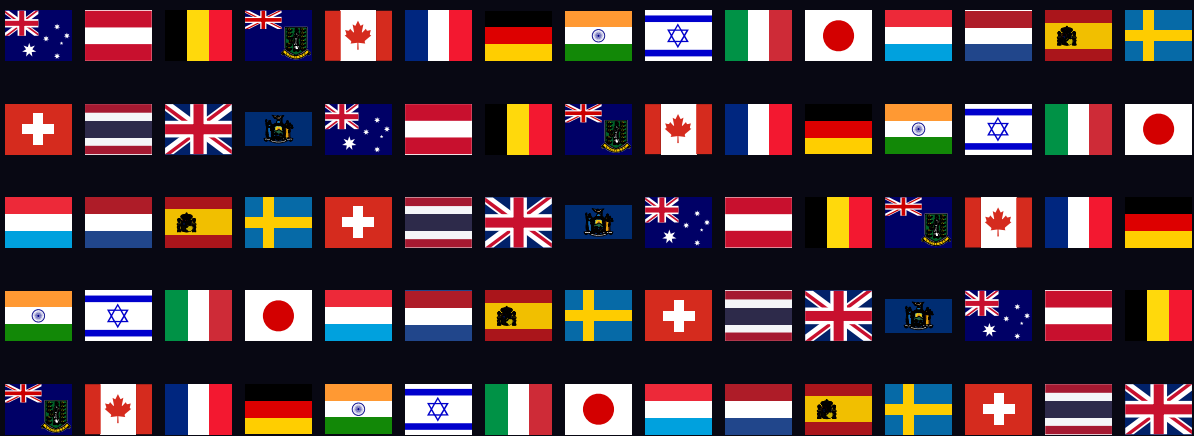


# LITIGATION FUNDING

## Luxembourg



# Litigation Funding

Consulting editors

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*Woodsford*

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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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## Table of contents

### **REGULATION**

Overview

Restrictions on funding fees

Specific rules for litigation funding

Legal advice

Regulators

### **FUNDERS' RIGHTS**

Choice of counsel

Participation in proceedings

Veto of settlements

Termination of funding

Other permitted activities

### **CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

Conditional fees

Other funding options

### **JUDGMENT, APPEAL AND ENFORCEMENT**

Time frame for first-instance decisions

Time frame for appeals

Enforcement

### **COLLECTIVE ACTIONS**

Funding of collective actions

### **COSTS AND INSURANCE**

Award of costs

Liability for costs

Security for costs

Insurance

### **DISCLOSURE AND PRIVILEGE**

Disclosure of funding

Privileged communications

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

**Other issues**

**UPDATE AND TRENDS**

**Current developments**

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## REGULATION

### Overview

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. Further, 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, while it is impossible to say at what level.

*Law stated - 28 September 2022*

### Restrictions on funding fees

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, and therefore subject to applicable general contract law.

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.

*Law stated - 28 September 2022*

### Specific rules for litigation funding

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. Further, specific rules of professional conduct governing the attorney-client relationship affect the third-party funding relationship.

*Law stated - 28 September 2022*

### Legal advice

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 of relying solely on contingency fees, the duty of professional secrecy and the duty of independence are the most relevant 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. However, the amended law of 10 August 1991 on the legal profession allows the attorney to disclose information covered by professional secrecy under specific conditions. Further, 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.

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.

*Law stated - 28 September 2022*

## Regulators

### 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 the 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). We are not aware of any plans to this end on the day this article is written.

Further, 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, should a dispute arise that involves the attorney.

*Law stated - 28 September 2022*

## FUNDERS' RIGHTS

### Choice of counsel

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

In principle, clients are completely free in regard to their choice of counsel. Of course, from a practical point of view, a third-party funder may present a funded party with recommended 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 of the third-party funder and must be able to act freely of any instructions from the latter.

*Law stated - 28 September 2022*

## Participation in proceedings

### 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.

On 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 parties.

*Law stated - 28 September 2022*

## **Veto of settlements**

### **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. It is common practice to include in the funding agreement a funder's right to be consulted in relation 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. On the other hand, there are also funding agreements that do not include any veto right of the funder with respect to settlements, especially if the funder's fee is calculated on the basis of a time-dependent multiple of the amount invested or committed.

*Law stated - 28 September 2022*

## **Termination of funding**

### **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 practice, a funder would only terminate funding if the prospects of success have become so low that the funder may not even get back his investment. In the event of termination, the funder will bear any costs incurred until the termination, as well as costs caused as a result of the termination.

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 right to terminate the funding after due notice and would not be obliged to cover the costs of the ongoing proceedings. Further, in the event of a material and irreparable breach entitling the funder to terminate funding without notice, the funded party may even be obliged to reimburse the funder for its costs and expenses.

*Law stated - 28 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?**

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 object to 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

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

In Luxembourg, attorneys' fees are not subject to any imposed 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 or her fees and bear his or her professional expenses. In exercising this option, however, the attorney must act with moderation and avoid any abuse. Consequently, various elements must be taken into account, such as the importance and the complexity of the case, the result achieved as well as the client's financial situation.

Pure contingency fees are prohibited in Luxembourg. Nonetheless, the attorney is allowed to claim an additional success fee in case of success. The right of an attorney to claim such success fee does not have to be provided for by an explicit agreement, though it is highly recommendable to do so. The success fee must be proportionate in relation to the fees claimed for the work performed. Otherwise, it can be reduced. 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 reasonably expected.

