PANORAMIC

LITIGATION FUNDING 2025

Contributing Editors

Jonathan Barnes and **Steven Friel**

Woodsford

LEXOLOGY

Litigation Funding 2025

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Panoramic guide (formerly Getting the Deal Through) 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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Third-party funding in international arbitration

Steven Friel and **Charlie Morris**

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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 guide'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 fee 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) updated its rules on a variety of key topics, it included new rules on third-party funding because it had noted an 'increased resort' to funding.

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 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 extended its third-party funding framework through the Civil Law (Third-Party Funding) (Amendment) Regulations 2021 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 has introduced a set of guidelines for third-party funding, with which funders will be expected to comply, and the Singapore International Arbitration Centre (SIAC) is in the process of finalising the latest edition of its rules, the draft of which includes a new provision (Rule 38) to deal with third-party funding.

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 of arbitration 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 that regulates a funder's conduct on a variety of matters, including capital adequacy, disclosure and the funding agreement.

Until recently 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 that the common law prohibitions on maintenance and champerty remain in force in Ireland, thereby restricting the availability of third-party funding. However, even those jurisdictions are now changing their approach, and arbitration has emerged as a fertile testing ground. In July 2023, the Courts and Civil Law (Miscellaneous Provisions) Act 2023 was signed into law in Ireland, which sees the restrictions of champerty and maintenance removed in respect of dispute resolution proceedings, that is to say, international commercial arbitration and any proceedings arising out of it (ie, in the High Court in Ireland) that are either seated in Ireland or subject to Irish law and seated in another EU member state. The law also provides for the introduction of criteria, including those relating to transparency, which provide that if met, a third-party funding contract 'shall not, insofar as it relates to dispute resolution proceedings, be treated as contrary to public policy or otherwise illegal or void'. The Law Reform Commission's wider consideration of third-party funding is ongoing, its consultation having closed in late 2023. If the experience of other jurisdictions is anything to go by, this may be the first step towards a more general acceptance of third-party funding in Ireland. Similarly, in May 2023, the Arbitration and Mediation Act was signed into law in Nigeria, thereby abolishing the torts of champerty and maintenance for third-party funding in respect of both Nigeria-seated arbitration and proceedings arising out of such arbitration in Nigerian courts.

In India, the courts have reflected increasing acceptance among both the judiciary and government of arbitration as a dispute resolution mechanism and that 'third-party funding is essential to ensure access to justice' through the decision of the High Court of Delhi on appeal in *Tomorrow Sales Agency Private Limited v SBS Holdings* FAO(OS) (Comm) No. 59/2023, which, in holding that a funder could not be held liable for adverse costs in circumstances where it was not a party to the arbitration, overturned an earlier 2019 decision in the same case.

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 in arbitration. This view was affirmed through the passage of the Arbitration Act 2023 in Luxembourg, which is silent on third-party funding, primarily because there is no legal prohibition on third-party funding and such funding has previously been used within the jurisdiction without issue. However, given the substantial use of arbitration in many civil law countries, we may soon see more explicit codification being adopted, 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. Likewise, while the Dubai International Arbitration Centre (DIAC) Rules 2007 were silent on the issue, the 2022 Rules explicitly address third-party 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 remains 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.

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 to avoid potential conflicts. Accordingly, in the last several years, a number of jurisdictions, arbitral institutions and organisations have offered specific rules or guidance on this matter, summaries of which follow.

It is perhaps surprising, therefore, that the issue of disclosure in respect of third-party funding was not identified as a potential area of review by the Law Commission in its

consideration of the English Arbitration Act 1996 and forms no part of its Final Report and Bill on the proposed amendments to the Arbitration Act 1996 (published 6 September 2023), or the Arbitration Bill 2024, which is now making its way through Parliament. Rather, the Commission has taken the view that the point is already sufficiently covered by its consideration of obligations relating to impartiality and disclosure more generally, while also citing the favourable treatment of funding by the High Court in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) and *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm) (both of which are considered further, below), as mitigating against the need for review by the Commission.

ICSID Rules

Drafted over a five-year consultation process involving no fewer than six working papers, the most recent ICSID Rules entered into force on 1 July 2022. Consistent with the trend among other institutions, the Rules increase transparency, including in respect of disclosure of third-party funding arrangements. The new Rule 14(1) is broad in that it requires disclosure not only of the existence of a funding arrangement, but also of 'a written notice disclosing the name and addresses of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding")' and further, '[i]f the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person'. The definition and scope of what constitutes third-party funding is therefore wide and includes arrangements that may exist with parties' representatives, such as contingency fee arrangements. The timing for doing so also comes early, in that Rule 14(2) requires that such notice must be filed 'upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration'. The duty of disclosure is ongoing inasmuch as the 'party shall immediately notify the Secretary-General of any changes to the information in the notice'. Rule 14(3) provides that the information is to be transmitted 'to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b)'. Rule 14(4) states that the 'Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3)', the latter of which concerns general principles of disclosure of evidence. The effect of this provision is, on the one hand, to avoid the need for a general duty to disclose the terms of a funding agreement, but it also allows for disclosure of this more sensitive information on the other; an example might be where a party appears to be financially distressed and an application for security for costs is brought.

International Court of Arbitration of the International Chamber of Commerce

While less onerous than ICSID, the International Court of Arbitration of the International Chamber of Commerce (ICC) requires, through article 11(7), that each party 'must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party that has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration'. The Note to

Parties and Arbitral Tribunals on the Conduct of the Arbitration (1 January 2021), which accompanied the 2021 Rules, noted that this was to assist arbitrators and prospective arbitrators to comply with their duty of disclosure (see paragraphs 20 and 32). It also clarified at paragraph 21 that article 11(7) would not normally capture:

- inter-company funding within a group of companies;
- fee arrangements between a party and its counsel; or
- an indirect interest, such as that of a bank having granted a loan to the party in the ordinary course of its ongoing activities rather than specifically for the funding of the arbitration.

Singapore International Arbitration Centre

While SIAC's Investment Arbitration Rules do not mandate disclosure of the existence of a third-party funding arrangement as a matter of course, Rule 24(l) grants a power to the tribunal to 'order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability'. It is, however, likely that this position will change, for in August 2023, SIAC released a draft 7th edition of its Rules for consultation, draft rule 38 of which requires the parties to disclose the existence of a third-party funding agreement and the identity of the third-party funder; it also stipulates that parties may not enter into a third-party funding agreement that would give rise to a conflict of interest for an arbitrator. These are expected to be finalised and come into force in 2024.

Hong Kong International Arbitration Centre

Article 44 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 to all parties, the arbitral tribunal, any emergency arbitrator and HKIAC of the fact that a funding agreement has been made and must disclose the identity of the third-party funder. Where a funding agreement is made on or before the commencement of the arbitration, it must be communicated in the application for the appointment of an emergency arbitrator, the Notice of Arbitration, the Answer to the Notice of Arbitration, the Request for Joinder or the Answer to the Request for Joinder (as applicable); where a funding agreement is made afterthe commencement of the arbitration, it must be communicated as soon as practicable after the funding agreement is made. These provisions have been retained, unamended, in the 2024 Hong Kong International Arbitration Centre Administered Arbitration rules, which entered into force on 1 June 2024.

Malaysia

In July 2024, the Arbitration (Amendment) Bill 2024 was passed; when it comes into force, it will make several key changes to the Malaysia Arbitration Act 2005, including

provisions relating to third-party funding in arbitration. This will bring Malaysia into line with other jurisdictions in the region, such as Singapore and Hong Kong. It introduces new provisions that provide a framework for regulating the use of third-party funding in Malaysia, including the creation of disclosure and transparency obligations aimed at avoiding conflicts of interest.

Nigeria Arbitration and Mediation Act

Nigeria has joined Singapore and Hong Kong in being one of the few jurisdictions to promulgate express legislation to deal with third-party funding through the signing into law of the Arbitration and Mediation Act 2023, which applies learning from experience in other jurisdictions, and deals directly with a number of issues that have given rise to questions and discussion elsewhere, including disclosure obligations vis-à-vis third-party funding. Section 62 of the Act requires that the funded party must disclose the name and address of the funder to the other parties, the tribunal and the arbitral institution on or before the commencement of the arbitration, or where proceedings have already commenced, immediately following the execution of the funding arrangement.

China International Economic and Trade Arbitration Commission

While Chinese law remains silent on third-party funding and consequently, it continues to be subject to judicial discretion, the 2024 revisions to the China International Economic and Trade Arbitration Commission (CIETAC) tribunal Arbitration Rules (which came info effect on 1 January 2024) deal, for the first time, with third-party funding in arbitration. Article 48 now requires the party receiving funding to disclose, without delay, information relevant to CIETAC, including the third-party funder's name, address and factual and economic interest in the case, which will then be forwarded to the tribunal. The amendments also introduce tribunal powers to order the funded party to disclose such additional information regarding funding as it deems necessary. When making decisions on costs, the tribunal shall take into consideration the funding arrangement and compliance with the disclosure requirement.

The China International Economic and Trade Arbitration International Arbitration Investment Rules (2017) – which deal specifically with international investment disputes – remain in force and deal with third-party funding at article 27, which 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 'the disclosure by the party accepting the funding of any relevant information of the third-party funding arrangement'.

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 the funding or financial assistance', although it 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

In November 2022, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) issued its updated rules, which provide greater certainty and bring together rules that were previously contained in various Administrative Resolutions, such as No. 18 (2016), which dealt with third-party funding. Article 7 mandates that the party that wishes to commence an arbitration shall submit a request for arbitration to the CAM-CCBC, which shall contain, among other things, information on related parties and third-party funding. Article 8 deals with what the other party must do and it too is subject to the same obligations in respect of funding. Article 9.6 requires that the parties must promptly disclose the existence of third-party funding to allow the arbitrators to verify and disclose any conflict of interest and article 9.7 prohibits the parties, 'throughout the proceedings, from creating any incidental fact that characterises impediment of one or more arbitrators, including under the claim of alteration of their respective representation, funding, or assistance, and the Arbitral Tribunal or the CAM-CCBC shall in any case adopt the appropriate measures'.

DIAC

DIAC is now Dubai's sole arbitration centre and rules, which came into force in March 2022, expressly deal with litigation funding at article 22, which requires prompt disclosure of the fact that a party has entered into a third-party funding agreement prior to the constitution of the tribunal, as well as the identity of the funder and any adverse cost commitment. The rules also require that after the constitution of the tribunal, the parties shall not enter into third-party funding arrangements if the consequence will or may give rise to a conflict of interest with any member of the tribunal; where a third-party funding arrangement is entered into, the same disclosures are required.

Vienna International Arbitration Centre

The Vienna International Arbitration Centre (VIAC) 2021 Rules of Arbitration and Mediation specify not only that a party shall disclose 'the existence of any third-party funding and the identity of the third-party funder in its statement of claim or its answer to the statement of claim, or immediately upon concluding a third-party funding arrangement', but also that the tribunal may, if it deems it necessary, order the disclosure of specific details relating to the funding arrangement, the funder's interest in the outcome of the proceedings and whether the funder has committed to bear some or all of any adverse costs liability.

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.

International Bar Association

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 were updated in 2024 and define at General Standard 7 the parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party as including group companies, individuals having a controlling influence on the party, or legal or natural persons having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the General Standards, might affect the arbitrator's impartiality or independence.

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 resorting to the relevant law of the seat of the arbitration (or potentially the substantive law of the dispute).

While the rules of the major arbitral institutions have, for the most part, tended not to address this issue expressly, revisions and updates to rules may present useful opportunities to address questions relating to confidentiality and privilege. The HKIAC Rules, which are based on section 98 of the Arbitration Ordinance, do 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)). More recently, the November 2022 updates to the CAM-CCBC Rules dealt with confidentiality explicitly at article 39, but provide for exceptions, including where provided for by law, other applicable legal rules or by express agreement between the parties, and article 39.1.1 also allows for the production in legal proceedings of documents related to the arbitration proceeding that prove necessary to protect the right of the party involved in the arbitration case, which does not constitute a violation of the duty of confidentiality. While disclosure to funders is not expressly dealt with, it is clear from the text of the Rules that engagement, by one or more of the parties, with funders is expressly envisaged from the outset.

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 to be disclosed in 'exceptional circumstances'. Moreover, the Task Force Principles note that 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 that 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, on 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' (namely, 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)).

Significantly, particularly in circumstances involving improper conduct on the part of the respondent, a funded claimant may be able to recover not only the costs of the arbitration but also the premium or success fee paid to the funder. For example, in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), the English High Court, which had supervisory jurisdiction, reviewed the decision made in an ICC arbitration seated in London to award the claimant (Norscot) not only its legal costs of the arbitration, but also the cost of paying the funder, Woodsford, the funder's 'success fee' on the basis that the respondent had caused the claimant's impecuniosity and effectively 'forced' it to seek funding. The respondent challenged the award on the basis that the arbitrator erred in concluding that he had jurisdiction to award such costs as 'other costs', but the English High Court upheld the award. The approach adopted in *Essar* was confirmed by the High Court in *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm). Costs were awarded in respect of a litigation funding agreement that included a fixed fee and a variable fee, which was payable in the event of a successful outcome, plus compound interest on that loan at 9 per cent, already accrued and continuing until payment. TFM sought to distinguish *Essar* as the fees had been advanced by way of a shareholder loan by one of KCS's own shareholders, albeit pursuant to a 'litigation funder agreement'. TFM submitted that, on the present facts, there was no reason to follow the decision in *Essar* and the tribunal was therefore not entitled to award the funding costs as part of the 'costs of the arbitration' and that doing so was in excess of the powers of the tribunal. The decision not to allow cross-examination on the funding agreement was also raised. In rejecting the application, it was held that the issue was whether the type of funding was reasonable, not whether it could have been obtained elsewhere, and that the tribunal was entitled to reach the decision that cross-examination was not necessary. The starting point was that TFM had to show that the tribunal had gone so far wrong in the conduct

of the arbitration that 'justice calls out for it to be corrected'. A further important issue is the relevance, if any, of third-party funding in connection with a tribunal's consideration of security for costs applications. While each jurisdiction or tribunal has different rules that apply to such applications, in general, unless a tribunal establishes a likelihood that costs could, in principle, be awarded against an unsuccessful claimant, it cannot make a decision on security for costs applications. Moreover, a tribunal will often lack the jurisdiction to make an order for security for costs against a funder that is not a party to the arbitration agreement.

Respondents seeking a security for costs application sometimes argue that the fact that a party has sought funding is evidence of impecuniosity or that it will render it less likely to be able to satisfy an award of costs in the event the claim fails. But third-party funding is frequently used by parties that are solvent and, in any event, such funding is generally provided on a non-recourse basis and therefore does not compromise a party's financial position if the claim is lost. As such, there is a growing consensus, particularly in investor-state arbitration, that the mere fact that a party has obtained third-party funding is not, by itself, a reason to justify a security-for-costs order (see *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015); *South American Silver Limited v The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2013–15), Procedural Order No. 10 (11 January 2016); *Guaracachi & Rurelec v Bolivia* (UNCITRAL, PCA Case No. 2011–17), Procedural Order No. 14 (11 March 2013)). However, in two 'exceptional' matters, the existence of third-party funding has been an important – but not the sole – factor in the ultimate decision to order security for costs. In *RSM Production 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.

The updated ICSID Rules state that the tribunal shall consider 'all relevant circumstances' in determining whether to order a party to provide security for costs, and that it shall consider all evidence adduced in relation to the relevant circumstances, 'including the existence of third-party funding' (Rule 53). The new DIAC rules are also express in stating that the tribunal may take into account the existence of any third-party adverse costs liability when apportioning the costs of the arbitration between the parties. More recently, the Nigerian Arbitration and Mediation Act has taken a pragmatic approach to the issue of costs in allowing that the funded party or its counsel may provide the tribunal with an affidavit confirming whether or not the funder has agreed to cover adverse costs, with such information to form part of any consideration of whether to order that security for costs be provided.

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Overview

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

Third-party litigation funding is permitted in Australia and is commonly used in single-party, insolvency-related and class action litigation.

The High Court of Australia, in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386 (*Fostif*) held that third-party funding per se was not contrary to public policy or an abuse of process. *Fostif* did not, however, consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished (being at the time Queensland, Western Australia, Tasmania and the Northern Territory). The torts of maintenance and champerty prohibit an unrelated third-party from litigation funding or profiting from litigation in which they have no interest. The torts are intended to protect against interference in the litigation process for gain.

In relation to Queensland, in *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No. 4)* [2019] QSC 228, Justice Crow found, 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: *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors* [2020] QCA 250. In relation to Western Australia, the Civil Procedure (Representative Proceedings) Act 2022 (WA), abolished the torts of maintenance and champerty. In Tasmania, the torts were abolished by the Justice and Related Legislation (Miscellaneous Amendments) Act 2015 (Tas) which introduced section 28E(ba) and (bb) into the Civil Liability Act 2002(Tas) abolishing maintenance and champerty as tortious actions at common law. The purpose was so that uniform national rules could be introduced in relation to litigation funders. In the Northern Territory, no legislation has been passed to abolish the torts of maintenance and champerty and as such, they remain on foot.

The available statistics about class action filings show that in the period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court of Australia were funded. This increased substantially in the years following, with the percentage of funded class actions in the year ending 30 June 2018 growing to 74.1 per cent. However, recent statistics demonstrate a drop in funded class actions, with the number of funded class actions in the year ending 30 June 2023 decreasing to 41.5 per cent.

The overall decrease in the number of funded class actions since 2018 may be the result of the numerous regulatory changes introduced regarding third-party litigation funding in recent years and the uncertainty regarding the Court's ability to make common fund orders, arising out of the decisions in *BMW Australia Limited v Brewster* (2019) 269 CLR 574, *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501 and *Davaria Pty Ltd v*

7-Eleven Stores Pty Ltd (No 13) [2023] FCA 84. A further reason for the overall decline is likely the arrival of the group costs order (GCO) regime in the Supreme Court of Victoria, which allows law firms to be paid a contingency fee pursuant to a court order, meaning that some plaintiff firms have opted to pursue class action litigation without the involvement of a litigation funder. This shift is represented in the location of filing of new class actions, with 35.8 per cent of all new class actions filed in the year ending 30 June 2023 being filed in the Supreme Court of Victoria, almost doubling from the previous year (19.6 per cent).

Law stated - 27 September 2024

Restrictions on funding fees

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

There is presently no legislation in Australia that limits the fees that funders can charge as a remuneration for the risks undertaken in funding the litigation. While in the past there have been calls for the regulation of funding commissions, including through a draft bill proposed by the former Liberal government in 2021 to impose a statutory minimum return for group members, the bill failed to pass the Senate before the 2022 federal election. The impact of such a reform on a funders' fees and interest would have been significant. No efforts have been made to reignite the bill since the ascension of the Labor government to power following the 2022 federal election, and it would seem unlikely given the general policy of the Labor government to roll back other changes introduced by the Coalition regarding the legislative regulation of litigation funding.

Outside of government regulation, the courts have a supervisory role in the approval of funded class action settlements (including the amounts allocated for the payment of a funder's fee). The applicable legal costs or litigation funding charges in class actions must be disclosed to group members (often at the time of the opt out notice) and the court. The lead plaintiff is also required to disclose a copy of applicable costs agreements or a litigation funding agreement (or both) to the other parties, which may be redacted to the extent the respective agreement contains information that might reasonably be expected to confer a tactical advantage, such as war chest information.

According to the High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386, contract law considerations such as illegality, unconscionability and public policy may arise, but there is no objective standard against which the fairness of litigation funding agreements may be measured. Accordingly, whether a clause in a litigation funding agreement contravenes public policy is to be answered with regard to the circumstances of each particular case.

Australian courts can exercise equitable jurisdiction to set aside litigation funding agreements. For example, where the funder's interest constitutes an equitable fraud, in the sense that it involves 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. Bargains may be set aside where terms are harsh, unfair or unconscionable. Funded litigants may also rely on prohibitions against unconscionable and misleading or deceptive conduct in their dealings with litigation funders by virtue of the general consumer protection provisions

in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

When it comes to the quantum of the funder's commission, generally Australian courts will either make a 'common fund order' (CFO), or a 'funding equalisation order' (FEO). Pursuant to a CFO, the quantum of a litigation funder's remuneration is fixed as a proportion of any amount ultimately recovered in the proceeding, for which all group members bear a proportionate share of that liability. Thus, a CFO 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. In contrast, an FEO requires unfunded group members to contribute to the total commission payable by the funded group members under their funding agreements. This means all group members (both funded and unfunded) contribute equally to the commission, but the funder receives the same commission as if they had fully recovered under the funding agreements with only funded group members.

The purpose of both CFOs and FEOs is the equitable distribution of the costs of prosecuting the claim on behalf of the group, such that unfunded group members must also contribute to the costs of the claim, including the funder's fee. In 2019, the High Court in *BMW Australia Limited v Brewster; Westpac Banking Corp v Lenthall* (2019) 269 CLR 574 (*Brewster*) held that there is no power to make CFOs prior to a settlement, however, the decision left open the question of whether a CFO could be made on settlement or judgment. While some judges have declined to make CFOs at settlement based on the reasoning in *Brewster* (see, eg, *Cantor v Audi Australia Pty Limited (No. 5)* [2020] FCA 637 and *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84) many common fund orders have been made since *Brewster* in the context of a settlement approval (see, eg, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625; *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No. 3)* [2020] FCA 461).

In *Elliott-Carde & Anor v McDonald's Australia Ltd* (2023) 301 FCR 1 and *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493, the Full Court of the Federal Court confirmed that there is power pursuant to section 33V(2) of the Federal Court of Australia Act 1976 (Cth) to make a common fund order at settlement.

