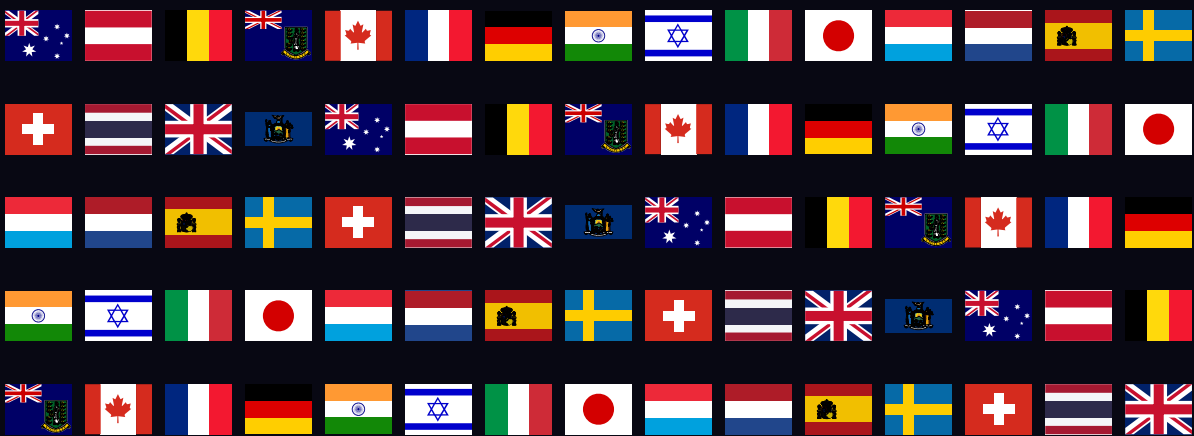


LITIGATION FUNDING

Italy



Litigation Funding

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

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Italy



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REGULATION

Overview

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

Third-party litigation funding is permitted in Italy as an instance of the 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.'

The Italian litigation funding market is still pretty new but in the past, six to eight months a couple of domestic funds came into being and the first cases have been funded, in particular in the antitrust matter.

The prospects for the industry are growing.

Law stated - 25 September 2022

Restrictions on funding fees

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 fee 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).

Law stated - 25 September 2022

Specific rules for litigation funding

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

No. In Italy, as in the rest of Europe, 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 contracts (eg, mortgage contracts, insurance contracts).

There is an EU project for regulating this tool – European added value assessment (EAVA), which accompanies a resolution based on a legislative initiative report prepared by the European Parliament's Committee on Legal Affairs, 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 EU legislation. The various policy options to address this gap are then analysed and their potential costs and benefits are assessed.

Law stated - 25 September 2022

Legal advice

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 that would prevent lawyers from informing their clients about the possibility of 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.

Law stated - 25 September 2022

Regulators

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.

Law stated - 25 September 2022

FUNDERS' RIGHTS

Choice of counsel

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.

In other cases – namely, when the litigation fund works on a particular project, it could be that the fund appoints its own legal.

Law stated - 25 September 2022

Participation in proceedings

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.

Law stated - 25 September 2022

Veto of settlements

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.

Law stated - 25 September 2022

Termination of funding

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.

Law stated - 25 September 2022

Other permitted activities

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

The funder 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.

Law stated - 25 September 2022

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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 businesses, 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.

Law stated - 25 September 2022

Other funding options

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 coverage are contractually stipulated. This cover is normally only provided for certain types of litigation; and
- funding of natural persons or corporations by accredited intermediaries.

Law stated - 25 September 2022

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?

Regarding the length of civil trial, Italy ranks the slowest in the European Union. At the moment, the reform of civil procedure is being approved with the aim of speeding up the legal cases.

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.

Law stated - 25 September 2022

Time frame for appeals

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 that 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.

Law stated - 25 September 2022

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.

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.

Law stated - 25 September 2022

COLLECTIVE ACTIONS

Funding of collective actions

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 of banks in the northeast area are pending.

Class actions are regulated by Law No. 31/2019, published in Official Gazette 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.

Law stated - 25 September 2022

COSTS AND INSURANCE

Award of costs

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

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

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 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 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.

Law stated - 25 September 2022

Liability for costs

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.

Law stated - 25 September 2022

Security for costs

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

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.

Law stated - 25 September 2022

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 could not 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.

Law stated - 25 September 2022

Insurance

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 ATE 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 claims.

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?

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.

Law stated - 25 September 2022

Privileged communications

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.

Law stated - 25 September 2022

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No. To date, no disputes between litigants and their funders have been noted.

Law stated - 25 September 2022

Other issues

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 more widespread practice in the near future, especially considering the planned justice reform that is aimed at cutting the length of lawsuits and increasing the predictability of their outcome.

Law stated - 25 September 2022

UPDATE AND TRENDS

Current developments

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 – 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. To seize this opportunity, FiDeAL – the first Italian consulting firm specialised in litigation investment solutions – has scaled up its efforts to penetrate the Italian market.

A couple of domestic funds came into being and the litigation funding tool started to be used.

In particular, collective cases and antitrust private enforcement cases were funded but also single cases are on the way to being funded.

Law stated - 25 September 2022

Jurisdictions

	Australia	Piper Alderman
	Austria	Nivalion AG
	Belgium	Nivalion AG
	British Virgin Islands	Martin Kenney & Co
	Canada	Omni Bridgeway
	France	Nivalion AG
	Germany	Omni Bridgeway
	India	Khaitan & Co
	Israel	Woodsford
	Italy	Fideal S.R.L
	Japan	Miura & Partners
	Luxembourg	Nivalion AG
	Netherlands	De Brauw Blackstone Westbroek
	Spain	PLA Litigation Funding
	Sweden	Nivalion AG
	Switzerland	Nivalion AG
	Thailand	Rajah & Tann Asia
	United Kingdom - England & Wales	Woodsford
	USA - New York	Liston Abramson LLP