consideration of a share of proceeds of the litigation) have not technically been abolished in New Zealand, the recent attitude of the New Zealand courts to third-party funding can be described as ‘cautiously permissive’ and, perhaps, increasingly receptive. To describe this approach, a distinction needs to be drawn between representative proceedings under Rule 4.24 of the High Court Rules (which allows one or more persons to sue on behalf of, or for the benefit of, all persons with the same interest in the subject matter) and ordinary non-representative proceedings.

Representative proceedings

A representative proceeding requires that the representatives sue with the consent of the other persons who have the same interest (Rule 4.24(a)), or the court directs this on an application (Rule 4.24(b)). The Court of Appeal has confirmed that the existing procedure does not require the court to give prior approval for a funding arrangement (Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489 (Southern) at [79]). Instead, the court will ensure that in making a direction it is not facilitating an abuse of process. If a representative proceeding is based on clearly misleading funding arrangements or amounts to a bare assignment of claims, then the court will not grant leave knowing that its processes are being used to facilitate unlawful conduct. In this regard, the courts will exercise a greater supervisory role over the setting up of representative proceedings (ie, the funding arrangements and communications with prospective class members) than where a party bring an ordinary proceeding that is funded.

Non-representative proceedings

The Supreme Court of New Zealand has made it clear that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, outside its supervisory role in ‘representative’ proceedings (see above). Instead, the role of the courts is to adjudicate on any applications brought before them to which the existence and terms of a litigation funding arrangement may be relevant (Waterhouse Coopers v Contractors Bonding Ltd [2016] NZCA 338 (Waterhouse)) at paragraph 14(e).

Scope for intervention

Under the High Court Rules or its inherent powers, the High Court may intervene (for example, by imposing a stay of proceedings) in both representative or non-representative funded proceedings under the following circumstances.

Abuse of process

The High Court may intervene if there is a manifestation of an abuse of process on traditional grounds, such as where proceedings:

• deceive the court, are fictitious or mere sham;
• use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose, or in an improper way;
• are manifestly groundless, without foundation or serve no useful purpose; and
• are vexatious or oppressive.

See PriceWaterhouseCoopers v Walker [2016] NZCA 338 (Price-WaterhouseCoopers) at paragraph 14(e).

Non-permitted bare course of action

A funding arrangement (including an assignment of a security agreement) amounts to an assignment of a bare cause of action to a third-party funder in circumstances where this is not permissible (ie, the exceptions to maintenance and champerty do not apply).

In assessing whether litigation funding arrangements amount to an assignment that is not permitted, the court will have regard to the level of legal (rather than de facto) control able to be exercised by the funder, the profit share of the funder and the role of the lawyers acting (Waterhouse and PriceWaterhouseCoopers).

For a recent example where an assignment of bare causes of action to a litigation funder was held not to be permissible (and a stay of the proceedings was ordered), see Cain v Mettrick [2020] NZHC 2125.

Even where such concerns arise, the provision of appropriate undertakings by a funder may be effective to allay them. In Price-WaterhouseCoopers, a funding agreement was in place between the plaintiff company (in liquidation) and the litigation funder (SPF No. 10 Ltd), in conjunction with an assignment under a security agreement to the funder of the plaintiff’s right of action against the defendant (being its only valuable asset). The defendant argued that this arrangement was an impermissible assignment of a bare cause of action to the funder, which amounted to an abuse of process. The majority of the Supreme Court held (paragraphs 77 to 91) that the belated provisions of the following undertakings given by the funder to the court satisfied concerns as to the permissibility of the assignment:

• to not rely on clauses in the security agreement giving it greater control than it had under the funding agreement; and
• to pay a proportion of proceeds of a successful claim for the benefit of unsecured creditors (where the funder was otherwise entitled to all of these under the security agreement).
Misleading statements given to the court
Where a representative action has been promoted to prospective liti-
gants using misleading statements, the court may also intervene, either by refusing a direction under Rule 4.24(b), or to correct the harm done by the distribution of the material (Southern at paragraphs 78 and 82).

Funding of arbitration
Given the private nature of arbitration, the treatment of third-party litigation funding in domestic arbitration in New Zealand is largely unknown. The relevant legislation (the Arbitration Act 1996) does not contain any provisions relating either directly or indirectly to litigation funding (or even class arbitrations). Instead, an arbitrator has the power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (article 19, Schedule 1). An arbitrator may also order ‘any party to do all such other things during the arbitral proceedings as may reason-
abley be needed to enable an award to be made properly and efficiently’ (Clause 3(1)(j) of Schedule 2). These broad powers would encompass the ability to regulate funded domestic arbitrations with respect to those referred to in the following questions.

In addition, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request assistance from the High Court or a district court in the exercise of the powers conferred on the arbitral tribunal relating to the conduct of arbitral proceedings (Clause 3(2) of Schedule 2). This ability would allow either the arbitral tribunal of its own motion, or one of the parties with its approval, to request assis-
tance from the High Court or a district court in the event of an issue arising in the context of a funded domestic arbitration.

Litigation funding is becoming more commonly used in New Zealand, although it is not as commonly used as in other common law jurisdictions (such as the United Kingdom and Australia). In recent years, a variety of proceedings funded by third parties have been brought, with allegations in relation to:

• losses on share investments resulting from misleading statements in a share prospectus (Saunders v Houghton [2014] NZHC 2229) or in initial public offering materials (Fularton & Ors v Arowana International Ltd v Ors CIV-2020-404-551);
• building products (White v James Hardie New Zealand [2017] NZHC 2112 and Paine v Carter Holt Harvey Ltd [2019] NZCN 1614);
• losses resulting from kiwi fruit being affected by the entry of disease into the country (Strathboss Kiwifruit Ltd v Attorney-General [2018] NZHC 1559 [Strathboss Kiwifruit]);
• illegitimate fees charged to consumers by banks (Cooper v ANZ [2013] NZHC 2827);
• insurance claims arising out of earthquakes (Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2017] NZCA 489, [2018] 2 NZLR 312); and

Restrictions on funding fees
2 Are there limits on the fees and interest funders can charge?
There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court of New Zealand has said that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff, presum-
ably including funder remuneration (Waterhouse, paragraph 48). In the context of a representative funded action, the High Court was not persuaded that the terms of the funding agreement (including an enti-
tlement to terminate the funding agreement without cause on five days’ notice and a power to veto in relation to settlement) were inappropriate for a representative action (Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, [2015] 23 PRNZ 69 at paragraph 70).

That said, in assessing whether litigation funding arrangements amount to an assignment that is not permitted, the courts will have regard to the profit share of the funder.

Specific rules for litigation funding
3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?
There are no provisions specifically applicable to third-party litigation funding, but there are general provisions that have application.

As providers of financial services and products in trade, litiga-
tion funders are subject to the provisions of the Fair Trading Act 1986. This contains consumer protections against misleading and deceptive conduct, unsubstantiated representations, and false or misleading representations. It provides redress against such conduct by funders in, for example, marketing funding, negotiating with prospective plain-
tiffs, or in relation to acts or omissions while a funding arrangement is in place. The Consumer Guarantees Act 1993, which imposes statutory guarantees in relation to services, may also have application.

Funders with a place of business in New Zealand, and who provide a ‘financial service’ (typically, this is because they act as a creditor under a credit contract, as defined in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act, must register as a financial service provider. Those providing services to ‘retail clients’ (as defined in section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act) must also belong to a dispute resolution scheme. All financial service providers are subject to the ‘fair dealing’ provisions in the Financial Markets Conduct Act 2013, which prohibit misleading conduct, false or misleading representations and unsub-
stantiated representations in relation to financial products and services. The regulatory authority, the Financial Markets Authority, can take civil action against financial service providers whose conduct breaches these provisions. Possible civil orders include declarations of contra-
vention, pecuniary penalties and compensatory orders.

Legal advice
4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?
No specific rules apply. The general professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 apply.

In Houghton v Saunders (2011) 20 PRNZ 509, the High Court, at paragraph 75, found the following guidelines ‘helpful’:

• There should be a direct client–solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation.
• The lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder.
• The litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.
Regulators

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

No public bodies have specific interest in or oversight over third-party litigation funding, apart from the courts and the Financial Markets Authority to the extent that litigation funders are subject to the relevant legislation.

FUNDERS’ RIGHTS

Choice of counsel

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

It does not appear that this issue has come before the courts to date. It is very unlikely that third-party funders have such a legal entitlement, because choice of counsel is the exclusive right of the client (i.e., the plaintiff). This right is reflected in the professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Participation in proceedings

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

There is no restriction on representatives of funders attending hearings or settlement discussions, unless excluded by order of the court. Funders do not have a right to participate in hearings, and attempts to do so might raise concerns as to inappropriate control or abuse of process. Funders may participate in settlement negotiations, but cannot influence or make settlement decisions unless this is provided for under the funding agreement. Such an entitlement might also raise concerns as to inappropriate control or abuse of process.

Veto of settlements

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

Only if such rights are provided for under the funding agreement. The courts take a fairly liberal approach to such veto rights. In Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraphs 70 to 73, the High Court was not persuaded that the existence of a power of veto in relation to settlement was inappropriate for a representative action. This was for the following reasons:

- in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- to the extent the action requires positive input from all the claimants, the funder will need to maintain their goodwill to carry on with the action; and
- where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, reputationally this will provide a fetter on the funder’s ability to act unreasonably.

Termination of funding

9 | In what circumstances may a funder terminate funding?

In the first instance, this will depend on the terms of the funding agreement (which often provides for termination upon notice). In the unlikely event that the funding agreement does not make express provision for termination, the Contracts and Commercial Law Act 2017 will apply by default. A funder would be able to cancel (prospectively) a funding agreement in the following circumstances:

- for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;
- if a term of the funding agreement is broken by the plaintiff(s); or
- if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

In all these situations, the funder may exercise the right to cancel if, and only if:

- the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term, is essential to the funder; or
- the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be:
  - substantially to reduce the benefit of the contract to the funder;
  - substantially to increase the burden of the funder under the contract; or
  - in relation to the funder, to make the benefit or burden of the contract substantially different from that represented or contracted for.

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?

Funders may not take any active role in the litigation process if that would amount to an abuse of process.

That said, it should be noted that, in the context of a funded representative action, the High Court has stated that concerns as to champertous pursuit of claims have to be tempered by the reality that funded arrangements are commercial arrangements and it ‘would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune’ (Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 66).

There are no ways in which funders are required to take an active role.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Litigation lawyers may enter into conditional or contingency fee agreements, but only of a certain type. ‘Conditional fee agreements’ (where payment depends on whether the outcome of the matter is successful) are permissible under sections 333 to 335 of the Lawyers and Conveyancers Act 2006 if the fee arrangement amounts to:

- the normal fee that would have been charged for the services provided; or
- the normal fee accompanied by a premium that:
  - compensates counsel for the risk of not being paid at all;
  - compensates counsel for waiting to be paid until proceedings have been concluded; or
  - is not calculated as a proportion of the amount recovered by the proceedings.

However, conditional fee agreements are prohibited for criminal proceedings, immigration proceedings and family law proceedings.
Conditional or contingency fee agreements that fall outside this statutory permission may be illegal or unenforceable, especially where the payable fee is calculated as a proportion of the amount recovered (and therefore amounts to the tort of champerty).

Other funding options

12 What other funding options are available to litigants?

Government-funded legal aid for litigants who cannot afford lawyers is available through the Ministry of Justice for certain civil disputes (including debt recovery, breaches of contract, defamation, and bankruptcy proceedings). A litigant must apply for such aid. Whether aid is granted depends on a number of factors including:

- any arrears from a previous legal aid debt;
- the income of the litigant;
- the assets of the litigant; and
- the merits of the legal case.

Legal aid is considered a loan and a litigant may have to repay some or all of the legal aid, depending on how much they earn, the property they own and whether they receive any money or property as a result of the case.

Litigants may explore other funding options, including specialised insurance products. Such products are not yet widely available (or even promoted as being available) in New Zealand.

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?

This will depend on the nature and complexity of the claim, the number of parties, the level of court in which it is filed and the workload of that court. Given the typical quantum of funded claims, almost all of these will be filed in the civil jurisdiction of the High Court.

In the civil jurisdiction of the High Court, the statistics for the past four years available are as follows:

- 1 January to 31 December 2020: the average age at disposal was 704 days;
- 1 January to 31 December 2019: the average age at disposal was 764 days;
- 1 January to 31 December 2018: the average age at disposal was 699 days; and
- 1 January to 31 December 2017: the average age at disposal was 759 days.

Time frame for appeals

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

This can be estimated as a function of the number of cases disposed of and the number of appeals brought.

In the civil jurisdiction of the High Court, the statistics for the past four years available are as follows:

- 2020: 2,723 cases were disposed;
- 2019: 2,360 cases were disposed;
- 2018: 2,308 cases were disposed; and
- 2017: 2,352 cases were disposed.

New civil appeals to the Court of Appeal:

- 2020: 230, which means that roughly 10.12 per cent were appealed;
- 2019: 211, which means that roughly 8.94 per cent were appealed;
- 2018: 239, which means that roughly 10.36 per cent were appealed; and
- 2017: 234, which means that roughly 9.95 per cent were appealed.

The length of time an appeal takes depends on the nature and complexity of the appeal, the number of parties and the workload of the Court of Appeal. On average, an ordinary civil appeal might take at least one year to be disposed, from the date of filing until the date of judgment.

Enforcement

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

There are no statistics available on this issue. Whether enforcement proceedings are required will primarily depend on the defendant’s financial position in each case.

In the High Court, following the sealing of judgment, a range of enforcement options are available against the judgment debtor and the judgment debtor’s personal or real property (Part 17 of the High Court Rules). These are as follows:

- order for examination of the debtor;
- attachment orders over salary or wages due and payable by an employer;
- charging orders over real or personal property;
- sale orders over land and chattels;
- possession orders over land and chattels;
- arrest orders;
- sequestration orders over rents and profits from real and personal property; and
- imprisonment until security deposited or bond executed.

Generally, an enforcement procedure in respect of real property (such as a sale order) is the most difficult to implement.

Collective Actions

Funding of collective actions

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

The High Court Rules allow for ‘representative actions’ rather than ‘class actions’ or ‘group actions’ per se. Rule 4.24 provides:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding:

- with the consent of the other persons who have the same interest; or
- as directed by the court on an application made by a party or intending party to the proceeding.

The threshold for the ‘same interest’ requirement is low: there must be a common issue of fact or law of significance for each member of the class represented (see Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 at paragraphs 53 and 151). In addition:

- all members of the class must have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences applicable to only some of the class;
- the action must be beneficial to all of the class; and
- the action must cover the whole or virtually the whole of the class of potential plaintiffs and consent of all represented members of global damages to the representative plaintiff must be given (Credit Suisse, paragraph 151).
Sub-paragraph (a) allows a group of identified plaintiffs with the ‘same interest’ to sue together if they consent to this. The plaintiffs are then listed together in the same statement of claim.

Sub-paragraph (b) requires the party or intended party to make an application to the court for a representative order. In granting a representative order, it is standard practice for the court to impose a final ‘opt-in’ date for qualifying members of the class (Cridge v Studorp Limited [2017] NZCA 376 at paragraph 41). This has the benefit of protecting members of the represented group against a limitation bar arising after the date of their election to opt in to the proceeding (Credit Suisse, paragraphs 65 to 66 and 129).

Representative actions may be funded by third parties, although there are greater restrictions on these than on non-representative actions. In Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 79, the Court of Appeal concluded (in the context of a representative action) that litigation funding arrangements will not be tortious or otherwise unlawful maintenance and champerty where:

- the court is satisfied there is an arguable case for rights that warrant vindicating;
- there is no abuse of process; and
- the proposal is approved by the court.

Funding arrangements have been approved in earlier cases (In re Nautilus Developments Ltd [2000] 2 NZLR 505 (HC) and In re Gellert Developments Ltd (in liquidation) [2001] NZCLC 262,714). It remains unclear whether such approval must, as a matter of course, be obtained in advance of proceedings, or simply in the event that the proposal is challenged by the defendant.

**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. The courts may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in litigation. All matters of costs are at the discretion of the High Court (Rule 14.1), but one of the default principles is that the party that fails with respect to a proceeding or an interlocutory application should pay (scale) costs to the party who succeeds (Rule 14.2(a)).

Generally, costs are assessed by applying a notional daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application (Rule 14.2(c) and (d)).

According to Rule 14.6(3), the court may award increased costs where:

- the nature of the proceeding, or the step it is in, such that the time required by the party claiming costs would substantially exceed the time allocated under the highest scale band;
- the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by:
  - failing to comply with the rules or with a direction of the court;
  - taking or pursuing an unnecessary step or an argument that lacks merit;
  - failing, without reasonable justification, to admit facts, evidence or documents, or accept a legal argument;
  - failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the rules; or
- failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under Rule 14.10 or some other offer to settle or dispose of the proceeding;

According to Rule 14.6(4), the court may award indemnity (ie, actual) costs where:

- the party has acted vexatiously, frivolously or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding;
- the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party;
- costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding;
- the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it;
- the party claiming costs is entitled to indemnity costs under a contract or deed; or
- some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

Litigation funding costs do not constitute either ‘costs’ or ‘disbursements’ within the meaning of the above costs regime. The only basis on which the High Court might order the unsuccessful party to pay the litigation funding costs of the successful party would be pursuant to its inherent jurisdiction, there does not appear to be precedent for this.

**Liability for costs**

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

In exceptional circumstances, funders may be liable for adverse costs as non-parties, even in the absence of any abuse of process (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 52) or impropriety (Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145 (Dymocks) at paragraph 33). Further, the level of such costs is not limited to the amount of funding provided (Waterhouse at paragraph 53).

According to the leading case on costs against non-parties (Dymocks at paragraph 25):

Where . . . the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

In this case, a non-party had funded unsuccessful litigation by an insolvent company. The Privy Council did not have litigation funding specifically in contemplation. Given that a litigation funder always stands to benefit financially from the proceedings and will ordinarily exercise at least some control over the proceedings, the above proposition must
be read down. It seems likely, therefore, that for a funder to be liable for adverse costs, something more is required. One situation might be where the funder exercises control over the proceedings to the effective exclusion of the plaintiffs. Another might be where the funder withdraws funding part way through the litigation, leaving the defendant or defendants to face a plaintiff who is impecunious or insolvent. A third, and very rare, instance might be where it should have been clear at the time of filing that the funded claim was simply not tenable and litigation should have been avoided (Foh v Cousins & Associates Unreported, HC Christchurch, CIV 2010-409-2154, 4 February 2011 at paragraph 61).

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party (Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZCA 67 at paragraph 135).

**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?)**

Yes. Under Rule 5.45 of the High Court Rules, on the application of a defendant, a judge may order the giving of security for costs if:

- a plaintiff is resident outside New Zealand;
- a plaintiff is a corporation incorporated outside New Zealand;
- a plaintiff is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
- there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff’s proceeding.

The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants (Saunders v Haughton (No 1) [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 36 and Walker v Forbes at paragraphs 92 to 94).

Calculation of the sum is a matter for the court to assess in all the circumstances.

Those circumstances include the:

- amount or nature of the relief claimed;
- nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutory procedures;
- estimated duration of trial; and
- probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant’s estimated actual (ie, solicitor and client) costs.

Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of default scale costs.

The sum ordered must either be paid into court or security for such sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank guarantee directly enforceable by the defendant.

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

Yes. A third-party funded claim does have an influence, and may justify increased security for costs. In Haughton v Saunders [2015] NZCA 141, the Court of Appeal stated at paragraph 11:

> The fact a party is supposed by a litigation funder may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit. Security allows the court to hold the funder more directly accountable for costs. It is consistent with the court’s jurisdiction to award costs against a non-party which is sufficiently interested in the litigation. Security is all the more appropriate where the funder can avoid liability for future costs by terminating the funding agreement by notice before the litigation concludes.

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ$100,000 (increased from NZ$86,000) because the overseas litigation funder retained the right to terminate its indemnity to the representative plaintiff for costs on notice and the scale costs of the proceeding were unusually high.

It was confirmed by the High Court in Highgate on Broadway Ltd v Devine [2013] NZHC 2288, [2013] NZAR 1017 at paragraph 22(d) that the fact the plaintiff is funded is a ground for the order of security.

**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 permitted in New Zealand. In our experience, it is commonly used by funders.

Generally, the only types of parties who would use other types of insurance to cover legal (defence) fees would be company director defendants (directors and officers’ insurance) and professional defendants, such as lawyers, accountants, architects and engineers (professional indemnity insurance).