Since then, special leave applications to the High Court have been filed by the respondents in *R&B Investments Pty Ltd atf the R&B Pension Fund & David Furniss v Blue Sky Alternative Investments & Ors (Blue Sky)*. Former Blue Sky director Robert Shand and Blue Sky's auditor, Ernst & Young, are seeking to set aside a decision of the Full Federal Court (*R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89), which found that the Federal Court has power to make an order that solicitors be granted a percentage of the proceeds of a class action at the point of settlement or judgment, known as a 'solicitors' CFO'. The special leave application asks the High Court to determine whether the Federal Court has power to make a common fund order on settlement or judgment at all, as well as whether that power extends to solicitors' CFOs. The appeal has not yet been listed for hearing, but the outcome will likely have significant ramifications for the funding industry.

Examples of where FEOs in lieu of CFOs have been ordered include *Zantran Pty Limited v Crown Resorts Limited (No 4)* [2022] FCA 500 (*Zantran*)and *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 (*Estia Health*-). In *Zantran*, despite thefunder seeking a 25 per cent CFO, his Honour Justice Beach considered the funder would be adequately rewarded by an FEO, which would also be more

beneficial to the group members. It should be noted however that the FEO still equated to 25.16 per cent of the settlement monies. In *Estia Health*, an FEO was sought and approved, resulting in the contractually agreed funding commission being distributed pro rata across all group members who participated in the settlement.

Law stated - 27 September 2024

Specific rules for litigation funding

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

In 2009, the High Court in *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 (*Brookfield*) held that in certain circumstances, a litigation funding scheme may constitute a managed investment scheme (MIS) within the meaning of section 9 of the Corporations Act 2001 (Cth). Following this decision, in 2012, the federal Labor 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.

In August 2020, regulations were introduced that had the effect of removing this exemption, meaning third-party litigation funders were required to hold an Australian Financial Services Licence (AFSL) or be an authorised representative of an AFSL holder.

In June 2022, in *LCM Funding Pty Ltd v Stanwell Corporation Limited* (2022) 292 FCR 169, the Full Court of the Federal Court unanimously held that litigation funding schemes are not MIS's within the meaning of section 9 of the Corporations Act 2001 (Cth) and that the decision in *Brookfield* was 'plainly wrong'.

In December 2022, the federal government announced the commencement of the new litigation funding regulations, the Corporations Amendment (Litigation Funding) Regulations 2022(2022 Regulations). The 2022 Regulations provide litigation funding schemes with an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of the Corporations Act 2001 (Cth). The Australian Securities and Investment Commission (ASIC) also extended relief to litigation funding schemes until January 2026 in relation to two matters not addressed by the 2022 Regulations. Specifically, the ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37 provides relief from the application of the National Credit Code in Schedule 1 to the National Consumer Credit Protection Act 2009 (Cth) to litigation funding arrangements and proof of debt arrangements, while the ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 provides relief from the requirements in Chapters 5C (MIS) and 7 (AFSL and disclosure) of theCorporations Act 2001(Cth) to litigation funding arrangements where the members wholly or substantially fund their legal costs under a conditional costs agreement.

As providers of financial services, litigation funders are also required to manage any conflicts of interest. ASIC's Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations.

Separately, the Federal Court of Australia's Class Actions Practice Note (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 plaintiffs, the group members, the plaintiff's lawyers and any litigation funder. Similar practice notes operate in New South Wales, Queensland, Victoria and Western Australia.

Law stated - 27 September 2024

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 judgment 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 their client and their primary duty as an officer of the court.

While not explicitly required by legislation, it is increasingly common that lead plaintiffs in a funded class action are provided with (or at least offered the opportunity to obtain) independent legal advice on the terms and effect of funding agreements prior to the commencement of any litigation. This can help to avoid any suggestion of conflict between the legal practitioner's duties.

In addition, both federal and state class action regimes require that any settlement of a class action must be approved by the court. These legislative powers provide a level of discretion to the courts to moderate the legal and other professional costs incurred in the conduct of the litigation, the third-party funder fees and interest, and to enquire into the probity of the funding arrangements. In this context, the conduct of lawyers and third-party litigation funders has become increasingly scrutinised with any issues usually coming to light during applications for settlement.

An example of how the settlement approval process can expose ethical violations and professional misconduct arose in relation to the approval of the settlement of a class action in *Bolitho v Banskia Securities Ltd (No 18) (remitter)* [2021] VSC 666 (*Banskia Securities*). At the instigation of a group member, the Court embarked on a wide-ranging enquiry into the integrity of the barristers, solicitors, client and funder relationships and the professional fees rendered.

Describing the situation as 'one of the darkest chapters in the legal history of this State', Justice Dixon found that the funder, the barristers and the solicitors acting for the group members all engaged in egregious conduct in connection with a fraudulent scheme designed to significantly inflate legal costs and overcharge their clients. Dixon J considered that their conduct corrupted the proper administration of justice, misled the Court and

damaged confidence in legal professionals and the expectation that they will act honestly. As a result of Dixon J's judgment, the funder, barristers and solicitors were ordered to pay damages to the group members of A$11.7 million plus costs of over A$10 million. Dixon J also ordered that the barristers be removed from the roll of persons admitted to the legal profession and that the solicitors show cause as to why they were still fit and proper to remain on the roll. Dixon J also referred his findings to the Director of Public Prosecutions for any potential criminal investigation.

A feature of the *Banksia Securities* class action, which is also reflected in other recent cases, is the willingness of the Court to appoint contradictors as independent counsel to represent the interests of group members in the settlement approval process. Contradictors have also increasingly taken on a more active role in the settlement approval process, with examples including the contradictor in *Banksia Securities*, who cross-examined various witnesses, and in *Gill v Ethicon Sal (No 12)* [2023] FCA 902, where the contradictor opposed the class action lawyers recovering the full amount of the legal costs sought on the grounds the amount was not fair and reasonable to group members.

Law stated - 27 September 2024

Regulators

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

Regulators including the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) have an interest in or oversight over third-party litigation funding. Both ASIC and the ACCC regulate the conduct of Australian companies, including litigation funders. Industry and professional bodies also play a part, such as the Association of Litigation Funders Australia (AALF) and International Legal Finance Association (ILFA).

Litigation funders are subject to ASIC regulatory oversight, with penalties attached to instances of non-compliance. In July 2021, ASIC released a Consultation Paper on Litigation funding schemes: Guidance and relief (CP 345) that proposed to:

- provide definitional guidance for key terms in the managed investment scheme (MIS) regulatory regime as they apply to litigation funding schemes;
- grant relief from the equal treatment duty in relation to distributions of a settlement or judgment sum obtained in connection with a litigation funding scheme;
- extend relief from the dollar disclosure provisions in relation to certain commercially sensitive information; and
- not remake pre-August 2020 relief instruments, which were due to expire in January 2023.

In April 2022, ASIC extended the relief from certain dollar disclosures in product disclosure statements for litigation funding schemes inASIC Corporations (Disclosure in Dollars) Instrument 2016/767until 1 October 2026. The existing relief was due to expire on 28 April 2022. In December 2022, the federal government announced the

commencement of the new litigation funding regulations, theCorporations Amendment (Litigation Funding) Regulations 2022(2022 Regulations). The 2022 Regulations provide litigation funding schemes with an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of theCorporations Act 2001 (Cth).

The ACCC deals with allegations involving litigation funders breaching the Australian Consumer Law by engaging in misleading or deceptive conduct, or unconscionable conduct, for example when promoting class actions to potential clients or in relation to the operation of the funding agreements clients are required to sign.

AALF is comprised of litigation funder members and law firms who regularly operate in third-party funded litigation in Australia and together engage with government, legislators, regulators and other policymakers in relation to the regulatory environment for litigation funding in Australia. AALF has produced guidelines representing a best practice framework for standards and behaviour to be observed by its members. ILFA represents the global commercial legal finance community, including third-party litigation funders.

Law stated - 27 September 2024

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 arrangement, appoint the lawyers to provide the legal work, and the retainer 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.

Law stated - 27 September 2024

Participation in proceedings

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

Yes. It is permissible and indeed common for a 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, 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. This level of control over the litigation process is consistent with the principles in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 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 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 in the proceeding, including the reasonableness of the funder's commission, will be subject to court approval. The Federal Court of Australia's Class Actions Practice Note (GPN-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 for settlement approval. This is because in the course of the settlement approval application, the lead plaintiff will usually be seeking orders providing that a certain percentage of the recovery be paid to the funder to reimburse it for the costs expended, and its fee for funding the proceeding. This requires input from the funder as the courts 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, as this leads to unique conflicts of interest.

In *Ellis v Commonwealth of Australia* (2023) 411 ALR 578, the litigation funder obtained independent counsel for the settlement application. The funder was granted leave to intervene to be heard and sought approval for costs to be deducted from the settlement sum. The litigation funding agreement was tendered as evidence, and an affidavit by the litigation funder's CEO was read. The litigation funder's deductions represented 12.8 per cent of the total settlement amount. The Court was satisfied that the amounts sought by the litigation funder were reasonable given the significant risk assumed, and the costs of disbursements and adverse costs insurance premiums it funded. The case followed the decision in *Williamson v Sydney Olympic Park Authority* [2022] NSWSC 1618.

In *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2024] FCA 386*,* the funder of a competing proceeding, which had been stayed two years earlier following a carriage motion, intervened to recover a portion of their costs under section 33V(2) of theFederal Court of Australia Act 1976 (Cth). In that case, Justice Thawley allowed the funder to recover a portion of its claimed costs after finding it was 'just' for group members to bear these costs.

Concurrent proceedings have also led to independent funder intervention. In recent case management hearings regarding a settlement approval in *Excel Texel Pty Ltd (As Trustee For The Mandex Family Trust) & Anor v Frank Cullity Wilson* (Federal Court of Australia proceeding NSD1983/2017) (*Excel Texel*) the settled claims against the respondents included claims adopted from a separate class action which was heard concurrently with *Excel Texel*. The funder of the rival action intervened independently in order to seek costs from the settlement sum on the basis that it had funded the work carried out from the claim adopted by the applicants in *Excel Texel*.

Outside of a settlement context, a funder may be required to have some input into interlocutory steps in the proceeding, such as what information is included in notices to group members. For example, it is important that group members are notified of a funder's intention to seek a common fund order before one is sought. In a settlement approval application in *Wills v Woolworths Group Ltd* [2022] FCA 1545, Justice Beach rejected the funder's application for a common fund order as notice had not been provided to group members of the funder's intention to seek such an order. While his Honour noted that he had no difficulty with making a common fund order at settlement, given there was no notification to group members earlier in the proceeding, Justice Beach declined to make the order.

Funders must be careful, however, not to use notices issued to group members as an opportunity to drum up registrations. In an application for the approval of an opt-out notice in *Kerry Michael Quirk v Suncorp Portfolio Services Limited* (Supreme Court of New South Wales proceeding 2019/00193556), Justice Hammerschlag considered that the opt-out notice was being used by the funder to procure group 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.

Law stated - 27 September 2024

Veto of settlements

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

In class actions, it is usual for litigation funding agreements to prevent a funder from vetoing a settlement and any differences of opinion between a funder and a representative plaintiff 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 the terms of the funding agreement.

Law stated - 27 September 2024

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 or a material change to the legal merits or value of the claim. More recently, funding agreements have contained termination clauses that reflect developments in the class action landscape, such as clauses allowing the funder a

right of termination if a group costs order was not made in the proceeding. 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 will generally also apply.

It is also usual that the litigation funder will have responsibility to pay adverse costs and provide security for 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 (LCMLitigation Management Pty Ltd) terminated a litigation funding agreement that obliged LCM to satisfy orders for security for costs. Justice Beach 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.

A recent example of a litigation funder terminating funding was in *Laith & Fadi Investments Pty Ltd v Fogo Brazilia Holdings Pty Limited* NSWSC 2021/00245787, where Galactic, a New York-Based funder, terminated the litigation funding agreement. No information is available as to the basis of Galactic's decision to terminate funding. The class action is set to continue with the law firm, Levitt Robinson, running the action on a 'no win, no fee' basis.

Law stated - 27 September 2024

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. Decisions of Australian courts, especially in the class action context, follow *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 in being philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

Accordingly, it is common for funders to play an active role in the litigation process, and the various obligations of the funder in this respect are usually set out in the litigation funding agreement. For example, the funder is generally permitted to give day-to-day instructions to the lawyers running the proceeding and provide support to resolve the claims. In addition, the funder will often participate in other activities such as:

- strategic discussions;
- identifying and engaging service providers including counsel and experts;
- negotiating security for costs; and
- monitoring legal costs to ensure they are proportionate to the claimed amount in the action.

In a number of cases where the courts have considered a common fund order or other orders that could affect the funder's interest, the courts have permitted the funder to retain its own representation and appear to make submissions. This is often seen in the context

of settlement approval applications, where funders retain their own counsel to represent their interests.

This was evident in *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd (No 2)* [2023] FCA 643, where the claimed legal and funding costs were brought into question by Justice Rares. As the legal and funding costs sought would have substantially diminished the already limited settlement funds available for group members, the Court approved the settlement, but did not approve the costs, instead fixing the matter for a further hearing. At the further hearing the funder obtained independent counsel. The funder and the solicitors each put forward reduced cost figures, increasing funds available to group members, which were approved by the Court.

In recent years, there has been an increase in competing class actions being filed. Where a competing class action is filed, it is common for the parties to confer (and the courts often order they do so) in relation to whether consolidation or some other arrangement can be reached for the conduct of the proceedings, for example for one law firm to have carriage of the case but that firm be funded by each of the litigation funders. Given their vested interest in the outcome of this conferral, litigation funders are often involved in the discussions with the other firms and the other litigation funders providing funding to the competing cases, to try to come to a resolution.

Litigation funders may also take a proactive role with respect to the choice of lead plaintiffs and solicitors running the action. In the *Westconnex Resumption* class action (*Darren Mitchell v Roads and Maritime Services (now known as Transport for New South Wales*) (Supreme Court of New South Wales proceeding 2021/88654), a dispute arose between the funder of the action and the lead plaintiffs and solicitors, with the funder seeking to replace the solicitors and the plaintiffs. A similar dispute occurred in the *Sydney Light Rail* class action (*Hunt Leather Pty Ltd v Transport for New South Wales)* (Supreme Court of New South Wales proceeding 2018/263841) in which the law firm on record for the class action was replaced with another law firm running the case together with same following a reported breakdown in the relationship between the on-record law firm and the litigation funder.

Law stated - 27 September 2024

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. Under a ‘no win, no fee’ conditional costs agreement 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.

Victorian legislation permits contingency fees to be paid to plaintiff law firms in class action proceedings commenced in the Supreme Court of Victoria under 'group costs orders'. On 30 June 2020, the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) introduced a section 33ZDA to the *Supreme Court Act 1986* (Vic). Section 33ZDA provides that the legal costs payable to the law firm representing the group be calculated as a percentage of the amount of any award or settlement in the proceeding, and 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 (GCO).

The first successful GCO was made in*Allen v G8 Education Ltd* [2022] VSC 32. In that case, Justice Nichols approved the GCO, which fixed the fees of the plaintiff's law firm at 27.5 per cent of the total award or settlement amount. In approving the GCO, Justice Nichols considered it relevant that the GCO would cap the costs of the law firm and mitigate against the risk for the plaintiffs of having to pay adverse costs. Justice Nichols considered that because the GCO would mean the plaintiffs and group members would receive no less than 72.5 per cent of any final award or settlement amount, it would provide the plaintiffs and group members with certainty about their return. Justice Nichols compared this to if the case was funded by a litigation funder, where there is the risk that the plaintiffs and group members would be left with little return in the event legal costs were high and the amount of the settlement was low. Justice Nichols also opined that granting the GCO would avoid the delay and costs to the plaintiffs and group members in having to search for third-party litigation funding. Importantly, Justice Nichols noted that at the conclusion of the litigation, the plaintiffs and their lawyers would need to show that the fixed rate of recovery by the lawyers was reasonable, and ultimately that the amount could be adjusted.

On 28 August 2024, in handing down a judgment approving a A$46.5 million settlement of that proceeding, Justice Watson confirmed the 27.5 per cent GCO, noting that there was no reason to reduce or otherwise vary the rate as it was reasonable when considering the effort and risk involved in bringing the case. This is the first judgment in Australia allowing a law firm to earn a contingency fee since GCOs were introduced in 2020. Justice Watson also noted that this GCO would provide the plaintiffs and group members greater certainty regarding money received when compared to a matter that proceeded to judgment or was supported by third-party litigation funders.

As can be seen from the commentary by Justices Nichols and Watson, the central consideration regarding a GCO is what would best promote the interests of the plaintiffs and group members in the circumstances.

Similar reasons were given by Justice Nichols in 2022 in *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424, where a GCO was granted fixing the plaintiff's law firm's recovery at 24.5 per cent. Again in 2023, Justice Nichols granted a GCO at 14 per cent in a carriage dispute among four law firms regarding a shareholder class action against Star Entertainment Group (*DA Lynch Pty Ltd v Star Entertainment Group Ltd* [2023] VSC 561). Justice Nichols noted that the competition of the carriage dispute drove the percentage down.

In contrast, in 2021 an application for a GCO was rejected in *Fox v Westpac; Crawford v ANZ* (2021) 69 VR 487. In that case, Justice Nichols viewed that a 'no win, no fee' arrangement was a legitimate alternative to the GCO, and considered that in the circumstances the evidence was too uncertain to conclude that a GCO would secure a better result for the plaintiffs and group members than the 'no win, no fee' arrangement. However, her Honour's

orders provided the ability for the plaintiffs and law firm to reassess their position and reapply for such an order under section 33ZDASupreme Court Act 1986 (Vic) at a later time. Two years later, following a new application, the Court approved a GCO at 24.5 per cent in *Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95.

The availability of GCOs and the successful applications for those orders have seen the Supreme Court of Victoria become a more commonly used forum for the commencement of class actions for firms who wish to run class actions without the backing of a litigation funder.

Outside of the Supreme Court of Victoria, the Federal Court of Australia has been considering 'solicitors' common fund orders' (solicitors' CFOs) where it is the plaintiff's firm, rather than the litigation funder, who is remunerated for costs and risk for funding the class action. In October 2023, the availability of a solicitors' CFO was considered by Justice Lee in *Greentree v Jaguar Land Rover Australia Pty Ltd* [2023] FCA 1209, where his Honour did not explicitly confirm whether the Federal Court of Australia has the power to grant a solicitors' CFO, but noted there is nothing in Part IVA of the Federal Court of Australia Act 1976(Cth) that precludes the possibility of a solicitors' CFO where such an order is 'just' in the circumstances.

On 5 July 2024, in *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89, the Full Federal Court unanimously held that the Federal Court of Australia has the power to grant a solicitors' CFO. This judgment was strictly with respect to whether the Federal Court has the power to make the solicitors' CFO as, their Honours were not asked to, nor did they address, the question as to what specific circumstances would warrant a solicitors' CFO. The respondents are appealing that decision to the High Court. The appeal has not yet been listed for hearing. If that decision is affirmed by the High Court, that may make the Federal Court more desirable for plaintiff firms for commencing class action litigation, decreasing the filings in the Supreme Court of Victoria.

Law stated - 27 September 2024

Other funding options

12 | What other funding options are available to litigants?

There are a range of funding options 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. In one of the *pelvic mesh* class actions, *Gill v Ethicon Sàrl* (No 12) [2023] FCA 902 (*Gill*), Shine Lawyers (which was running the case on a 'no win, no fee' basis) obtained funding for its disbursements through two disbursement funding facilities.

Whether the interest payable on these funding facilities is able to be recovered by the plaintiff firms from any settlement or from the respondent to the proceedings is another matter. In *Gill*, Justice Lee declined to order that interest on a loan obtained to fund the law firm's fees be reimbursed to Shine Lawyers from the settlement monies, however, in obiter, his Honour commented that the argument that such sums are recoverable from the

respondents had 'real merit' and the Court has power under Part IVA of the Federal Court of Australia Act 1976 (Cth) to make such an order, if it is in the interests of justice to do so.

Portfolio funding is an alternative to case-specific litigation funding that 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 (ATE) insurance can be purchased after a dispute has arisen or a proceeding is contemplated, and covers a claimant's liability to pay adverse costs 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, which 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.

Individuals (and, in some instances, lawyers and law firms) have also utilised crowdfunding to facilitate actions, in particular class actions. Examples of litigation using crowdfunding include class actions arising out of the covid-19 pandemic regarding vaccination programmes and mandatory lockdowns. Australian online news website *Crikey* reported that more than A$1 million was raised across several campaigns listed on crowdfunding platforms for class actions or test cases against vaccine mandates or lockdown orders. A website for a class action in the Federal Court of Australia, *Anthony Leith Rose & Ors v The Secretary Of The Department Of Health Aged Care, Brendan Murphy & Ors,* seeks donations from the public to cover the costs of the class action. However there are potential issues with this form of funding, including that there may be very little transparency about how the money is spent.

Law stated - 27 September 2024

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?

It is not possible to say precisely 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.

Courts' caseloads are also monitored to provide timely and comprehensive information to judges and court officers managing cases. The Productivity Commission's report into Government Services 2023 sets out the clearance rates for Australian courts for 2021–2022. A clearance rate measures whether a court's caseload has increased or decreased over the reporting period, through comparing the number of cases lodged with the number of cases finalised. A figure of over 100 per cent means that more cases were finalised than were lodged during the reporting period, and a figure of under 100 per cent means the opposite. The clearance rate for the Supreme Courts of each state and territory and the Federal Court (including appeals) for 2021–2022 was 94.0 per cent, which is the lowest since pre-2012–2013, meaning the case load is increasing and either cases are taking longer to be finalised or more cases are being filed.