In any event, the attorney must not exaggerate when determining the final fee. In the case of a dispute, the President of the Bar will decide on the basis of a taxation procedure what amount should reasonably be paid to the lawyer. Should the attorney disregard such decision, he or she may be subject to disciplinary proceedings.

*Law stated - 28 September 2022*

### Other funding options

#### 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 disputes 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 their 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.

*Law stated - 28 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?

In our experience, in commercial matters, the average duration of proceedings on the merits from the date of the summons to a first-instance judgment is one to two years.

However, the duration of a case varies depending on the type of proceedings. While civil proceedings require a written procedure that takes more time, especially in the context of complex cases, commercial proceedings are largely dealt with orally and therefore considerably faster.

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

*Law stated - 28 September 2022*

## Time frame for appeals

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

No published 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 18 months to two years from filing an appeal to obtaining a judgment on appeal.

No publicly available information exists as to the number of annulments of arbitral awards rendered in Luxembourg.

*Law stated - 28 September 2022*

## Enforcement

### 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 or forcing bankruptcy). In principle, however, it should be noted that a judgment given by a Luxembourg court is enforceable without a visa, provided that it is final and enforceable and that the rendering judge has not suspended its enforcement.

*Law stated - 28 September 2022*

## COLLECTIVE ACTIONS

### Funding of collective actions

#### 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 are in the process of being introduced in Luxembourg.

The draft bill 7650 submitted on 14 August 2020 to the Luxembourg Parliament intends to introduce class actions in the field of consumer law. For the time being, the draft bill is still being discussed, and it appears from the opinions submitted by the different stakeholders so far in the legislative process that some issues will require further

clarification and possible amendments.

Under the current Luxembourg procedural rules, related actions may under certain conditions be grouped together for a joint judgment of the court. However, 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 current absence of a statute 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. Further, 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).

*Law stated - 28 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?

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 successful party has made a request to that effect, expressly asking for the opposing party to be ordered to pay a lump sum for costs, either in the summons initiating the proceedings or at a later stage especially if required by defendant.

If such a request has been made, it is for the judge to assess whether it is well grounded. Article 240 of the New Code of Civil Procedure provides that the judge may order a party to pay a certain amount where appropriate. These sums concern mainly the attorney's fees. Only the prevailing party can obtain compensation on the basis of Article 240 of the New Code of Civil Procedure. Thereby, 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. The determination of the amount is in the sole discretion of the judge. In any event, the procedural indemnity is systematically only symbolic and covers a part of the lawyer's fees (usually the procedural indemnity ranges from €500 to €5,000).

It should be noted that in accordance with case law of the Luxembourg Court of Cassation, a claimant may claim full compensation for its actual legal costs if it can be demonstrated that, in addition to the conditions of damage and causation, there is a fault on the part of the defendant in relation to the legal basis of its action.

Unlike attorneys' fees and expenses, the costs directly incurred by the claimant with regard to the initiation of the proceedings (such as bailiff's fees and translation costs) can be recovered from the unsuccessful party without further conditions. No specific request in this respect is needed; the judge must, however, expressly specify who has to bear the costs.

## Liability for costs

### 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 earlier).

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, not being a party to the litigation funding agreement, has no enforceable right against the funder.

Law stated - 28 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 Luxembourg, a defendant cannot request the court to order the claimant to provide security for costs. However, if the claimant 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.

Law stated - 28 September 2022

### 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. This being said, the existence of a funder should remain without consequence on the court's decision on security for costs.

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 (eg, 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.

Law stated - 28 September 2022

## Insurance

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

ATE insurance is not used in Luxembourg, and to our knowledge not available on the local market, although no legal or regulatory restrictions limit this type of product. Should a funder offer an exclusive solution for the coverage of adverse costs by way of ATE insurance, ATE insurance could of course be included in the litigation funding agreement (one-stop shop).

**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?

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 exists, and 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 (eg, 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.

*Law stated - 28 September 2022*

**Privileged communications**

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

Subject to legal privilege, attorneys 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.

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.

*Law stated - 28 September 2022*

**DISPUTES AND OTHER ISSUES****Disputes with funders**

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.

*Law stated - 28 September 2022*

**Other issues**

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 open and without guidance. 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.

*Law stated - 28 September 2022*

## UPDATE AND TRENDS

### Current developments

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

Compared to 2020 and 2021, 2022 was a rather quiet year in terms of legal developments.

The main focus in the legislative sphere has been the introduction of a wide-ranging reform of Luxembourg's civil procedure, which came into force on 16 September 2021. The reform was implemented in light of the increasing number and complexity of cases pending before the courts and aims to strengthen civil and commercial justice by optimising existing procedures and creating new ones, all with a view to making justice more accessible, swift and efficient.

In addition, Luxembourg is in the process of introducing class action procedures. This will finally allow a group of consumers to bring a single action against the wrongful conduct of a trader, thus avoiding costly and time-consuming individual actions. For the time being, however, the draft law is still under discussion.

As regards third-party litigation funding, Luxembourg remains relatively underdeveloped in this area.

However, as the litigation funding market develops in other EU jurisdictions Luxembourg is likely to join this trend. Indeed, at the EU level, the first incentives appear. For example, in June 2021, the European Parliament's Legal Affairs Committee published a draft report containing recommendations to the Commission on responsible private litigation funding.

Further, with the growing interest in the enforcement of arbitral awards against sovereign states in Luxembourg, it is expected that the relevance and use of third-party funding will increase further in Luxembourg. Investment loss and financial services disputes, as well as commercial arbitrations, seem to be the most fertile practice areas in Luxembourg for the use of third-party funding in the near future.

*Law stated - 28 September 2022*

## Jurisdictions

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