**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?**

Upon the commencement of funded proceedings, a litigant must disclose the following matters to the other party or parties:

- the fact there is a litigation funder and the funder’s identity;
- the amenability of the funder to the jurisdiction of the New Zealand courts; and
- the terms of withdrawal of funding, but only if those terms in some way give legal control over the proceedings to the funder (eg, the ability to withdraw finding if the funded party refuses to obey instructions given) (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91, paragraphs 67 to 69 and 72).

The litigation funding agreement itself must be disclosed to the opposing party and court where an application is made to which the terms of the agreement could be relevant, such as applications for a stay on the basis of abuse of process, applications for third-party costs orders, and applications for security for costs (Waterhouse, paragraphs 73 to 74).

In relation to the latter type of application, the Supreme Court has said that it is ‘strongly arguable’ that the courts have power to order disclosure of at least the existence of a litigation funder and the relevant terms of the funding agreement (Waterhouse, paragraph 63).

Disclosure to the opposing party is subject to redactions being made to preserve confidentiality, litigation-sensitive matters, and privilege.
In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession of power of a party (Schedule 2, Rule 3(1)(f) to the Arbitration Act 1996). This is broad enough to encompass a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

Privileged communications

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

Yes. The Evidence Act 2006 relevantly provides that the following communications and materials are capable of being protected by privilege:

1 a communication between the party and any other person (which would include funders);
2 a communication between the party’s legal adviser and any other person (which would include funders);
3 information compiled or prepared by the party or the party’s legal adviser; or
4 information compiled or prepared at the request of the party, or the party’s legal adviser, by any other person (which would include funders).

(In all cases described under points (1) to (4) above, the communication or information must be made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.)

The applicable types of privilege are:

1 Section 56: privilege for a communication or information if the communication is made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.
2 Section 57(1): a person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:
   • intended to be confidential; and
   • made in connection with an attempt to settle or mediate the dispute between the persons.
3 Section 57(2): a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

It should be noted that communications between lawyers and funders are not capable of being protected by solicitor-client privilege (section 54) given that lawyers acting for plaintiffs in funded proceedings will not be acting for the funders.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There do not appear to be any such disputes reported as at the time of writing.

Other issues

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

It appears that some funded litigation has occurred in the main Pacific Islands. The civil procedure rules of the Cook Islands, Fiji and Samoa all permit ‘representative actions’, rather than ‘class actions’ or ‘group actions’ per se.

UPDATE AND TRENDS

Current developments

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

Reform

On 10 May 2018, the Law Commission (an independent law reform agency established by statute) announced that it is to review the law relating to class actions and litigation funding, with a view to making reform recommendations to the Minister of Justice.

The task of the Law Commission is ‘to assess whether the potential benefits of class actions and litigation funding can be realised in a manner that outweighs any costs and disadvantages they might give rise to’.

The Terms of Reference for the review include the following issues in relation to litigation funding:

1 whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty;
2 the role of the courts, if any, in overseeing litigation funding arrangements; and
3 whether and to what extent litigation funders or funding arrangements should be regulated, for example, in relation to:
   • the nature and extent of the litigation funder’s recovery;
   • the powers and responsibilities of litigation funders;
   • the potential for conflicts of interest; and
   • disclosure requirements.

Subsequently, an expert advisory group, representing a range of perspectives, was established to provide technical expertise and advice to the Law Commission.

On 4 December 2020, the Law Commission released an Issues Paper entitled ‘Class Actions and Litigation Funding’. The Commission stated its preliminary view that litigation funding is ‘desirable in principle’ and ‘should be permitted’ in New Zealand, as long as certain concerns can be addressed. The concerns were stated as including:

• funder control over litigation;
• the potential for conflicts of interest;
• funder profits; and
• capital adequacy of litigation funders.

The Commission sought feedback on the preliminary view that litigation funding is desirable in principle, and on how the concerns with litigation funding can be managed and whether a regulatory response is warranted. Options for the form of any regulation and oversight of litigation funding were stated as including:

• industry self-regulation;
• bringing litigation funding within the scope of the Financial Markets Conduct Act 2013, as a ‘managed investment scheme’;
• a tailored licensing system for litigation funders;
• a new statutory regime with oversight by a new statutory body; and
• court approval of funding arrangements.

Submissions closed on 11 March 2021.
After considering those submissions, the Commission confirmed its view that New Zealand should have a statutory class actions regime. On 30 September 2021, the Commission issued a Supplementary Issues Paper to seek feedback on detailed aspects of a class actions regime and to outline draft legislative provisions on some topics. The topics covered in the Supplementary Issues Paper are:

- issues relating to commencement of a class action, including class actions with multiple defendants and the impact of a class action on limitation periods;
- a detailed proposal for certification;
- how competing class actions should be managed;
- relationships in a class action, including the responsibilities of the representative plaintiff and the nature of the lawyer-class member relationship;
- issues that arise during a class action, including giving notice to class members, case management, discovery, managing individual issues and whether to allow common fund orders or funding equalisation orders;
- several issues associated with class action judgments; and
- settlement of a class action.

Submissions on the Supplementary Issues Paper were open until 12 November 2021.

Ultimately, the Commission will make recommendations in a final report to the Minister of Justice. As at the time of writing, no final completion date for the review has been set.

Once completed, the government will decide whether to accept or reject some or all the recommendations. If some or all are accepted and legislation is required, a bill is prepared and introduced to Parliament in the ordinary way. Unless urgency is required, the process can take several Parliamentary sessions over one or more years before legislation is enacted.

Case law
In relation to the existing procedural rules, a significant development in 2020 was the judgment of the Supreme Court in Southern Earthquake Services Ltd v Ross [2020] NZSC 126, confirming the ability of the court to make an ‘opt-out’ order as part of a direction under Rule 4.24 of the High Court Rules. Such an order means all members of the relevant class are automatically included in the action, unless they expressly ‘opt out’. Where actions are tried in two stages (a trial on liability followed by a trial on quantum), it is possible that class members will still need to ‘opt in’ at the quantum stage, to have an opportunity to prove their loss and enjoy a share of recovery. The parties had agreed on this course in Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489, although the Court did not hold that it was necessary either in that case or generally.

This marks a significant change to the New Zealand law relating to representative actions, enabling funded actions to be brought more easily.

It is also possible that, absent legislative intervention, ‘common fund orders’ or ‘equalisation orders’ in favour of litigation funders may become a feature of the funded class action landscape. In Southern Earthquake Services, the respondents had applied for a common fund order. The Supreme Court did not comment on the availability of such an order, and as at the time of preparing this publication, the application is still to be heard by the High Court.
Russia

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

Third-party litigation funding is a relatively nascent concept in Russia compared to more established markets such as the UK and US. It is permitted and a small number of domestic funders have been established since the late 2010s. Uptake of funding remains limited, but appears to be growing: a 2019 survey of the Russian litigation market indicated that 8 per cent of respondents (including litigators, in-house counsel and end-clients) had worked with litigation funders in some capacity, up from 6 per cent in 2018. Topics related to litigation funding are now regularly on the agenda at major Russian panel events focusing on litigation and bankruptcy, particularly those aimed at an international audience.

There do not appear to have been any reported funded cases to date in which courts have commented on funders’ involvement. The increasing number of cases backed by third-party funders will hopefully lead to further clarity on Russian courts’ stance on the issue.

In addition, a working group including funders, lawyers and officials to develop the draft bill ‘On the financing of litigation costs by third parties’ has been formed. The draft bill will aim to protect the rights of investors as well as litigants. Relevant public officials, such as Chairman of the Council of Judges of the Russian Federation Victor Momotov, have spoken positively about litigation funding while the discussions of the draft bill have been ongoing.

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

As litigation funding is currently unregulated, litigation funders are free to set their own terms. As such, there is no specific limit on fees or interest that funders can charge in Russia. The majority of funders operating in the Russian market charge a success fee of between 20 per cent and 40 per cent of recoveries.

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

Given the recent arrival of the concept of litigation funding in Russia, there is currently no legislation or regulation applying specifically to third-party litigation funding in Russia.

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

Qualified advocates advising their clients on litigation funding in Russia will need to abide by the Federal Law On Advocacy and the Bar in the Russian Federation and Russian Federal Bar Association’s Code of Professional Ethics; for instance, they will need to ensure that they remain independent while giving this advice and that their communications with clients remain confidential. There are no professional or ethical rules regarding legal advice that specifically relate to, or prohibit, litigation funding.

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

There is currently no public body that has specific oversight of litigation funding. Deputy Justice Minister Denis Novak has attended working groups on the draft law ‘On the financing of litigation costs by third parties’.

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

Third-party funders are free to refuse to fund a case if a client’s existing choice of counsel does not meet their criteria.

May funders attend or participate in hearings and settlement proceedings?

The majority of Russian commercial (Arbitrazh) hearings are conducted in open court and as such third parties, including funders, are free to attend. Third-party funders’ attendance at private hearings and confidential settlement discussions would be subject to the approval of the opposing party.

Do funders have veto rights in respect of settlements?

Funders have no special rights under Russian law, including over vetoes in respect of settlements. Target settlement amounts may be stipulated in their litigation funding agreements.
Termination of funding

9  In what circumstances may a funder terminate funding?

As there are no specific laws regarding litigation funding, funders may terminate funding in accordance with the relevant provisions in their litigation funding agreements.

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?

There are no provisions in Russian law specifically allowing or requiring third-party funders to actively take part in court proceedings, which is the prerogative of qualified advocates. The amount of general strategic assistance provided by the funder will be subject to the litigation funding agreement.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

In March 2020, updates to the law ‘On Advocacy and the Bar in the Russian Federation’ came into force. These included specific legislation on contingency fee agreements for Russian advocates.

In particular, clause 4.1 of article 25 was updated to include the following:

In accordance with the rules established by the Council of the Federal Bar Association, the agreement on the provision of legal assistance may include a condition according to which the amount of remuneration paid by the client is made dependent on the result of the lawyer’s rendering of legal assistance, with the exception of legal assistance in criminal cases and in cases regarding administrative offences.

Other funding options

12  What other funding options are available to litigants?

Impecunious or vulnerable citizens, or both, may qualify for free legal assistance under the law ‘On Free Legal Aid in the Russian Federation’. Litigation-related insurance products are not widely offered in Russia, although they are not specifically prohibited.

Other options litigants may consider include assignment of debts to another party, or the involvement of specialist equity investors who acquire a controlling interest in companies whose financial performance is directly related to the outcome of litigation or asset recovery efforts. Both of these options have been used by companies in financial distress in Russia as well as other countries of the former Soviet Union, and a number of regionally headquartered investors are able to support companies in this manner. Both of these options may be inferior to non-recourse litigation funding for solvent claimants who are looking to extract maximal value from a single claim while reducing the financial risk.

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?

The length of proceedings at the first instance varies widely between regions and depending on the complexity of the case. In addition, little official statistical analysis has been conducted on this matter. However, the standard time for proceedings in the first instance in Arbitrazh courts is six months according to the Russian Arbitrazh Procedure code. In particularly complex cases, this may be extended by up to nine months.

Time frame for appeals

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

There appears to be no recent statistical analysis of the proportion of first-instance judgments that are appealed or on their usual duration. According to the Russian supreme court’s ruling ‘On the application of the Arbitrazh Procedure Code Of the Russian Federation’ when considering cases in the Arbitrazh court of appeal, appeals should take a maximum of between two and three months, depending on the circumstances.

Enforcement

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

There is no official data regarding the proportion of judgments that require contentious enforcement proceedings. While domestic judgments may be enforced in Russia, it is rare for foreign judgments to be successfully enforced via Russian courts. There is a well-known tradition of complex, international enforcement proceedings arising from large Russian court judgments and bankruptcies of the size that might typically be of interest to international litigation funders (ie, in the millions of US dollars). This has arisen in part due to the tendency of Russian businesses and high-net-worth individuals to structure their assets and transactions via complex ownership structures involving offshore jurisdictions. Given the cost of these enforcement proceedings and the international expertise required, this is an area where litigation funding is increasingly sought by Russian parties, including from non-Russian funders.

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions are permitted in Russia under Federal Law No. 191-FZ of 18 June 2019, which came into force in October 2019. Prior to this, class actions required the involvement of certain categories of parties such as prosecutors, consumer protection agencies or local authorities. Since this law came into force a number of class actions have already taken place, some of which have been backed by litigation funders. This includes the first class action under the new law, against Fem Fatal Rus LLC, a seller of cosmetic products, initiated in 2019 with the support of domestic litigation funding platform Platforma. Since then, a number of other reported class actions have been supported by third-party litigation funders.
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?

The courts may order the unsuccessful party to pay the reasonable costs incurred by the successful party engaging their counsel. Recoverable costs were defined by the Russian Supreme Court as ‘costs for the payment of a representative’s services that are usually charged for similar services in comparable circumstances’. There are no specific provisions for the recovery of litigation funding costs, although it will be interesting to see in the next few years whether Russian courts will take an expansive approach to their definition of advocate costs by including litigation funding costs.

Liability for costs

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

Adverse costs orders will only apply to parties in the case. However, there are no specific rules prohibiting arrangements for litigation funders to cover adverse costs from being included in litigation funding agreements.

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?)

Russian courts do not order claimants or third parties to provide security for costs.

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

The involvement of a litigation funder does not affect the availability of security for costs.

Insurance

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

Although insurance for litigation costs and similar products are not specifically prohibited in Russia, such insurance is not commonly used or offered.

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 specific obligation to disclose litigation funding to the opposing party or the court. We are not aware of any reported cases in which courts have ordered the disclosure of litigation funding agreements.

Privileged communications

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

Under the Federal Law On Advocacy and the Bar in the Russian Federation, information related to the provision of services by qualified advocates (ie, lawyers admitted to the bar) to their clients, including related communications, is covered by advocate secrecy. However, such secrecy does not apply to litigants’ in-house communications or communications between litigants and third parties such as funders. It should also be noted that many Russian lawyers are not qualified advocates and, as such, do not need to comply with Bar regulations on advocate secrecy.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No domestic disputes between litigants and their funders in Russia appear to have been reported. It should be noted that it is likely that at least some litigation funding agreements entered into by Russian parties will be governed by foreign law (eg, English law).

Other issues

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

There are currently no laws in Russia specific to litigation funding. As such, litigants and funders will need to ensure that their agreements comply with Russian law in general, but should be able to reach a litigation funding agreement that benefits both parties.

UPDATE AND TRENDS

Current developments

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

There are no additional developments that should be noted in particular. Litigation funding is a growing industry in Russia and there is an increase in both the number of domestic funders, and the number of foreign funders interested in funding cases involving Russian parties. In our experience, foreign litigation funders are at present typically more interested in disputes involving Russian parties if they are to be heard primarily before courts outside Russia, particularly in Western Europe, the United States and common-law offshore jurisdictions, due to their greater familiarity with, and trust in, those courts.
Is third-party litigation funding permitted? Is it commonly used?

There is no specific legal prohibition or regulation of third-party funding, whether in litigation or arbitration proceedings. Although third-party litigation funding is a relatively new concept in Korea and its legality has not yet come before Korean courts for determination, third-party funding for international arbitrations is gaining increasing traction among practitioners and clients in Korea. Korean courts have not had a chance to directly opine on or endorse third-party litigation funding, but special attention and care would be warranted in securing third-party funding for litigation claims before Korean courts, especially considering the issues addressed below.

Article 6 of the the Trust Act expressly prohibits any trust, the purpose of which is for the trustee to proceed with litigation. Violation of this provision is distinguished from the right-holder’s legitimate entrustment of its right to carry out litigation to a third party, by (1) the abuse of the trust system contrary to its institutional purpose, and (2) the third party’s intent to gain an unfair profit against the conventional norms. In a case involving a questionable land sale, the Korean Supreme Court held in Judgment 2006Da463 dated 27 June 2006 that a transfer of credit, for the primary purpose of assigning a litigation case, was void because that transfer and assignment was deemed as creating a trust within the meaning of article 6 of the Trust Act. In this case, the Court noted that the plaintiff obtained the credit at issue through forging a ‘highly unusual’ land sale transaction that appeared to be a sham. The issue of whether third-party litigation funding could be construed as constituting a trust prohibited under the Trust Act would depend in large part on the specific terms of the litigation funding agreement, particularly whether the terms are so unfair as to violate the conventional norms. If, for instance, the funding arrangement stipulates a payment to the funder for its intervention in the lawsuit that is against the conventional norms, the court is likely to invalidate the funding agreement by applying article 6 of the Trust Act.

Further, article 34(1) of the Attorney-at-Law Act prohibits non-attorneys from introducing, referring, or enticing a party (engaged in an ongoing or potential litigation) to a specific attorney, in exchange for money or any other benefit. Moreover, under article 34(5) of the Attorney-at-Law Act, no fees or other profits earned through services provided by attorneys can be shared with any person who is not an attorney. In effect, those provisions bar the solicitation of clients by non-lawyers. In other words, third-party funders approaching clients for litigation funding and encouraging them to initiate litigation for the purpose of eventually sharing proceeds with them could be interpreted as falling within article 34(1) referred to above.

Meanwhile, the Korean Supreme Court and Constitutional Court have interpreted the purpose of the provision as to protect professionalism and ethical practice in the legal profession, and in light of this interpretation, there is a view that as long as the funders do not harm professionalism and fairness in the legal profession by directly intervening in attorneys’ work, it would not violate the Attorney-at-Law Act for a funder to directly provide funding to the litigant and receive a portion of the proceeds.

Finally, the Korean Supreme Court has recently issued a notable ruling wherein the Court recognised the attorneys’ fees to be paid by a third party to the lawsuit (rather than the winning party) as part of the litigation fees to be paid by the losing party (Supreme Court Judgment 2019Ma6990 dated 24 June 2020). While the facts of the case do not involve an actual funding arrangement and it is unclear what implication this judgment will have on the acceptance of third-party funding for litigations in Korea, we expect the case to at a minimum draw more attention to the possibility of third-party funding for litigations and prompt more discussions and analysis on the subject to resolve the current uncertainty on the permissibility of third-party funding for litigations.

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

No, there is no specific legal prescription on the fees a third-party funder may charge.

However, in the event the funding arrangement is structured as a loan that the client is liable to repay in the event of a successful outcome, then the interest component of that repayment could be subject to the Interest Limitation Act. Under the Interest Limitation Act, interest that may be charged is presently capped at 24 per cent per annum, and any amount exceeding that rate is null and void. Under the Act, any money that a creditor receives in connection with a loan including a deposit, rebate, fees, deduction, delay penalty or advance interest is deemed as interest for the purpose of applying the statutory interest rate ceiling.

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

Depending on how a litigation funding agreement is arranged or structured, it could be limited by the restrictions set forth under the Trust Act and the Attorney-at-Law Act.
Legal advice

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

Three provisions of the Attorney’s Code of Ethics are apposite to third-party litigation funding. First, attorneys are prohibited from ‘stirring up litigation’, either by directly encouraging potential clients or by indirectly permitting a third party to do so. Second, attorneys are not allowed to conduct a joint business with clients or non-attorneys where proceeds received by way of attorney fees are distributed with non-attorneys. Lastly, attorneys may not ‘take over’ ongoing litigations from their clients, and all proceeds from litigations thus ‘taken over’ are deemed to be illegitimate regardless of their means and forms.

Regulators

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

Not presently. However, if third-party funding becomes more common or prevalent in Korea, it is likely that the Ministry of Justice and financial authorities, as well as the Korean Bar Association would actively oversee third-party funding.

FUNDERS’ RIGHTS

Choice of counsel

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

No definite answer can be found. However, in view of the stipulations provided in the Attorney-at-Law Act, third-party funders would probably be restricted in insisting on their choice of counsel.

Participation in proceedings

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

Yes. In principle, all civil case hearings are open to the public, unless the Court determines that a public hearing is detrimental to national security or public policy. Therefore, funders may attend court hearings.

In terms of participation in court hearings or court-administered settlement proceedings, all participants must have a legal interest in the proceedings to do so. The scope of who has a ‘legal interest’ varies across the nature of the dispute (eg, civil, criminal or administrative) at issue; but in general terms, it covers both parties to the dispute, and those parties whose rights or obligations are contingent on the outcome of the litigation (eg, article 71, Korean Civil Procedure Act; article 16, Korean Administrative Litigation Act). Funders’ financial interest in the outcome of the litigation would not necessarily qualify as legal interest in the proceedings; for, if the funding arrangement provides funders qualifying legal interest, then such an arrangement would fall under the restrictions of the Trust Act or Attorney-at-Law Act. For arbitrations, third-party funders may be able to participate with mutual consent of the parties and with permission from the tribunal.