The Federal Court of Australia 2022–2023 Annual Report includes information about the Federal Court's general operations and performance. The Annual Report provides that the Federal Court has a benchmark of 85 per cent of cases (excluding native title cases) relating to major causes of action (which include bankruptcy, corporations and consumer law matters) being completed within 18 months of commencement. Of the cases completed in the 2022–2023 reporting period (including appeals and excluding native title actions), 77.2 per cent of them were completed within 18 months, while 22 per cent of cases were completed in a period greater than 18 months. In the previous reporting period, being 2021–2022, these figures were 79.8 per cent and 20.1 per cent respectively, reflecting an increase in the time taken to complete matters.

Further, from 1 July 2018 to 30 June 2023, a total of 19,483 matters (excluding native title matters) were completed in the Federal Court. Some 56.1 per cent of these matters were completed in less than six months, 20.8 per cent took six to 12 months to complete, 9.1 per cent took 12 to 18 months to complete and 5.3 per cent took 18 to 24 months to complete. Only 8.5 per cent of cases took longer than 24 months to complete.

For complex commercial matters, it can often take several years for the litigation to be finalised.

Law stated - 27 September 2024

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 are 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 courts.

The Federal Court of Australia 2022–2023 Annual Report provided that in 2022–2023, 750 appellate cases were filed in the Federal Court, with 560 being appeals and related actions (the remaining being cross-appeals and interlocutory applications such as applications for an injunction). This represents an overall decrease in the number of appeals filed from the previous year, with 907 appellate cases being filed in 2021–2022 (695 being appeals and related actions). The Annual Report attributes this decrease to a 24 per cent decrease in migration appeals, and also decreases in the Commercial and Corporations and Native Title practice areas.

The Annual Report also states that 691 appeals and related actions were finalised, with 172 of these being matters filed and finalised in the same period. Further, as at 30 June 2023, there were 793 appeals before the Federal Court, some 25.2 per cent of which had been on foot for a period of less than six months, 23 per cent had been on foot for a period of six to 12 months, 13.5 per cent had been on foot for a period of 12 to 18 months, 11.1 per cent had been on foot for a period of 18 to 24 months, and 27.2 per cent had been on foot for a period of over 24 months (a significant increase from the previous reporting period, where only 18.9 per cent of appeals took more than 24 months to be resolved).

The above statistics show that there has been an increase in the time it takes for an appeal in the Federal Court to be resolved and it is far more common that an appeal can take more than two years to be finalised.

Law stated - 27 September 2024

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.

While there are ways in which a judgment can be enforced in Australia, the enforcement of judgments can be a complex, expensive and time-consuming process. It is also futile to pursue a judgment debtor if they lack assets or funds to pay the judgment sum. Accordingly, lawyers commonly seek examination notices or orders following judgment to ascertain

whether a defendant or respondent in a matter has the funds or assets to pay a judgment debt.

Relatedly, lawyers often undertake investigations prior to commencing claims to ensure that the defendant in a matter will be able to pay a judgment debt. In a situation where a corporation is the proposed defendant, this would involve considering the corporation's assets. Taking this preliminary step helps to avoid a scenario where following years of litigation and large amounts of legal costs, a judgment sum cannot be paid or paid in full.

Law stated - 27 September 2024

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.

In 1992, the Australian Parliament amended the Federal Court of Australia Act 1976 (Cth) to include a new Part IVA on representative proceedings. Since that time, New South Wales, Queensland, Tasmania, Victoria and Western Australia have implemented legislative class action regimes, the most recent of these being Western Australia, with the *Civil Procedure* (Representative Proceedings) Act 2022 (WA) receiving Royal Assent on 14 September 2022.

Regarding third-party funding, as held in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386*,* class actions can be funded by third parties and it is not an abuse of process or contrary to public policy. In this regard, it is well-accepted in Australia that litigation funders play an important role in providing access to justice. As at the year ending 30 June 2023, there were 53 class actions filed, with 41.5 per cent of these being funded by a third-party litigation funder. This is a five-year low as a percentage of class actions matters funded by a third-party, a cause of which may be the rise of class actions filed in the Supreme Court of Victoria, being the only court which currently has the power to grant a group costs order. Group costs orders are orders that allow a plaintiff law firm to receive a percentage of any award or settlement for its legal fees and expenses of the class action as well the risks undertaken in funding the litigation, with liability for payment shared among the group members in the class action.

Law stated - 27 September 2024

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. 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.

The amount that may be recovered pursuant to any costs order varies from court to court and 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 funder's commission.

In *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140, the plaintiffs sought to recover the litigation funder's commission of 40 per cent as damages (the Court agreeing that they were not costs within the meaning of section 19 of the Civil Procedure Act 2005 (NSW)). The plaintiffs submitted that the litigation funding costs (ie, the commission) were caused by the nuisance alleged against the defendant, and that they formed part of the reasonably foreseeable consequences of such nuisance. The plaintiffs argued that it was reasonably foreseeable that it would be uneconomic for individuals and businesses impacted by the nuisance to bring claims against the defendant individually as they would be unwilling to take on the substantial adverse costs and risks involved in bringing proceedings against the defendant, and therefore it was reasonably foreseeable that any proceedings would likely be brought by way of a class action, which would be funded by a litigation funder.

While finding in favour for the plaintiffs in respect of liability, Justice Cavanagh held that the plaintiffs could only recover their 'actual loss', which did not include the funder's commission. His Honour noted that the plaintiffs were entitled to be put back in the position they would have been but for the tortious conduct, however the funder's commission arose because they entered into a third-party agreement to enable them to recover their loss. The funder's commission was the result of steps taken by the plaintiffs independently of anything done by the defendant and as such, had the effect of breaking any chain of causation between the defendant's conduct and that loss. Transport for NSW appealed Justice Cavanagh's finding that it was liable for the group's loss. By cross-appeal, the plaintiffs' solicitors, Banton Group, submitted that the funding commission was a loss for which damages for nuisance should account. In *Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW* [2024] NSWCA 227, the Court of Appeal upheld Justice Cavanagh's finding in this respect, finding there was 'no doubt' that group members acted voluntarily when entering the funding agreement and the funder's fee was not to be regarded as a foreseeable loss caused by the defendant's nuisance, but instead as the voluntary act of the particular plaintiff.

There has been some commentary from judges that suggests such orders may be made. In some instances, plaintiff law firms running claims on a 'no win, no fee' basis will take out loans to support the funding of disbursements. In the settlement approval application in one of the *pelvic mesh* class actions, *Gill v Ethicon Sàrl (No 12)* [2023] FCA 902, Shine Lawyers (which was running the case on a 'no win, no fee' basis) sought to have the interest that had accrued on two disbursement funding facilities entered into by Shine deducted from the settlement monies. In the judgment handed down in August 2023, Justice Lee declined to make such an order, however in obiter his Honour commented that while the argument that such sums are recoverable from the respondents is a novel one, it had 'real merit' and

the Court has power under Part IVA of the Federal Court of Australia Act 1976 (Cth) to make such an order, if it is in the interests of justice to do so. In light of these comments, we may see more attempts by plaintiffs to seek to recover the costs of the litigation funding from unsuccessful respondents.

Law stated - 27 September 2024

Liability for costs

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

Yes. The power to order costs against a non-party was confirmed by the High Court in *Knight v FP Special Assets* (1992) 174 CLR 178 (*Knight*). In *Knight*, Chief Justice Mason and Justice Deane 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, *Knight* was cited in *Gore v Justice Corp Pty Ltd* (2002) 119 FCR 429, where the Full Federal Court held that Justice Corp, the litigation funder of the proceedings, was liable to pay the appellants' costs in the 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) 341 ALR 154, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director, company secretary 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. The argument that making a costs order against the company director was 'piercing the corporate veil' was 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. A court may also rely on section 43 of the Federal Court of Australia Act 1976 (Cth) when issuing costs orders against non-parties. 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) 366 ALR 594*,* five competing class actions were 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 ultimately resolved in favour of the representative plaintiff 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 costs order against the Federal Court plaintiffs. Justice Stevenson 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, each of the funders should pay the costs in circumstances where the applications had failed.

In *Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd (No. 2)* [2021] NSWSC 1202, Justice Stevenson ordered that a litigation funder be jointly and severally liable for the costs incurred by a defendant. In coming to this decision, Justice Stevenson considered five factors relevant to whether an order should be made for costs against a non-party, being whether the non-party:

- provided funding for the litigation;
- had a direct interest in, and entitlement to, a substantial part of the fruits of the litigation;
- was involved in the litigation purely for commercial gain;
- had a right to information and involvement in decision-making in relation to the litigation; and
- agreed to provide an indemnity to the unsuccessful party for any adverse costs order.

In *Hardingham v RP Data Pty Limited (Third Party Costs)* [2023] FCA 480 (*Hardingham)*, the Court affirmed *Knight* and held that a costs order can be made against a non-party under section 43 of theFederal Court of Australia Act1976(Cth) in circumstances where a non-party has a connection to the litigation that is sufficient to warrant exercise of the power. Justice Thawley noted that it is not exceptional to order costs against a litigation funder who facilitates litigation for their own commercial gain. In *Hardingham*, RP Data made an application for costs against a third-party litigation funder, Court House Capital Pty Ltd, after being successful in the underlying proceedings. The parties had entered into a funding agreement that did not contain an indemnity in favour of the plaintiffs for any adverse costs order. However, his Honour did not accept that the lack of indemnity prevented an order for costs against the funder.

Hardingham was upheld on appeal in *Court House Capital Pty Ltd v RP Data Pty Ltd* [2023] FCAFC 192. The Full Court considered whether the primary judge's exercise of discretion miscarried when costs were awarded against a commercial litigation funder. The Full Court held that the primary judge was correct in holding that the power to order costs against a non-party will only be exercised in circumstances where the non-party has a connection to the litigation that is sufficient to warrant the exercise of power. The Full Court remarked that there is no rigid checklist of factors that may be taken into account, and that this is particularly so given that the determination of the nature and extent of the relevant connection will be informed by the character of the non-party.

Law stated - 27 September 2024

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 have the power to order a plaintiff to provide security for the defendant's cost of defending the plaintiff's claim. Such an order is, in its essential and usual character, an order compliance with which is a condition of the relevant proceeding not being stayed or dismissed (*Augusta Ventures Limited v Mt Arthur Coal Pty Limited* (2020) 283 FCR 123 (*Mt Arthur Coal*)). 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 in funded litigation 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 (PJC) made reference to a submission by Dr Peter Cashman, which stated 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 contractual 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.

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. Ordinarily, the defendant will provide the court with an estimate of the costs they believe will be incurred and this will be a matter for evidence, but the courts acknowledge that security for the defendant's costs is not intended to be a complete estimate or indemnity. In complex claims, it is usual that security orders will be given in tranches by reference to identified phases in the litigation.

There are various means by which litigation funders may provide security for costs, the most traditional being payment into court or by way of a bank guarantee, as per *DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401 (*DIF III*). In *DIF III*, Justice Hargrave said that the 'central inquiry' to be undertaken where security is not put forward in such traditional ways is 'whether the proposed form of security is adequate to achieve its object as security; namely to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff'. In this regard, a common form of security for costs is an after-the-event (ATE) insurance policy, which, per *DIF III*, must be readily enforceable to be adequate security. This approach has been widely adopted by the courts (*Re Tiaro Coal Ltd (in liq)* [2018] NSWSC 746; *Firexpress Australia Pty Ltd v Imago Exchange Pty Ltd* [2022] FCA 129;*APFC No.1 Corporation v Insurance Australia Limited* [2024] NSWSC 534).

In *Turner v Tesa Mining (NSW) Pty Ltd* (2019) 290 IR 388, one of two representative proceedings relating to the underpayment of mining employees brought pursuant to the *Fair Work Act 2009* (Cth) (FWA), the plaintiffs' litigation funder, Augusta Ventures Limited, was ordered to provide security for the respondents' costs. The applicants opposed the ordering of security on the basis that section 570 of the FWA prevents costs orders being made against a party, except in limited circumstances. In ordering that the funder provide security for the respondents' costs, Justice Lee found that there was no compelling reason for the costs protection in the FWA to extend to non-party funders using such claims to obtain some commercial advantage or gain.

This decision was appealed by the funder in *Mt Arthur Coal*. The Full Federal Court allowed the appeal and set aside the orders made by Justice Lee on the basis that making an order for security for costs, even where it is the third-party funder providing the security, undermines the purpose of the section 570 of the FWA. The Full Federal Court considered that it would not be just if the proceedings were stayed or dismissed due to the funder's failure to comply with the orders in circumstances where the applicant could not be held to be responsible for the respondent's costs (unless a section 570 exception applied). In summary, it is unlikely in employment class actions brought pursuant to the FWA that the court will order a funder to provide security for costs.

Law stated - 27 September 2024

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

If a 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 (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744). The exception being class actions brought under the *Fair Work Act 2009* (Cth), where section 570 provides that each party is liable for its own costs (*Augusta Ventures Limited v Mt Arthur Coal Pty Limited* (2020) 283 FCR 123).

In the case of *Perera v Getswift Limited* (2018) 263 FCR 1, 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 'Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders' released in December 2018 also recommended that there be a statutory presumption that a litigation funder will provide security for costs.

Law stated - 27 September 2024

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. The court has an unfettered discretion as to the form that payment of security may take. The form is ultimately 'immaterial so long as it is adequate to achieve its object as a security' (*Yara Australia Pty Ltd v Oswal* (2013) 41 VR 245 cited in *DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors* [2016] VSC 401 (*DIF III*).

Nonetheless, judicial views on the acceptability of ATE insurance as a form of security have been varied.

In *DIF III*, the Court accepted a deed of indemnity proffered by an overseas-based ATE insurer as adequate security. In *Capic v Ford Motor Company of Australia Ltd* (2021) 154 ACSR 235, the Court ordered that security for costs be 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 if the defendant's case was successful.

In *Bonham as trustee for the Aucham Super Fund v Iluka Resources Ltd (Security for Costs)* [2019] FCA 1693, Justice Perram accepted that the particular deed of indemnity proffered as security for costs was sufficient. Although the insurers did not have assets in the jurisdiction, the plaintiff 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 for costs previously paid to the Court by the plaintiff could be replaced by the aforementioned deeds of indemnity and a lesser amount paid into Court, Justice Perram found against the plaintiffs. Justice Perram 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.

In Queensland, the issue was considered in *Equititrust Limited v Tucker* [2020] QSC 269 (*Equititrust*), in which Justice Bond held that security in the form of a deed of indemnity from its ATE insurer posed an 'unacceptable disadvantage' to the defendants. Earlier in the proceedings, Justice Bowskill also rejected the plaintiff's application to provide a deed of indemnity as a form of security, finding that the plaintiff had failed to establish that a deed of indemnity was adequate.

In *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* (2021) 9 QR 141, the Queensland Court of Appeal upheld Justice Applegarth's decision at first instance that the litigation funder's offer of security in the form of ATE insurance provided by AmTrust Limited was not an appropriate method for payment of security, as AmTrust held no assets in the jurisdiction. The Court adopted the reasoning in *Equititrust* that there is no freestanding right or entitlement for the plaintiff to provide security in the form least disadvantageous to it; the ordinary forms of security (namely, payment into the court or a bank guarantee) must pose a discernible disadvantage to the plaintiff to justify ordering an alternative form of security.

In *APFC No. 1 Corporation v Insurance Australia Ltd* [2024] NSWSC 534, Justice Nixon held that the ATE policy proffered by the plaintiffs did not meet the relevant benchmark, being 'to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff'. Citing *DIF III*, the Court held that the plaintiff must satisfy it 'that the proposed security will not impose an 'unacceptable disadvantage' on the defendant'. The Court also noted that the 'fact that some delay may be involved in accessing that security is, while relevant, not decisive'. Justice Nixon also held that dealing with an

overseas insurance provider and having to enforce the judgment overseas will not put the defendant 'at an unreasonable disadvantage' if the party against which the judgment will be enforced 'has sufficient assets in the overseas jurisdiction and judgment can be enforced there'. Justice Nixon, borrowing from Justice Gleeson in *Re Tiaro Coal Ltd (in liq)* [2018] NSWSC 746, highlighted that the question to be asked is not whether there is 'relative adequacy' when the ATE security proposal is compared with other forms of security, but rather 'whether the security put forward is adequate to achieve the object of providing a fund or asset against which a successful defendant can readily enforce an order for costs'.

Whether the premium for an ATE insurance policy taken out by a funder can be recovered by the funder from any settlement or judgment has been controversial, and litigation funders are facing increased scrutiny where the costs of ATE insurance premiums are 'passed on' to group members. In *Peterson Superannuation Fund Pty Ltd v Bank of Queensland Limited (No. 3)* (2018) 132 ACSR 258, the 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 *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No. 3)* (2020) 385 ALR 625, a litigation funder sought reimbursement of ATE insurance premiums, on top of commission by way of a CFO. Justice Lee observed, 'If a funder wishes to defray their risk of performing that obligation it is a matter for the funder but, in my view, it is not a cost that ought to 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 addition to the CFO. In May 2023, the funder for the plaintiff in *Spozac Pty Limited as Trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd* [2023] FCA 643 sought 70 per cent of the up-front payment for acquiring ATE insurance. Justice Rares was of the view that ATE costs are ordinary costs of running funded litigation, and indicated it was not 'just or fair' that the group bear the risk.

Law stated - 27 September 2024

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 of Australia and certain state courts, claimants are required to disclose the litigation funding agreement subject to redactions to conceal information that might reasonably be expected to confer a tactical advantage to another party.

The Federal Court of Australia's Class Actions Practice Note (GPN-CA) is the governing practice note for the class actions commenced in the Federal Court of Australia. The GPN-CA requires that prior to the first case management hearing, a plaintiff's lawyers shall, 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 GPN-CA provides that no later than seven days prior to the first case management hearing, the plaintiff's lawyers shall file and serve a notice in the specified form together with a copy of the litigation funding agreement.

The GPN-CA also covers the level of detail required in the plaintiff'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 GPN-CA.

Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd (t/as ANZ Investment Bank) [2016] FCA 306 (*Coffs Harbour City Council*) provides examples of terms that may be redacted, which included some of the commercial terms of the litigation funding agreement. Justice Rares stipulated, however, that its approval of certain redactions only applied to that certain point in the litigation, and that those terms may lose their confidentiality at a later point in the litigation, such as where a judgment occurred, or a settlement was entered into.

Similar procedures are covered in the State Supreme Court practice notes. For instance, Practice Note SC Gen 10, which relates to class actions commenced in the Supreme Court of Victoria, provides that prior to the first case management conference, the plaintiff's solicitors must disclose to the Court and to the other parties' copies of the litigation funding agreement, if applicable. However, it notes that where it is considered that disclosure may give rise to material prejudice or is inconsistent with the maintenance of client legal privilege, they may propose sensible redactions or object to the disclosure. In both instances, this needs to be raised with the Court so that it can determine the merits. The plaintiff's solicitors must still provide an unredacted copy to the Court.

In relation to the Supreme Court of New South Wales, Practice Note SC Gen 17 deals with class actions. It is not as descriptive as the applicable practice note in the Supreme Court of Victoria, but similarly provides that at or before the initial case management conference each party is expected to disclose any litigation funding agreement, but that this can be redacted to conceal information that might reasonably be expected to confer a tactical advantage on the other party. *Coffs Harbour City Council* was recently affirmed in *Metro Environmental Logistics Pty Ltd v Newcastle Port Corp (No 4)* [2024] NSWSC 657, which applied Practice Note SC Gen 17, and examined whether disclosure of a redacted litigation funding agreement would confer a tactical advantage on the defendant.

The practice note applicable to class actions in the Supreme Court of Queensland (Practice Direction No. 2 of 2017) mirrors the practice note applicable in New South Wales in so far as disclosure and redactions to a litigation funding agreement are concerned.

For the Supreme Court of Western Australia, class action proceedings are governed by Consolidated Practice Directions 9.19, 'Proceedings commenced under the *Civil Procedure (Representative Proceedings) Act 2022'*. Section 9.19 is the same as the GPN-CA, whereby the representative party's legal practitioners must provide unredacted copies of the cost agreement and any litigation funding agreement to the Court no later than seven days prior

to the first case management hearing. The representative party's legal practitioner must also serve copies on all other parties, and the agreement can be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding.

Law stated - 27 September 2024

Privileged communications

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

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

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. Without prejudice 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.

In *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234-, Justice Bergin considered whether communications between the plaintiff's lawyers and a third-party funder (including communications enclosing advice given to the plaintiff, and documents prepared for meetings attended by the funder) were privileged. Her Honour held that the collaborative and supportive aspects of the relationship between the funder and the plaintiff, the nature of the meetings attended, the documents provided and the abovementioned purpose were matters from which it was appropriate to imply that when the information at the meetings and the contents of the documents were disclosed to the funder, it had an obligation not to disclose their contents. As such, her Honour was satisfied that the communications with the funder were confidential communications. Her Honour held that common interest privilege subsisted such that there was no waiver. Her Honour held that even if there was no common interest privilege, privilege had not been waived as the documents were provided to the funder in the course of a confidential communication.

In *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, the Court held that certain documents prepared during investigation stages of a class action were subject to legal professional privilege, despite those documents being created prior to the receipt of instructions from a client. In this case, IOOF obtained orders for discovery from law firm Maurice Blackburn and litigation funder Harbour Litigation Funding Ltd of certain documents relating to Maurice Blackburn's initial investigations into IOOF and the potential class action against it. Maurice Blackburn and Harbour resisted discovery on the basis that the documents were subject to legal professional privilege.

The Supreme Court of Victoria found that certain of the documents created by Maurice Blackburn during the investigative process were privileged as they had been created for the dominant purpose of obtaining legal advice as to the prospects of success of any potential action. Documents created prior to the existence of any intention to give or receive legal advice, however, were precluded from privileged protection.