Veto of settlements

8  Do funders have veto rights in respect of settlements?

A funder’s rights to approve or reject a proposed settlement may vary depending on the terms and conditions of the relevant funding arrangement. There are no specific restrictions that apply under Korean law. However, considering the restrictions above, we do not expect funders to have veto rights.

Termination of funding

9  In what circumstances may a funder terminate funding?

The funder’s right to terminate is a matter of contract to be addressed in the relevant funding agreement. There are no specific restrictions that apply under Korean law.

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 principle, assuming the funding arrangement complies with relevant laws, a funder’s role would be limited to funding the cost of litigation. Due to restrictions on the role of non-attorneys in litigation, we would think funders would be neither expected nor required to take any active role in the litigation process.

On the other hand, since non-attorneys may take part in arbitrations, a funder’s degree of involvement in the arbitral process would be for the relevant parties to negotiate under the funding arrangement to the extent permitted by applicable laws, including laws of the seat.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Yes, litigation lawyers may enter conditional or contingency fee arrangements for civil cases. Indeed, conditional or contingency fee arrangements have been widely accepted in the Korean legal community and business circles. However, if a dispute arises in connection with the fee arrangement, a court may reduce the agreed contingency fee if it finds that the contingent amount is unreasonably excessive and that it is inequitable and violates the principle of good faith. As for criminal cases, the Korean Supreme Court held in its Judgment 2015Da200111 dated 23 July 2015 that contingency fee arrangements are not permissible.

Other funding options

12  What other funding options are available to litigants?

For litigants with limited resources to pay for the costs of a lawsuit, the court may grant litigation aid, either ex officio or upon request of the litigant.

Although no similar funding options are available for arbitration, we understand the Korea Federation of Small and Medium Enterprises (SMEs) and the Korean Commercial Arbitration Board recently executed an MOU to provide funding to SMEs for arbitrations. The Korea Federation of SMEs is organised under the Small and Medium Enterprise Cooperatives Act and operates under the auspices of the Ministry of SMEs and Startups. The MOU was signed to provide financial aid to those SMEs who may find it financially burdensome to participate in arbitral proceedings. Under the MOU, SMEs may seek up to 50 per cent of their incurred counsel fees, capped at 15 million won. Separately, some insurance products cover a certain portion of litigation costs.
## JUDGMENT, APPEAL AND ENFORCEMENT

### Time frame for first-instance decisions

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<tr>
<td>13 How long does a commercial claim usually take to reach a decision at first instance?</td>
<td>Commercial claims in a civil lawsuit typically take between eight and 12 months from the filing of a complaint to final judgment at first instance.</td>
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### Time frame for appeals

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<tr>
<td>14 What proportion of first-instance judgments are appealed? How long do appeals usually take?</td>
<td>Overall, less than 10 per cent of first-instance judgments are appealed. However, in cases heard before three-judge benches (i.e., cases with claim amounts exceeding 200 million won), the appeal rate is over 40 per cent. Disposal of appeals usually takes between six months and one year; but an appeal may take longer depending on the nature and complexity of the case. We note there is no appeal process against arbitral awards in Korea.</td>
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### Enforcement

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<tr>
<td>15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?</td>
<td>Although no official data is available, contentious enforcement proceedings are quite common in civil cases. Enforcement of judgments is relatively easy; once a final and conclusive judgment is obtained, the successful party can enforce it against the assets of the unsuccessful party by initiating proceedings for execution. In addition, the court may decide a judgment to be provisionally enforceable before a final and conclusive judgment is rendered. Korean courts allow enforcement of foreign court judgments on a reciprocal basis. Also, courts are receptive to the recognition and enforcement of foreign arbitral awards, in particular, if the award falls under the enforcement regime of the New York Convention.</td>
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## COLLECTIVE ACTIONS

### Funding of collective actions

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<tr>
<td>16 Are class actions or group actions permitted? May they be funded by third parties?</td>
<td>Class actions are not permitted, except in limited cases based on the type of claim at issue. Those include cases seeking damages under the Securities Related Class Action Act, and cases against an enterprise if it infringes directly on the rights and interests of consumers relating to their lives, bodies, or property and the infringement continues under the Framework Act on Consumers. It bears mention that if the rights or liabilities forming the object of a lawsuit are common to many persons or are generated by the same factual or legal causes, then such persons may join in the lawsuit as co-litigants under the Korean Civil Procedure Act. However, only those participating in the lawsuit would be subject to the outcome of the case, and its benefits would not pass to any non-litigants. Additionally, the Korean government recently announced that its decision to allow class actions, regardless of the type of claim, with the aim of providing efficient relief for collective losses. To that end, we understand the Korean government is in the process of taking necessary measures including introducing new legislations or amendment to existing laws.</td>
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Overall, there is no specific law or regulation that regulates third-party funding for class actions or group actions, and thus, such arrangements will be subject to the same general restrictions under Korean law.

## COSTS AND INSURANCE

### Award of costs

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<tr>
<td>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?</td>
<td>The courts, in principle, order the unsuccessful party to pay costs of the successful party in litigation. In calculating litigation costs, courts take guidance from the Supreme Court’s Regulations that prescribe the methodology to be followed and stipulate limits thereon. In effect, courts typically award only a portion of attorneys’ fees, and other items such as stamp duties. In line with this approach, courts are unlikely to order the unsuccessful party to pay all litigation funding costs of the successful party.</td>
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### Liability for costs

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<tr>
<td>18 Can a third-party litigation funder be held liable for adverse costs?</td>
<td>Under the present regime for costs allocation, adverse cost orders can only be ordered against one of the litigating parties. Therefore, adverse costs are likely to be ordered against the unsuccessful party to the litigation, rather than the third-party funder.</td>
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### Security for costs

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<td>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?)</td>
<td>No. However, where a plaintiff has no domicile, office or business place in Korea, or where it is recognised that furnishing security for the costs of a lawsuit is necessary because it is obvious that the claim is groundless based on the complaints, briefs or other records on a lawsuit, then the court may order the plaintiff to furnish security for the costs of lawsuit, upon request from a defendant. Further, even without request from the defendant, courts may ex officio order the plaintiff to furnish security for the costs of the lawsuit (article 117, Korean Civil Procedure Act). Although courts may not be able to order a third-party funder to provide security for costs, there could be cases in which a funder is required to provide security on behalf of the plaintiff under the terms of the funding arrangement.</td>
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### Insurance

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<tr>
<td>20 If a claim is funded by a third party, does this influence the court’s decision on security for costs?</td>
<td>While there is no precedent or reported case-law on the matter, we do not believe third-party funding would influence the court’s decision.</td>
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<tr>
<td>21 Is after-the-event (ATE) insurance permitted? Is ATE insurance commonly used? Are any other types of insurance commonly used by claimants?</td>
<td>There is no legislative or regulatory prohibition on ATE insurance in Korea. Insurance for attorneys’ fees is offered by some insurers, but,</td>
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</table>
in general, insurance related to litigation and legal disputes is quite a nascent market in Korea and is therefore yet to evolve fully.

**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?

No specific legislation requires a litigant to disclose a litigation funding agreement.

**Privileged communications**

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

Korea does not recognise attorney-client privilege as commonly understood and practised in common law jurisdictions. Rather, Korean laws (ie, the Civil Procedure Act, the Criminal Procedure Act and the Attorney-at-Law Act) only impose obligations on attorneys not to disclose information obtained in the course of performing his or her duties as an attorney and information that is secret or confidential (ie, non-public information), unless otherwise exempted. This includes the work-product of the attorney prepared for his or her client.

Considering the lack of systematic protection of attorney-client privilege, in June 2020, an amendment bill to the current Attorney-at-Law Act was placed before the National Assembly. The bill introduces certain protections as a matter of general rule and provides exceptions to such protections. Under the bill, all (1) correspondences exchanged between the client and the attorney in relation to their case, (2) documents or data (including electronic copies) submitted by the client to the attorney in relation to his or her case, and (3) documents or data the attorney has produced in relation to his or her case, are exempted from disclosure and submission before the court. Evidence acquired in violation of those proposed stipulations would be excluded from judicial and quasi-judicial proceedings. Exceptions to this rule comprise of where (1) the client provides its consent, (2) disclosure is necessary in public interest, or (3) the relevant attorney requires disclosure in relation to any dispute with the client.

Since the present regime only accounts for communication between the attorney and client, we would think communications between the third-party funder and the client are not subject to protection by privilege.

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

There have been few publicly reported disputes between litigants and their funders. The Korean Supreme Court Judgment 2013Da28728 dated 24 July 2014 is a rare example of a litigation between a ‘funder’ (management company of an apartment complex) and the litigant (the representative body of apartment residents). The dispute arose from the funder’s request for reimbursement of its disbursements in facilitation of the litigant’s separate litigation. The Supreme Court held that the funder’s role in financing the litigation costs was in violation of article 109(1) of the Attorney-at-Law Act and consisted of a de facto ‘representation’ as an attorney, and additionally pointed out that the litigation costs were paid in return for a future contract award. Therefore, the court held that the underlying stipulation in relation to disbursements was null and void. The above case reflects that the Korean Supreme Court interprets ‘representation by attorney-at-law’ under the Attorney-at-law Act quite broadly to prevent potential misrepresentation.

Considering the above, we reiterate that the Korean judiciary takes a rather conservative and strict approach towards third-party litigation funding.

**Other issues**

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

Not at this point in time. However, this issue should be revisited when legislation and regulations regarding litigation funding are introduced.

**UPDATE AND TRENDS**

**Current developments**

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

No updates at this time.
Spain

Jesús Rodrigo, Fernando Gragera and Silvia Ochoa
Procurator Litigation Advisors (PLA)

REGULATION

Overview

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

Third-party litigation funding is not expressly regulated in Spain but it is allowed under the general civil and commercial laws, provided that the funding agreements do not infringe the law or public order, and that the rules of professional conduct for lawyers are respected. In fact, articles 1526 et seq. of the Spanish Civil Code and the case law of the Supreme Court allow for the possibility of buying credit rights in a broad sense, including rights relating to a claim.

Third-party funding is a new practice in Spain and we cannot say that it is commonly used. However, there is a growing interest from the different stakeholders in learning more about this industry, and a rising demand from companies and law firms that see litigation funding as a tool to reduce costs and manage risks.

Restrictions on funding fees

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

Currently there are no limits on the fees and interest that funders can charge.

At EU level, Draft Report 2020/2130(INL) of the European Parliament requests the EU Commission to submit a proposal for a directive to regulate third-party litigation funding and recommends that only under exceptional circumstances should arrangements between litigation funders and claimants vary from the rule that a minimum of 60 per cent of the gross settlement or damages is paid to the claimants. It is to be seen if the EU decides to regulate this matter.

Specific rules for litigation funding

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

Currently there are no specific legislative or regulatory provisions applicable to third-party litigation funding in Spain.

At EU level, the European Parliament is currently promoting an initiative to regulate third-party litigation funding and has requested the EU Commission to submit a proposal for a directive (Draft Report 2020/2130(INL)), seeking to ensure a balance between access to justice and providing appropriate safeguards to those engaged in litigation. The European Parliament recommends that member states may determine in accordance with national law whether third-party funding agreements can be offered. Even when this could take years to crystallise, it seems likely that third-party funding will be expressly regulated in Spain at some point.

Legal advice

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

In Spain, there are general rules of professional conduct for lawyers that apply to lawyers advising clients in any given situation, such us the General Statute of the Spanish Legal Profession (2021), the Code of Ethics of the Spanish Legal Profession (2019) and the regulations of the different bar associations.

Although these rules are not specifically designed to regulate third-party litigation funding, they do apply to lawyers advising clients in relation to third-party litigation funding. They cover matters such as legal privilege, independence, avoidance of conflict of interest, publicity, relationships with clients, opposing parties and other legal professionals.

Regulators

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

To our knowledge, public bodies in Spain have not yet expressed any particular interest in or oversight over third-party litigation funding.

In the private sphere, there is an ongoing debate between legal professionals, legal associations and third-party funders on whether litigation funding should be regulated, and if so, to what extent.

FUNDERS’ RIGHTS

Choice of counsel

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

According to general principles of Spanish law and the professional and ethical rules that apply to the legal profession, claimants should have the right to freely choose their counsel. This principle is closely related to the independence of lawyers and to the avoidance of conflicts of interest.

However, there are no specific provisions in the Spanish legislation concerning the possibility of delegating the choice of counsel to a third party. In our opinion and depending on the circumstances, the validity of this practice could be questionable.

In practice, most of the third-party funders acting in Spain follow the best practices of the industry and allow funded parties to freely
choose their counsel, without insisting on or imposing the funder’s choice of counsel.

But at the same time, it is important to point out that the background, track record and expertise of the legal team chosen by the funded party are factors that the third-party funder will undoubtedly consider when deciding whether or not to fund a case.

**Participation in proceedings**

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

Judicial proceedings are governed by the principle of publicity recognised in the Spanish Constitution, whereby court hearings are generally open to the public. In consequence, funders can attend hearings if they wish.

Regarding participation in court hearings, in theory any person or entity with a direct and legitimate interest in a claim can request to participate in the proceedings under the Spanish Civil Procedure Rules. In practice, the court has a wide discretion to order the participation of third parties and we consider it difficult for a funder to be allowed to participate. To date, there are no judicial precedents of the application of these provisions to third-party funders.

In arbitration proceedings, the general rule is that hearings are closed to the public unless the parties agree otherwise. Accordingly, funders can only attend or participate in arbitration hearings if there is no objection by the counterparty, or if this is allowed by the applicable arbitration rules and by the arbitrators.

The participation of litigation funders in settlement discussions would depend on the specific agreement reached between the funded party and the funder. Best practice dictates that the funder should not directly participate in settlement negotiations.

**Veto of settlements**

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

In Spain, funders have no veto rights in respect of settlements. Funders usually ask to be informed of any settlement negotiations and settlement offers received, and generally give their opinion to the funded parties. But the decision to settle a dispute ultimately lies with the funded party, with the advice of its legal team.

It is market practice not to include veto rights on settlements in litigation funding agreements, but to regulate the economic consequences of the funded party settling the claim in different thresholds. This way, funded parties know and accept from the outset what their share of the proceeds would be when settling the claim for any given amount, and the funders can ensure a fair return on their investment.

**Termination of funding**

9 | In what circumstances may a funder terminate funding?

As third-party funding is not expressly regulated in Spain, the general rules of commercial contracts apply to the termination of litigation funding agreements. Consequently, a funder may terminate funding if there is a repudiable breach of the litigation funding agreement. In the end, this will depend on the specific contractual terms agreed by the parties.

It is usual practice to include generic termination clauses pursuant to which the funder can terminate the funding agreement, for instance in the case of a material breach of the litigant’s obligations under the agreement; and also, specific clauses in line with the Code of Conduct for Litigation Funders (2018) of the Association of Litigation Funders of England and Wales. This Code allows a funder to terminate funding if the funder (1) reasonably ceases to be satisfied about the merits of the dispute; (2) reasonably believes that the dispute is no longer commercially viable; or (3) reasonably believes that there has been a material breach of the litigation funding agreement by the funded party.

**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?

There is not a specific regulation requiring funders to take an active role in the litigation process. The role of the funder will depend on what the parties agree in the funding agreement, while respecting the applicable legislation.

Funders may play an active role assisting the litigants and their lawyers in strategic decisions about the conduct of the case, and giving an objective and independent opinion at any stage of the proceedings. This is often very useful, given funders’ expertise managing complex litigation.

Depending on the agreement of the parties, funders may also coordinate or act as a link between the different parties involved in the litigation or arbitration, such as lawyers, court representatives, experts and other services providers – in any case, bearing in mind that the litigant will always have control of the case and respecting the applicable professional and ethical rules.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

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

In Spain, litigation lawyers may enter into conditional or contingency fee agreements. *Quota litis* agreements (damages-based agreements) are permitted and they are actually quite common in court proceedings. Competition in the Spanish legal market is very high and many firms and sole practitioners seek to compete in price, offering damages-based agreements.

On the other hand, conditional fee agreements are not so common because the general practice in Spanish litigation is to agree with the client a fixed fee depending on the complexity and quantum of the case (which may be combined with a contingency fee), instead of acting on an hourly-rate basis.

**Other funding options**

12 | What other funding options are available to litigants?

Other funding options available to litigants include (1) private funds; (2) union and association funding; (3) insurance such as motor, home and directors’ and officers’ insurance; (4) legal aid, although it is rarely applicable to complex litigation; and (5) since a few years ago, litigation funding.

**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?

According to the latest official statistics published by the Spanish judiciary, the average duration of ordinary proceedings at first instance in civil courts was 15.1 months in 2019.

In commercial courts, the average duration of ordinary proceedings at first instance was 23 months in 2019. Commercial courts have
jurisdiction to hear insolvency proceedings and specific matters such as legal claims relating to unfair competition, intellectual property and maritime law, among others.

In arbitral proceedings, arbitral awards are typically issued in 10 to 15 months. The duration of the proceedings differs depending on the arbitral institution and applicable rules.

In any event, the timescale to receive a judgment or arbitral award will depend on several factors, especially the workload of the specific court and the complexity of the proceedings.

### Time frame for appeals

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

According to the latest official statistics published by the Spanish General Council of the Judiciary, 15.1 per cent of the judgments made by civil and commercial courts were appealed in 2020. To correctly analyse this figure, it is important to note that judgments made in the small claims track (juicios verbales) for claims with a value of up to €3,000 cannot be appealed.

According to public data, the average duration of appeals in civil ordinary proceedings ranges between 3 and 16.7 months, depending on the region. The national average for 2019 was 9.5 months.

### Enforcement

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

According to the official statistics published by the Spanish General Council of the Judiciary, Spanish civil and commercial courts registered 484,329 applications to enforce judgments in 2019, and 419,361 in 2020. Considering that the civil and commercial proceedings initiated amounted to 2,384,147 in 2019 and 2,212,084 in 2020, we can conclude that a relevant proportion of judgments (around 20 per cent) require contentious enforcement proceedings.

In general, judgments (and arbitral awards) are easy to enforce in Spain. The claimant must file a claim for the enforcement of the judgment, and the court will examine the formal requirements and issue an enforcement order. The grounds for the debtor to challenge the enforcement are very narrow and the courts have powers to investigate the debtor’s assets within the jurisdiction.

In any case, the ease of enforcing a judgment depends on several factors, mainly on the type of order made by the judgment and on the kinds of assets that the defendant has within the jurisdiction. If a judgment orders the payment of money and the defendant has valuable assets within the jurisdiction, enforcement proceedings are usually quite straightforward. Funds in bank accounts can be easily frozen and deposited in the court’s bank account. If other assets are seized, they may be sold – normally at public auction – and the proceeds would be used to pay the debt.

Enforcement of judgments or arbitral awards that contain orders different from a payment of money are usually more difficult to enforce.

### COLLECTIVE ACTIONS

#### Funding of collective actions

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

Collective or representative actions are permitted in Spain for consumer claims, but only certain subjects have legal standing to file them and to act for the consumers. These include legally constituted consumer associations and representative consumer associations; groups of consumers aggrieved by a harmful event – provided that the claims are filed by the majority of the consumers pertaining to the relevant group; and the Public Prosecution Service.

This restriction and the lack of a comprehensive regulation make the viability of class actions and group actions very limited in Spain as compared to certain other jurisdictions. However, there has been a push in recent years to facilitate class actions in Europe in general and in Spain in particular. Recently, the European Union adopted Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. This Directive sets out rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all member states, while providing appropriate safeguards to avoid abusive litigation.

While individuals cannot file class actions, it is possible to join several claims in a single set of proceedings, provided that the claims are based on the same facts. In any case, courts are usually reluctant to allow the joinder of many claims in a single set of proceedings.

Given the current regulation of collective actions in Spain, it would be unusual for them to be funded by third parties. Directive (EU) 2020/1828 contemplates the possibility that these actions be funded by third parties. It remains to be seen how Spain transposes this Directive, and what changes are made in relation to class or group actions and in relation to third-party funding.

### 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?

The general rule in the Spanish legal system is that costs follow the event. The courts shall order the unsuccessful party to pay the costs of the successful party, provided that the successful party has succeeded in all of its pleadings. This general rule may be excepted if the court considers and reasons that the case poses serious doubts on points of fact or points of law, or both.

If the successful party has succeeded only in some but not all of its pleadings, each party shall bear its own costs, unless the court considers that a party has been reckless in bringing or defending the claim.

It is important to note that costs are not based on an indemnity principle, so litigants are not truly entitled to recover all the costs incurred. The costs are assessed by the courts’ clerks and usually amount to a percentage of the quantum of the claim, in line with the non-binding guidelines of the different Spanish bar associations. The recoverable legal costs (excluding court representatives’ fees) are in any event limited to a maximum of one-third of the quantum of the claim.

The position differs a little in relation to arbitration, where the arbitrators usually have a wider discretion to decide on adverse costs issues. The answer will ultimately depend on the agreement of the parties, the applicable arbitration rules and the criteria of the arbitrations appointed.

There is no provision in Spanish law that allows the courts to order the unsuccessful party to pay the litigation funding costs of the successful party, nor are we aware of any case law in this regard. litigation funding costs do not qualify as ‘costs’ under the Spanish Civil Procedure Rules, and we do not consider that they qualify as recoverable ‘expenses’ either.
Liability for costs
18 Can a third-party litigation funder be held liable for adverse costs?

Spanish legislation and case law does not contemplate the possibility of holding a third-party litigation funder liable for adverse costs. In principle, only the parties to a case can be held liable for adverse costs.

Moreover, in a typical litigation funding agreement structured as a silent partnership under Spanish law, the silent partner (ie, the funder) would be protected from claims by third parties pursuant to article 242 of the Spanish Commercial Code, and therefore cannot be held liable for adverse costs.

This is regardless of the contractual relationship between a party and a third-party litigation funder, under which the parties to such contract may agree that the litigation funder covers the risk of adverse costs. In any event, the doctrine of privity of contract will apply, therefore courts cannot hold a third-party litigation funder liable for adverse costs even if a contract of this kind exists.

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?)

The Spanish Civil Procedure Rules do not provide for the possibility of ordering a claimant or a third party to provide security for the defendant’s costs. A defendant cannot apply for security for costs via an application for an interim injunction either, since the possibility of applying for interim injunctions is restricted to claimants.

In commercial arbitration with a seat in Spain and to which the Spanish Arbitration Act applies, the arbitrators may have discretion to make an order for security for costs. There is neither clear case law nor a uniform approach to security for costs applications and the answer will ultimately depend on the agreement of the parties, the applicable rules and the discretion of the arbitrators. In our experience, unless otherwise agreed by the parties, arbitrators (especially international arbitrators) are increasingly assuming that they have the power to decide on security for costs applications. In any case, security for costs orders in arbitrations sited in Spain are rare.

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

As the Spanish Civil Procedure Rules do not contemplate the possibility of ordering a claimant or a third party to provide security for costs, the fact that a claim is funded by a third party does not influence the court’s decision in this regard.

In arbitration there is not a settled position, mainly because security for costs applications are not so common as in other jurisdictions and because third-party funding is a relatively new industry in Spain.

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

ATE insurance is permitted in Spain, however it is not commonly used. The moderate risk of adverse costs and the lack of local ATE providers make it not worth taking out ATE insurance in most cases.

Nonetheless, claimants are becoming interested in ATE insurances, especially for complex disputes in which litigation funders are involved. ATE insurances are increasingly being demanded in complex international arbitrations and mass litigation.

In civil court proceedings, litigants have no obligation to disclose a litigation funding agreement to the opposing party or to the court.

In Spain, there is no disclosure and inspection, or discovery as compared to certain other jurisdictions such as England and Wales and the United States. The parties can only request that the opposing party produces specific documents provided that they refer to the subject matter of the dispute or constitute relevant evidence. The courts retain discretion to decide on such applications and are normally reluctant to order the production of documents unless they are truly relevant to decide the dispute. Based on this and in the absence of judicial precedent, it would be unlikely for a court to compel disclosure of a funding agreement.

In commercial arbitration, the procedure is more flexible, and arbitrators normally have a wider discretion to order the disclosure or production of documents. Soft-law instruments and arbitration rules of some arbitral institutions in Spain have promoted the need of disclosing the existence of third-party funding agreements. In this regard, the Spanish Arbitration Club (Club Español del Arbitraje) Code of Good Arbitration Practice 2019, the Spanish Court of Arbitration Arbitration Rules 2019 and the Madrid International Arbitration Center Arbitration Rules 2020 provide that where a party has received funds or obtained funding from a third party, it shall inform the arbitrators and the counterparty of this fact and disclose the identity of the funder.

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

Any spoken or written communications between a party’s lawyers and a funder is protected by legal privilege (secreto profesional) and must be kept confidential. This also includes communications between a party’s in-house legal counsel and a funder.

In theory, legal privilege would not extend to the relationship between the funded party and the funder. However, if the relationship is between the funded party and the funder’s lawyers, there are grounds to argue that their communications should also be protected by privilege. Given the relative novelty of litigation funding in Spain, there is no authority in this regard. In any event, funding agreements usually contain strict confidentiality clauses that may protect the parties from an unwanted disclosure.
DISPUTES AND OTHER ISSUES

Disputes with funders

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

We are not aware of any disputes between litigants and their funders in Spain being reported.

Other issues

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

In the contentious-administrative jurisdiction, practitioners should be aware of Supreme Court Judgment No. 53/2020 of 22 January 2020. In this judgment, the Supreme Court (Contentious-Administrative Chamber) found that, unlike in civil proceedings, in claims for damages against the Spanish public administration (responsabilidad patrimonial de la Administración) litigants are not allowed to sell their litigious or contentious credit rights or rights to claim (or both). Litigants would only be allowed to sell their credit rights if those credit rights have been acknowledged by a final administrative decision or by a final court judgment.

The judgment contains a dissenting opinion of Justice Mr Ángel Ramón Arozamena Laso, which supports the possibility of selling future credit rights and specifically addresses the practice of third-party funding.

UPDATE AND TRENDS

Current developments

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

Litigation funding in Spain is booming, with more and more litigants and law firms turning to litigation funders, looking for solutions other than the traditional ones. Litigation funding is increasingly being used in complex litigation and arbitration proceedings and we believe that this trend will continue in the years to come.
Regulation

Overview

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

Third-party funding (TPF) is not subject to regulation under Swedish law. Thus, the use of TPF is permitted.

Although it is known that arbitral proceedings in Sweden from time to time have been funded by third parties, TPF is still considered a relatively new phenomenon in Sweden. Considering the confidential nature of arbitration, it is difficult to comment on how frequently TPF is used. However, the increase in the number of cases, internationally, that are funded by a third party, indicates that this is also the case in Sweden. The number and presence of international as well as local funders has increased on the Swedish market, indicating that the volume of funded disputes has increased as well. Considering that Stockholm is one of the world’s leading venues for international arbitration, the potential market for TPF in Sweden is large.

Restrictions on funding fees

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

There are no specific rules under Swedish law that impose restrictions on the fees and interest funders can charge for their services.

Specific rules for litigation funding

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

TPF is not subject to any specific legislative or regulatory provisions. With respect to disclosure of a funder’s involvement in a dispute, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) adopted a policy in 2019 addressing disclosure of third parties with an interest in the outcome of the dispute. The policy aims to encourage a party to disclose the identity of any funder in its first written submission. It should, however, be noted that the policy is not obligatory. Consequently, the parties are not formally obliged to disclose the existence of funders.

Legal advice

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

There are no professional or ethical rules in Sweden governing the duties of legal counsel (in Swedish advokat, i.e., lawyers registered with the Swedish Bar Association) specifically in regard to TPF.

Nonetheless, if a third-party funding arrangement involves a Swedish advocate, the Code of Professional Conduct for Members of the Swedish Bar Association (CPC) must be considered, as it governs the financial interests of advocates in disputes in which they act as counsel. Section 4.2.1 of the CPC prohibits advocates from working for a contingency fee. There are, however, a few narrow exceptions to this general rule, but a third-party funding arrangement is typically not attributable to any of them, unless it is a group action. Consequently, funders who engage Swedish counsel must accept that advocates utilize traditional fee models.

Notably, it is advisable for an advocate to exercise caution when agreeing to an obligation to disclose information to the funder. If the obligation is too extensive, the advocate runs a risk of ending up in a conflict of interest in relation to his or her client. It is conceivable, in certain situations, that the disclosure of information to the funder is not necessarily in the client’s best interest. Therefore, an advocate should insist that he or she is given a right to continuously test, in each individual situation, whether a disclosure is compatible with his or her fiduciary duty towards the client.

Regulators

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

No public bodies have been assigned responsibility to monitor or supervise TPF. Further, TPF does not qualify as lending or insurance business and is therefore not subject to the regulations and supervision applicable to banks and insurance companies.

Funders’ Rights

Choice of counsel

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

The funder is not a party to the dispute and therefore has no rights or obligations in the proceedings. The procedural rights and obligations belong to the party in the proceedings.

One of the principal rules of legal professional conduct is independence when acting on behalf of the client. It happens, however, that funders require some level of influence as a precondition for financing the dispute. For understandable reasons, it is of vital importance for the funder that the advocate is sufficiently qualified for the dispute in question. On a contractual basis, it is possible to include a clause in the funding agreement where the funder is given authority to appoint an advocate. It should be noted that such a contract is not procedurally valid under Swedish law and is therefore not possible to enforce. A contract granting the funder a right to appoint an advocate is nevertheless contractually binding and there is nothing preventing the parties to the funding agreement from including a liquidated damages clause in their contract, applicable if the funded party acts in a way that is not acceptable to the funder.
In the situation where the funder is being granted a contractual right to appoint an advocate, the advocate has to be independent from the funder and only accept instructions from the party to the dispute. This is necessary in order for the advocate to avoid a conflict of interest and to avoid, unintentionally, entering into a client-attorney relationship with the funder. It should also be noted that an advocate has an obligation to show fidelity and loyalty towards his or her client according to Section 1 of the Code of Professional Conduct for Members of the Swedish Bar Association (CPC). An advocate does not have a corresponding obligation towards the funder.

**Participation in proceedings**

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

As previously mentioned, a funder is not a party to the dispute and consequently has no rights or obligations in regard to the proceedings. Accordingly, a funder does not have a procedural right to attend or participate in hearings and settlement proceedings. It is, however, possible for the litigant and funder to stipulate in the funding agreement that the funder shall have the right to attend and participate in hearings and settlement proceedings. Nevertheless, the funder’s attendance at a hearing before an arbitral tribunal (or a settlement discussion) will require the opposing party’s approval.

If the hearing takes place in general court, a funder has the right to attend, as proceedings in general courts are open to the public. There are, however, exceptions to this general rule, where a court may decide that the hearing shall not be made public. For example, in cases where it can be assumed that information presented or disclosed in the proceeding is covered by secrecy, the court can order that the hearing shall not be public. Settlement discussions moderated by the court (or even mediation) are very rare in commercial cases in Sweden. If the judge were to invite the parties to deliberations (in private meetings), the funder would be excluded.

**Veto of settlements**

8. **Do funders have veto rights in respect of settlements?**

A funder has no ‘default’ veto right in regard to settlements. It is, however, common practice to include in the funding agreement a clause giving the funder a veto right in relation to settlement propositions. Such a clause is contractually valid but cannot be enforced so as to prevent the litigant from entering into a settlement agreement with the opposing party. A veto clause could, however, be combined with a liquidated damages clause taking aim at a situation where the funded party decides to accept or propose a settlement without the funder’s consent.

**Termination of funding**

9. **In what circumstances may a funder terminate funding?**

The parties to a funding agreement are at liberty to agree on grounds for termination, as well as the consequences of such a termination. Therefore, it is difficult to give a general and conclusive answer as to the circumstances in which a funder may terminate funding. However, the following are some examples of termination grounds:

- a change of circumstances significantly reducing the chance of success in the dispute;
- a change of circumstances which renders the dispute no longer commercially viable;
- a funded party’s material breach of contractual obligations;
- the insolvency of the funded party; and
- the insolvency of the opposing party.

**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?**

A funder is not required to take an active role in the litigation process. The level of involvement on the part of the funder varies: some funders prefer to be significantly involved while others prefer to remain in the background. However, if the funding agreement prescribes that the funder has an obligation to take an active role in the proceedings, such a clause is of course binding as between the parties.

Notably, if a funder takes a more active part in the litigation process, including assisting the funded party to instruct the advocate, this might create a conflict of interest for the law firm acting on behalf of the funded party.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

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

Section 4.2.1 of the Code of Professional Conduct for Members of the Swedish Bar Association (CPC) provides that advocates are not, unless in extraordinary circumstances, allowed to work with contingency fee arrangements. Funders who engage Swedish advocates must consequently accept that Swedish advocates utilise traditional fee models.

When it comes to conditional fee arrangements, the situation is not equally clear, as the CPC (along with its commentary) does not provide a conclusive answer in this regard. According to Section 4.2.2 of the CPC, an agreement where the advocate assumes a financial risk in relation to the outcome of the case does not necessarily lead to a situation where the lawyer’s interest in the matter becomes disproportional or otherwise has an adverse effect on the lawyer’s performance of its mandate. Conditional fee arrangements can therefore be allowed, provided that the risk and the reward are reasonably balanced.

**Other funding options**

12. **What other funding options are available to litigants?**

Besides third-party funding, there are other funding options available to litigants in Sweden. However, some of these funding options are only available to natural persons. The following options are available:

- Business insurance policies are widely available and commonly include coverage of litigation costs, up to a capped amount, in certain types of dispute. As a general rule, the claimant must notify the insurance company prior to the commencement of the proceeding, to be able to successfully claim compensation for the litigation costs.
- Legal Expense Insurance (LEI) is included in all household insurance policies and covers litigation costs. The terms of LEI vary between the insurance companies offering it. LEI normally covers certain types of dispute in general court and usually excludes disputes handled by administrative courts.
- Legal aid is available to natural persons whose gross income does not exceed 260,000 krona, according to section 6 of the Legal Aid Act of 1996. An application for legal aid must be submitted to the competent authority. Legal aid may not be granted if the claimant has LEI or any other similar legal protection that covers the matter.
- Loan agreements, where a party obtains a loan from a creditor in order to fund the litigation of a claim. This type of arrangement differs from third-party funding as the debtor is obliged to repay the loan regardless of the outcome of the dispute.
JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

According to statistics from the Swedish National Courts Administration, referring to data from 2020, a claim at first instance (in 75 per cent of the submitted claims) has a processing time of seven months, following the submission of the claim for decision to the competent court. However, the data does not specifically refer to commercial claims but to civil claims in general. In our experience, the processing time for complex commercial disputes is generally longer than seven months (and closer to a year).

Of the ordinary arbitration proceedings administered under the Arbitration Rules of the Stockholm Chamber of Commerce (SCC), 50 per cent have a processing time of six to 12 months; and 27 per cent of ordinary SCC arbitrations have a processing time of less than six months. The majority of expedited SCC arbitration procedures have a processing time of less than three months; and 45 per cent of expedited SCC arbitrations have a processing time of three to six months. The time indications are based on information from the SCC.

Time frame for appeals

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

According to statistics from the Swedish National Courts Administration, referring to data from 2020, 5 per cent of first-instance judgments in civil claims are appealed. However, the data does not specifically refer to commercial claims, but to civil claims in general.

Most civil cases under Swedish law require leave to appeal in order to obtain the right to get the matter tried at a higher instance. It takes 1.7 months, on average, to get a decision on leave to appeal (in 75 per cent of the requests for leave to appeal). In addition, the proceedings at second instance take 12.6 months, on average. The data do not specifically refer to the appeal of commercial claims, but to the appeal of civil claims in general.

An arbitral award cannot be challenged on material grounds. It is, however, possible for a party to challenge the award on procedural grounds, in accordance with sections 33 and 34 of the Swedish Arbitration Act of 1999. There are no official statistics on what proportion of arbitral awards are challenged or data that specifically refer to the processing time of challenge proceedings before the Swedish courts.

Enforcement

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

There are no official statistics regarding the proportion of judgments that require contentious enforcement proceedings.

If a party fails to voluntarily comply with a domestic court judgment, the opposing party can apply for enforcement at the Swedish Enforcement Authority (SEA). An application for enforcement can be made for both monetary claims and specific performance. Following the application, the SEA will contact the other party and stipulate a period within which that party is compelled to perform what is required. If the other party fails to comply within the time set out by the SEA, the party’s assets may be seized.

For judgments rendered by courts in other EU member states, EU Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters will be applied.

In order to enforce a judgment rendered by a foreign court outside the EU, there has to be an applicable treaty between Sweden and the foreign state in question. If no treaty between Sweden and the foreign state exists, the judgment cannot be enforced in Sweden, unless the parties have an exclusive jurisdiction agreement. Furthermore, for a foreign court judgment to be enforceable, the judgment is required to involve a matter of civil law and must not be in conflict with Swedish public policy.

An arbitral award made by a tribunal seated in Sweden is considered a Swedish award and is enforceable in Sweden as of the day on which it is rendered. This is so even if none of the parties are Swedish, the underlying contract has no relation to Sweden and Swedish law does not govern the substance of the case. A Swedish award may be enforced by the SEA following the application of a party. In order for the SEA to be able to enforce an award, the award must be compliant with the formal requirements, namely, be in writing and signed by the arbitrators.

An award made by a tribunal with its seat outside Sweden is considered a foreign award and cannot be enforced until it has passed an exequatur procedure. In order for foreign arbitral awards to be enforced in Sweden, a party is required to file an application of recognition and enforcement at the Svea Court of Appeal. The applicable provisions in sections 54 and 55 of the Swedish Arbitration Act mirror the requirements in article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. An exception applies to International Centre for Settlement of Investment Disputes awards, for which no exequatur procedure is required.

COLLECTIVE ACTIONS

Funding of collective actions

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

Under Swedish law, group actions are permitted. Group actions are regulated in the Swedish Group Proceedings Act of 2002. The Swedish Group Proceedings Act has been in force since January 2003, but has not yet been utilised to a particularly high extent. In the absence of rules that restrict third-party funding, there are no legal obstacles to using third-party funding for a group action.

Swedish advocates are not normally allowed to work with contingency fee arrangements, according to the rules set out in section 4.2.1 of the Code of Professional Conduct for Members of the Swedish Bar Association (CPC). There are, however, specific situations where it might be allowed. In the commentary to section 4.2.2 of the CPC it is stated that contingency fee arrangements are permitted in situations where an advocate is representing the interests of a collective action; however, under no circumstances may the Swedish advocate accept a quota litis. Consequently, funders who engage Swedish advocates when funding a group action are allowed to apply contingency fee arrangements as regards the remuneration of counsel.

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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?

The philosophy under Swedish law, when it comes to the issue of allocation and the costs of litigation, is that a winning party that has not been at fault should not suffer any loss in asserting or defending its right. Consequently, a party that wins in full is entitled to be reimbursed for its costs relating to the proceedings, according to Chapter 18, section 1 of the Swedish Code of Judicial Procedure (Code of Procedure) of 1942. An unsuccessful party, on the other hand, is liable for its own expenses as well as those of the opposing party. If a party succeeded in part, reimbursement can only be sought in relation to the specific issues, and the extent of those, on which the successful party won. There are, however, exceptions to this general rule that apply in certain situations (Chapter 18, section 3 of the Code of Procedure).

The winning party shall recover all necessary costs for conducting the litigation, including the court fees (which are relatively low and not related to the amount in dispute), fees for legal representation and costs for expert evidence. The winning party also has the right to be reimbursed for its own time spent working on the case, for example time spent by its in-house counsel, management or other specialist functions. Such costs are calculated based on the involved employees’ salaries or other remuneration. In order for costs to be recovered they must be deemed to have been reasonably incurred to safeguard the party’s interests. The parties usually file their written cost submissions after the end of the hearing and are granted leave to provide comments within one or two weeks. The decision is finally taken by the court as a part of the judgment.

Under Swedish law, funding costs are not deemed to constitute a cost that is attributable to the preparation of the proceedings or the presentation of the case. Nor can it be said to constitute a fee for legal representation or time spent by the party. Due to the definition of recoverable costs in the national legislation, it therefore appears highly unlikely that a Swedish court would order a losing party to reimburse the other party’s funding costs.

Regarding arbitration proceedings, section 42 of the Swedish Arbitration Act equally provides that the losing party shall compensate the prevailing party for its costs of the proceedings. The provision does not set out which types of cost are recoverable. It is, however, the general understanding that the principles outlined in the Code of Procedure apply unless the parties have agreed otherwise. Thus, the allocation and the content of legal costs are the same in a Swedish ad hoc arbitration as in domestic court litigation, provided that the parties did not agree to allocate the legal costs differently. This also means that it is highly unlikely that a Swedish court would order a losing party to reimburse the other party’s funding costs.