Harbour also claimed privilege over certain communications with Maurice Blackburn. The Court accepted that where Harbour sought legal advice from Maurice Blackburn, privilege could be claimed despite Maurice Blackburn not being formally retained to provide that advice. Harbour was, however, ordered to produce communications with Maurice Blackburn relating to the proposed funding agreements for the prospective class action, as these were found to be 'commercial negotiations' and not created for the dominant purpose of a lawyer providing legal advice.

Similarly, in *Hastie Group Ltd (in Liq) v Moore* (2016) 339 ALR 635, 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.

Law stated - 27 September 2024

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 on disputes between plaintiffs and their funders.

In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455, 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.

In *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 of the funding agreement. The Court dismissed the litigant's claim and determined that the funder, LCM, was obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

In *Caason Investments Pty Limited v Cao (No 3)* [2020] FCA 91, a judgment in the *Arasor* class action,one of the representative plaintiffs, Caason Investments, sought legal, administrative and accounting costs that it claimed it was owed under the funding agreement. The funder argued that Caason Investments' costs were unreasonable and denied liability. 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 application.

In July 2024, it was reported that a dispute arose in the *Westconnex Resumption* class action (*Darren Mitchell v Roads and Maritime Services (now known as Transport for New South Wales*)) between the funder of the proceedings, WCX Pty Ltd (the Funder) and the solicitors, Ironbridge Legal (the fifth law firm to have carriage of the case). The dispute first arose over the conduct of the proceedings, including the Funder's desire to terminate the retainer of senior counsel, the Funder's objection to the use of particular experts and the Funder's statement of the directions to be sought at the directions hearing on 19 April 2024. The Funder sought to terminate the funding agreement an demanded that funds which had been deposited into Ironbridge's trust account be returned to it.

The plaintiffs made an application seeking orders that the Funder be joined as a defendant to the proceedings and for an order pursuant to section 183 of the Civil Procedure Act 2005 (NSW) (CPA) that funds which had been deposited into Ironbridge's trust account were held for the benefit of the plaintiffs to be applied towards their legal costs incurred as lead plaintiffs in the proceedings. The Funder sought to stay the plaintiffs' application and sought to replace the lead plaintiffs, and their solicitors, and indicated that it would only continue funding if new plaintiffs and legal representatives were appointed. On 13 September 2024, Justice McGrath handed down judgment, finding that the Funder could be joined as a defendant to the proceedings to allow for declaratory relief that the funds held in Ironbridge's trust account was for the benefit of plaintiffs and could not be rescinded, and rejecting the Funder's bid to replace the plaintiffs and solicitors on the basis that there was no evidence before the Court that a new representative plaintiff and law firm was willing to take over the conduct of the proceedings.

Law stated - 27 September 2024

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 updates to the regulatory landscape regarding litigation funding schemes in the last year and in particular, the impact of the *LCM Funding Pty Ltd v Stanwell Corporation Limited* (2022) 292 FCR 169 (*Stanwell*) decision and the commencement of the Corporations Amendment (Litigation Funding) Regulations 2022 (2022 Regulations).

The Full Court of the Federal Court held in *Stanwell* that litigation funding schemes are not managed investment schemes within the meaning of section 9 of the Corporations Act 2001 (Cth). The effect of*Stanwell* and the 2022 Regulations is that litigation funding schemes have an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of the Corporations Act 2001(Cth).

In March 2021, the High Court of Australia handed down its judgment in *Wigmans v AMP Limited & Ors* (2021) 270 CLR 623 (*Wigmans*). The High Court, in dismissing the appeal, held that the Supreme Court of New South Wales 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. The High Court affirmed the primary judge's (Ward CJ) list of factors that the Court will take into account, namely:

- the competing funding proposals, cost estimates and net hypothetical return to group members;
- proposals for security;
- the nature and scope of the causes of action advanced (and relevant case theories);
- the size of the respective classes;
- the extent of any book build;
- the experience of the legal practitioners (and funders) and availability of resources;
- the state of progress of the proceedings; and
- the conduct of the representative plaintiffs to date.

Law practitioners should be aware of the rules and requirements under section 8 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) that relate to competing class actions. Competing class actions are increasingly common in the Australian landscape, with more than 17 competing class actions filed in 2023 alone.

With the increasing numbers of competing class actions being filed in Australia, law firms must be well prepared when considering whether to file a competing proceeding. As noted in the joint judgment of Chief Justice Kiefel and Justice Keane J in Wigmans, multiplicity of proceedings and competing representative proceedings must not to be encouraged as they are inimical to the administration of justice. Should a party seek to file a class action that will cause a carriage dispute, they ought to do so on reasonable grounds that they consider they will be successful in any carriage dispute.

This principle was most recently emphasised in the judgments in *Bain v International Capital Markets Pty Ltd* (No 2) [2024] FCA 847 and *Vingrys v International Capital Markets Pty Ltd* [2024] VSC 455, which concerned a multiplicity dispute between lead applicants in competing representative proceedings run by three law firms. The multiplicity dispute

was cross-jurisdictional as the applicants in two proceedings had filed in the Federal Court of Australia*(Wyer v International Capital Markets Pty Ltd and Anor* (proceeding VID88/2024) (the *Wyer* proceedings); *Bain v International Capital Markets Pty Ltd and Anor* (proceeding VID1088/2023) (the *Bain* proceedings)) and thereafter agreed to consolidate their proceedings, while the third applicant had filed proceedings in the Supreme Court of Victoria (*Vingrys v International Capital Markets Pty Ltd* (proceeding S ECI 2024 01169) (the *Vingrys* proceedings)).

All three proceedings were set down for a joint hearing before his Honour Justice O'Bryan of the Federal Court of Australia and his Honour Justice Delany of the Supreme Court of Victoria to determine the carriage dispute. The Courts ultimately determined that the consolidation of the *Bain* and *Wyer* proceedings was reasonable and that the consolidated proceeding should be awarded carriage over the *Vingrys* proceeding. In coming to this decision, the Courts took into account the respective law firms' experience, both historically in large consumer law class actions, and specifically regarding the subject matter of the representative proceedings.

The Courts also focused on the independent investigations undertaken by the Federal Court applicants' law firms in preparing their respective claims and the estimated returns to group members in the competing proposals. As to the former, both Courts focused on the preparation of the respective pleadings, with Justice Delaney accepting the Federal Court applicants' submission that 'first-hand knowledge of the investigations, research and forensic decisions underlying the preparation of such pleadings' was relevant to a practitioner's position to run the case. As to the latter, notwithstanding that the funding commission proposed to be sought by way of common fund order in the consolidated proceeding was at a higher percentage rate in comparison to the *Vingrys* proceeding, Justice O'Bryan held that the funding proposals favoured the consolidated proceeding including because the differences were not large and the funding proposal in the consolidated proceeding provided greater certainty that sufficient resources will be available to conduct the proceeding. Justice Delany also considered the return to group members, stating that while the *Vingrys* carriage proposal was superior on price it was not a significant factor in favour of the *Vingrys* proceeding.

Law stated - 27 September 2024

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 include:

- updates in respect of the court's power to make soft closure orders;
- the development of the solicitors' common fund order;
- consolidation of competing class actions resulting in firms running cases jointly;
- cross-jurisdictional multiplicity issues; and

- data breach and privacy actions.

Soft closure orders

Class actions in Australia operate on an 'opt-out' basis, meaning group members are automatically included in a class action unless they decide to 'opt-out' of the proceedings. In some cases, this can cause difficulties when trying to quantify the size and composition of the class for the purposes of settlement negotiations.

Australian courts have attempted to address this issue by granting class closure orders, whereby group members are required to take an active step to participate in the proceedings. There are two types of class closure orders, 'hard' class closure and 'soft' class closure. A hard class closure extinguishes an unregistered class member's rights to share in the fruits of any subsequent judgment or settlement. This is contrasted with a soft class closure, where group members who do not register are excluded for a period of time, usually until after a mediation, but remain bound upon a successful outcome. If no settlement is reached at mediation, group members who have not registered can still continue to participate in the class action – that is, the class re-opens.

While the courts are in agreement that hard class closure orders are wholly inappropriate given they have the effect of permanently extinguishing non-registering group members' claims (*Gill v Ethicon Sàrl* (No. 2) (2019) 134 ACSR 649), the courts are currently split as to whether they have the power to make soft class closure orders.

In *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890, the NSW Court of Appeal held the Court did not have power to make soft class closure orders under section 183 of the Civil Procedure Act 2005 (NSW), which mirrors the equivalent provision in the Federal Court of Australia Act 1976 (Cth) under section 33ZF. In *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 (*Wigmans 1*), the NSW Court of Appeal refused to make an order to issue pre-mediation notices, stating that if a group member did not register, their claim would be extinguished, as an order of this kind was contrary to the 'fundamental precept' of the class action regime for group members to do nothing up until the point of settlement or judgment. However, in a 2022 decision in *Parkin v Boral Ltd* (2022) 291 FCR 116, the Full Federal Court held that the decision in *Wigmans 1* was 'plainly wrong' and that the Court has a 'broad and unqualified' power to make an order that a notice be issued to group members informing them of the plaintiff's intention to seek soft class closure if the matter is settled at mediation. The Full Federal Court held that contrary to *Wigmans 1*, group members can also be required to act prior to settlement.

In a recent decision of the NSW Court of Appeal in *David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83 (*Lendlease*), the Court did not follow the Full Federal Court's finding in *Parkin*, again finding soft class closure orders cannot be made in class actions commenced in the Supreme Court of NSW. The decision in Lendlease is on appeal before the High Court and is set to resolve the division on the question of the Court's power to make class closure orders that exclude unregistered group members from any settlement.

Despite the Supreme Court of Victoria and the Federal Court of Australia having power to issue soft class closure orders, there are cases in these forums where the Courts have declined to exercise that power. In the *Medibank* Class Action (*Robert Laird Kilah v*

Medibank Private Limited, Supreme Court of Victoria proceeding S ECI 2023 01227), the Supreme Court of Victoria ruled it was 'not appropriate' to exclude group members from any form of settlement shortly before trial. Similarly, in *Alford v AMP Superannuation Limited* (No. 2) [2024] FCA 423, the Federal Court dismissed an application by the respondent seeking soft class closure orders before mediation. The Federal Court found that such order was not necessary to facilitate settlement as the respondents could ascertain the population of group members from their own records and accordingly make a reasonable estimate as to quantum. The Federal Court also considered the 'substantial cost' the applicants would incur in conducting a registration process for a class of two million group members and the fact that it would divert resources away from preparing for mediation and trial.

Ultimately, whether it is appropriate for soft closure orders to be made will depend on the context and facts of the case.

Solicitors' common fund orders

Since October 2023, the Federal Court of Australia has been considering whether the Federal Court has the power to order 'solicitors' common fund orders' (solicitors' CFOs). A solicitors' CFO is a common fund order that allows the plaintiff's firm, rather than the litigation funder, to be remunerated for costs and risk from funding the class action.

In *Greentree v Jaguar Land Rover Australia Pty Ltd* [2023] FCA 1209, Justice Lee did not explicitly confirm whether the Federal Court of Australia has the power to grant a solicitors' CFO, but said there was nothing preventing the Court from making such an order should the proposed payment be 'just' when having regard to all of the circumstances.

On 5 July 2024, in *R&B Investments Pty Ltd (Trustee) v Blue Sky* (Reserved Question) [2024] FCAFC 89 (*Blue Sky*), the Full Federal Court unanimously held that the Federal Court of Australia has the power to grant a solicitors' CFO. This judgment was strictly with respect to whether the Federal Court has the power to make the solicitors' CFO; their Honours were not asked to, and did not address, the question as to what specified circumstances would warrant a solicitors' CFO. Special leave applications to the High Court were subsequently filed by the respondents in *Blue Sky*, asking the Court to determine whether the Federal Court has power to make a common fund order on settlement or judgment at all, as well whether that power extends to solicitors' CFOs. The appeal has not yet been listed for hearing, but the outcome will have significant ramifications for the funding industry.

Carriage motions and consolidation of class actions

In *Wigmans v AMP Limited & Ors* (2021) 270 CLR 623 (*Wigmans 2*), 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 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 book build;
- 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. This multifactorial approach is now well established in competing class actions within Australia.

In June 2023, there was a carriage contest in the *Star Entertainment* class action between four firms. Three firms sought a GCO of varying rates, and one firm proposed a 'no win, no fee' basis, with a 25 per cent uplift. Criticism was made by the competing firms against the firm with the lowest proposed GCO rate of 14 per cent on the basis that it would not be capable of properly litigating the class action due to lack of resourcing and could lead to a misalignment of incentives. These submissions were rejected by a court-appointed contradictor, who noted that the lower GCO rate was a result of market forces, and was not a negative. Justice Nichols put great emphasis on 'the competing funding proposals, costs estimates and net hypothetical return to group members' factor identified at the High Court in *Wigmans 2*. In the end, Slater and Gordon's 14 per cent GCO took home the win.

On 27 September 2023, judgment was handed down by his Honour Justice Delany in *Lidgett v Downer EDI Ltd* [2023] VSC 574 (*Downer*). This case involved four competing class actions. Three of the proceedings agreed to orders consolidating their proceedings such that two out of the three firms would continue to represent the plaintiffs cooperatively as the solicitors on record, to be jointly funded by Maurice Blackburn and CASL Funder Pty Ltd (Consolidated Proceeding). The Court then considered the Consolidated Proceeding proposal against the fourth competing proposal for carriage, where both competing proposals sought a GCO of 21 per cent. His Honour ultimately determined that it was in the best interest of the group members for the Consolidated Proceeding to proceed, staying the fourth proceeding. His Honour held that the GCO rate of 21 per cent was reasonable and praised the parties in the Consolidated Proceeding for acting in good faith and in a manner consistent with the facilitation of the efficient and cost-effective resolution of the issues in dispute. His Honour opined that consolidating the three proceedings was consistent with the overarching purpose of the Civil Procedure Act 2010 (Vic), that significant efficiencies are achieved through consolidation, and that the consolidation would enhance the prospects of resolution through negotiation or mediation.

Firms should keep this in mind when engaging in carriage dispute, as courts may act favourably to parties that can demonstrate that they have acted in a manner that assists the court in its pursuit to facilitate efficient, timely and cost-effective resolution of the real issues in dispute.

This was most recently emphasised in the judgments in *Bain v International Capital Markets Pty Ltd* [2024] FCA 847 and *Vingrys v International Capital Markets Pty Ltd* [2024] VSC 455. The judgments related to a carriage dispute between three law firms, two of which had agreed to consolidate.

Consolidation – solicitor acting as agent

Firms facing a carriage dispute can agree to work together to avoid a contested hearing. Procedurally this may involve either a consolidation of the two proceedings or the continuance of one proceeding and the stay of the other. In both cases, the firms may also agree to there being joint solicitors on the record (ie, one from each firm) or that one firm will be on the record while the other will act as that firm's agent. Further, in either scenario it is common for the two firms to enter into a cooperative litigation protocol that formalises the practicality of the work arrangement, avoiding duplication of work and costs. The firms are also usually required to provide a periodic billing report to an appointed cost referee to ensure fair and reasonable costs are incurred without duplication by the respective firms. This also provides the court and group members reassurance as to the reasonableness of such costs.

Cross-jurisdictional multiplicity issues

Issues also arise where multiple class action proceedings are commenced in more than one jurisdiction, and the courts have been asked to determine which proceeding should go forward and in what jurisdiction. The issue first arose in *Wigmans v AMP Ltd* (No. 3) (2019) 366 ALR 594 (*Wigmans No. 3*), where five competing class actions were commenced; four in the Federal Court and one in the Supreme Court of New South Wales. AMP Ltd sought to transfer the four Federal Court proceedings to the Supreme Court of New South Wales, while the applicants in each of the Federal Court actions filed applications in the Supreme Court of NSW to transfer that proceeding to the Federal Court. The Full Federal Court ultimately ordered that the Federal Court actions be transferred to the Supreme Court of NSW, following which the plaintiff in each proceeding brought an application to stay each other's proceeding.

Shortly following the issues faced in *Wigmans No. 3*, the Federal Court of Australia agreed protocols for communication and cooperation with the Supreme Court of Victoria (dated 5 June 2019) and Supreme Court of New South Wales (dated 1 November 2018) to facilitate the efficiency and effectiveness of class action proceedings where multiple proceedings are brought in competing courts across more than one jurisdiction (the Protocols). The Protocols provide that once the Court becomes aware of the existence of the competing class action, it may be appropriate for there to be a joint case management hearing before a judge of each court to determine how the cases should proceed.

This approach was adopted in *Downer*, in which three proceedings were commenced in the Federal Court of Australia, and one was commenced in the Supreme Court of Victoria. The competing proceedings were jointly case managed by the two courts, following which all three of the Federal Court proceedings agreed to transfer proceedings to the Supreme Court of Victoria. In making orders giving effect to the transfer, Justice Halley stated that the transfer of all three Federal Court class actions was consistent with the Protocol and would 'facilitate a more expeditious and less complicated resolution of the multiplicity issue

and avoid any possible inconsistencies that might arise in the court of a joint determination of the issues between the courts'.

In the class actions filed against *International Capital Markets Pty Ltd*, the *Vingrys* proceeding was filed in the Supreme Court of Victoria and the *Bain* and *Wyer* proceedings were filed in the Federal Court of Australia. In this instance, neither party consented to the proceeding being transferred to the other jurisdiction. Unlike in *Wigmans No. 3* where the transfer application was heard before the carriage application, here the Courts did not determine the transfer application before the carriage motion was heard.

With the agreement of the parties, the carriage motion was heard in a concurrent sitting before Justice Delany of the Supreme Court of Victoria and Justice O'Bryan of the Federal Court of Australia. Each applicant sought orders that the competing proceeding be stayed or alternatively that the proceeding be transferred.

Those transfer applications were not ultimately pressed at the hearing and, as noted by Justice O'Bryan in his judgment, as multiplicity was able to be addressed through a concurrent sitting of the courts to hear the stay applications, the transfer applications ultimately served no useful purpose. Justice O'Bryan considered that the juridical and procedural advantages put forward by each applicant in support of their proposed forum were better addressed as part of the resolution of the multiplicity issue, rather than as a preliminary transfer issue divorced from the multiplicity issue.

As noted above, Justices Delany and O'Bryan ultimately delivered two separate judgments however their Honours reached the same conclusion, finding that the consolidated *Bain* and *Wyer* proceedings should continue and the *Vingrys* proceeding be permanently stayed.

While in this instance both judges were in agreement as to the appropriate orders, the question of how the courts will deal with this situation where there is a difference of opinion in a joint sitting remains unknown.

Data breaches, privacy claims and artificial intelligence

In 2023 there was a large surge of personal data breach class actions, with multiple class actions filed in the Federal Court of Australia and Supreme Court of Victoria, the most prominent being against Medibank (*Robert Kilah & Brendan Sinnamon v Medibank Private Limited* (S ECI 2023 01227)) and Optus (*Peter Robertson & Anor V Singtel Optus Pty Limited ACN 052 833 208 & Ors* (VID256/2023)). However, no new data breach class actions have yet been filed in 2024.

In the wake of the data breaches in 2022, the Australian government was quick to amend the Privacy Act 1988 (Cth) (Privacy Act), increasing the maximum penalty for serious or repeated interference with privacy from A$2.5 million to A$50 million, three times the value of the benefit obtained, or, where the court is unable to determine the value of the benefit, 30 per cent of the company's adjusted turnover for the relevant period.

Most recently on 12 September 2024, the Privacy and Other Legislation Amended Bill 2024 was first read in the Legislative Assembly (Lower House), following the Attorney-General's Privacy Act Review Report of February 2023 and the government's response to that report in September 2023. The bill introduces a new statutory tort for serious invasions of privacy, and targeted criminal offences to respond to doxing (the malicious publication of an individual's personal information). The introduction of this bill may give rise to new

class actions arising out of data breaches, particularly as the Office of the Australian Information Commissioner has reported that data breaches are the highest they have been in three-and-a-half years.

In June 2023 and July 2023 in the United States, multiple class actions were filed against providers of artificial intelligence (AI) technologies. These types of class actions have not yet been replicated in Australia. There is currently no specific law regulating the use of AI in Australia, but on 21 June 2024, the Australian government released its National Framework for the Assurance of Artificial Intelligence in Government. This framework in based on Australia's AI Ethics Principles 2019, and establishes cornerstones and practices of AI assurance.

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Law stated - 27 September 2024

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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, 27 February 2013, 6 Ob 224/12b) and confirmed on various occasions, most recently in an obiter dictum statement at the end of 2021, that third-party funding is permissible under Austrian law (OGH, 15 December 2021, 18 OCg 5/21s).

Thus, today, litigation funding in Austria is an accepted practice and has been judicially endorsed by the Austrian courts. Although the courts have not comprehensively covered all aspects involved, they have 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, including in insolvency proceedings; but it is still not as commonly used as in other jurisdictions. It is, however, expected to increase in use in relation to joint consumer actions due to the long-awaited enactment of the Qualified Entity Law, transposing (EU) 2020/1828 Collective Redress Directive into Austrian law in July 2024.

Law stated - 14 October 2024

Restrictions on funding fees

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

There is no explicit limit on what is considered an acceptable compensation for a funder's services. However, as a general rule, a third-party funding agreement – as any other agreement under Austrian law – must not violate a legal prohibition or be against *bonos mores* (ie, it must not constitute profiteering) (section 1 of the Act against Profiteering [WucherG]; section 879 II No. 4 of the Austrian Civil Code).

The Austrian Supreme Court determined that the prohibition of a *pactum de quota litis* agreement (client promises a remuneration to its lawyer based on a percentage of the damages or sums recovered) does not apply to funders – in contrast to legal supporters (including lawyers, notaries public, tax advisers and auditors) – as long as funders do not provide legal advice to the funded party (OGH, 23 February 2021, 4 Ob 180/20d; OGH, 25 March 2021, 2 Ob 10/21s; OGH 10 September 2024, 4 Ob 144/24s). The court noted in that respect that the funder must not exert direct influence on the proceedings or the way the proceedings are conducted by the funded party's lawyer and that the funded party must remain the 'master of the proceedings'. Otherwise a funder could be subject to the *quota litis* prohibition, rendering the success fee null and void.