Regarding arbitration proceedings, section 42 of the Swedish Arbitration Act equally provides that the losing party shall compensate the prevailing party for its costs of the proceedings. The provision does not set out which types of cost are recoverable. It is, however, the general understanding that the principles outlined in the Code of Procedure apply unless the parties have agreed otherwise. Thus, the allocation and the content of legal costs are the same in a Swedish ad hoc arbitration as in domestic court litigation, provided that the parties did not agree to allocate the legal costs differently. This also means that it is highly unlikely that a Swedish court would order a losing party to reimburse the other party’s funding costs.

However, the situation is somewhat different when it comes to institutional proceedings, according to the Arbitration Rules of the Stockholm Chamber of Commerce (SCC Rules). When it comes to the issue of allocation and recoverability of costs, the SCC Rules are written in a more open and indeterminate way than the Code of Procedure. Article 50 of the SCC Rules provides that ‘any reasonable costs incurred’ having regard to ‘any relevant circumstances’ are recoverable, while the Code of Procedure refers mainly to ‘costs of preparation for trial and presentation of the claim’. Hence, it may not be ruled out that a successful party in an arbitration under the SCC Rules may be awarded compensation for the funding costs. However, for a funded party to be able to recover its funding costs, most likely special circumstances are required similar to those that existed in Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd (Queen’s Bench Division (Commercial Court), 15 September 2016). In this case a claimant was awarded costs for its funding fees. The reason why the funded party was in need of funding was partly due to the opposing party’s actions, which had left the funded party impecunious, which, in turn, made financing a prerequisite for the party to be able to pursue the claim and assert its rights.

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

Under Swedish law, a disputing party initiating arbitral proceedings is not required to have the financial resources to be able to compensate the opposing party in accordance with an adverse costs award (except regarding security for costs under the SCC Rules – see below). This is true regardless of whether the party is funded by a third party or not. Furthermore, the general rule is that obligations relating to adverse costs may only be directed at parties to the proceedings. A funder is not a party to the proceedings and, thus, cannot be held liable for adverse costs.

However, in its ruling at NJA 2014, p 877, the Swedish Supreme Court (Supreme Court) held shareholders of an empty ‘litigation company’ liable for adverse costs. The Supreme Court found that the arrangement had been set up with the intentions of avoiding liability for adverse costs and circumventing the rules on reimbursement of costs as set forth in the Swedish Code of Procedure. The case concerned a situation where the claim as such had been assigned to an empty ‘litigation company’ that had been set up with the sole purpose of acquiring and facilitating the dispute, a situation that is clearly distinguishable from a third-party funding arrangement, where the original claim holder is the party pursuing the claim. However, it cannot be ruled out, although it seems improbable, that a funder in certain special cases may be obliged to reimburse the opposing party for its adverse costs in the event that the funded party is unable to fulfil its adverse costs order. This would in any case require subsequent proceedings, most likely in a domestic court, in which the funder is the defending party.

A funder is not subject to the authority of the arbitral tribunal because the funder is not a party to the arbitration agreement. Hence, the funder cannot be held liable by the arbitral tribunal for adverse costs in relation to a successful opposing party.

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?)

In domestic court litigation, on the request of the defendant the court may order a claimant to provide security for the defendant’s estimated adverse costs, provided that the claimant is not a national of an EEA country (see section 1 of the Act on the Obligation for Foreign Plaintiffs to Provide Security for Legal Costs of 1980). The court cannot order a third party to provide security for costs. Nonetheless, a third party is permitted to provide security on the claimant’s behalf in the form of a guarantee or a deposit. If the claimant is a national of an EEA country (or a company registered in an EEA country), the court may not order a claimant to provide security for costs.

According to the recently introduced article 38 of the SCC Rules, an arbitral tribunal may, in exceptional circumstances and at the request of a party, order a claimant to provide security for costs. In determining whether to order security for costs, the tribunal shall have regard to (1) the prospects of success of the claims, counterclaims and defences; (2) the claimant’s ability to comply with an adverse costs award and
the availability of assets for enforcement of an adverse costs award; (3) whether it is appropriate in all the circumstances of the case to order one party to provide security; and (4) any other relevant circumstances. Since 2017 this provision has only rarely been applied by SCC tribunals. Usually, the tribunal will consider the claimant’s access to justice argument. It must not become impossible for a claimant, who may have been financially encumbered by the dispute, to enforce its claims in arbitration proceedings. During the public hearings at the SCC in preparation for the new rule, it was noted several times that tribunals should be cautious about applying the provision and seek guidance in the Chartered Institute of Arbitrators’ 2015 guidelines ‘Applications for Security for Costs’ (https://www.ciarb.org/media/4196/guideline-5-security-for-costs-2015.pdf).

The arbitral tribunal may, under section 38 of the Swedish Arbitration Act of 1999 as well as under article 51 of the SCC Rules, request security for its compensation, regardless of the involvement of a funder. The requested security should correspond to the estimated amount of the fees and expenses of the arbitral tribunal and the administrative fee (in institutional arbitrations). Security for costs is usually provided in the form of advance payments by the parties.

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

In domestic court litigation, on the request of the defendant the court may order a claimant to provide security for the defendant’s estimated adverse costs, provided that the claimant is not a national of an EEA country (see section 1 of the Act on the Obligation for Foreign Plaintiffs to Provide Security for Legal Costs). Where the claimant is not a national of an EEA country, the fact that a claim is funded by a third party does not influence the court’s decision on security for costs. This is due to the fact that the existence of a third-party funding agreement is not a criterion for the court to consider when determining whether the request for security should be granted.

In arbitration proceedings, the mere existence of a third-party funding agreement is not in itself a decisive reason for granting a security request. Instead, the deciding factors will be the parties’ financial situation, the availability of assets and whether or not the funder has made a commitment to cover adverse costs.

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

ATE insurance is by all means permitted in Sweden, albeit not commonly used.

Business insurance policies are widely available and commonly include coverage of litigation costs, up to a capped amount and regarding certain types of disputes. As a general rule, the claimant must give the insurance company notice prior to the commencement of the proceeding, in order to successfully recover the litigation costs.

Legal Expense Insurance (LEI) is included in all household insurance policies and covers litigation costs. The terms of LEI vary between the insurance companies offering it. LEI normally covers costs up to a capped amount in certain types of dispute in general court and usually excludes disputes handled by administrative courts.

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?

A litigant has no general obligation to disclose the existence of a litigation funding agreement to the opposing party or to the court, as there are no such rules relating to litigation proceedings. Notably, in the course of the enforcement proceedings in Kazakhstan v Ascom Group SA before the Svea Court of Appeal (The Republic of Kazakhstan v Ascom Group SA and Others, Svea Court of Appeal, Case No. ÖA 7709-19, Decision on Production of Documents, 18 March 2020), a party requested that the opposing party, who had received funding from a third-party funder, be ordered to produce the funding agreement. The Svea Court of Appeal denied the request and did not provide any reasoning for its decision. A reasonable inference to be drawn from the decision is that, other than in exceptional circumstances (such as where the funding agreement would be deemed to be of importance as evidence concerning a disputed issue relating to the subject matter of the dispute), neither the opposing party nor the court can compel the funded party to disclose.
a funding agreement. It can however be strategic, in some cases, to disclose the existence of funding in order to avoid issues relating to conflict of interest.

With regard to arbitral proceedings, on 11 September 2019 the Stockholm Chamber of Commerce adopted a policy for disclosure of third parties with an interest in the outcome of the dispute. The policy aims to encourage a party to disclose the identity of any funder in its first written submission to the tribunal. However, the policy is not obligatory. Consequently, the parties are not formally obliged to disclose the existence of funders.

**Privileged communications**

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

Communications obtained by a Swedish advocate in his or her professional capacity are protected by legal professional privilege. Swedish advocates are also required to maintain confidentiality according to the Code of Professional Conduct for Members of the Swedish Bar Association. Information provided by a client to counsel is consequently safe from having to be disclosed. Advocates cannot be obliged to testify in a national court or in front of an arbitral tribunal in regard to information obtained in their professional capacity.

There is no confidentiality provision or privilege protecting communications between a funded party and the funder. The funder and the funded party may, however, enter into a non-disclosure agreement in order to protect their exchange of information. To better protect sensitive information shared between the party and the funder, it may be preferable if such communication solely goes through the funded party’s advocate.

**DISPUTES AND OTHER ISSUES**

Disputes with funders

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

To our knowledge, there have been no reports of disputes between litigants and their funders.

Other issues

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

As there is no legislation governing the use of funding and little to no case law, the funding agreement is of central importance. Swedish law takes a liberal approach on contracts. Accordingly, practitioners should draw up the funding agreement making sure that the contract thoroughly regulates the parties’ respective obligations and rights.

**UPDATE AND TRENDS**

Current developments

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

Until recently, as late as 2018, it was noted that no domestic market for third-party funding existed in Sweden (Josefsson/Neway Herrman, ‘Extern finansiering av tvister och riskavtal – en möjlighet att stärka Sverige som säte för internationella skiljeförfaranren?’ ['External Financing of Disputes and Risk Agreements – A Possibility to Strengthen Sweden as a Seat for International Arbitration?'], Ny Juridik 2018/1, 85–94 (86)). However, international funders such as Burford, Therium and Nivalion have since then increased their presence in Sweden. Local third-party funders such as Kapatens and Litigium Capital have also emerged on the Swedish market.
Is third-party litigation funding permitted? Is it commonly used?

The Swiss Federal Supreme Court held in 2004 that litigation funding by third-party funders is permissible in Switzerland provided that the funder acts independently of the client’s lawyer (BGE 131 I 223). The court stated that it could even be advantageous for a claimant to have his or her claim assessed by an independent expert who intends to cover the financial risk of the envisaged litigation process and who is thus complementing the claimant’s lawyer’s view (BGE 131 I 223 c. 4.6.3).

In 2014, the court expressly confirmed its earlier decision and emphasised that, meanwhile, litigation funding has become common practice in Switzerland. The court further concluded that it is part of the lawyer’s professional duty as provided for in the Federal Act on the Freedom of Movement for Lawyers (BGFA) to inform claimants about a potential litigation funding option as the circumstances require (Federal Supreme Court decision 2C_814/2014 c. 4.3.1).

Thus today, litigation funding is an accepted practice in Switzerland and has been judicially endorsed repeatedly by the Federal Supreme Court in recent years. In light of its rather comprehensive and detailed legal analysis, the court established a quite favourable and predictable environment for third-party litigation funding in Switzerland.

Nevertheless, the Swiss third-party litigation funding market is still relatively small. The reasons for this might be the rather late establishment of litigation funders in Switzerland compared with other jurisdictions, and the fact that class actions and other mechanisms of collective redress do not yet form part of Switzerland’s civil procedural law practice. However, with the envisaged revision of the Swiss Civil Procedure Code (CPC), third-party funding in Switzerland will be further promoted, since the Final Draft of the revised CPC requires the Swiss Federal Council to provide the public with adequate information regarding third-party litigation funding to facilitate access to justice.

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

There is no explicit limit on what is an acceptable compensation for the funder’s services. However, as a general rule stated by the Swiss Penal Code (ie, article 157), a third-party funding agreement – as any other agreement under Swiss law – may not constitute profiteering (ie, exploitation of a person in need).

The Federal Supreme Court did not explicitly state a limit, but has indirectly approved the common practice in Switzerland with success fees ranging from 20 to 40 per cent of the net revenue of the proceeds. In its legal analysis, the court cited a source who described a success fee of 50 per cent as ‘offending against good morals and thus illegal’, however, without confirming or even commenting on this opinion (BGE 131 I 223 c. 4.6.6).

In practice, the funder’s share is usually dependent on the amount of proceeds recovered by the claimant and on the point in time at which the dispute comes to an end. Typically, the third-party funder’s share is lower, the sooner a case can be settled or resolved. In recent times, the pricing of third-party litigation funders in Switzerland has become increasingly sophisticated so that the pricing structure may vary depending on the specific characteristics of the case. Frequently, a third-party funder’s success fee is calculated on the basis of a time-dependent multiple of the amount invested or committed by the funder.

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

There are no specific provisions in the CPC or in any other Swiss legislation. However, the Federal Supreme Court held that a range of existing general provisions in various parts of the Swiss legislation (eg, article 27 of the Civil Code, article 19 of the Code of Obligations or article 8 of the Unfair Competition Act) would be applicable should a litigation funding agreement violate certain principles of Swiss law (BGE 131 I 223 c. 4.6.6).

With regard to regulatory provisions, the court explicitly stated that third-party litigation funding cannot be considered as an insurance offering as defined by the Swiss Insurance Supervision Act (ISA), since there is no payment of a premium for the coverage of a future risk (BGE 131 I 223 c. 4.7). Furthermore, the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on the funding structure, funders might qualify as asset managers of collective investment schemes and must be authorised by the Swiss Financial Market Supervisory Authority (FINMA).

In light of the rules pertaining to lawyers’ professional conduct in Switzerland, which do not allow for lawyers to be paid on the basis of contingency fees only, it has to be kept in mind that any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer would violate the respective provisions.

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

The lawyer’s professional conduct in Switzerland is provided for in article 12 of the BGFA. According to several Federal Supreme Court decisions, the lawyer’s independence in acting on behalf of his or her client is crucial; this also applies to cases involving third-party funding.

The court determined that by a clear separation of the roles between the
lawyer and the funder, a lawyer who advises his or her client in relation to a funder has no conflict of interest in principle. Quite to the contrary, the court considered that it is part of the lawyer’s professional duty to support his or her client in negotiations with a third-party litigation funder, obviously, always advising in the interest of the client.

In addition, the court made clear that the claimant’s obligations under the litigation funding agreement (eg, to fully inform the funder about all the aspects and the developments of the case, not to enter into a settlement agreement without the funder’s prior approval) do not jeopardise the lawyer’s independence from the funder.

Regulators

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

The Federal Supreme Court clarified this question in part when it determined that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA. As the core offering of a funder generally does not fall under the Swiss financial market laws, there is no known interest of the Swiss financial regulator to oversee litigation funding.

However, the Federal Supreme Court does not seem to exclude a need for future regulation (BG E 131 I 223 c. 4.6.6).

FUNDERS’ RIGHTS

Choice of counsel

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

Independence in acting on behalf of the client is an important principle of the lawyer’s professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that, in general, the litigant’s lawyer must be able to act freely from any instructions of the third-party funder and solely on behalf of the client. However, this does not exclude the funder’s right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace his or her lawyer, funding will only be further granted if the new lawyer is approved by the funder.

Participation in proceedings

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

In domestic litigation, court hearings are generally open to the public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite his or her funder to participate in such proceedings based on a respective clause in the funding agreement.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it must be kept in mind that the majority of cases funded by third-party funders in Switzerland so far have been carried out without disclosing the funder’s engagement. As such, the relevance of the funder’s permission to attend or participate in hearings and settlement proceedings is quite limited.

Veto of settlements

8  Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is generally permissible under the Swiss Code of Obligations and interferes neither with the independence of the litigant’s lawyer nor with any other provision of Swiss law. Thereby, the parties often agree in advance on certain minimum and maximum amounts limiting the funder’s veto power. Similarly, funding agreements typically provide for an exit mechanism if the claimant and the funder fail to reach an agreement regarding a specific settlement. The party rejecting the settlement offer is usually entitled to continue the proceedings but will become liable to the other party for the proceeds that would have resulted from the settlement.

Termination of funding

9  In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances entitling the parties to terminate the funding agreement. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown detrimental facts;
- a change in the case law that is decisive for the relevant legal questions;
- a loss of evidence or evidence that is accepted and tends to negatively impact the proceedings; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred until the termination, as well as costs caused as a result of the termination.

While these clauses prevent the funder from continuing to fund proceedings that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such a case, the funder can usually terminate the funding after due notice and has no duty to cover any further costs. On the contrary, given these circumstances, the litigant might even be obliged to reimburse the funder for its costs and expenses.

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?

Since the independence of the client’s lawyer from the litigation funder is considered crucial by the Federal Supreme Court, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible under Swiss law. The lawyer would violate the professional duties as provided for by the Federal Act on the Freedom of Movement for Lawyers (BGFA) if his or her actions were based on a funder’s rather than on his or her client’s instructions.

Therefore, any rights and actions the funder intends to exercise during the course of the proceedings have to be agreed with the funded party in the litigation funding agreement. This includes any information rights, access to documents produced during the process and any rights to reject the actions a litigant is usually free to take.

As a result, the litigant is typically obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to file any appeal or to otherwise dispose of the funded claim without prior consultation and permission of the funder.

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding, funders only need to take an active role insofar as provided for in the litigation funding agreement.
The fact that the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of cases (at least as long as no international arbitration proceedings are concerned) further limits the funder’s role within the litigation process.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

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

The lawyer’s professional conduct as provided for in the Federal Act on the Freedom of Movement for Lawyers (BGFA) prohibits fee agreements in which the lawyer’s fee depends entirely on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. Only if the lawyer charges a basic fee (flat or on an hourly basis) for his or her services that covers the actual costs of the lawyer’s practice and allows for a reasonable profit, is he or she permitted to agree on a premium in addition to the basic fee in the event of a successful outcome of the case. However, according to the Federal Supreme Court, such success-related premium is not allowed to exceed the total amount of the basic fee (Federal Supreme Court decision 4A 240/2016 c. 2.7.5).

Consequently, the litigation funding agreement must neither directly nor indirectly provide a model resulting in a pure conditional or contingency fee for the lawyer. Conversely, it is permissible to add a success fee for the lawyer in the funding agreement within the limits described above.

**Other funding options**

12 | What other funding options are available to litigants?

Legal cost insurances are widely available and frequently used in Switzerland. However, the extent and limits of coverage depend upon the specific policy as these insurances usually only cover the costs of certain types of claims. Furthermore, the insurance policy typically has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event litigation insurance is not common in Switzerland.

A litigant may also seek legal aid if he or she lacks the financial resources to fund litigation proceedings and if the case does not seem devoid of any chance of success. However, both conditions are handled rather strictly by Swiss courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security for costs, an exemption from court costs, or the appointment of a lawyer by the court, if necessary to protect the rights of the requesting party. It does, however, not exempt the litigant from paying the legal fees of the opposing party in the case of defeat. In theory, legal aid is also available to companies, provided, among other things, that the matter in dispute is the company’s only remaining asset. Obviously, this constellation is extremely rare.

**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?

In general, a commercial litigation before a court of first instance in Switzerland takes between one and two years. If the case is rather complex or if the court accepts an extended range of evidence to be heard, the litigation process may take considerably longer. In Swiss-based arbitration, the duration is normally between one and three years.

**Time frame for appeals**

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

There is no comprehensive statistical data available regarding the proportion of appealed first-instance judgments. There is also a considerable difference in the respective practice of the various cantons of Switzerland. As a general rule, approximately one-third of judgments are appealed before the second instance. On average, the second instance takes between one year and 18 months to render a decision. Only a small proportion of these judgments are appealed before the Federal Supreme Court. An average appeal here usually takes less than one year.

Challenges to an arbitral award are heard exclusively by the Federal Supreme Court (unless explicitly otherwise specified in an arbitration agreement providing for Swiss-based domestic arbitration) and are generally adjudicated within a time period of four to six months from the date of the challenge.

**Enforcement**

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Swiss judgments related to non-monetary claims is governed by the Swiss Civil Procedure Code (CPC), while judgments related to the payment of money are enforced pursuant to the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA).

In principle, a judgment rendered by a Swiss court is enforceable if it is final and binding and if the court has not suspended its enforcement, or if it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court rendering a judgment regarding a non-monetary claim may directly order the required enforcement measures.

In Switzerland, the enforcement of an enforceable judgment or arbitral award is not seen as particularly burdensome, expensive, or unsecure. Also, it is important to note that an enforceable decision allows for an attachment of known assets of the debtor located in Switzerland.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

Class actions are not part of Switzerland’s civil procedural law practice. The only form of collective redress currently available under the Civil Procedure Code (CPC) is the joinder of parties. Unlike class actions, the parties to the joinder may not seek damages on behalf of others who have not joined the proceedings. Accordingly, funding of such litigation processes by a third-party funder is comparable to the funding of individual claims and is thus permissible without any restrictions.

In its 2013 Report on Collective Redress, the Swiss Federal Council suggested a number of measures to support the effective and efficient procedural handling of a large number of identical claims against the same respondents, and to allow for a facilitated enforcement of consumer rights in particular. The authors of the Report also suggested the promotion of third-party funding to cover the costs of the envisaged collective redress proceedings.

Against this background, the Preliminary Draft of the revised CPC proposed a number of collective redress mechanisms. However, during
the consultation phase the proposals related to collective redress were discussed controversially and heavily criticised by representatives of the business community. As a consequence, the Swiss Federal Council decided to exempt the collective redress mechanism from the current revision of the CPC, and announced that the topic will be dealt with separately at a later stage. The Swiss Federal Council is expected to present a new draft amendment to the CPC with proposed provisions on collective redress towards the end of 2021.

**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?

As a general principle of the Civil Procedure Code (CPC), court fees as well as all other expenses arising from the litigation, including the opposing lawyer’s fees, are borne by the losing party. If a party prevails only in part, the fees and expenses are split proportionally between the parties. In the event of a settlement, the costs are charged to the parties according to the terms and conditions of the settlement agreement.

The Swiss courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before cantonal courts and the Swiss Federal Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party and there is little legal basis for such an argument in Swiss law, neither in the rules pertaining to material damages nor in those regarding procedural costs (e.g., adverse costs).

**Liability for costs**

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

Provided that the litigation funding agreement stipulates an obligation of the funder to cover the adverse cost risk, which is common practice in Switzerland, the third-party litigation funder has a legally enforceable obligation towards the funded party to hold him or her harmless for the adverse costs.

In addition, there may be a constellation in which a litigation funder can be held liable for adverse costs directly by the non-funded party. If the unsuccessful claimant assigns his or her claim against the funder, to cover the adverse costs imposed on him or her by the court, to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

However, there is no basis for the court to directly order a third-party funder to pay for adverse costs. In the litigation funding concept developed and observed in Switzerland, the funder’s contractual obligation towards the litigant has no reflex effect.

**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?)

There are two different types of security for costs that Swiss courts may order a claimant to provide. The courts usually order the claimant to post a security for the expected court costs based on the CPC. In addition, the claimant must advance the costs for taking the evidence he or she requested.

At the request of the defendant, the claimant may also be ordered to provide security for the potential compensation of the opposing party’s costs if the claimant has no residence or registered office in Switzerland, appears to be insolvent, owes costs from prior proceedings, or, if for other reasons, there seems to be a considerable risk that compensation will not be paid. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Switzerland has entered into a treaty that excludes respective security bonds.

The CPC does not provide for a basis to request such security from the funder of a claim and there have been no cases reported where Swiss courts considered such a request.

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

In most of the state court cases funded so far by third-party funders in Switzerland, the funder’s engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focusing on the claimant’s status and did not take the existence of the third-party funder into account. Accordingly, the fact that a claim is financed by a third-party litigation funder does, in principle, not discharge the claimant from its obligation to provide security for costs.

In Swiss-based domestic and international arbitration proceedings, in contrast, the fact that the claimant is supported by a third-party funder may have an impact on the evaluation of a security-for-costs request. The prevailing view seems to be, however, that third-party funding per se is not sufficient to justify an order for security for costs.

**Insurance**

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

ATE litigation insurance is not common in Switzerland. Although no legal or regulatory restrictions limit the respective product, there is, currently, no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases. Moreover, the Swiss market leader in the field of third-party litigation funding offers its clients an exclusive solution for the coverage of adverse costs by way of ATE insurance.

By contrast, legal cost insurance is commonly used in Switzerland. It is arranged before the need to litigate arises and provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.

**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?

The Civil Procedure Code (CPC) does not provide any basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that he or she is supported by a third-party funder. It also does not provide a basis for a Swiss court to order a litigant to do so.

While some authors have argued that a litigant might have, under specific circumstances, such an obligation in domestic arbitration, there...
have been no cases reported where a litigant had to disclose the litigation funding agreement in a Swiss-based arbitration. In Swiss-based international arbitration proceedings, on the other hand, several sets of institutional rules (such as the newly revised ICC Rules of Arbitration), as well as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, may require the disclosure of the existence of, or relevant provisions contained in, a funding agreement.

Privileged communications

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

While any legal advice given by a Swiss or non-Swiss lawyer to his or her client is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege. Consequently, the confidentiality of information exchanged between a litigant or his or her lawyer and a third-party funder must be provided for in the litigation funding agreement.

Obviously, the fact that a litigant or his or her lawyer share certain information with a third-party funder cannot be considered as a waiver of the attorney-client privilege by the litigant.

There have been no cases reported where communications between litigants or their lawyers and third-party funders had to be disclosed by order of a Swiss court.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

So far, only one dispute between a litigant and his or her funder has been recorded in Switzerland. In that case, the Supreme Court of the Canton of Zurich ordered the third-party litigation funder to compensate the unsuccessful litigant for the adverse costs of the successful respondent that the litigant had been ordered to bear (decision RT180059-O/U).

In an unpublished decision, the Supreme Court of the Canton of Zurich further established that pursuant to Swiss law a litigation funding agreement – depending on the contractual terms – may be qualified as a contract for the benefit of a third party so that the claimant’s lawyer has a direct claim against the third-party funder regarding his or her fees.

Other issues

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

No.

UPDATE AND TRENDS

Current developments

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

The uncertainty and challenges that come with the covid-19 crisis have increased the demand for third-party litigation funding in Switzerland and throughout Europe, and sparked the interest in less common and more sophisticated funding products, such as portfolio funding, claim or award monetisation, or the funding of defence cases. Moreover,
Thailand

Surasak Vajasit, Melisa Uremovic, Chotiwit Ngamsuwan and Supawadee Vajasit

R&T Asia (Thailand) Limited

REGULATION

Overview

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

Although there is no statutory prohibition on third-party litigation funding, it could be inferred from past Supreme Court judgments that litigation funding by a third party who has no legitimate interest in the legal action in return for a share in the proceeds if the claim succeeds is likely to be considered by the Thai courts as being contrary to public policy and good morals; therefore, there is a risk that it could be void under Thai law.

Restrictions on funding fees

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

Not applicable.

Specific rules for litigation funding

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

There are no specific rules that prevent lawyers in Thailand from advising their clients on using third-party litigation funding.

Legal advice

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

At present, we are not aware of any impending enactment of legislation or any particular interest that has been taken by a public body concerning litigation funding in Thailand.

Regulators

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

Not applicable.

FUNDERS’ RIGHTS

Choice of counsel

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

Not applicable.

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Not applicable.

Veto of settlements

Do funders have veto rights in respect of settlements?

Not applicable.

Termination of funding

In what circumstances may a funder terminate funding?

Not applicable.

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?

Not applicable.
CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Litigation lawyers cannot enter into conditional or contingency fee arrangements. Although there is no statutory prohibition on conditional or contingency fee agreements, there is a well-established line of past Supreme Court judgments that have ruled that a conditional or contingency fee arrangement is contrary to public order and good morals and is, therefore, void under Thai law. In those past cases that were adjudicated by the Supreme Court, the lawyers seeking to enforce the conditional or contingency fee arrangements argued that, because the arrangements are not prohibited under the Lawyers Act B.E. 2528 (A.D. 1985) and the Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986) (which are now still in force), they are valid and enforceable. The Supreme Court disagreed and ruled that, despite the fact that the Lawyers Act B.E. 2477 (A.D. 1934), which expressly prescribed that lawyers who enter into conditional or contingency fee arrangements may be subject to professional sanctions had been repealed and replaced, conditional or contingency fee arrangements are inconsistent with the ethical principles applicable to the legal profession and contrary to public order and good morals.

Other funding options

12 | What other funding options are available to litigants?

We are of the view that a loan granted to a litigant to fund legal proceedings should not be considered by the Thai courts to be contrary to public policy, provided that the litigant’s decision to commence legal action has not been at the instigation of the lender and there is no agreement for the lender to take a cut of any proceeds or recovery in the lawsuit.

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?

The length of the entire proceedings in the court of first instance is difficult to predict and would also depend on the complexity of the case and backlog of cases at that particular court. Based on our experience, it usually takes between six and 18 months for a judgment to be rendered by the court of first instance from the date of commencement of legal proceedings.

Time frame for appeals

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

An appeal against a judgment of the court of first instance is required to be filed within one month from the date on which the judgment of the court of first instance is read.

Direct statistics on the proportion of first-instance judgments that are appealed is not available. Based on the statistics that are published by the Office of the Judiciary, in 2019 approximately 140,000 judgments on civil claims were rendered by the court of first instance, while approximately 8,000 appeals against judgments on civil claims were accepted for consideration by the Court of Appeal and approximately 940 appeals against judgments on civil claims were accepted for consideration by the Supreme Court. Therefore, it may be inferred from such statistics that approximately 5–6 per cent of first-instance judgments on civil claims are appealed.

Enforcement

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

There are no available statistics on the proportion of judgments that require contentious enforcement proceedings.

Enforcement of court judgments in Thailand can be a complicated and lengthy process. Proceedings for the enforcement of court judgments can only commence in the following cases:

- a court order for a stay of execution is not granted to the party who lost the case in the court of first instance or the Court of Appeal; or
- the case has become final because the party who lost the case did not appeal to the higher court within a specified time.

In practice, on the date of reading of the court judgment, the court will issue a decree for the performance of the relevant obligations by the judgment debtor within a specified time, which shall commence from the date on which the decree is acknowledged by the judgment debtor.

Such decree shall be deemed to have been acknowledged by the judgment debtor on such date unless neither the judgment debtor, his or her lawyer nor any of their authorised person is present at the time of the issuance of the decree. In the latter case, in practice the decree will be served by means of a court summons and the date on which the decree is deemed to have been acknowledged by the judgment debtor is, therefore, a much later date.

If the judgment debtor fails to comply with the decree, the judgment creditor will have to file a motion to the court for a writ of execution. The execution of a court judgment may be by means of seizure and sale of the judgment debtor’s assets, attachment of the judgment debtor’s rights of claim against third parties, arrest and detention of the judgment debtor or other means. It is worth noting that execution of court judgments is carried out by an execution officer and any sale of assets must be carried out by the execution officer by means of public auction.

COLLECTIVE ACTIONS

Funding of collective actions

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

The Civil Procedure Code was amended in 2015 by the Act Amending the Civil Procedure Code (No. 26) B.E. 2558 (A.D. 2015) to allow class actions. For a claim to be eligible as a class action, such claim must be based on the same right arising out of the same common facts and the same provisions of law. The type of damage suffered by each class member does not have to be the same.

Claims that may be subject to class action includes tort claims, breach of contract claims, claims based on rights derived from other laws, such as environmental law, consumer protection law, labour law, securities and exchange law, and trade competition law.

Although the law does not specify the minimum number of class members required to file a class action claim, in deciding whether or not to grant permission for the class action to proceed, the court is required to consider whether the number of class members is so large that a normal lawsuit would be complicated and impractical. The court will have to also consider whether a class action would result in better justice and efficiency than a normal lawsuit, and whether the claimant (who must be a member of the class) and the claimant’s counsel would be able to adequately and fairly protect the interests of the class.

Any potential class member who does not wish to be a class member must formally opt-out of the class action within the period prescribed by the court. In the case of opt-out, such individual will not be bound by the judgment and is entitled to pursue individual claims.
In a class action lawsuit, the counsel may be awarded a sum of money that is calculated based on the total monetary amount awarded to the class members in the event that the claim is successful. The court is provided with the discretion to award a sum of money to the claimant’s counsel (payable by the defendant) as the court deems appropriate, taking into account the complexity of the case and the time, efforts and expenses that the claimant’s counsel spent on the case, subject to a maximum limit of 30 per cent of the total monetary amount awarded to the class members.

Despite the said possibility of counsel being awarded a monetary sum by the court based on the success in the outcome of the lawsuit, third-party litigation funding agreements in respect of class actions are likely to be considered by the Thai courts to be contrary to public policy and, therefore, may be void and unenforceable under Thai law.

**COSTS AND INSURANCE**

### Award of costs

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<td>Not applicable.</td>
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The Thai courts have the discretion to allocate statutory costs between the successful party and the unsuccessful party. Statutory costs comprise of court fees, fees for taking evidence outside court, travel expenses, fees payable to particular individuals (such as witnesses), accommodation costs for witnesses, experts, translators and officers of the court, lawyer fees, expenses in relation to the court proceeding including fees or other expenses payable under the law. In general, the courts will order the unsuccessful party to pay the statutory costs of the successful party. However, the amount awarded by the courts may be nominal and is limited by the rates prescribed in the Schedule attached to the Civil Procedure Code. For cases with monetary claims, the amount of lawyer fees that the court of first instance may award is limited to 5 per cent of the total value of the monetary claims and the amount of expenses in relation to the court proceeding that the court of first instance may award is limited to 1 per cent of the total value of the monetary claims. For the Court of Appeal and the Supreme Court stages, the amount of lawyer fees that may be awarded is limited to 3 per cent of the total value of the monetary claims.

### Liability for costs

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### Security for costs

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Section 253 of the Civil Procedure Code provides that the defendant may file a motion to the court requesting the court to order the claimant to provide security for statutory costs and other expenses if (1) the claimant has no domicile or place of business in Thailand and has no assets that may be enforced in Thailand, or (2) there is a reason to believe that the claimant may not pay the statutory costs and other expenses if the claimant loses the case. Such a motion can be filed with the court at any time before a judgment is rendered.
**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

We are aware of two Supreme Court judgments that held that a funding arrangement by a funder who does not have a legitimate interest in the case is contrary to public policy and good morals and is therefore void under Thai law. In those two Supreme Court cases, the funders were ordinary individuals and there appeared to be no facts indicating that they provided litigation funding in their ordinary course of business.

**Other issues**

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

There are no other issues.

**UPDATE AND TRENDS**

**Current developments**

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

The Act amending the Civil Procedure Code (No. 32) B.E. 2563 (A.D. 2020), which introduced a new legal provision allowing a party to a dispute to request an in-court civil mediation even before a complaint is filed with the court, came into force on 7 November 2020. Pursuant to this legal provision, a party may submit a motion with the court having territorial jurisdiction over the dispute to appoint a mediator to settle the dispute before a complaint is filed with the court. If the court accepts the motion, the court will seek consent from the opposing party. If the opposing party agrees to mediation, the court will subpoena the parties to attend a mediation session and appoint a mediator to conduct the session. The parties are not required to be accompanied by their lawyers to the mediation session. In the event that the parties are able to reach a mutual agreement or compromise, the mediator will refer the matter to the court for determination. If the court finds that the agreement or compromise conforms with the parties’ intention and the principle of good faith, and the agreement is fair and not contrary to the law, the court will allow the parties to sign the agreement or compromise. The parties may also request the court to render a judgment according to the settlement agreement. There is no right of appeal against a judgment issued according to a settlement agreement, unless there is an allegation of fraud against any party, or an allegation that the judgment infringes any legal provision involving public order or is not in accordance with the agreement or compromise between the parties.

If the prescription period (1) expires after the petition requesting the mediation is filed and the parties cannot reach a mutual agreement or compromise during the mediation, or (2) will expire within 60 days of the date on which the mediation ceased without agreement from the parties, the prescription period will be extended for a further 60 days from the date on which the mediation ceased.
In New York, third-party litigation funding is permitted, subject to a few caveats. While it is still a relatively new concept in the United States compared with, for example, the United Kingdom, more and more claimants and their counsel are considering third-party litigation funding.

In the traditional third-party litigation funding model, the third-party litigation funder makes a non-recourse loan to the holder of a claim to cover legal fees or costs in exchange for a portion of the proceeds (whether through court action or settlement) arising from the holder’s enforcement of its claim. The judicial acceptance of litigation funding can be seen through the case law mentioned below, which has, on the whole, protected claimant-funder disclosures, held funder participation not to constitute impermissible interference between lawyer and client, and held that funders’ returns do not constitute usury.

When addressing the related issue of third-party funding of law firms, New York Supreme Court Justice Shirley Kornreich extolled the value of ‘the sound public policy of making justice accessible to all, regardless of wealth’ and recognised that the expense of litigation can otherwise deter litigation against ‘deep pocketed wrongdoers’. See Hamilton Capital VII LLC v Khorrami LLP, 48 Misc 3d 1223(A), 9 (NY Supreme Court 2015).

Restrictions on funding fees

New York law provides no explicit limits on the fees and interest that a funder can charge. NY Banking Law section 14-a provides that interest on a loan cannot exceed 16 per cent. The permissible interest rate can go up to 25 per cent if the loan value is from US$250,000 to US$2.5 million, without any limit for loans in excess of US$2.5 million. However, since third-party litigation funding is generally provided on a non-recourse basis, the funding is treated as a purchase or assignment of the anticipated proceeds of the lawsuit, and therefore not subject to the usury statute, which limits interest rates that a person can charge. See New York City Bar Association’s Committee on Professional Ethics (NYCBA) Formal Opinion 2011-2; Lynx Strategies LLC v Ferreira, 957 NYS2d 636 (NY Sup Ct 2010) (third-party investment for share of proceeds is not usury); but see Echeverria v Estate of Lindner, 2005 NY Slip Op 50675(u), at *8-9 (NY Sup Ct 2005) (non-recourse agreement was a ‘loan’, not an investment, because recovery was certain under strict liability statute and interest rate was, therefore, usurious).

Specific rules for litigation funding

There are no statutes or regulations in New York directly applicable to third-party litigation funding, let alone any that expressly prohibit, or that would have the effect of prohibiting, third-party litigation funding.

One question that is often asked is if champerty prohibits third-party litigation funding. Since federal law does not address champerty, state law governs. There is significant variation between the states on this issue, with each state having its own definition of conduct that is champertous (although several states no longer prohibit, or never prohibited, champerty).

New York has laws, long on the books, which prohibit champerty. New York courts interpret champerty to occur when a party purchases a note, security, or claim ‘with the intent and for the primary purpose of bringing a lawsuit’. See Justinian Capital SPC v WestLB AG, 28 NY3d 140 (NY 2016); and Credit Agricole Corp v BDC Finance LLC, 2016 WL 6995892, 2016 NY Slip Op 32368(U) (NY Sup Ct 30 November 2016) (the champerty statute does not bar a transfer or assignment when its goal is the collection of a legitimate claim). The prohibition against champerty is ‘limited in scope’ and has historically been ‘directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs’. See Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp, 13 NY3d 190 (NY 2009).

No court in New York has found the traditional third-party litigation funding model to be champerty.

The Court of Appeals of New York has analysed the champerty statute in the context of transactions in which a party acquires a note or security and then brings a lawsuit in its own name on the basis of that note or security. These cases help illustrate why third-party litigation funding is not champerty under New York law. The difference between champertous and non-champertous conduct turns on the party’s intent when entering into the transaction. Compare Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp (it was not champerty where the party purchased a note and brought an action as a way to enforce its rights under the note) and Justinian Capital SPC v WestLB AG (it was champerty where the sole purpose of acquiring the note was so the plaintiff could bring the action).

In both cases, the transactions were structured very differently from how a traditional third-party funding agreement is structured. For example, a third-party litigation funder does not acquire the asset itself, nor does it bring a lawsuit in its own name. Instead, the party whose lawsuit is being funded is, and remains to be, the original owner of the asset that is the subject of the litigation. Furthermore, the nature of the funder’s interest is to the proceeds of the litigation, not the underlying asset itself.

In the unlikely event a court was to consider third-party litigation funding to be champerty, the statute prohibiting champerty was
amended in 2004 to add a safe harbour provision (NY Judiciary Law 489(2)). The safe harbour provision exempts any transaction in excess of US$500,000 from the prohibition against champerty. See Justinian Capital SPC v WestLB AG. This would serve to protect just about any litigation funding arrangement from being prohibited as champerty.

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

In New York, the New York Rules of Professional Conduct (NYRPC) govern a lawyer’s conduct. A lawyer who violates the NYRPC could be subject to disciplinary action, which could lead to his or her disbarment (rescindment of his or her right to practise law).

The NYRPC rules that a lawyer needs to consider in connection with third-party litigation funding include the following:
- the lawyer’s obligation to provide candid advice about the benefits and risks of litigation funding;
- avoiding conflicts of interest;
- maintaining client control over the proceeding; and
- the disclosure of information to the funder.

Rule 2.1 specifies that:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.

A lawyer may not render advice based on the best interests of anyone other than his or her client. Accordingly, if a client is seeking litigation funding, a lawyer must provide candid advice regarding whether the arrangement is in the client’s best interest, and should discuss the costs and benefits, as well as alternatives (see NYCBA Formal Opinion 2011-2). That includes advising the client if the lawyer has any sort of relationship – even if non-financial – with a potential funder. See SD v St Luke’s Cornwall Hosp, 63 Misc 3d 384, 96 NYS3d 467 (NY Sup Ct 2019) (where a funder financed costs for an infant’s lawsuit, the law firm should have disclosed that the funder was owned by the lawyer’s brother).