Law stated - 14 October 2024

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 (prohibition of *quota litis* agreements; section 16 of the Lawyer's Ordinance (RAO) and section 879 II No. 2 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 and is void.

Law stated - 14 October 2024

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 regulated in the RAO and the Professional Practice Guidelines. In light of these rules, 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 (OGH, 25 March 2021, 2 Ob 10/21s).

Law stated - 14 October 2024

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.

Law stated - 14 October 2024

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 free 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.

Law stated - 14 October 2024

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 discussions are often conducted in private. However, if the counterparty does not object, a litigant might even invite their funder to participate in such discussions.

It must be kept in mind that the majority of litigation 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.

In arbitration, the respective hearings and proceedings are generally private, and funders may participate only if there is no objection by the counterparty.

Law stated - 14 October 2024

Veto of settlements

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

To protect the funder's investment, the funder is often granted information or consultation rights regarding a potential settlement in the funding agreement. This is, in general, permissible under Austrian law, provided it does not interfere with the independence of the funded party's lawyer, who has a duty to defend the funded party's rights. This is key as litigation funders might be subject to the *quota litis* prohibition if they provide legal advice to the litigator in an attempt to influence the way the proceedings are conducted by the lawyer, as recently emphasised by the Austrian Supreme Court (OGH 10 September 2024, 4 Ob 144/24s).

Law stated - 14 October 2024

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances 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 decision that results 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 litigation 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.

Law stated - 14 October 2024

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 (OGH 10 September 2024, 4 Ob 144/24s). The lawyer would violate professional conduct rules (sections 7 and 9 of the Lawyer's Ordinance; section 6 of the Professional Practice Guidelines) if their actions were based on a funder's, rather than their client's, instructions. Therefore, any rights and actions the funder intends to exercise during the course of the litigation must be agreed with the claimant in the litigation funding agreement. The litigant remains free to take any actions it wishes to take.

The litigant is only obliged to inform the funder prior to concluding or revoking any settlements, waiving any claims, initiating any additional proceedings in connection with the funded claim, adopting any legal remedies, expanding the claim or otherwise disposing of the funded claim. Funders do not take an active role during the proceedings but only within the limited framework as provided for in the litigation funding agreement to protect the funder's investment. The involvement of a litigation funder does not have to be disclosed to the court or the counterparty, which also considerably limits the funder's role within the litigation in the majority of the cases.

Law stated - 14 October 2024

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.

Law stated - 14 October 2024

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. Further, 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.

Law stated - 14 October 2024

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 nine months (district courts) and 17 months (regional courts). 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.

Law stated - 14 October 2024

Time frame for appeals

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

There is considerable difference in the respective practices 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 approximately one year.

Law stated - 14 October 2024

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 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.

Law stated - 14 October 2024

COLLECTIVE ACTIONS

Funding of collective actions

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

A special class action mechanism has been a part of Austria's civil procedural law practice for more than 10 years. This particular instrument, often referred to as 'class action Austrian-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. Further, 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 (OGH 27 February 2013, Ob 224/12b). Subsequently, third-party funders have shown increasing interest in funding Austrian-style class actions, which has gained public interest. Cases include those against Volkswagen, a truck cartel, GIS and AWD.

As at the time of writing, the (EU) 2020/1828 Collective Redress Directive has just been transposed into Austrian law. On 18 July 2024 the Qualified Entity Law (QEG) entered into force. The QEG regulates the authorisation of qualified entities (QEs), their supervision by the Federal Cartel Prosecutor and their ability to file collective claims. The old regime of class action Austrian-style still remains applicable for cases that fall outside the scope of the new law. On the same date, the amendments to the Civil Procedural Code on collective redress also entered into force. With respect to third-party funding, section 6 QEG clarifies that third-party funding of representative actions is generally permissible and that the specific form should be left to party autonomy. Statutory requirements in this regard were deemed neither necessary nor sensible, including any caps for the funder's success fee. Thus, a QE can enter into a third-party funding agreement with a funder for a specific collective redress action and may make participation by a consumer in such action dependent on the joining parties concluding the pre-agreed third-party funding agreement between the QE and the funder. If the QE makes use of third-party funding for a specific representative action, it must inform the court of this at the earliest opportunity, disclosing the names of the third-party funders. However, it only needs to disclose the litigation funding agreement itself, or its essential content, upon request to the Federal Cartel Prosecutor, who serves as a supervisory authority for QEs, but not to the court responsible at first instance or an appellate court. The Federal Cartel Prosecutor will check whether the criteria for authorising a QE are still valid, among others 'the independence of the QE from any external influence'. If this is no longer the case, the authorisation of the QE can be withdrawn, which leads to the claim being dismissed.

The new law on collective redress was much awaited and discussed in advance. With the current model (ie, no prohibition of restriction of commercial funding and opt-in), it seems that funding of such claims may at least be commercially viable with the following caveat: various ambiguities in the Directive (also maintained in the Austria national law transposing it) create ample opportunities for defendants to challenge the admissibility of representative actions, or the legal standing of individual qualified entities, or both. This will, of course, decrease the possibility that such actions will receive funding in the first place –because litigation funders are typically not inclined to invest in claims that aim at clarifying new questions of laws with an uncertain outcome.

Law stated - 14 October 2024

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.

Law stated - 14 October 2024

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.

Law stated - 14 October 2024

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 (which essentially excludes security for cost orders against all claimants resident or registered within the European Union).

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.

Law stated - 14 October 2024

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 been disclosed neither 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.

Law stated - 14 October 2024

Insurance

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

Although no legal or regulatory restrictions limit the use of ATE insurance, the product is only used to a limited extent in Austria, and there is no standard offering available. However,

several insurance companies and third-party litigation funders offer their clients solutions for the coverage of adverse costs by way of ATE insurance.

By contrast, legal cost insurance is commonly used in Austria. This insurance product is arranged before the need to litigate arises (before-the-event insurance) and provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.

Law stated - 14 October 2024

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 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 was required to disclose the litigation funding agreement in an Austria-based arbitration.

In (domestic and international) arbitration proceedings administered by the Vienna International Arbitral Centre (VIAC), the existence of any funding and the name of the funder (but not the entire funding agreement) must be disclosed at the outset (article 13a VIAC Rules 2013).

Law stated - 14 October 2024

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 (NDAs) between a funder, lawyer and client. NDAs are usually concluded at the outset, namely, upon receipt of the funding request.

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

Law stated - 14 October 2024

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.

Law stated - 14 October 2024

Other issues

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

With no legislation regulating third-party funding in Austria, the Austrian Supreme Court's judgments give guidance on various aspects including the legality and enforceability of funding agreements. The ongoing discussions and initiatives to regulate third-party funding at the EU level will more than likely impact the future of third-party funding in Austria.

Law stated - 14 October 2024

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 that has prevailed for decades (OGH 17 June 2019, 17 Ob 6/19k). This has opened up new possibilities for third-party funders to finance avoidance claims in insolvency proceedings and has given 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 have ultimately benefited from this development.

Law stated - 14 October 2024

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REGULATION

Overview

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

Thus far, the permissibility of third-party litigation funding has not 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.

A number of factors likely contribute to the limited use of third-party funding in Belgium to date, including, among others:

- The costs associated with Belgian judiciary proceedings are relatively low compared to the legal costs incurred in other jurisdictions.
- The judgment proceeds resulting from litigation or arbitration proceedings under Belgian law tend to be lower than in other jurisdictions – particularly common law – since concepts such as punitive damages are not available under Belgian law.
- As Belgian courts currently have a substantial backlog, the adjudication time frames are generally very long, especially compared to other countries. This has proven to be an important drawback to funders.

Consequently, third-party litigation funders have shown relatively modest interest in the Belgium market so far, which has prevented litigants from making vast use of third-party litigation funding. Nevertheless, while the courts have yet to grant judicial validity, the use of third-party litigation funding continues to demonstrate its utility and potential for greater use and growth within the market.

Law stated - 10 October 2024

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 a funder's return. As a general rule, a funder's profit should not exceed a litigant's share of the proceeds.

Typically, a funder's share is calculated based on a multiple of the funds contributed, a percentage of the proceeds or a combination thereof. In practice, a funder's success fee commonly ranges between 20 per cent 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).

Law stated - 10 October 2024

Specific rules for litigation funding

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

The Belgian legislature has yet to enact 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.

Law stated - 10 October 2024

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 Lawyer's Code of Ethics (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 legal privilege and may not be disclosed to the funder without the 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 Code of Ethics.

This is in line with the 17 March 2008 Regulation of the French and German-speaking Belgian Bar governing the relationship between lawyers and third parties (Regulation of the Belgian Bar), according to which professional secrecy does not prevent a lawyer from sharing the client's legal position and objectives, as well as the planned litigation strategy with a third-party funder, provided that the exchange of such information has been previously agreed upon between the lawyer and the client.

Besides the rules of confidentiality, the ethics rules also include the obligation to act in the best interests of the client (as opposed to the interests of a third-party funder or the attorney's interest) and the obligation to act independently.

It should also be noted that the Order of the Flemish Bar Associations (OVB) issued some recommendations in 2023 regarding third-party funding.

Law stated - 10 October 2024

Regulators

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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, or make available credit facilities for their own account.
- It is not a legal protection insurance, as 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 (AIFM Directive) implemented under Belgian law by the AFIM Act. The AIFM Directive defines 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.

Law stated - 10 October 2024

FUNDERS' RIGHTS

Choice of counsel

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

As a matter of principle, a litigant's lawyer is independent of the third-party funder and must be able to act freely from any instructions from the latter. However, a 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 chosen lawyer and the reasonableness of their proposed fees and provide funding only if the litigant's choice of counsel can be approved.

Law stated - 10 October 2024

Participation in proceedings

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

The role of a third-party litigation funder and such 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 envisioned 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, as state court hearings are open to the public in Belgium.

Law stated - 10 October 2024

Veto of settlements

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

According to current best practices, funding agreements do not include any veto right of the funder with respect to settlements, but only a consultation right. The funder's interests remain safeguarded due to the structure of its success fee, which is typically primarily or exclusively based on a time-dependent multiple of the committed amount, combined with the funder's priority position in the waterfall payment structure.

Law stated - 10 October 2024

Termination of funding

9 | In what circumstances may a funder terminate funding?

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

- a change in circumstances having a material impact on the chances of success of the funded case;
- 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.

Under such circumstances, a funder may terminate the funding agreement while bearing any costs incurred up until the point of, and as a result of, termination. Accordingly, such clauses might prevent the funder from continuing to finance proceedings that have become clearly unpromising.

In addition, the funder may terminate the funding in the event of a material breach of the litigant's contractual obligations. In this scenario, the funder typically has no duty to cover any further costs, but the funded party is obliged to reimburse the funder for its costs and expenses.

However, if a funder (unilaterally and without contractual provision allowing it) ceases performance of its contractual obligations, the contract can be legally enforced under Belgian general contract law. Additionally, a funded party can claim damages as a result of the breach of the funding agreement.

Law stated - 10 October 2024

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 that a third-party litigation funder wishes to exercise during the course of a funded proceedings must be determined in the funding agreement. This may include rights to otherwise confidential information, access to documents, and the power to preclude actions that 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.

Law stated - 10 October 2024

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

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).

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 the fee arrangement with their clients provides for minimal remuneration, independent of the case outcome.

Law stated - 10 October 2024

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 (the Insurance Act), the insurer must 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; and
- after-the-event (ATE) insurance: as 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.

Law stated - 10 October 2024

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.

Law stated - 10 October 2024

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 the requirement of an application to set aside the award if none of them is either a natural person having Belgian nationality or their domicile or habitual residence in Belgium, or a legal person having their 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 on limited grounds specifically set forth in the Belgian Judicial Code (BJC). Challenges to an arbitral award generally take one to two years.

Law stated - 10 October 2024

Enforcement

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

There are 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 sale of the debtor's property or other assets, and garnishment of the debtor's receivables and bank accounts.

As arbitration proceedings are based on the mutual consent of the parties, arbitral awards require enforcement proceedings less often, 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 specifically listed in article 1721 of the BJC.

Law stated - 10 October 2024

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, an 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 Business Court by a group of consumers or small and medium-sized enterprises 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. Nevertheless, 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, as 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 recent years, there have been some high-profile cases in Belgium wherein the claimants benefited from third-party funding. These were investment recovery cases that involved an important number of claimants, but they did not, however, qualify as class actions. It is also of note that the funders involved were mostly international funders with activities in Belgium.

In November 2020, the European Union issued a new Directive on representative actions for the protection of the collective interests of consumers. This Directive was transposed into Belgian law by a law dated 21 April 2024. The Directive provides the possibility for member states to foresee third-party funding of class actions provided that a number of safeguards are put into place. The Belgian Act on class actions already met most of the requirements set forth in the Directive. However, Belgian law now expressly requires the group's representative to disclose whether the action is financed by a third party or parties and, if so, by whom and up to what amount(s) (article XVII.42, section 1, 6° of the CEL).

Besides class actions, Belgian law also allows for other instruments of collective redress; in particular, actions where:

- numerous claimants act together and unite their claims in one single procedure; or
- 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 an award.

Law stated - 10 October 2024

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 article 1017 of the Belgian Judicial Code (BJC), the general rule is that the court condemns the losing party to pay the legal costs unless the costs incurred by the successful party are proven to be excessive or unnecessary. If the plaintiff's claim is partly granted, the legal costs are usually divided equally.

The costs of the proceedings that courts may order the losing party to pay to the successful party are specifically enumerated in article 1018 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 of the principal amount the losing party is ordered to pay under the award, interest excluded, on behalf of the tax authorities if the losing party is ordered to pay an amount exceeding €12,500.
- A procedural indemnity that is a flat-rate contribution to the lawyers' fees; this amount is set by law and adjusted from time to time to account for inflation.
- Since 1 November 2022, the basic indemnity ranges from €225 to €22,500 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 €1,800. These amounts may be decreased (to a minimum of €112.50) or increased (to a maximum of €45,000) by the court under specific circumstances, depending on different criteria, such as the financial capacity of the unsuccessful party, the complexity of the case, existing contractual compensation for the successful party or blatant unreasonable submissions (see article 1022, section 3 of the BJC).

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 1713, section 6 of the BJC provides that the final award must fix the costs of the arbitration and decide which party shall bear what proportion of said costs, as article 1017 BJC does not apply.

Moreover, the arbitral tribunal will take all circumstances into account (such as equity arguments). The tribunal is thus not obliged to divide the legal fees in accordance with its award and can design a distribution key specific to the case at hand.

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 1713, section 6 of the 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.

Law stated - 10 October 2024

Liability for costs

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

Unless a claim was specifically assigned to a third-party funder, the funder does not become a party to the funded proceedings as a result of the conclusion of a 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.

Law stated - 10 October 2024

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?)

According to the text of article 851 BJC, 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. This *cautio judicatum solvi* is aimed at protecting Belgian litigants against pecuniary losses caused by foreign claimants who commence proceedings but who do not offer enough security in Belgium to ensure the payment of costs and damages that may result. 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. To date, the Belgian legislature has still not amended article 851 BJC. However, the Belgian Supreme Court has addressed the issue by ruling on 10 March 2023 that this provision may be raised against any claimant, irrespective of their nationality, who lives or resides abroad and does not have sufficient assets in Belgium to cover the financial consequences of a potentially unfavourable decision.

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, section 1 of the BJC.

Of course, nothing prevents parties to a third-party funding agreement from finding a contractual arrangement on the issue of providing security for costs. Also, when a funder turns out not to be capable of fulfilling its financial obligations, it can generally be held liable for breach of contract.

Law stated - 10 October 2024

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

Security for costs can only be ordered by Belgian courts if requested against a claimant, irrespective of their nationality, who lives or resides abroad and does not have sufficient assets in Belgium to cover the financial consequences of a potentially unfavourable decision. The existence of a third-party funding agreement is therefore not a criterion for the granting of security for costs under the relevant provision of the BJC (and of its current interpretation).

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

Law stated - 10 October 2024

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 admitted and frequently used. Several insurance companies and third-party litigation funders offer their clients solutions for the coverage of adverse costs by way of ATE insurance.

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 (automobile liability insurance, household insurance, etc).

Law stated - 10 October 2024

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?

According to the Directive on representative actions and its transposition into the Code of Economic Law (CEL) by a law dated 21 April 2024, any 'qualified entity' should disclose the existence of third-party funding. (A qualified entity is any organisation or public body representing consumers' interests that has been designated by a member state as qualified to bring representative actions in accordance with the Directive.) Since 10 June 2024, the group's representative must disclose whether the class action is financed by a third party or parties and, if so, by whom and up to what amount(s) (article XVII.42, section 1, 6° of the CEL).

Apart from this, in the absence of any statutory 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 existence of the funding agreement be disclosed 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 of the Belgian Judicial Code (BJC) are met (namely, the existence of serious, precise and concordant presumptions that a party or 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 generally considered necessary that the existence of a funder (and of the related funding agreement) be disclosed to the arbitral tribunal. Indeed, article 1686 BJC obliges the arbitrator to inform parties of all circumstances that may arise regarding his or her independence or impartiality. Given that an arbitrator's prior relationships or dealings with the funder may qualify as such a circumstance, disclosing the existence of a funding agreement is important. However, the specific terms and conditions of the funding agreement do not have to be disclosed. Additionally, the principle of fairness of the debates, enshrined in article 1699 of the 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, as arbitrators may have worked before with third-party funders when acting as a lawyer.

In the context of international arbitration, the 2021 International Chamber of Commerce 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.

There is no such requirement in the rules of the major Belgian national arbitration organisation (namely, the CEPANI). However, in a November 2021 seminar, a majority of the participants advised including a disclosure obligation in the CEPANI Arbitration Rules – although this has yet to be implemented.

Independent of the applicable procedural rules, in any case, an arbitrator is required to disclose all information that could give rise to reasonable doubts as to his or her independence and impartiality. Non-compliance with this rule may constitute a ground for annulment of the arbitral award.

Law stated - 10 October 2024

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.

Law stated - 10 October 2024

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.

Law stated - 10 October 2024

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.

Law stated - 10 October 2024

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 growing presence of Continental European and British funders.

This forecast is endorsed by the resolution of the European Parliament of 13 September 2022, regarding recommendations to the European Commission on regulations of litigation funding in the European Union. These recommendations may encourage the start of a legislative process at the European and national levels and, therefore, stimulate the third-party litigation funding market in countries such as Belgium.

Law stated - 10 October 2024

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UPDATE AND TRENDS

Current developments

REGULATION

Overview

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

Historically, there has been a certain degree of uncertainty about whether third-party litigation or arbitration funding is compatible with local public policy, and whether litigation funding agreements are enforceable.

The British Virgin Islands (BVI) has a common law system. It is arguably unclear whether the doctrines of champerty and maintenance continue to apply in the jurisdiction, to potentially render third-party funding contracts unenforceable.

While criminal liability for champerty and maintenance was abolished in the BVI in 1997 by section 328 of the BVI Criminal Code, to the extent that the doctrines still lurk in the backdrop of the BVI's legal system, they have not been fully abolished by local statute as a civil wrong or a tort, as is the case in England and Wales.

Until 29 September 2020, BVI courts had not fully assessed the enforceability of third-party funding arrangements. In the important (but uncontested) decision of *Crumpler v Exential Investments Inc*, Claim No. BVIHC (COM) 81 of 2020, the BVI Eastern Caribbean Supreme Court (Commercial Division) gave its approval of a third-party funding agreement between two BVI liquidators and a third-party litigation funder.

Litigation funding had previously been sanctioned by the court on previous occasions, but this was the first time that the position had been confirmed in a written decision. In his judgment, the Honourable Justice Jack noted that the modern English approach permitting third-party litigation funding at common law has been adopted in judgments by courts in Bermuda, Jersey, Australia and Cayman (citing a whole series of cases in that regard). The Learned Judge concluded that the funding arrangement was not contrary to BVI public policy – in fact, that the contrary was the case. In Justice Jack's view, the liquidators would not have been able to recover assets for the benefit of the creditors without such funding in place, and the funding arrangement was essential to ensure access to justice. This acceptance of third-party funding has not yet been considered at the appellate level. It may take considerable time before the courts come to a final landing on the acceptability of third-party funding.

Prior to the court's decision in *Crumpler*, in *Hugh Brown & Associates (Pty) Ltd v Kermas Limited*, Claim No. BVIHCV (COM) 2011/13 and 14, Mr Justice Bannister was prepared (without deciding the point) to proceed on the assumption that third-party funding was permissible. Subsequently, in *Leremeieva v Estera Corporate Services (BVI) Ltd*, Claim No. BVIHCM2017/0118, Justice Gerhard Wallbank observed that litigation funding might provide access to justice, which he described as 'laudable'. In the judge's view, the tell-tale signs of a champertous agreement included excessive control over the litigation by the funder, significant returns conditional upon the outcome of the claim and that the funder does not appear to be a professional funder or a regulated financial institution.

Given the scarcity of BVI precedent on the topic, whether third-party financing of litigation is common in the BVI is difficult to judge. An argument can certainly be made that BVI courts will continue to adopt the modern English common law model, by permitting responsible

third-party funding to flourish under judge-made rules. As a result, it would not be surprising to see an upsurge in cases that are funded by professional funders or regulated financial institutions.

By the adjective 'responsible' in modifying the noun 'funding' we mean to say funding agreements that:

- do not permit a funder to exercise control over the prosecution of a bare cause of action for an unliquidated sum; and
- require a funder to fund adverse costs up to the level of its funded costs.