Where the third-party litigation funder is paying the client’s legal fees, the lawyer must ensure that the payment structure does not create a conflict of interest. The lawyer can meet his or her ethical obligations by obtaining informed consent from the client and ensuring that the funder does not interfere with the lawyer’s independent judgment or the client-lawyer relationship (NYRPC 1.8(f)(2)). The rules prohibit a lawyer from representing a client if, for whatever reason, there is a risk that the lawyer’s professional judgment will be adversely affected by the funder’s involvement in the case (NYRPC 1.7(a)).

At all times, it is the client who must control the litigation. While the client may permit the funder to be involved in the strategy or other aspects of the lawsuit (subject to any risks discussed throughout this chapter), such involvement is only allowed with the client’s explicit and informed consent (NYCBA Formal Opinion 2011-2). Except as authorised by law, a funder’s influence must never amount to interfering with, directing or regulating the lawyer’s judgement, or compromising his or her duty to maintain client confidences (NYRPC 5.4(c)).

Thus, regardless of the funder’s financial interest, a lawyer has a duty to abide by the client’s decision regarding litigation objectives and whether and under what terms to settle a matter (NYRPC 1.2).

In addition, as is discussed in more detail below, an attorney cannot disclose any information to any party, including a funder (or potential funder) without obtaining the client’s informed consent to disclose such information (NYRPC 1.6(a)(1)).

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

There are no governmental bodies that currently regulate or oversee third-party litigation funding in New York state.

Various lobbying organisations and legislative agencies in the US, and more specifically in New York, have suggested that further regulation is warranted, and have proposed that the Securities and Exchange Commission, Federal Trade Commission or even the Consumer Financial Protection Bureau would be well placed to oversee third-party funders and ensure that third-party funders transact in a manner that protects the attorney-client relationship and the integrity of the judicial system and comports with the public interest. However, no such regulatory oversight has been enacted federally or in New York state.

FUNDERS’ RIGHTS

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

From a legal and ethical perspective, the client must select his or her own counsel and have control over the litigation (New York Rules of Professional Conduct (NYRPC) 1.2). However, from a practical standpoint, the funder is deciding whether to enter into a contractual agreement with the client and if the funder does not approve of the attorneys that the client wishes to retain, the funder is fully within its rights to decline to fund the litigation.

The quality of the attorneys is a significant factor in a funder’s decision whether to fund the litigation. Thus, any client seeking litigation funding should expect that the funder will insist on counsel with experience, expertise and a proven record of success.

Once the funding agreement is signed and the client has retained its attorneys, the client controls the engagement. If the funder becomes displeased with the client’s attorneys, the funder can speak with the client about its concerns, but the client decides whether, and with whom, to replace the attorneys. If the client does not follow the funder’s wishes, the funder’s only recourse will be governed by the terms of the funding agreement, which may allow the funder to cease funding the litigation.

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

Court hearings in New York, and in the United States as a whole, are generally open to the public and anyone, including the funder, may attend as an observer. The funder is not considered a party and therefore would not be entitled to participate in any judicial proceeding or otherwise be represented at a hearing or other court appearance.

Settlement conferences normally only include the parties to the litigation. Courts generally want to encourage settlement and, for this reason, settlement communications are treated as confidential and not discoverable in future litigation or by other parties. The funder should have no expectation of being able to participate in these discussions, though both parties could presumably consent. Further, even though the funder does not get a seat at the negotiating table as a matter of right, nothing prohibits a client from consulting with its funder about a proposed settlement or the funder from offering his or her thoughts to the client and its lawyers regarding settlement.
In arbitration, the hearing and settlement proceedings are both confidential and, absent agreement of the parties, the funder would not be entitled to attend.

Veto of settlements

8 Do funders have veto rights in respect of settlements?

There is no law in New York that directly addresses a funder’s veto rights in respect of settlement. In general, the funding agreement, including rights in respect of settlement, is defined by contract. As a matter of contract law, there is no reason why a client could not grant a funder the right to veto the client’s acceptance of a settlement agreement.

That being said, an attorney is ethically obligated to ‘abide by a client’s decision whether to settle a matter.’ (NYRPC 1.2(a)). Thus, even if the client granted to the funder veto authority over settlement decisions, if the client wants to accept a settlement in the face of a funder’s exercise of its veto rights, the lawyer must follow the client’s instructions and accept the settlement. The New York City Bar has considered this question and noted that absent client consent, a lawyer is not permitted to allow anyone to direct or influence litigation strategy, including whether to settle (New York City Bar Association’s Committee on Professional Ethics Formal Opinion 2011-2).

Termination of funding

9 In what circumstances may a funder terminate funding?

In general, the funding agreement, including the right to terminate, is defined by contract. If the terms of a contract call for continued funding, the funder has an obligation to continue funding, barring grounds for voiding that obligation. Such grounds may include fraudulent inducement or omission of material fact. A funder may also be excused from continued funding under the agreement if the contracting party materially breaches the agreement.

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?

Funders are not required to take an active role in the litigation process.

While not required to take an active role, in addition to providing the financial resources to support the litigation, there are many ways in which funders can serve as a valuable resource to counsel and to the client. By serving as an adviser or sounding board, the client (and the client’s lawyers) can draw on a funder’s broad experience and financial acumen to, among other things, consider the strategy and tactics as to the litigation, assess strengths and weaknesses in the case as the litigation proceeds and evaluate settlement proposals.

A funder can also review certain materials about the litigation and provide its thoughts to the client and the client’s lawyers. The materials that the funder can review, however, will likely be limited by a protective order in the litigation that will restrict access to the other side’s document production. The materials the funder can review may also be limited by concerns of potential waiver of attorney-client privilege or work product protection.

Other funding options

12 What other funding options are available to litigants?

Litigants have a wide range of funding options available to them. In addition to a full litigation funding agreement, where the funder covers all costs and legal fees, the litigant can enter into a partial funding agreement, where the funder funds only a portion of the litigation and the litigant (or the litigant’s attorneys on a contingent basis) agrees to pay the rest of the costs and fees for the litigation. A litigant (or the litigant’s attorneys) may also obtain portfolio funding, whereby the funder provides capital on a non-recourse basis to the litigant (or the litigant’s attorneys), which is repaid from the proceeds of cases in that portfolio of cases.

A funder may also purchase an interest in the litigation (as well as certain rights to serve on the litigant’s board) in exchange for a percentage of any recovery, which may address certain concerns about waiver of attorney-client privilege and work product.

A litigant can, of course, seek to take a recourse loan, using the proceeds of the litigation as collateral that must be repaid regardless of the results of the action.

With respect to a law firm obtaining a non-recourse loan from a funder to be repaid from the law firm’s future legal fees, the New York City Bar Association (NYCBA) issued an advisory opinion in 2018 that called into question the appropriateness of such an arrangement (NYCBA Formal Opinion 2018-8). The NYCBA concluded that such an arrangement is impermissible fee-splitting in view of NYRPC 5.4. The NYCBA’s opinion is inconsistent with settled New York case law on this point (see Hamilton Capital VII LLC v Khorrabi LLP, 48 Misc 3d (1223[A], 9 NY Sup Ct 2015) (law firm financing is not impermissible fee-splitting, and further it ‘promotes the sound public policy of making justice accessible to all, regardless of wealth.’)). It is noteworthy that in its advisory opinion the NYCBA distinguished its analysis from the traditional litigation funding model — whereby the client obtains funding itself — which the NYCBA had previously held to be acceptable (NYCBA Formal Opinion 2011-2).

In view of widespread criticism of this non-binding advisory opinion, the NYCBA’s president formed the Litigation Funding Working Group (Working Group) to ‘study third-party litigation funding and to provide a report on observations and recommendations regarding the practices utilized in connection with litigation funding’ (NYCBA Report to the President by Litigation Funding Working Group (2020)). In its report, the Working Group ‘considered whether Rule 5.4, as interpreted in Opinion 2018-5, well serves the professional community and the public, or whether the Rule should be revised to reflect contemporary commercial and professional needs and realities’ (p 23). The group found that ‘it would be beneficial for the Rule to be revised’, and that ‘lawyers and clients . . . will benefit if lawyers have less restricted access to funding’ (p 23).

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?

In the US District Court for the Southern District of New York, a commercial claim can be expected to take over 30 months from filing to a hearing on the merits of the case. Since many cases are resolved before trial through motion practice or settlement negotiations, the median length from filing to disposition of a case is six months. These statistics are available on the US Courts website.

For complex commercial claims, the timeline in New York state courts would be similar. Most of these claims will be heard before
the Commercial Division of the New York Supreme Court, which is a specialist division that focuses on creating uniformity and predictability in complex commercial disputes.

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

Approximately 11 per cent of filed cases are appealed. In cases that have gone to trial, nearly 40 per cent are appealed. See Eisenberg, Theodore, ‘Appeal Rates and Outcomes in Tried and Non-tried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes’ (2004), Cornell Law Faculty Publications, Paper 359.

In the Court of Appeals for the Second Circuit, which encompasses New York, the median time from filing an appeal to disposition is 15 months.

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

In our experience, defendants generally satisfy a judgment against them without the need for enforcement, let alone contentious enforcement proceedings.

However, if a defendant is unwilling to satisfy a judgment against it, both federal and New York courts have robust and well-established mechanisms to empower the plaintiff to locate, freeze and seize the defendant’s assets to satisfy the judgment.

The ease or difficulty in enforcing a judgment is influenced by myriad factors, including:
- the judgment debtor’s willingness and resources to resist enforcement proceedings;
- the size of the judgment;
- the location of the judgment debtor’s assets;
- what, if any, steps the judgment debtor has taken to conceal its assets; and
- the extent to which the judgment creditor has mitigated against the risk of an unsatisfied judgment by careful selection of targets through pre-suit investigation and by learning as much as possible about the judgment debtor during discovery in the underlying litigation.

COLLECTIVE ACTIONS

Funding of collective actions
16 | Are class actions or group actions permitted? May they be funded by third parties?

Class actions are permitted and third parties may fund them. In fact, third parties have funded many of the larger class actions. See, for example, Kaplan v SAC Capital Advisors LP, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (a securities class action on behalf of shareholders seeking over US$680 million arising from an insider trading scandal was funded by a third party). In 2017, the United States District Court for the Northern District of California issued a standing order that specifically requires the disclosure of a party funding a class action litigation (ND Cal Standing Order No. 19 (17 January 2017)). This rule does not apply to general civil litigation and there is no such rule directed specifically to disclosure of funders (as compared to those requiring general disclosure of anyone with a financial interest in the lawsuit) in any other courts, including those in New York.

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?

In responding to this question, we think it best to distinguish between ‘costs’ (disbursements related to expenses other than legal fees) and ‘fees’ (legal fees). As a general rule, in US litigation, the losing party does not pay the attorneys’ fees of the prevailing party except in specific types of cases, or where otherwise required by a contract between the parties. For instance, consumer protection or civil rights lawsuits allow for the collection of attorneys’ fees, as do patent-related matters in exceptional cases. In addition, a court has the discretion to order the unsuccessful party (or its attorney) to pay to the prevailing party its attorneys’ fees or other financial sanctions, if the unsuccessful party engaged in frivolous conduct in connection with the litigation (22 NYCRR 130-1.1; see also Fed R Civ P 11). In 22 NYCRR 130-1.1(c), New York has defined conduct to be frivolous if:

1  it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
2  it is undertaken primarily to delay or prolong the resolution of the litigation . . . ; or
3  it asserts material factual statements that are false.

Further, ‘costs’ are awarded to the prevailing party in both the New York state system and the federal system. In the state system, costs are set by statute and are a small and arbitrary amount based on factors such as timing and amount of resolution, with a maximum amount of a few hundred dollars. In federal court, however, awarded costs can be significant. Chargeable costs include some court and transcript fees, witness fees and document copying costs (28 USC section 1920). Expert witness fees, which depending on the nature of the litigation can be large, are generally not chargeable beyond the small statutory daily attendance fee. In some cases, document copying costs have been held to include a portion of the prevailing party’s e-discovery costs, which can be substantial. See Balance Point Divorce Funding LLC v Scrantom, 305 FRD 67 (SDNY 2015).

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

No published case applying New York law has held a third-party litigation funder liable for adverse costs (including attorneys’ fees in applicable circumstances).

This does not mean that the terms of the funding agreement may not make the funder responsible for the payment of any adverse costs order. Best practices dictate that the funding agreement address whether the funder is or is not responsible for the payment of any adverse costs order (including any responsibility for attorneys’ fees).

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?)

Courts do not order a party to provide security except if the party is seeking a preliminary injunction or a temporary restraining order.
in advance of the adjudication of the dispute on the merits. See, for example, NY CPLR section 6312(b); Fed R Civ P 65(c). The court will set the amount of security required to ‘an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained’ (Fed R Civ P 65(c)).

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

No. The applicable rules provide that the security should be calibrated to the amount of the potential damages that would be incurred if a party is wrongfully enjoined, not the resources of the party seeking an injunction.

Moreover, in many cases, the court would not necessarily be aware of the existence of third-party funding.

Insurance

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

ATE insurance indemnifies the client for legal costs in the event the client loses its case. ATE insurance, which is purchased after the dispute has arisen, can protect against paying the other side’s adverse costs and can reimburse the client for its own attorneys’ fees and out-of-pocket expenses.

There is no statute in New York that prohibits ATE insurance. That being said, as in most states, insurance in New York is, generally speaking, a heavily regulated field, with licensing and other rules that may affect who can issue or purchase ATE insurance.

In our experience, ATE insurance is not commonly used in New York. But as lawyers and clients in New York become more familiar with ATE insurance, we would expect interest in this product to grow, including with clients who may have the resources to pay legal fees and costs on their own, but want to offset fees and costs if they lose the case.

We are not aware of other types of insurance, in the context of fees or expenses, commonly used by claimants in New York. But as interest in litigation funding grows, we would not be surprised if interest in ATE insurance grows with insurance alternatives entering the market.

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 have been efforts to require the disclosure of the existence and identity of a litigation funder. For example, in the United States District Court for the Northern District of California, a party must disclose the identity of a funder in class action cases only. That court rejected a broader proposed order that would have required the explicit disclosure of the funder in all cases in that district. In certain courts, such as the District Court for the Central District of California, a party is required to disclose anyone that ‘may have a pecuniary interest in the outcome of the case’ (CD Cal LR 7.1-1). While this rule is not specific to litigation funders, it may require the disclosure of the name, although not the funding agreement itself, of the funder.

In 2019, the United States District Court for New Jersey similarly declined to require disclosure of third-party funders. See In re Valsartan & N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation, No. CV 19-2875 (RBK/JJS), 405 F Supp 3d 612 (DNJ 18 September 2019) (denying inquiry into the possibility that plaintiff was backed by a litigation funder on the grounds that such information is irrelevant where there is no evidence of any untoward behaviour).

However, in 2021, the District Court in New Jersey amended its local rules to require lawyers to disclose details about third-party litigation funding. New Jersey Local Civil Rule 7.1.1(a) requires all parties to disclose the identity of any party providing non-recourse funding, if the funder’s approval is necessary for litigation or settlement decisions, and a brief description of the nature of the financial interest. While the New Jersey District Court does not require the automatic disclosure of the funding agreement itself, a party may seek the disclosure of the agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case. No other court has adopted this broad disclosure requirement and there has not yet been any decision in New Jersey on what showing is necessary to justify the disclosure of an agreement.

Currently, no New York court or statute requires a party to disclose the existence of a litigation funder or a litigation funding agreement to the opposing party or to the court.

However, an opposing party could compel the disclosure of a litigation funding agreement if the court determines that the agreement is relevant to the case and it is not otherwise protected from disclosure. New York courts that have addressed this issue have found that, in the cases presented, the funding agreements were not relevant and are not discoverable. (See Kaplan v SAC Capital Advisors LP, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (ruling that a funding agreement was not relevant to the privilege’s adequacy as class counsel in a securities class action lawsuit and explicitly declining to address if disclosure of the agreement would be entitled to work product protection) and Benitez v Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 (EDNY 14 March 2019) (denying defendant’s request to review plaintiff’s financing on the ground that it is not related to plaintiff’s credibility nor relevant to any other claim or defence).)

If a court determined that the funding agreement was relevant to the case, then a party would be required to disclose the funding agreement if it were not protected from disclosure by attorney-client privilege or work product protection (see response below).

If deemed relevant, a client would likely be compelled to disclose at least some information about the identity of the third-party funder. See, for example, In re Nassau County Grand Jury Subpoena Duces Tecum Dated 24 June 2003, 4 NY 3d 665, 678-79 (NY 2005) (information regarding the payment of fees by a third party is not protected as an attorney-client privileged communication).

New York courts have not addressed whether work product protection would protect against the disclosure of the funding agreement. They have, however, recognised that the terms of a joint defence agreement, which is an agreement to share information between multiple defendants to the same litigation, is considered work product. See RFMAS Inc v So, No. 6 Civ 13114 VM MHD, 2008 WL 465113 (SDNY 15 February 2008).

Privileged communications

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

In certain circumstances, the attorney-client privilege and the work product doctrine protect against the disclosure of communications and information shared between attorney, client and funder. There has been very limited analysis of these protections by New York courts as they relate to third-party litigation funding. We suspect that New York
courts may find that attorney-client privilege will not protect communications with a funder from disclosure. Further, New York courts will likely find that work product protection will protect from disclosure of certain communications and information provided to a funder.

Communications between an attorney and client for purposes of providing legal advice are privileged in all US jurisdictions, including New York. If attorney-client communications are disclosed to a third party, the privilege can be deemed to have been waived as to the communications themselves and even in some cases as to the subject matter of the communications. However, if the communications are shared with a third party with whom the client has a ‘common legal interest’, there is no waiver of the privilege.

In the context of third-party litigation funding, whether disclosure of communications with a funder waives attorney-client privilege turns on whether a client has a common legal interest with the funder. There has only been one decision in New York addressing this question and it did not extend the common interest doctrine to litigation funders. There the court declined to protect information shared with a litigation funder. In Cohen v Cohen, No. 09 CIV 10230 LAP, 2015 WL 745712, at *4 (SDNY 30 January 2015) the court noted that:

[Although] the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy.

So ruling, the court found that, since the litigation funder was not a party to the litigation and there was no suggestion that she had a legal claim against the defendant, there could not be a common legal interest. The work product doctrine is separate and distinct from attorney-client privilege.

The work product doctrine protects from disclosure documents prepared, and information collected, in anticipation of litigation. The work product doctrine seeks to prevent such documents and information from falling into the hands of the party’s adversary. Unlike attorney-client privilege, disclosing work product to a third party does not waive work product production where such disclosure did not substantially increase the likelihood that the work product would fall into the hands of an adversary in the litigation. See In Re Steinhardt Partners LP, 9 F3d 230 (Second Circuit 1993).

Since New York courts have not addressed the applicability of work product protection to the disclosure of information given to a third-party litigation funder, we look to other jurisdictions for guidance. Courts in those jurisdictions have generally found such information to be protected as work product. See Miller UK Ltd v Caterpillar Inc, 17 F Supp 3d 711, 736 (ND Ill 2014) (the disclosure of a memorandum describing the strengths and weaknesses of a case to a funder was protected as work product). This would specifically include documents prepared with the intention of disclosing to potential investors to aid in future litigation. See Mondis Tech Ltd v LG Elecs Inc, No. 2:07-cv-565, 2011 WL 1714304, at *3 (ED Tex 4 May 2011) (documents prepared with the intention of disclosing to potential investors in aid of future litigation were protected), Lambeth Magnetic Structures LLC v Seagate Tech (US) Holdings, Inc, No. 16-cv-00538, 2018 WL 466045 (WD Pa 19 December 2017) (same). We expect, but are not certain, that New York courts will adopt the same reasoning and protect work product disclosed to third-party litigation funders.

In the end, a balance needs to be struck between obtaining sufficient information to make decisions about whether, or to what extent, to fund a case and the risk of waiver, which could lead to the disclosure of information that could harm the case, and the funder’s investment in it, by putting at risk the attorney-client privilege. Given the lack of definitive case law in New York on this issue, to avoid the risk of waiving attorney-client privilege, a funder should tread lightly in requesting communications between the client and attorney that would otherwise be protected as privileged communications.

However, work product protection will likely allow the client to disclose to the funder documents prepared in aid of the litigation that should be sufficient to allow a funder to make an informed funding decision and to remain apprised of key developments over the life of the case.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

We are not aware of any reported disputes in New York between a litigant and a funder in cases where the funder has lent money to the holder of a claim to cover the legal fees and costs in exchange for a portion of the proceeds arising from the holder’s enforcement of its claim.