Also, by 'responsible' we are referring to adequately capitalised and professional third-party funders. If these guiding principles are not followed, in our opinion, there exists a real risk under BVI law that an offending funding agreement will be found to be unenforceable.

It is relevant to note that on 26 July 2023, the Supreme Court of England and Wales gave judgment in *R (PACCAR) Inc) v Competition Appeal Tribunal* [2023] UKSC. In summary, the majority concluded that litigation funding agreements that give a funder a percentage interest in any damages recovered must comply with the Damages-Based Agreements Regulations 2013; and if an agreement does not, it will be unenforceable. There are no equivalent regulations or legislation in the BVI and therefore the decision in *PACCAR* is unlikely to have a material impact in this jurisdiction.

Law stated - 18 November 2024

Restrictions on funding fees

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

There are no established limits on the fees and interest that funders can charge. However, if an application is made for the court's approval of a funding agreement, the amount of fees and interest charged by the funder will likely be a relevant consideration for the court.

Law stated - 18 November 2024

Specific rules for litigation funding

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

There is currently no regulation of third-party litigation funding in the BVI.

Law stated - 18 November 2024

Legal advice

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

Several of the rules contained in the Code of Ethics appended to the Legal Professions Act 2015 (the Code) will be relevant to those legal practitioners in the BVI who advise on funding. For example, a legal practitioner must maintain his or her integrity and independence and act in the best interests of the client. A breach of the Code may constitute professional misconduct. As in other common law jurisdictions, a legal practitioner in the BVI owes his or her client a duty of care, and the failure to meet the requisite standard of care when advising on funding may result in a claim for professional negligence.

Law stated - 18 November 2024

Regulators

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

There are no such public bodies in the BVI, although the BVI court will of course scrutinise any agreement that it is called upon to approve.

Law stated - 18 November 2024

FUNDERS' RIGHTS

Choice of counsel

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

Securing litigation funding can be a complex and lengthy process. Potential funders will need to be convinced that the case is worth funding from a commercial perspective. A variety of factors will be considered by the funder, including the composition of the client's legal team. If for whatever reason the funder is not satisfied with the legal team, it may of course refuse to fund the litigation.

Law stated - 18 November 2024

Participation in proceedings

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

There is nothing preventing a funder from attending open court hearings. If the proceedings are being held in chambers or in camera, it would be necessary to first obtain permission from the judge. Equally, there is nothing prima facie improper with a funder attending settlement discussions, although it may be appropriate to obtain the opposing party's consent first.

Law stated - 18 November 2024

Veto of settlements

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

Litigation funding agreements will often require a funder to be kept informed of settlement offers and negotiations, and the degree to which it can contribute to the litigant's decision to settle the matter and what terms should be set out in the agreement. Decisions from the courts of England and Wales are persuasive authority in the British Virgin Islands (BVI). Therefore, the BVI court is likely to intervene when a funder is attempting to procure an improper settlement (*Davey v Money* [2019] EWHC 997 (Ch)).

Law stated - 18 November 2024

Termination of funding

9 | In what circumstances may a funder terminate funding?

The circumstances under which an agreement may be terminated by the funder or the litigant, or both, will generally be set out in the funding agreement.

Law stated - 18 November 2024

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 ways and extent to which funders can take an active role in litigation remain untested in the BVI. While the BVI court appears to be taking a modern approach to litigation funding, it is arguable that the public policy against champerty and maintenance remains alive in the BVI, at least to some extent, and a funder must therefore not assume control over the litigation. That said, it is arguable that the BVI court should adopt the modern approach of the English courts and ask itself whether the right of control enjoyed by a funder will likely undermine or corrupt the process of justice (*Davey v Money* [2019] EWHC 997 (Ch)).

It is relevant to note that on 20 October 2022, the Eastern Caribbean Court of Appeal in *Fang Ankong v Green Elite Limited* BVIHCMAP2022/0048 refused an appeal of the BVI Commercial Court's decision to permit the joint liquidators of the respondent to share the appellant's confidential information to the respondent's litigation funder. The confidential information – which provided details of the appellant's assets – was disclosed to the respondent under compulsion of a freezing order. The primary ground on which the underlying application was sought was to allow the litigation funder to consider the proportionality and appropriateness of providing further funding to the respondent. The Court of Appeal held that sharing the information with the funder was permitted because it was for the purposes of the proceedings in which the disclosure was made. The Court also held that, to the extent that an implied undertaking applied to the disclosure, sharing the

information with the funder to allow it to consider the proportionality and appropriateness of providing further funding was ancillary to the purpose for which the disclosure was ordered (namely, to police the injunction) and was therefore permitted. This is an important decision, not only on the specific issue of information sharing with a funder, but also because it demonstrates the jurisdiction's evolving openness to litigation funding.

Law stated - 18 November 2024

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Yes. Section 26 of the Legal Professions Act 2015 (LPA) provides that the Code of Ethics appended to the LPA (the Code) governs the conduct of legal practitioners in the British Virgin Islands (BVI).

Section 6 of Part B (Mandatory Provisions and Specific Provisions) of Schedule 4 (Code of Ethics) of the Act provides the following:

> 6(1). Subject to paragraph (2), a legal practitioner shall not acquire directly or indirectly by purchase, or otherwise, a financial or other interest in the subject matter of the case he or she is conducting.
>
> (2) It is not improper for a legal practitioner to enter into a written agreement with a client for a contingency fee provided that such fee is fair and reasonable.

In relation to this, it is relevant to note the BVI court's decision in *Abdel-Karim Taher Itum v Forbes Hare* (Claim No. BVIHCV 2016/0199) dated 1 December 2020. The central issue was whether there was a binding and enforceable contract between a BVI law firm (the Law Firm) and its client (the Client), and if so on what terms. The Law Firm had issued a partially signed letter of engagement to the Client, who, rather than signing the agreement, issued what he described as a 'counter-offer'.

The counter-offer contained a proposal that if the Law Firm's initial efforts were successful and a funder was identified, an additional sum on top of the capped fee would be settled through the funder.

The court found that the Client had not agreed to the written letter of engagement and the Law Firm had not agreed to the counter-offer. However, the court held that the Client had impliedly entered into an agreement to retain the Law Firm and, as a result, the Client was the subject of an implied obligation to remunerate the Law Firm reasonably in exchange for the firm's services – and such fees were not capped.

Relevantly for present purposes, the judge proceeded to deal with the Law Firm's ancillary argument that it would not be reasonable to conclude that the firm would have accepted the terms of a counter-offer that, if accepted, would be unenforceable by reason of it being

incompatible with the public policy rule at common law against champerty (on the theory that the Client's counter-offer represented a conditional fee arrangement).

Having examined several older English judgments in support of the proposition that a conditional fee agreement offends the rule against champerty – and is therefore unenforceable – the judge concluded that even if it could be said that the Client contracted with the Law Firm on such terms, the agreement would likely be unenforceable at common law.

In our respectful view, the judge's finding on this issue is unlikely to be followed in the future. First, there is a strong argument that this finding was made obiter and that the ratioof the case appeared earlier in the judgment. Second, it appears that the judge did not refer to section 6(2) of the Code, which authorises the use of contingency fees (albeit only in writing). Third, the judge was not referred to Justice Jack's decision in *Russell Crumpler and David Standish as Joint Liquidators of External Investments Inc (In Liquidation) v External Investments Inc*,Claim No. BVIHC (COM) 81 of 2020, where the court found that a third-party litigation funding agreement was not incompatible with BVI public policy.

Law stated - 18 November 2024

Other funding options

12 | What other funding options are available to litigants?

Legal aid is not provided for by statute in the BVI for civil litigation matters. Unless a litigant has insurance, if third-party funding is not in place, he or she must personally fund the litigation.

Law stated - 18 November 2024

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 British Virgin Islands (BVI) High Court currently has four judges who sit full time, two of whom deal exclusively with matters in the Commercial Division. The time it takes for a commercial claim to be determined at first instance depends on a variety of factors, including how legally or evidentially complex the case is and how busy the court's list is.

Interlocutory applications can be dealt with on an urgent basis within a couple of days of filing, but only if the court is satisfied that there are cogent grounds for urgency. A trial will, of course, take much longer to be determined, and it would not be unusual for 12 months to elapse between the issuance of a claim and final determination at first instance. This period will increase substantially if issues of proper forum or service arise. A report published

by the Eastern Caribbean Supreme Court indicates that in 2018 (namely, pre-covid-19 pandemic) the average time for a commercial court matter to be disposed of was 241 days.

Law stated - 18 November 2024

Time frame for appeals

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

The Court of Appeal division of the Eastern Caribbean Supreme Court, headquartered in Castries, Saint Lucia, operates as an itinerant court of appeal whereby the Justices of Appeal travel to each of the member states for scheduled sittings. The nine member states are the Territory of Anguilla, Antigua and Barbuda, the Commonwealth of Dominica, Grenada, the Territory of Montserrat, the Federation of Saint Christopher and Nevis, Saint Vincent and the Grenadines, Saint Lucia and the Territory of the British Virgin Islands.

The Court of Appeal usually sits in the BVI twice a year (sometimes three). While most BVI appeals are heard when the court is sitting in the jurisdiction, emergency appeals can be heard in any jurisdiction where the court is sitting at that time. As with decisions at first instance, the time taken for an appeal to be determined will vary greatly and will depend on the circumstances of the case and how busy the court's diary is. Broadly speaking, it can take around one to two months for an emergency appeal and 12 to 18 months for a non-urgent, complex appeal to be resolved.

Law stated - 18 November 2024

Enforcement

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

There are no statistics detailing the proportion of judgments that require enforcement action in the BVI. The available methods of enforcement of a money judgment are set out under Part 45.2 of the Eastern Caribbean Civil Procedure Rules (Revised Edition) 2023 and include:

- a charging order;
- a garnishee order;
- a judgment summons;
- a seizure and sale order; or
- the appointment of a receiver.

Before a foreign judgment can be enforced in the BVI it must first be recognised under the Reciprocal Enforcement of Judgments Act 1922 (which applies to judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in

Scotland and the courts of the Bahamas, Barbados, Belize, Grenada, Guyana, Jamaica, St Lucia, Trinidad and Tobago, and New South Wales (Australia)) or a substantive claim must be issued in the BVI based on the outstanding judgment debt.

Law stated - 18 November 2024

COLLECTIVE ACTIONS

Funding of collective actions

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

There are no rules that specifically relate to class or group actions. However, where there are five or more persons who have the same or similar interest in the proceedings, the court may appoint:

- a body having sufficient interest in the proceedings; or
- one or more of those persons to represent all or one of the persons with the same or similar interest (pursuant to Part 21 of the Eastern Caribbean Civil Procedure Rules (Revised Edition) 2023).

A representative may be either a claimant or a defendant. In principle, there is no reason why group litigation could not be funded by a third party, although group litigation in the British Virgin Islands is relatively rare.

Law stated - 18 November 2024

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) 64.6 the general rule is that where the court decides to make an order about costs, the court must order the unsuccessful party to pay the costs of the successful party. However, the court has wide discretion and may order the successful party to pay all or part of the unsuccessful party's costs or make no order at all. As for the costs liability of a funder, while the issue remains untested, it is likely that the British Virgin Islands (BVI) court will adopt the position in England that an unsuccessful party in litigation cannot be ordered to pay the costs of third-party funding.

Law stated - 18 November 2024

Liability for costs

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

The issue of whether a third-party funder can be made liable for the costs of a funder is yet to be considered by the BVI court. However, English precedent is persuasive authority in the BVI, and it is therefore arguable that the court may have the discretion to order a funder to pay adverse costs (see *Davey v Money* [2019] EWHC 997 (Ch)).

Law stated - 18 November 2024

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?)

By Civil Procedure Rule 24.3, the court may order the claimant to pay security for costs if it considers that it would be just to do so having regard to all the circumstances of the case, and if any of the following applies:

- some person other than the claimant 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;
- the claimant:
    - failed to give his or her address in the claim form;
    - gave an incorrect address in the claim form; or
    - has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;
- the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;
- the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21 of the Civil Procedure Rules, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;
- the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
- the claimant is an external company; or
- the claimant is ordinarily resident out of the jurisdiction.

In *Dr Martin Didier et al v Royal Caribbean Cruises Ltd*, SLUHCVAP 2017/0051, the Court of Appeal (for the Eastern Caribbean Supreme Court) held that the court would not order security for costs solely because the claimant was ordinarily resident outside the jurisdiction. That said, a non-resident claimant without any assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs.

The amount and nature of the security shall be such as the court thinks fit (CPR 24.2 (4)). The court should ensure that the amount ordered to be paid is not oppressive or disproportionate and will consider such factors as the value of the claim and the costs

incurred to date. Security may be in various forms, including a payment into court, bond or guarantee.

Law stated - 18 November 2024

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

Under CPR 24.3(a), one of the circumstances under which the court may order security for costs is if some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property that the claimant may recover. This would include most if not all third-party funding arrangements.

In *Hualon Corporation (M) SDH BHD (in receivership) v Marty Limited*, BVIHC (COM) 2014/0090, Justice Farara held that the claimant's refusal to provide the defendant with a copy of the funding agreement was one of the factors weighing in favour of granting security for costs, because it 'raises the serious likelihood that the Claimant is either unable or unwilling to pay or to meet any costs awarded to the Defendant in these proceedings'. However, while there are no decided cases in the BVI, it is unlikely that the existence of funding alone would warrant an order for security for costs, particularly if the funding is being provided by an established funder.

Law stated - 18 November 2024

Insurance

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

There are no rules prohibiting the use of after-the-event insurance. However, there are no published statistics detailing how common its usage is in the BVI.

Law stated - 18 November 2024

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 obligation on the parties to disclose the existence of a funding agreement, although the refusal to do so may be a factor (among others) that weighs in favour of granting security for costs (*Hualon Corporation (M) SDH BHD (in receivership) v Marty Limited*,BVIHC (COM) 2014/0090).

Under Civil Procedure Rule 24.3(a) the court may order security for costs if some person other than the claimant has contributed or agreed to contribute to the claimant's costs in

return for a share of any money or property that the claimant may recover. The equivalent provision in England has been held to include an inherent power for the court to require the disclosure of the identity of the funder (*RBS Rights Issue Litigation* [2017] EWHC 463 (Ch). It is reasonable to expect that the British Virgin Islands (BVI) court would adopt a similar stance.

Law stated - 18 November 2024

Privileged communications

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

There appears to be no written judgment from the BVI court examining whether a third-party funding agreement is likely to attract privilege. The concepts of litigation, common interest and legal advice privilege apply in the BVI in the same manner as they do in England, and therefore the BVI court would likely adopt the position on this issue currently taken in England. In the *Matter of Edwardian Group Limited* [2017] EWHC 2806 (Ch), Morgan J considered the applicable authorities concerning legal advice privilege in this context. He held that if the litigation funding agreement '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), then legal advice privilege would apply to the funding agreement. It is advisable for all prospective funders to be put under a non-disclosure agreement (including a clause confirming the existence of the common interest privilege). A common interest privilege may not actually bite until a funder goes risk and is exposed to loss on a claim – much like the relationship between an insured and its insurer.

Law stated - 18 November 2024

DISPUTES AND OTHER ISSUES

Disputes with funders

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

None reported in this jurisdiction.

Law stated - 18 November 2024

Other issues

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

Recently, a report was issued by the British Virgin Islands (BVI) Insolvency Law Reform Committee setting out a number of preliminary recommendations for legislative reform on litigation funding by both third parties and legal professionals. This is an important law reform report. The Committee was established by the Honourable Chief Justice in 2017 and has six members. Currently, they include three sitting judges of the Court of Appeal and two senior members of the BVI Bar. The report recommends, in part, the abolition of the common law rules relating to champerty and maintenance insofar as they concern tortious conduct and as a ground for the automatic avoidance of funding agreements on public policy grounds. It is substantially a pro-litigation funding report, albeit under a regulated structure. The report recommends that the BVI enact a statute governing third-party litigation funding in the BVI, based substantially on:

- elements of a relatively recently enacted statute governing third-party funding in the Cayman Islands; and
- a draft Bill to enact a Dispute Resolution Funding Act (BVI) authored by the authors of this article.

Law stated - 18 November 2024

UPDATE AND TRENDS

Current developments

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

The proposed Bill to Enact the Dispute Resolution Funding Act 2021 (British Virgin Islands) (BVI) was prepared by the authors at the request of the BVI government. It is now under consideration by the government for possible enactment. An earlier version of the draft Bill has been commented on extensively by the recent report of the BVI Insolvency Law Reform Committee.

Law stated - 18 November 2024

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UPDATE AND TRENDS

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REGULATION

Overview

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

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, resorting to third-party funding has grown significantly in the field of international arbitration over the past 10 to 15 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).

Law stated - 15 October 2024

Restrictions on funding fees

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

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 in the case 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). This case law seems to reflect the principle that the portion of the lawyer's fees that is contingent upon the outcome of the dispute must be proportionate to the service rendered (Court of Cassation, 10 November 2021, No. 19-26.183; CA Lyon, first president, 27 March 2023, No. 22/02231).

Law stated - 15 October 2024

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 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.

Last, 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)).

Law stated - 15 October 2024

Legal advice

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

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 (namely, 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 the French Bar Associations (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 on charging 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 a 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 on attorneys advising a financed party to provide legal advice to the funder;
- emphasises the prohibition on 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 (namely, 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), 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.

Law stated - 15 October 2024

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.

Law stated - 15 October 2024

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.

Law stated - 15 October 2024

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.

A recent ruling by the International Commercial Chamber of the Paris Court of Appeal sheds further light on the legal status of third-party funders (Paris Court of Appeal, International Commercial Chamber, 25 January 2022, No. 20/12332). The ruling was issued in the context of a set-aside application against an arbitral award rendered in a Paris-seated arbitration. The underlying arbitration had been initiated by a physical person (who was a shareholder of one of the defendant companies) in relation to the alleged violation of certain shareholder rights. To fund the arbitration, the claimant had concluded a funding agreement with a third party pursuant to which the third party would be entitled to receive the claimant's shares in the defendant company in the event that the claimant prevailed. The defendant sought to set aside the arbitral tribunal's ruling on jurisdiction made in a partial award. The set-aside application named both the claimant and the third-party funder as defendants in the set-aside action. One of the grounds for setting

aside the award was that the arbitral tribunal had allegedly failed to extend the arbitration agreement to the third-party funder and thus wrongly rejected jurisdiction over the funder. The Paris Court of Appeal rejected this argument:

- the Paris Court of Appeal first analysed the language of the arbitration agreement and confirmed the arbitral tribunal's finding that the arbitration agreement could not be interpreted as extending to the third-party funder in the case at hand;
- the Paris Court of Appeal then held that the mere involvement of a third-party funder did not, on its own, justify an extension of the arbitration agreement. Rather, the court noted that an arbitration agreement could only extend to a third-party funder under 'exceptional circumstances';
- the court did not elaborate on what could constitute such 'exceptional circumstances' that justified the extension of an arbitration agreement;
- the court noted that the disclosed presence of a funder (instead of a funder being 'concealed as is often the case') does not create an exceptional circumstance;
- likewise, the fact that the funder has an interest in the outcome of the dispute that is not purely monetary – and that it only occasionally acted as a third-party funder – could not be considered to constitute an exceptional circumstance that would justify extending the arbitration agreement to the funder; and
- the Paris Court of Appeal explicitly noted that the claimant and the funder had 'separate interests'.

Law stated - 15 October 2024

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.

Law stated - 15 October 2024

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.

The 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.

The 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.

Law stated - 15 October 2024

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 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 the funder, the attorney must 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 must 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.

Law stated - 15 October 2024

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Aside from international arbitration, French law prohibits attorney remuneration on a full contingency basis (Law No. 71-1130 of 31 December 1971, article 10, National Internal Regulations adopted by the National Council of French Bar Associations, article 11-3 and Attorney's Code of Ethics, article 10). Attorneys may, however, agree in advance to a partial contingency fee in addition to a fixed fee. When asked to review the validity of contingency fee arrangements, French courts will verify that the amount of the fixed fee is not derisory compared to the contingency fee ultimately claimed by the attorney. In a recent case, it was held that a contingency fee 70 times higher than the fixed fee was disproportionate, rendering the fixed fee derisory and the fee agreement invalid and unenforceable (Court of Cassation, 10 November 2021, No. 19-26.183; see also CA Lyon, first president, 27 March 2023, No. 22/02231).

Regarding international arbitration, French courts have considered that contingency fee-based arrangements that may otherwise have been considered non-compliant with the prohibition under French law were valid and enforceable, provided that the actual amount of such contingency-based remuneration was not 'manifestly abusive' towards the client (Paris Court of Appeal, 10 July 1992).

Law stated - 15 October 2024

Other funding options

12 | What other funding options are available to litigants?

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.

Law stated - 15 October 2024

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 statistics available from the French Ministry of Justice, commercial chambers of the civil courts of first instance reached decisions over an average duration of 9.9 months in 2021 and 9.1 months in 2022, respectively. In the commercial courts of first instance, the average duration to obtain a decision was 10 months in 2021 and 9.5 months in 2022. 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.

Law stated - 15 October 2024

Time frame for appeals

14 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 27.2 per cent of commercial court decisions of first instance in 2022. The average duration of appeal proceedings was 15.7 months in 2021, and 14.9 months in 2022.

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 challenge the award (Code of Civil Procedure, article 1518). Based on the latest statistics of the International Commercial Chamber of the Paris Court of Appeal (ICCP-CA), as at 30 June 2023, 109 applications for setting-aside of international arbitration awards and five appeals of exequatur orders were pending before the ICCP-CA. The average duration of arbitration- related proceedings before the ICCP-CA was 17 months as at the same date.

Law stated - 15 October 2024

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 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 provides 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 counterparty, but also compensate the counterparty for any loss suffered.

In general, the enforcement of a final judgment or arbitral award in France is relatively 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).