There may be several reasons why there have been no reported disputes in New York. Most funding agreements have strict confidentiality provisions. And since most funding agreements have arbitration clauses, if there is a dispute between a litigant and a funder, that dispute would be confidentially arbitrated.

It is worth noting that there have been several reported disputes in New York (or by courts applying New York law) in the context of consumer legal funding, where a consumer legal funder provides a non-recourse advance to a plaintiff (commonly in a tort case) to cover the plaintiff’s living expenses during the pendency of the case in exchange for a portion of the proceeds from the claim. See Cash4Cases, Inc v Brunetti, 167 AD3d 448, 449 (1st Dept 2018) (affirming a judgment in favour of a funder who provided non-recourse case advance to a client in a consumer personal injury lawsuit); Lynx Strategies LLC v Ferreira, 957 NYS2d 636 (NY Sup Ct 2010) (confirming an arbitration award in favour of the funder where the plaintiff and plaintiff’s law firm did not pay the funder its share of the settlement proceeds); Obermayer Rebmann Maxwell & Hippel LLP v West, Civ No. 15-81, 2015 WL 949791 (WD Pa 30 December 2015) (applying New York law and holding that failure to
pay the funder its share of the proceeds was breach of a funding agreement); and MoneyForLawsuits VLP v Rowe, No. 4:10-CV-11537, 2012 WL 1068171 (ED Mich 23 January 2012) (same).

**Other issues**

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

As legal costs continue to increase, as client budgets for litigation shrink, and as lawyers and clients learn more about litigation funding, interest in litigation funding is growing in the US, and more and more funders are entering the market. In selecting funders with which to do business, clients and counsel should look for funders that have:

- established track records of funding cases through to completion;
- ample resources to handle the expense of litigation;
- the fortitude to weather the uncertainties that are an inevitable feature of litigation;
- the ability to make funding decisions without inordinate delay; and
- the ability to offer sound advice along the way, while still respecting the autonomy of the client and the ethical duties of the lawyer to his or her client.

**UPDATE AND TRENDS**

**Current developments**

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

The use of third-party funding is continuing to expand in civil litigation in New York and throughout the United States. Both small and large companies are increasingly seeking third-party funding. Such companies include those with the capital to self-fund, but that would rather offset some of the costs of the litigation to third parties. There are also accounting benefits for obtaining litigation funding compared to a company paying the costs itself.

The growth of litigation funding has led to many new funders entering the US market. It has also increased the different types of funding available. From the traditional case-based funding model to portfolio financing, litigants can work with funders to obtain funding that is tailored to their particular needs.

Courts are increasingly amenable to third-party funding as well. Each year comes with additional decisions that reflect acceptance of funding. Notable is a decision by a New Jersey US district court, WAG Acquisition LLC v Multi Media LLC (No. 14-2340-ES-MAH, DI 190), in which the court found that the existence of a third-party funding agreement that did not give the funder further rights independent of its funding did not impact plaintiff’s ownership of intellectual property, nor its ability to bring a lawsuit enforcing its rights to such property.
United States – other key jurisdictions

Robin Davis, Alex Lempiner, Dan Kesack and Deborah Mazer

Woodsford

The United States is a federal system, with overlapping federal and state jurisdictions, including 96 federal judicial districts and 50 individual US states, each with its own court system. As such, attorneys and parties contemplating commercial litigation finance transactions in the US must pay particular attention to the many potential jurisdictions that may be implicated by a single particular transaction – including the governing law of the litigation finance agreement, the location of the parties, the venue of the particular litigation, and the jurisdiction in which a judgment may eventually be enforced. Further, because litigation finance remains relatively new, the law is still in development, so those considering a litigation funding transaction in one jurisdiction would be well advised to consider the applicability of precedents from other jurisdictions.

This brief addendum is not intended to be a comprehensive guide to litigation finance in the US outside of New York. Rather, it endeavours to highlight some of the notable rules and precedents in a few important jurisdictions beyond New York, which have developed recently as litigation finance has become more common in the US. The addendum is largely focused on permissibility of commercial litigation finance generally, and any rules regarding disclosure of funding and the scope of protection afforded communication with funders. Consumer litigation finance transactions may implicate other regulations that are beyond the scope of this addendum.

Covid-19

The covid-19 pandemic has caused significant uncertainty in the litigation space, beginning in 2020 and continuing through 2021. Parties to litigation are unsure whether their current capital and revenue streams are sufficient to support the expense of drawn-out legal battles; lawyers are navigating the difficulties of collecting and reviewing discovery from clients who may not have access to their files during periods of lockdown or remote work; and courts grapple with keeping juries and litigants safe while attempting to keep the doors of justice open. Indeed, most US jurisdictions have moved to motion hearings by video or teleconference, and trials have been postponed by several months, if not indefinitely. Nearly all active cases have experienced covid-related delays to their schedules. In this time of uncertainty and capital conservation, many prospective plaintiffs are looking to hedge their risk through litigation funding.

US federal

Because litigation funding related issues typically involve matters of state law (eg, state bar rules, contract law, status of champerty provisions, etc) or procedural matters governed by local practice, some of which are discussed below in the state summaries, there is little purely federal law on funding. However, there have been recent proposals to legislate funding at the federal level. In 2021, the United States Congress reintroduced the Litigation Funding Transparency Act (first introduced in 2019), which, if enacted, would require disclosure of funding (and a copy of the funding agreement) in any federal class action or federal multi-district litigation (MDL) (the proposed law was initially put forward without success in 2018). It is in consideration with the Senate Judiciary Committee, so it remains to be seen whether the law will eventually be amended or enacted. Additionally, certain states have considered similar laws, including New York State (Assembly Bill 6866), Florida (House Bill 7041) and Utah (House Bill 312), all of which have recently introduced bills to regulate litigation funding locally.

There is no general affirmative obligation to disclose litigation funding in federal court, though as noted below, some district courts in particular states have mandated disclosure in limited circumstances. Federal Rule of Civil Procedure 7.1 does not require the automatic disclosure of the involvement of litigation funders in the corporate disclosure statements required at the beginning of an action. However, litigants should be aware that many jurisdictions have supplemented Rule 7.1 with their own corporate disclosure requirements, which are generally broader than their federal counterparts. While these regional requirements have been enacted in order to identify court-related conflicts, some ambiguity exists regarding whether these requirements should encompass litigation funders, and such ambiguity will need to be resolved on a per-jurisdiction basis. For example, while the Northern District of California requires disclosure in the particular context of class actions, at least one court has rejected an argument that Rule 3-15 (the local version of Rule 7.1) generally requires affirmative disclosure of a funder in other (non-class) contexts (MLC Intellectual Prop., LLC v Micron Tech., Inc., No. 14-CV-03657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019)).

Some courts do require disclosure of the presence of a litigation funder for class action lawsuits and multi-district litigations. (See, eg, N.D. Cal. Standing Order ¶ 19 (Nov. 1, 2018).) However, these disclosures have only been required to be made in camera. (See, eg, In re Nat’l Prescription Opiate Litig., 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering in-camera submissions relating to financing terms).)

California

In California, litigation finance is generally permitted by state law. Indeed, unlike many eastern states, the doctrines of champerty and maintenance were never adopted into California laws. (See In re Cohen’s Estate, 152 P.2d 485 (Cal. Dist. Ct. App. 1944), Abbot Ford, Inc. v Superior Court, 43 Cal. 3d 858, 885 n.26 (Cal. 1987) (‘California . . . has never adopted the common law doctrines of champerty and maintenance.’))

Practicing attorneys in California, as in all states, are guided by rules of professional conduct and, importantly, such rules do not
prohibit litigation finance transactions. (See LA County Bar Association Ethics Committee Formal Opinion No. 500 (1999), discussing the permissibility of funding arrangement under California law and legal ethics regime.) The California State Bar established a Task Force on Access Through Innovation of Legal Services, which recently published several alternate proposed revisions to the ethical rules that would, if adopted, either allow limited non-attorney ownership in law practices or largely do away with the traditional restrictions on fee-sharing. In May 2020, the Board of Trustees of the State Bar of California voted to move forward with the Task Force’s recommendations. Instead of adopting widespread revisions to the ethical rules, however, the California Supreme Court approved a narrowly revised rule with respect to non-lawyer fee sharing, and the Board of Trustees established a second working group to look at the development of a ‘regulatory sandbox’ for non-lawyer ownership. As of the time of writing, the second working group has not issued its recommendations.

California has no rule requiring disclosure of a party’s funded status. However, for class action litigation in the federal courts, the Northern District of California recently revised its Standing Orders to require the disclosure of ‘any person or entity that is funding the prosecution’ of ‘any proposed class, collective, or representative action.’ (N.D. Cal. Standing Order No. 19 (Jan. 17, 2017)). Accordingly, for class or collective matters in the Northern District, a party’s funded status should be disclosed at the initial stages pursuant to Rule 3-15, or, if arising later, in connection with a party’s Case Management Statement. For all other matters, there is no general obligation of affirmative disclosure under the local rules. (See MLC Intellectual Prop, LLC v Micron Tech, Inc., No. 14-CV-03637, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019), rejecting the argument that a funded plaintiff had failed to comply with local rules by failing to identify the litigation funder.) Importantly, communications with a litigation funder have been shielded from disclosure and, where subject to a properly executed non-disclosure agreement, should not result in a waiver. This is consistent with the general trend in most US jurisdictions. (See Odyssey Wireless, Inc. v Samsung Electronics Co., 2016 WL 765898, at *5–*6 (S.D. Cal. Sept. 20, 2016); see also Space Data Corporation v Google LLC, No. 16-CV-03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (communications with potential funders are not relevant)).

Delaware
Litigation finance is generally permitted in Delaware. However, the doctrines of champerty and maintenance remain applicable. (See Litigation finance is generally permitted in Delaware. However, the Delaware United States – other key jurisdictions Woodsford.

With regard to privilege, both state and federal courts in Delaware have held communications with litigation funders are protected from discovery. As Delaware’s Court of Chancery has remarked, there is “[n]o persuasive reason . . . why litigants should lose work product protection simply because they lack the financial means to press their claims on their own’. (See Carlyle Investment Management v Moonmouth Co., 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015); see also Waiker Digital, LLC v Google, Inc., 2013 WL 960775, at *1 (D. Del. Feb. 12, 2013) (claimant and funder share a common legal interest and communications are protected as both attorney client privilege and work product), but see Leader Technologies Inc. v Facebook Inc., 719 F. Supp. 2d 373, 377 (D. Del. 2010) (no common interest inapplicable); Acceleration Bay v Activation Blizzard, 2018 WL 798731 (D. Del. 2018) (ordering disclosure where in the absence of signed non-disclosure agreement and using a ‘but for’ standard for work product).]

Texas
Texas common law never incorporated the doctrine of champerty. (See Bentinck v Franklin, 38 Tex. 458, 468 (1873).) Texas courts have reviewed commercial litigation funding agreements and found them not to be champertous or otherwise a violation of public policy. (See Anglo-Dutch Petroleum International v Haskell, 193 S.W.3d 87, 105 (Tex. App. 2006).) However, the funding of certain categories of claims – for example, malpractice actions – may present public policy issues, to the extent that the structure of those arrangements might embarrass or demean the legal profession. (See id.) Further, lawyers or law firms contemplating litigation funding transactions should ensure that the contemplated structure does not misalign incentives or undermine the primary duty to their clients. (See Texas Bar Opinion No. 576 concluding that proposed arrangement was ‘tantamount to fee splitting’.)

Regarding privilege, several federal courts in Texas have concluded that litigation funding information should be protected as work product and a non-disclosure agreement obviates waiver. (See US v Ocwen Loan Servicing, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); Mandis Technology Ltd v LG Electronics, Inc., 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011)).

Further, while there is no rule requiring disclosure of a party’s funded status, at least one court in Texas has ordered the disclosure of the identity of a litigation funder, while simultaneously holding that communications with that funder remained confidential. (See US v Homeward Residential Inc., 2016 WL 1031154, at *5 (E.D. Tex. March 15, 2016).)

New Jersey
New Jersey courts have long rejected common law prohibitions on champerty and maintenance. (See Schomp v Schenck, 40 N.J.L. 195, 206 (Sup. Ct. 1878).) More recently, New Jersey’s state bar has offered guidance permitting plaintiff factoring of a contingent interest in a potential judgment. (See New Jersey Advisory Committee on Professional Ethics, Opinion 691 (2001).)

The US District Court for the District of New Jersey recently adopted Local Civil Rule 7.1.1, which requires the disclosure of information regarding the use of third-party litigation funding within 30 days of the opening of a new matter in the jurisdiction (Local Civil Rule 7.1.1 is retroactive, requiring that all cases pending at the time the Rule was adopted disclose funding). (See D. N.J. L. R. 7.1.1.) Under the Rule, parties must file a statement with information relating to any non-party who provides funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation, or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance. (Id.) The statement must include details about the identity of the funder, whether the funder’s approval is required for litigation or
settlement decisions, and, if funder approval is required, the nature of the terms and conditions relating to that approval. Parties must also provide a brief description of the nature of the financial interest. (Id.) In addition, Local Civil Rule 7.1.1 allows for additional discovery of the terms of any third-party litigation funding agreement upon a showing of good cause. (Id.)

Illinois
Literation finance is permitted in Illinois. Notwithstanding the statutory prohibition of maintenance set out in 720 Illinois Criminal Code 5/32-12, the Northern District of Illinois has held that ordinary commercial litigation finance does not violate the statute. (See Miller UK v Caterpillar, 17 F. Supp. 3d 711 (N.D. Ill. 2014).) The court cautioned that ‘the Illinois criminal maintenance statute should not be given new life by judges … [where it was] never intended to be applied’. (Id. at 727.)

Regarding privilege, federal courts in Illinois have concluded that funding agreements, and communications with a litigation funder pursuant to a non-disclosure agreement, remain protected from disclosure. (See Art Akaine LLC, v Art & Soulworks LLC, No. 19 C 2952, 2020 WL 5593242, at *6 (N.D. Ill. Sept. 18, 2020) (finding litigation funding discovery irrelevant and potentially harmful to the plaintiff); Fulton v Foley, 2019 WL 6609298, at *2 (N.D. Ill. Dec. 5, 2019); Viamedia, Inc. v Comcast Corporation, 2017 WL 2836535, at *3 (N.D. Ill. June 30, 2017); Miller UK Ltd v Caterpillar, Inc., 17 F. Supp. 3d 711, 739 (N.D. Ill. 2014).)

Wisconsin
Litigation finance is permitted in Wisconsin. However, in early 2018, Wisconsin passed Wisconsin Act 235, which, among other things, requires disclosure of all funding agreements in civil litigation. Specifically, the Act mandates that:

[A] party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

Ohio
In Ohio, litigation finance is permitted, and is regulated by statute. (See Ohio Rev. Code section 1349.55 (2008).) For litigation funding agreements to be valid, the statute requires specific wording and disclaimers. The statute was promulgated in response to an Ohio Supreme Court decision which had previously invalidated a funding agreement on champerty grounds. (See Rancman v Interim Settlement Funding Corporation, 789 N.E.2d 217 (Ohio 2003).)

In a decision that is likely more relevant to federal practice – and multi-district litigation in particular – than to Ohio specifically, an Ohio district court recently ordered any funding be disclosed to the court in camera but made clear that any such disclosures should not be subject of ancillary litigation or discovery. (See In re National Prescription Opiate Litigation, 17–MD–2804, Dkt. No. 383 (May 7, 2018).)

Pennsylvania
In Pennsylvania, Clark v Cambria County Board of Assessment Appeals, 747 A.2d 1242, 1245 (Pa Cmwlth. 2000) saw champerty defined as:

[A] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject to be recovered.

Under certain circumstances, litigation finance may not be permitted in Pennsylvania. For example, in WFIC, LLC v LaBarre, 148 A.3d 812, 820 (Pa. Super. 2016), the court found that a funding agreement governed by Pennsylvania law was invalid because it met the requisite elements of champerty. (See Riffin v Consolidated Rail Corp., 363 F. Supp. 3d 569, 576 (E.D. Pa. 2019) (assignment of claims is invalid as champertous).)

Nevertheless, regarding disclosure, federal courts in Pennsylvania have concluded, consistent with other districts, that communications with a litigation funder are protected as work product. (See Lambeth Magnetic Structures, LLC v Seagate Technology (US) Holding, Inc., 16–CV–0538, 2018 WL 466045, at *5 (W.D. Pa. Jan. 18, 2018).)

Maryland
Litigation funding agreements in Maryland have been considered as loans by state regulatory agencies and are thus subject to state licensing requirements and a statutory cap on returns. (See Maryland Commercial Law §§ 12-102; 12-103, Md. Const. Art. III, Sec. 57.) At least one Maryland state investigation determined that a litigation funding agreement was usurious because, although no interest rate was set out in the contract, the effective rate was higher than that permitted by statute.

Alabama
State courts in Alabama have held that the state has a strong public policy against litigation funding. (See Wilson v Harris 688 So.2d 265 (Ala. Civ. App. 1996), holding that a funding agreement was void on public policy grounds because the agreement was ‘an illegal gambling contract and its speculative characteristics make it closely akin to champerty.’)

Minnesota
Litigation funding is no longer against public policy in the state of Minnesota. Although its highest court held for over a century that litigation funding is champertous, it recently overturned its precedent in Maslowski v Prospect Funding Partners LLC, 944 N.W.2d 235, 241 (Minn. 2020), abolishing Minnesota’s common law champerty doctrine. However, the opinion acknowledges that courts may still scrutinise litigation funding agreements, in particular ensure that such agreements do not provide the litigation funder with control over the litigation. (Id.)

Arizona
Champerty is not recognised in the state of Arizona, and thus the doctrine does not bar litigation funding agreements. (See Landi v Arkules, 172 Ariz. 126, 132, 835 P.2d 458, 464 (Ct. App. 1992).) At least some courts in Arizona have held that litigation funding agreements are protected under the work product doctrine. For example, the District of Arizona has held that litigation funding agreements fit within the Ninth Circuit’s standard of materials ‘created because of litigation’. This protection was held to extend to situations where a plaintiff is receiving financing from a third-party funder to support both litigation and operating expenses, where litigation is the scope of operation for that business. (See Cant’l Circuits LLC v Intel Corp., 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020).)

However, disclosure of the identity of the litigation funder itself was not protectable information under the work product doctrine. (Id.)

Kentucky
Litigation funding is generally not permitted in Kentucky, which recognises the doctrine of champerty by statute (KRS § 372.060). Federal courts in Kentucky and the Sixth Circuit have affirmed that litigation financing is contrary to public policy, and such contracts are void. (See Boling v Prospect Funding Holdings, LLC, 771 F. App’x 562, 568 (6th Cir. 2019) (‘the [litigation funding] Agreements violate Ky. Rev. Stat. § 372.060, and ... the Agreements are inconsistent with Kentucky’s public policy’); Charles v Phillips, 252 S.W.2d 920, 921-22 (Ky. 1952) (setting
aside a deed as champertous in violation of KRS 372.060 where it was
given in consideration of sums advanced to prosecute a divorce action).)

Utah
Utah became one of the latest states to regulate litigation funding when
its governor signed the Maintenance Funding Practice Act (HB 312)
in March 2020. The Act requires litigation funders to register with the
state, imposes reporting requirements on litigation funders, and sets
forth required funding contract terms and disclosures.

North Carolina
As the common law prohibition on champerty and maintenance remains
in effect in North Carolina, North Carolina considers many litigation
funding agreements to be both void and against public policy. (See
88, 91 (1995).) Although North Carolina courts have found litigation
funding agreements to be acceptable in certain very limited circum-
stances, many provisions common in third-party funder agreements are
not permissible. (Compare Odell v Legal Bucks, LLC, 192 N.C. App. 298

United States Tax Court
In May 2020, the United States Tax Court held that litigation funding
payments structured as loans but including non-recourse contingent
payments are considered ‘income’ rather than a ‘loan’ for federal tax
purposes. In Novoselsky v Comm’r of Internal Revenue, 119 T.C.M. (CCH)
1474 (T.C. 2020), the Tax Court applied a multi-factor test to determine
whether a litigation funding payment was the type of advance that
should be treated as a ‘loan’. The Tax Court found that because there
was generally no obligation to repay the loaned money unless the liti-
gation was successful, the advanced funds were more akin to advance
payments for legal services (rather than a loan), and thus were properly
considered income for federal tax purposes. (Id.) Lawyers and litigants
considering litigation funding transactions should consider the potential
tax and accounting implications, and may structure litigation funding
agreements accordingly to suit the particular circumstances.
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