Law stated - 15 October 2024

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, 32 class actions were introduced in France between October 2014 and 2022.

Third parties face no restrictions on funding class actions. However, regarding class actions relating to consumer protection, the French Code of Consumption provides that a consumer association that initiates 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 that 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 should, therefore, be worded accordingly.

Law stated - 15 October 2024

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 that 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 discretion to order the parties to pay costs and, if so, in what proportion. This could potentially include third-party funding costs of the prevailing party.

Law stated - 15 October 2024

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.

Law stated - 15 October 2024

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 provision of security for costs against the opposing party (but not against a third party) – a provision ad litem – 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.

Law stated - 15 October 2024

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.

Law stated - 15 October 2024

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 common in France. Although no legal or regulatory restrictions limit this type of product, there is currently no standard offering available. However, several insurance companies and third-party litigation funders offer their clients solutions for the coverage of adverse costs by way of ATE insurance.

In contrast, legal cost insurance is commonly used in France. This insurance product is arranged before the need to litigate arises (before-the-event insurance) and provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.

Law stated - 15 October 2024

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, 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.

Law stated - 15 October 2024

Privileged communications

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

Any communication between an attorney and a 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.

Law stated - 15 October 2024

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. 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, that ruling was overturned by the Versailles Court of Appeal for lack of jurisdiction.

Law stated - 15 October 2024

Other issues

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

No.

Law stated - 15 October 2024

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 and the Russia-Ukraine war 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.

It is also anticipated that French law on class actions will be amended in the upcoming 12 months, with potential ramifications regarding third-party funding.

Law stated - 15 October 2024

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UPDATE AND TRENDS

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REGULATION

Overview

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

There are currently no specific rules in Luxembourg 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 - 30 September 2024

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 that 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 - 30 September 2024

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 litigation funding (TPLF). As there is no specific legislation, the latter must comply with the general rules regarding contracts provided by articles 1101 et seq of the Civil Code and the principle of contractual freedom. If the beneficiary of the TPLF is a consumer, the regulation protecting consumers should equally apply. Finally, TPLF must comply with Luxembourg public policy.

Further, specific rules of professional conduct governing the attorney-client relationship could affect the third-party funding relationship, such as the ethical rules provided by the Bar (*Règlement Interieur de l'Ordre*) and the amended law of 10 August 1991 on the legal profession (LPA) (*loi du 10 août 1991 sur la profession d'avocat*).

Lastly, the only existing legal framework in the Luxembourg legal regime which refers to TPLF is Draft Bill No. 7650 on class actions, which is currently being discussed in the Luxembourg Parliament (transposing EU Directive 2020/1828). This bill will authorise class actions in consumer matters.

The overall aim of the bill is to improve access to justice for consumers, particularly by introducing the option to finance class actions through funding from private third parties. Interestingly, the bill expressly addresses the supervision of third-party class action financing. It stipulates that funders are prohibited from influencing the clients' decisions and allows the court to request a financial overview if there are any concerns about potential conflicts of interest.

Currently, the bill is still under discussion, and its drafting may evolve during the Parliamentary phase.

Law stated - 30 September 2024

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 LPA and the Bar Rules.

In that regard, the prohibition against 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 their client. However, the amended law of 10 August 1991 on the legal profession allows an 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 their 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.

Finally, article 38(1) of the LPA and the Bar Rules dictate transparent fee structures, fairness in fee allocation and compliance with professional standards. Consequently, a Luxembourg lawyer shall always respect ethical rules and considerations when entering into a fee agreement with a client or advising one on entering into an agreement with a funder.

Law stated - 30 September 2024

Regulators

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

At present, since TPLF is not regulated under Luxembourg law, TPLF 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 a regulated service falling under the supervision of the Luxembourg financial regulator. We are not aware of any plans to this end at the time of writing.

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 to be a competent regulator should a dispute arise that involves the attorney.

Law stated - 30 September 2024

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. 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 their attorney, funding will only be further granted if the new attorney is approved by the funder.

Since there are no explicit rules on TPLF, the choice of counsel is therefore subject to the parties' freedom of contract.

However, as a matter of principle, the litigant's attorney should be independent of the third-party funder and must be able to act freely of any instructions from the latter. Article 6(2) of the LPA stipulates in that regard that lawyers will only defend cases in which they believe 'in their soul and conscience'.

Law stated - 30 September 2024

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.

In contrast, arbitration hearings and settlement meetings are generally confidential. The participation of funders in those cases is therefore subject to the prior agreement of the parties.

Law stated - 30 September 2024

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. 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 - 30 September 2024

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 practice, a funder would only terminate funding if the prospects of success have become so low that the funder may not even get back their investment. In the event of termination, the funder will bear any costs incurred until the termination, as well as costs incurred 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. Similarly, a cause for termination could also arise in the event that a funded party fails to disclose information that would have led the funder not to invest in the claim. Further, in the event of a material and irremediable 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 - 30 September 2024

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 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.

Law stated - 30 September 2024

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 imposed tariff. In principle, attorneys charge their own fees. The rule is provided by article 38 of the LPA, which states that the attorney shall determine their fees and bear their 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 complexity of the case, the result achieved, the client's financial situation and the lawyer's reputation.

Pure contingency fees are prohibited in Luxembourg. Nonetheless, the attorney is allowed to claim an additional fee if the case is successful. 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 recommended 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, at the end of the process, the latter should not be surprised, by a success fee that they 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, they may be subject to disciplinary proceedings.

Law stated - 30 September 2024

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 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 - 30 September 2024

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, 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 - 30 September 2024

Time frame for appeals

14 | 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 - 30 September 2024

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.

However, Luxembourg law contains a number of provisions that facilitate the enforcement of judgments in the case of a final and enforceable decision (such as an attachment 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 - 30 September 2024

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, they are in the process of being introduced in Luxembourg.

Draft Bill No. 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 in the Luxembourg Parliament, 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.

The overall aim of the bill is to improve access to justice for consumers, particularly by introducing the option to finance class actions through funding from private third parties. Interestingly, the bill expressly addresses the supervision of third-party class action financing. It would add a new article L. 513-1 to the *Code de la consummation* (the Consumer Code), stipulating that funders are prohibited from influencing the clients' decisions and allows the court to request a financial overview if there are any concerns about potential conflicts of interest. The final version of the bill could impact the regulation of TPLF in Luxembourg.

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 their own personal benefit to recover a loss personally suffered. In other words,

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.

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 - 30 September 2024

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 their 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 the 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 such article. 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).

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.

Finally, unlike attorneys' fees and expenses, the costs directly incurred by the claimant with regard to the initiation of the proceedings (such as bailiffs' 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 must bear the costs.

Law stated - 30 September 2024

Liability for costs

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

As 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.

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 - 30 September 2024

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 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 Consignment Office). 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 - 30 September 2024

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 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. Indeed, national courts are bound by the rule of law.

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 - 30 September 2024

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, several insurance companies as well as third-party litigation funders offer their clients solutions for the coverage of adverse costs by way of ATE insurance.

Law stated - 30 September 2024

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 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 (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.

Law stated - 30 September 2024

Privileged communications

23 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 their attorney and a third-party funder must be provided for in the litigation funding agreement.

The fact that a litigant or their attorney shares certain information with a third-party funder cannot be considered a waiver of the attorney-client privilege by the litigant.

Law stated - 30 September 2024

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.

Law stated - 30 September 2024

Other issues

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

ATE insurance is not commonly used in Luxembourg, although no legal or regulatory restrictions limit this type of product. However, several insurance companies and third-party litigation funders offer their clients solutions for the coverage of adverse costs by way of ATE insurance.

Law stated - 30 September 2024

UPDATE AND TRENDS

Current developments

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

The main focus in the legislative sphere over the past few years 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 through Draft Bill No. 7650 on class actions, transposing EU Directive 2020/1828. 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. The bill would also be the first piece of legislation to expressly refer to third-party litigation funding.

As criticisms have been raised regarding impartiality, the bill explicitly requires the supervision of such a private third party, along with requirements for impartiality and a prohibition against influencing the client's decision-making process.

To date, there is no clear timeline for adoption of the bill, and the draft is still under discussion.

Luxembourg remains relatively underdeveloped in this area of third-party litigation funding. 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 have appeared. For example, the European Parliament published a resolution on 13 September 2022 with recommendations to the Commission on responsible private funding of litigation. To date, the Commission has yet to take a more detailed position regarding the initiative.

Ultimately, 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 - 30 September 2024

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REGULATION

Overview

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

Third-party litigation funding (TPLF) is permitted in the Netherlands in both litigation and arbitration proceedings. Indeed, over the past few years, TPFL has become increasingly common. This trend has gained traction due to the high need for external funding in complex claims, especially in collective redress cases under the Dutch Act on Collective Damages Claims (WAMCA), which allows for mass claims.

Law stated - 18 September 2024

Restrictions on funding fees

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

There are no statutory limits on the fees or interest that funders can charge under Dutch law. The fees can be freely negotiated between the funder and claimant, subject to article 6:248(2) of the Dutch Civil Code, which allows courts to intervene if they find that a provision of a contract is in conflict with the principles of fairness and equity. In practice, courts rarely intervene. An average compensation of 30 per cent is considered common and reasonable in the Netherlands.

In the context of mass proceedings, courts will consider the reasonableness of the funding arrangements when assessing the financing construction of the claim vehicle at the admissibility stage.

In recent case law of 25 October 2023, the District Court of Amsterdam (ECLI:NL:RB:AMS:2023:6694) gave preliminary guidance on the compensation of litigation funders. The court mentioned that a stipulated compensation could possibly be excessive if it is assumed that a certain percentage of the compensation is applicable regardless of the amount of the damages awarded and regardless of the number of injured parties that can claim damages. The court assumed that a maximum multiple of five of the amount invested by the litigation funder or of the amount made available to the foundation can be considered an appropriate maximum. The court acknowledged that it is entering new territory with this approach and allowed parties to respond to the preliminary principles. While this approach has raised question marks within the Dutch legal community, as at the time of writing, this topic has not been further discussed in the pending proceedings.

Law stated - 18 September 2024

Specific rules for litigation funding

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

Currently, no specific legislation or regulatory provisions apply to third-party litigation funding in the Netherlands if the funding concerns regular and non-collective proceedings. Such agreements are governed by general principles of contract law under article 6:248 of the Dutch Civil Code, which ensures that contracts adhere to principles of reasonableness and fairness.

However, certain rules applying to collective actions brought forward by a claim vehicle under the Act on Collective Redress of Mass Damages (WAMCA) have implications for funders:

- Article 305a, paragraph 2 of the Dutch Civil Code (DCC) provides, eg, that individuals represented by the claim vehicle must have effective and suitable mechanisms to participate in the decision-making process, and that the claim vehicle possesses sufficient financial resources to pursue the claim. It follows from the parliamentary papers associated with article 305a DCC that a court may review the funding structure between a claim vehicle and a funder and that the claim vehicle (not the funder) must have sufficient control over the legal action.
- Directive 2020/1828 obliges every member state to provide for a representative action procedure for consumers in its national law. The Directive was implemented in the Netherlands on 25 June 2023, although most of the Directive's requirements were already included in the WAMCA, which came into effect on 1 January 2020.
- The Claim Code 2019 is a body of soft law and a code of conduct for foundations and associations (claim vehicles) that bring collective actions or negotiate collective settlement agreements. The Claim Code gives guidance for the Dutch courts on how to assess the standing of claim vehicles and aspects of third-party funding. It consists of seven comply or explain principles, each with a further explanation of the principle.

Law stated - 18 September 2024

Legal advice

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

Lawyers advising clients in relation to TPLF must adhere to the strict ethical rules of the Dutch Bar Association. These rules emphasise independence, confidentiality and the duty to avoid conflicts of interest, as outlined in the Code of Conduct for Lawyers and article 10a of the Lawyers Act. Any information shared with funders must respect the client's confidentiality. Lawyers must ensure that the client's interests are paramount, not those of the funder.

Law stated - 18 September 2024

Regulators

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

There is no specific public body that oversees litigation funding.

Law stated - 18 September 2024

FUNDERS' RIGHTS

Choice of counsel

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

Third-party funders cannot insist on their choice of counsel, as the client has the ultimate right to choose their legal representation. However, funders may condition their investment on the involvement of a specific counsel accepted by the funder. This is supported by article 6:248(1) of the Dutch Civil Code (DCC), which allows parties to contract freely but within the bounds of fairness. In the context of mass proceedings and at the admissibility stage, the court may pay attention to the funding agreement and would typically assess whether decisions on the choice of lawyers would prevent the client from having control over the litigation process, or would allow the funder to have decisive influence over the claim, or both.

Law stated - 18 September 2024

Participation in proceedings

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

Funders are not considered parties to the litigation and generally cannot participate in hearings or settlement proceedings. However, court hearings are public in the Netherlands, as stipulated in article 27 of the Dutch Code of Civil Procedure, allowing funders to attend without actively participating. For arbitration, confidentially often applies, and whether a non-party to the proceedings may attend depends on the applicable arbitration rules.

Law stated - 18 September 2024

Veto of settlements

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

In non-collective proceedings, funders could, in principle, include provisions foreseeing veto rights in a funding agreement. However, according to recent best practices, funding agreements do not foresee a veto right, but only require the funder's consultation before settling a claim. Typically, the funder's interest remains safeguarded given the funder's

priority position in the waterfall and the structure of its success fee, which is typically primarily or exclusively based on a time-dependent multiple of the committed amount.

In the context of collective actions, article 305a, paragraph 2, subsection b of the DCC provides that an external funder may not exert decisive influence over procedural decisions, which means that a third-party funder may not have ultimate authority to approve or reject a settlement. The Claim Code 2019, a body of soft law, seems to define 'decisive influence' in stricter terms than the law. Recent court decisions also tend towards a stricter interpretation.

Law stated - 18 September 2024

Termination of funding

9 | In what circumstances may a funder terminate funding?

In principle, litigants and funders are free to agree in the funding agreement on the circumstances entitling the parties to terminate funding. In practice, typical grounds for termination by the funder that may be agreed are:

- a material breach of the litigant's contractual obligations;
- insolvency of the litigant or the opposing party; or
- a change of circumstances leading to a significant decrease in the likelihood of success.

Dutch statutory law allows a contract to be cancelled due to fraud or error under articles 3:44 and 6:228 of the DCC. Furthermore, under articles 6:265 and 6:258 of the DCC, Dutch law allows a contract to be dissolved in the case of fundamental breach or unforeseen circumstances.

Law stated - 18 September 2024

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 take an active role in litigation through contractual provisions granting them access to case updates, documents or litigation strategy decisions. However, in cases relating to collective actions, such participation rights must be clearly outlined in the funding agreement to ensure that the client retains control over the litigation process and the funder does not exert a decisive influence over the claims (article 305a, paragraph 2, subsection b of the DCC). The Claim Code 2019, a body of soft law, seems to define 'decisive influence' in stricter terms than the law.

Law stated - 18 September 2024

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Dutch law prohibits fully conditional or contingency fee agreements where a lawyer's fees depend entirely on the outcome of the case. 'No cure no pay' arrangements or a fee set as a percentage of the awarded claims are generally prohibited under the applicable professional rules.

However, lawyers are allowed to agree to fee arrangements that include a (temporary) reduction in the hourly rate applicable to the services, provided that the actual costs are covered. The reduced hourly rates may be raised if and when the proceedings are completed successfully.

Law stated - 18 September 2024

Other funding options

12 | What other funding options are available to litigants?

Litigants can access other funding options, including the following:

- legal aid (under the Legal Aid Act) for individuals with limited financial resources; or
- legal cost insurance, which may include limitations on the type of claims and typically needs to be arranged before the events giving rise to the dispute have occurred.

In many cases, these options do not constitute suitable alternatives to third-party litigation funding.

Law stated - 18 September 2024

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?

Commercial claims in the Netherlands typically take between nine months and several years to reach a decision at first instance. This time frame depends on the complexity of the case and the court's caseload. Cases that include expert evidence, witness hearings and multiple rounds of written procedural documents take longer.

Law stated - 18 September 2024

Time frame for appeals

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

In civil law proceedings, according to the Annual Report 2023 of Dutch Justice, the appeal rate was 11 per cent between 2021 and 2023.

Appeals generally take between one and two years, depending on the complexity of the case, the number of submissions and motions and the court's schedule and caseload.

An arbitral award is binding. Both parties must comply with the arbitral award. Appeals are available at some arbitration boards. If the option to appeal is not included in the applicable arbitration rules, arbitral appeal is in principle only possible if the parties have provided for it by agreement (article 1061b of the Dutch Code of Civil Procedure (DCCP)).

Otherwise, the only remedy open, but without suspensive effect, is the reversal of an arbitral award. However, the threshold for a reversal is high – civil courts are very reluctant to set aside arbitral awards. The grounds are exhaustively defined in the law (article 1065 DCCP).

We are not familiar with statistics of the durations of arbitral appeal proceedings.

Law stated - 18 September 2024

Enforcement

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

It follows from article 430 of the DCCP that judgments and court orders given by the Dutch court are directly enforceable in the Netherlands after service by the bailiff. If the losing party does not comply with the judgment or court order after service by the bailiff, the bailiff could attach the assets of this party.

Judgments from foreign courts are not enforceable in the Netherlands, unless there is a basis for it in a treaty or an act. Judgments from other EU member states in civil and commercial matters can directly be enforced based on the Brussels I bis Regulation (No. 1215/2012).

If the law or treaty concerned does not designate any other route, enforcement is dependent on obtaining an exequatur through the procedure of article 985 et seq of the DCCP.

In the event that any legal or treaty basis is missing, the proceedings can be brought again before the Dutch courts (article 431, paragraph 2 DCCP). The Dutch court must – given the circumstances of the case – assess whether, and to what extent, it grants authority to a decision of the foreign court.

According to Dutch case law, a foreign judgment is in principle recognised in the Netherlands if:

- the jurisdiction of the court that rendered the decision is based on a ground of jurisdiction that is generally acceptable by international standards;
- the foreign decision was arrived at in judicial proceedings that meet the requirements of due and proper administration of justice with adequate safeguards;
- recognition of the foreign decision is not contrary to Dutch public policy; and
- the foreign decision is not incompatible with a decision of the Dutch court rendered between the same parties, or with an earlier decision of a foreign court rendered between the same parties in a dispute concerning the same subject matter and based on the same cause of action, provided that such earlier decision is capable of recognition in the Netherlands.

A distinction must be made between the enforcement of a Dutch arbitral award (ie, if the location of arbitration is in the Netherlands) and the enforcement of an arbitral award made in a foreign state.

The enforcement in the Netherlands of a Dutch arbitral award can – according to article 1062 DCCP – only take place after the interim injunction judge of the district court of the district in which the place of arbitration is located has granted leave to do so at the request of one of the parties.

An arbitral award rendered in a foreign state to which a recognition and enforcement treaty applies may, at the request of either party, be recognised and enforced in the Netherlands (article 1075 DCCP). These procedures are frequently governed by the 1958 New York Convention, which the Netherlands has ratified.

If no treaty of recognition and enforcement is applicable or an applicable treaty allows recourse to the law of the country in which recognition or enforcement is sought, an arbitral award rendered in a foreign state may – according to article 1076 DCCP – be recognised in the Netherlands and enforcement thereof may be sought in the Netherlands by one of the parties, upon presentation of the original, or a certified copy, of the arbitration agreement and the arbitral award, unless the formal requirements listed in article 1076, paragraph 1(A)(a)–(e) are not met or the recognition and enforcement of the award is contrary to public policy.

Law stated - 18 September 2024

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions and mass claims are permitted under Dutch law and can be funded by third parties. The Dutch legal system, particularly with the introduction of the Dutch Act on Collective Damages Claims (WAMCA) in January 2020, encourages collective actions, and litigation funding is an important component in enabling claimants to pursue large-scale claims.

The Dutch Civil Code explicitly supports mass claims, with the implementation of article 3:305a of the Dutch Civil Code (DCC) allowing a foundation or association to represent a group of claimants to protect their shared interests, and claim damages suffered, in the Netherlands. The WAMCA is based on an opt-out arrangement for Netherlands-based claimants and an opt-in arrangement for individuals who have their place of residence abroad. The law is applicable to cases filed after 1 January 2020 and to mass claims related to events that took place on or after 15 November 2016.

Dutch claim vehicles (and other specific EU member state-approved vehicles) may act both on the claimant's side in their own names and in the names of their articles of association for the benefit of the interests of others. WAMCA imposes certain criteria on these vehicles (in article 3:305a DCC), as does the Dutch Claim Code 2019.

Before the court will deal with the merits of the case, it should first decide, in the admissibility phase, that the claim vehicle meets the admissibility requirements pursuant to article 1018c, paragraph 2 of the Dutch Code of Civil Procedure (the formal requirement) and article 3:305a, paragraph 1-3 of the DCC (the substantive requirements). The claim vehicle must prove, inter alia, to have sufficient funding to cover litigation costs and expertise to maintain control over the lawsuit itself. Third-party funders are not permitted to have dominant control over the claim or lawsuits, and courts tend to request that the party provide the funding agreement so that the court can – as happened in some recent cases – integrally assess that agreement.

Law stated - 18 September 2024

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 237 of the Dutch Code of Civil Procedure (DCCP), the unsuccessful party pays the costs of the litigation, namely, the extrajudicial and litigation costs. Further, the unsuccessful party must pay the court registry fees.

Litigation costs include, among other things, witness and expert expenses, costs of extracts from public registers, bailiff costs and lawyers' fees. The lawyers' fees are assessed according to a fixed rate (the court-approved scale of costs). These costs usually do not cover the actual costs, but only a small fraction of the total costs incurred.

The actual legal costs the successful party incurred may be compensated in full only in cases related to intellectual property, or in cases of misuse of law.

The courts may order the unsuccessful party to pay extrajudicial costs within the meaning of article 6:96, paragraph 2 of the Dutch Civil Code. This includes the costs of experts and expert opinions (not lawyers' fees). Courts apply the test of reasonableness regarding the decision to incur costs and the amount of costs involved. However, as at the time of writing, we are not aware of any specific judgments whereby the courts have awarded these costs.

In proceedings involving mass (tort) claims, a judge may deviate from article 237 DCCP. According to article 1018L, paragraph 1 of the DCCP the court may in its judgment, if the claim is prima facie unfounded, multiply the fees of the successful party's lawyer at the expense of the unsuccessful party by a maximum of 500 per cent. According to article 1018L, paragraph 2 of the DCCP a judgment involving mass (tort) claims shall also include an order for costs whereby the court may, to the extent necessary, order the unsuccessful party to pay reasonable and proportionate court costs and other costs incurred by the successful party.

Finally, and according to legal literature and legislative history, it seems possible, under article 6:96 of the Dutch Civil Code or article 1018L DCCP, or both, to recover from the liable party the success fee stipulated by the litigation funder in exchange for funding a collective action. The profit and risk fee is central to this. It is plausible that the entire success fee is not fully recoverable. Reasonableness limits the amount, but there is no case law on this aspect in the Netherlands yet.

The Netherlands Arbitration Act does not contain provisions for the recovery of costs. Usually, the parties will have agreed upon specific terms in this regard, for example, by relying on arbitration rules such as the arbitration rules of the Netherland Arbitration Institute (NAI), which contain express provisions. Otherwise, the arbitral tribunal may allocate costs in the way it deems fit.

Law stated - 18 September 2024

Liability for costs

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

Under Dutch law, third-party funders are not directly liable for adverse costs. A funder may, however, agree to cover the adverse cost risk in the funding agreement. In this case, the funder is obliged to hold the funded party harmless for adverse costs. However, usually adverse costs are relatively low, because they are ascertained on the basis of court-approved scale of costs.

Law stated - 18 September 2024

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 does not provide a basis to order a third party, such as a third-party litigation funder, to provide security for costs.

Article 224 of the DCCP states that all persons not domiciled or habitually resident in the Netherlands who file a claim with a Dutch court or intervene in legal proceedings are

obliged, at the request of the other party, to provide security for the costs of the proceedings and the damages they might be ordered to pay.

There is no obligation to provide security, if:

- this arises from a treaty or an EC regulation;
- the cost order is enforceable in the place where the claimant is domiciled or habitually resident;
- it is reasonably plausible that recovery is possible in the Netherlands; or
- this would impede effective access to justice.

Dutch law also does not provide any specific rules on the provision of security for costs by arbitral tribunals. It follows from article 1043b, paragraph 3 of the DCCP that the arbitral tribunal may, in connection with an interim relief, require each party to provide adequate security, for example, for the costs of proceedings and legal assistance.

Law stated - 18 September 2024

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

The fact that the claim is funded by a third party does not influence the court's decision by itself. On the basis of article 224 of the DCCP, a party may order that the other party – if not domiciled or habitually resident in the Netherlands – provide security for the costs of the proceedings and the damages they might be ordered to pay.

Law stated - 18 September 2024

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 the Netherlands. However, given that adverse costs are usually rather low in the Netherlands, ATE insurance solutions are not as commonly used as in some other jurisdictions. Legal cost insurance, which typically needs to be arranged before the events giving rise to the dispute have occurred, is more frequently used to protect against financial risks in litigation.

Law stated - 18 September 2024

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, there is no legal obligation to disclose a litigation funding agreement to the opposing party or the court.

In the context of mass claims, pursuant to article 305a, paragraph 2, subsection c of the Dutch Civil Code, a claim vehicle must have sufficient resources and control over the legal action. Based on these requirements the court may review the funding agreement in order to assess whether the content of the funding agreement, briefly stated, contains unreasonable agreements or allows for disproportionate compensation for the claim vehicle and the funder.

Pursuant to article 22, paragraph 1 of the Dutch Code of Civil Procedure (DCCP), the court may request provision of the funding agreement between the claim vehicle and the third-party funder. The Dutch Supreme Court in 2002 ordered that there is no obligation for the plaintiff to provide the funding agreement to the defendant(s). In practice, most Dutch courts comply with this rule of reasoning. However, the Court of Amsterdam recently ordered differently, but this judgment can be considered an exception.

Where the court has reviewed the funding agreement and believes the claim vehicle does not comply with the requirements as per article 305a, paragraph 2, subsection c, the claim vehicle may be declared inadmissible in its claim. However, Dutch courts tend to allow the claim vehicle and the funder to comply with the requirements and to amend the funding agreement accordingly. Courts base their decision on admissibility on the facts available at the time of the judgment and not the facts that were presented on the date of the claim's initial filing with the court. See, for instance, Court of Amsterdam, 10 January 2024, ECLI:RBAMS:2024:83.

Besides the possibility for the court to request the claim vehicle to provide the funding agreement on the basis of article 22 of the DCCP, the defendant may also request to see the funding agreements pursuant to the conditions under article 843a of the DCCP, if the defendant can prove relevance.

The Dutch Arbitration Act does not contain any provisions requiring a party to disclose funding. However, the Netherlands Arbitration Institute (NAI) has introduced in article 8, subsection k of its Arbitration Rules a disclosure requirement regarding external funding of the proceedings. These arbitration rules are in force as of 1 March 2024.

Law stated - 18 September 2024

Privileged communications

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

Communications between a lawyer and client are protected by legal privilege under article 165 and article 843a of the DCCP. The privilege is held by the lawyer, not the client. The funder is not covered by this article. However, it is advisable when the lawyer address their communications to the funder that they also address such communications to their client, to be able to argue that the communication is covered by legal privilege, at the very least. In general, communications between a litigant or their lawyer and the funder can be made

subject to non-disclosure agreements, but that will not mean that this communication is protected by legal privilege.

Law stated - 18 September 2024

DISPUTES AND OTHER ISSUES

Disputes with funders

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

On 11 January 2023 (ECLI:NL:RBROT:2023:228), the court in Rotterdam dealt with the termination of the funding agreement by the funder due to the fact that the litigant did not inform the funder properly. The funder therefore claimed damages, which claim was mostly awarded by the court.

The Amsterdam Court of Appeal and Dutch Supreme Court dealt with a case in which the funder claimed to be authorised to take over the litigants' position in pending proceedings based on the fact that the funder qualified as the pledgee of the litigants' claim towards the defendant. See Court of Appeal Amsterdam, 26 July 2022, ECLI:NL:GHAMS:2022:2158.

In the context of mass claims, the *TikTok* (ECLI:NL:RBAMS:2023:6694) and *Airbus* (ECLI:NL:RBDHA:2023:14036) cases highlight how courts scrutinise funding agreements to ensure that funders do not control litigation outcomes.

In the *TikTok* case, the Amsterdam court raised concerns about clauses in the funding agreements that gave funders too much control over litigation strategy and settlements, requiring adjustments to ensure the independence of the claim foundation. The court emphasised the risk of conflicts if funders' interests diverge from those of the claimants.

In the *Airbus* case, the Hague court examined how the foundation SILC became overly dependent on its funders, Therium and DRRT, which allowed them to influence key decisions. The court ruled that such dependency undermined the foundation's independence and highlighted the need for decision-making power to remain with the claimant, not the funder.

Law stated - 18 September 2024

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 litigation funding is not heavily regulated in the Netherlands, and parties must ensure that clear contractual terms govern the funding relationship, including the funder's rights and obligations.

Law stated - 18 September 2024

UPDATE AND TRENDS

Current developments

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

Litigation funding is expected to grow in the Netherlands, particularly in mass claims and commercial disputes. The use of collective redress mechanisms under the Dutch Act on Collective Damages Claims (WAMCA) and the potential for higher-value claims have driven increased interest in third-party funding. This trend is expected to continue as more claimants pursue large-scale legal actions that require external financial support. The WAMCA will be evaluated in the course of 2025 and may be amended in light of best practices.

Law stated - 18 September 2024

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UPDATE AND TRENDS

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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 on laws or public policy, and that the rules of professional conduct for lawyers are respected. In fact, article 1526 et seq of the Spanish Civil Code and the case law of the Supreme Court allow the purchase of credit rights in a broad sense, including rights relating to a claim.

It can therefore be concluded that it is a practice permitted by the Spanish legal system.

A draft law is currently being processed to transpose 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 into Spanish law. This draft law regulates, in an unsatisfactory way for the litigation funding industry, the funding of collective actions related to consumers. Its approval could lead to a considerable erosion of the financial resources available to plaintiffs in collective actions related to consumers.

In the field of arbitration, section 7 of the Code of Best Practices of the Spanish and Ibero-American Arbitration Club deals with the duties relating to the financing of an arbitration process. Specifically, it regulates the obligation to disclose the presence of third-party funding.

From the existence of this section it can be concluded that the financing of arbitration in Spain is an accepted practice. In addition, numerous commercial and investment arbitration proceedings have already been financed in Spain.

Spanish judges are aware that litigation funding is a widespread phenomenon but, in general, they do not tend to enter into the analysis of terms of the funding agreements.

While third-party funding is still a relatively new practice in Spain, there has been a steady increase in its usage. Interest is growing among companies, law firms and other stakeholders who see litigation funding as a valuable tool to reduce costs and manage risks.

Law stated - 30 September 2024

Restrictions on funding fees

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

There are currently no limits on the fees and interest that funders can charge beyond the limitations imposed, in general, by the Spanish legal system.

However, several measures have been taken at European level to regulate the industry, which subsequently will need to be addressed at national level.

On the one hand, the European Parliament has adopted the Resolution of 13 September 2022 (P9_TA (2022) 0308) with recommendations to the Commission on responsible private funding of litigation. The European Parliament requests the Commission to submit a proposal for a Directive to regulate third-party 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 yet to be seen whether the European Union will decide to regulate this matter.

On the other hand, the draft law implementing 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 introduces in article 850 the possibility of controlling ex post, in the class action certification order, whether or not the terms of the financing agreement are proportionate.

The draft law thus creates legal uncertainty since, on an ex post basis, once the financing operation has been closed and disbursement has been made by the litigation fund, it will be up to the court to rule on whether the terms of the financing are proportionate. De facto, this unprecedented judicial control based on an indeterminate legal concept will make it difficult for investment committees to decide on most financing opportunities ex ante.

In addition, in the framework of the parliamentary procedure, there are proposals to limit the profitability of the funder who has financed this type of collective action to a maximum of 30 per cent of the total amount recognised by the judgment, or 200 per cent of the amount invested by the funder. The application of the latter restriction would make the financing of class actions in Spain directly unfeasible in view of the cost of capital of third-party funding and the length of legal proceedings.

Law stated - 30 September 2024

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 the 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 (Resolution of 13 September 2022 (P9_TA (2022) 0308)), 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.

The draft law implementing Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers proposes that when a claim is lodged, the sources of funding should be detailed and any third-party funder should be identified.

Specific grounds for identifying conflicts, such as competition between the funder and the defendant or the influence of the funder on the plaintiff's decisions, are set out. Most importantly, courts and authorities will be empowered to review funding agreements to determine whether there is any doubt as to their adequacy and to assess potential conflicts of interest. The court will have the power to assess their impact on consumers and, if they are deemed disproportionate, the court may require them to be amended, or the funder changed.

In the field of commercial arbitration, 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.

Additionally, there are voluntary codes of conduct that govern the conduct of funders when providing litigation funding, to which funders may decide to adhere. One example is the Code of Conduct of the European Litigation Funders Association, to which some Spanish funders, including PLA Litigation Funding, have adhered.

Law stated - 30 September 2024

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 as 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.

Law stated - 30 September 2024

Regulators

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

There are currently no public bodies with a particular interest in litigation funding beyond the ongoing legislative process described above. 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.

Law stated - 30 September 2024

FUNDERS' RIGHTS

Choice of counsel

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

According to the 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 can be framed within the scope of party autonomy (article 1255 of the Spanish Civil Code).

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.

Law stated - 30 September 2024

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 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 unless specifically agreed.

Law stated - 30 September 2024

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.

Law stated - 30 September 2024

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 repudiatory 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:

- reasonably ceases to be satisfied with the merits of the dispute;
- reasonably believes that the dispute is no longer commercially viable; or
- reasonably believes that there has been a material breach of the litigation funding agreement by the funded party.

In addition, with regard to collective actions, the draft law transposing Directive 2020/1828 provides that qualified entities must be fully transparent to the courts and administrative authorities about the source of the funding of their activities and of the funds supporting representative actions for redress. If a conflict of interest is identified, the authorities may require the entity to modify or refuse the funding and may deny the entity standing or dismiss the representative action, without prejudice to the rights of the consumers involved.

Law stated - 30 September 2024

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 no 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 to in the funding agreement while respecting the applicable legislation.

Funders may play an active role in 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 in 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 service 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.

Law stated - 30 September 2024

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 on price, offering damages-based agreements.

On the other hand, conditional fee agreements of the kind we encounter in other jurisdictions (where the success fee is expressed as a percentage uplift over and above the time costs amount that would be payable if there was no contingency fee agreement) are not common. This is 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, or to cap the maximum fees if acting on an hourly rate basis. In any case, it is common to combine these fixed fee or hourly rates fee agreements with a success fee, which is usually a fixed amount agreed upon beforehand or a percentage of the amounts recovered.

Law stated - 30 September 2024

Other funding options

12 What other funding options are available to litigants?

Other funding options available to litigants include:

- private funds;
- union and association funding;
- insurance;
- legal aid, although it is rarely applicable to complex litigation; and
- litigation funding.

Law stated - 30 September 2024

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 16.1 months in 2023.

In commercial courts, the average duration of ordinary proceedings at first instance was 18.1 months in 2023. 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 in Spain, 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.

Law stated - 30 September 2024

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, 16.8 per cent of the judgments made by civil and commercial courts were appealed in 2023. 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 7.1 and 20.1 months, depending on the region. The national average for 2023 was 14 months.

Law stated - 30 September 2024

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 529,756 applications to enforce judgments in 2023, and 536,951 in 2022. Considering that the civil and commercial proceedings initiated amounted to 2,985,234 in 2023 and 2,809,693 in 2022, we can conclude that a relevant proportion of judgments (around 18 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 money in bank accounts 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 the judgment that is to be enforced contains an order different from the payment of money, or if the defendant has no money in bank accounts within the jurisdiction and other assets need to be seized, the enforcement proceedings become more complex and burdensome.

Law stated - 30 September 2024

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 (including those qualified in another member state); and
- the public prosecution service.

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.

In 2020, 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 EU member states, while providing appropriate safeguards to avoid abusive litigation.

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, and this option has been positively seen by the Spanish legislator and included in the Draft Bill on representative actions for the protection of the collective i
nterests of consumers.

However, there are amendments proposed by political parties that limit the profitability of funders. These restrictions and the lack of comprehensive regulation pose serious challenges to the viability of third-party litigation funding in Spain in class and collective actions. It remains to be seen how Spain will implement this Directive and what changes will be made in relation to class or collective actions and third-party funding.

Law stated - 30 September 2024

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 court's 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 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 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.

Law stated - 30 September 2024

Liability for costs

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

Spanish legislation and case law do 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 (namely, 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.

Law stated - 30 September 2024

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 is still rare.

Law stated - 30 September 2024

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 no settled position, mainly because security for costs applications is not as common as in certain other jurisdictions, and because third-party funding is relatively new in Spain.

Law stated - 30 September 2024

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, but it is not commonly used. The moderate risk of adverse costs makes it not worth taking out ATE insurance in most cases.

Nonetheless, claimants are becoming interested in ATE insurance, especially for complex disputes in which litigation funders are involved. ATE insurance is increasingly being demanded in complex international arbitrations, portfolio litigation and mass litigation.

Common insurances used by claimants in Spain include car insurance and home insurance, which normally include civil liability insurance and legal expenses insurance to cover the costs of a legal action related to the insured risks.

In the business context, there are insurance policies that cover the risk of non-payment of commercial debts. These insurances must normally be taken out before the prospect of non-payment and consequent legal proceedings arise.

Law stated - 30 September 2024

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 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 produce 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.

However, the forthcoming implementation of Directive 2020/1828 on representative actions for the protection of consumers' collective interests introduces provisions that may have an impact. In cases involving consumers and users, courts may review funding arrangements to ensure transparency and fairness, particularly in collective redress claims.

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 to disclose the existence of third-party funding agreements and the identity of the funder to avoid potential conflicts of interest. In this regard, the Spanish Arbitration Club 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.

Law stated - 30 September 2024

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 are protected by legal privilege and professional secrecy 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 unwanted disclosure.

Also, the lack of disclosure and inspection, or discovery as compared to certain other jurisdictions, such as England and Wales and the United States, protects the parties from unwanted disclosure.

Law stated - 30 September 2024

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.

Law stated - 30 September 2024

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, 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.

Law stated - 30 September 2024

UPDATE AND TRENDS

Current developments

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

The litigation funding market has matured in Spain over the past few years. Funders are becoming common players in the dispute resolution landscape.

Spain has experienced a rapid growth in competition law claims, particularly following on from regulatory findings of competition law infringements.

There is currently no specific legislative or regulatory provision governing legal finance in Spain. Provided that the terms of the financing agreement do not infringe on laws or public policy and respect the rules of professional conduct for lawyers, legal finance is permitted under civil and commercial law.

Commercial legal finance agreements are therefore considered private contracts that bind the legal finance provider and the claimant. Typical financing agreements contain a

confidentiality clause to ensure that document terms are not visible to others, and claimants have no obligation to disclose a legal finance agreement to the opposition or to the court.

That said, in Spanish arbitration proceedings, arbitrators have a wider discretion to order the disclosure or production of documents. As such, according to the Spanish Arbitration Club Code of Good Arbitration Practice 2019, the Spanish Court of Arbitration Rules 2019 and the Madrid International Arbitration Center Arbitration Rules 2020, in situations where a party has obtained third-party financing, it must inform the arbitrators and the counterparty of this, and disclose the identity of the legal finance provider.

Law stated - 30 September 2024

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PLA Litigation Funding

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REGULATION

Overview

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

Third-party funding (TPF) is permitted under Swedish law.

The Swedish TPF market is growing and funding is provided by local as well as international funders. The presence of international funders is largely limited to very large cases (claim size exceeding 100 million kronor). Local funders serve a broader range of cases (claims exceeding 10 million kronor), which has led to a more widespread use of TPF. The Arbitration Institute at the Stockholm Chamber of Commerce (SCC) has reported an increase in the number of funded arbitrations at the institute since 2021.

Although the number of cases funded has increased significantly, TPF cannot yet claim to be 'commonly used'. The number of funded cases in relation to the total number of litigations and arbitration brought in Sweden still represents a small fraction.

Law stated - 16 December 2024

Restrictions on funding fees

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

TPF is not subject to regulation, and freedom of contract prevails.

In theory, a TPF arrangement could be subject to the general contract rules on usury, which would automatically make a funding agreement invalid if a funder has recklessly abused a significantly weaker party's lack of understanding or dependent position. However, it would be difficult to foresee a situation in a commercial context with an established funder and a professional client where this rule would be relevant to consider in practice, as usury is practically never applied to begin with.

Law stated - 16 December 2024

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 general legislative or regulatory provisions, as a concept.

With respect to disclosure of a funder's involvement in a dispute, the SCC on 16 October 2024 updated its policy regarding disclosure of third parties with an interest in the outcome of the dispute. The policy requires a party to disclose the identity of any third-party funder (or other party with an interest in the dispute) in its first written submission.

As of 1 January 2024, consumer TPF has been subject to a narrow-scope regulation (Law 2023:730), which implements the EU Collective Redress Directive. Under sections 23 to 25 of the law, a (consumer) collective redress action cannot be funded by a defendant's direct competitor or any other party who is otherwise reliant upon or related to the defendant. In addition, the funder must not unduly influence the proceeding to the detriment of the group representative or act in any way detrimental to the group, in general. If there is reason to suspect non-compliance of said rules, the group representative shall be ordered by the court to disclose the funding arrangement and any related agreements or changes thereto. If measures are not taken to amend the financing arrangement in said situation accordingly, the group representative can have its legal standing to act on behalf of the group rescinded.

Law stated - 16 December 2024

Legal advice

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

Section 4.4.1 of the Code of Professional Conduct for Members of the Swedish Bar Association (CPC) provides an obligation for attorneys to inform their clients of available funding options through public benefits or insurance products. Although the provision does not explicitly comprise an obligation to inform about TPF, the provision is certainly closely related. As the TPF market continues to develop and become more widespread to the broad range of attorneys, one may foresee that attorneys may feel obliged to mention TPF as a funding option in the light of said provision and their general duties to their clients.

The CPC would prevent an attorney from acting on behalf of the client and the third-party funder at the same time. Consequently, Swedish attorneys should be mindful of not creating a fiduciary duty to the funder. TPF arrangements where attorneys sign a transaction document in the TPF arrangement, or otherwise accept contractual duties directly towards the funder, will likely not be accepted.

In assisting clients with their obligations to the third-party funder under a TPF arrangement, such as disclosure of information, attorneys should regularly consider whether such disclosures are in the best interests of their clients and in compliance with the CPC.

Law stated - 16 December 2024

Regulators

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

Aside from cases evoking the very specific collective redress action regulation, no public body is monitoring or supervising TPF, as TPF, in and of itself, is not subject to regulation. However, depending on how the third-party funder is organised, other compliance regulations may be applicable. For instance, a locally domiciled funder could be to be subject to registration or supervision by the Swedish Financial Supervisory Authority.

Law stated - 16 December 2024

FUNDERS' RIGHTS

Choice of counsel

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

It is of vital importance for a third-party funder that a reputable and skilled counsel represents the funded party in the dispute. Unless the funder has comfort in the quality of the counsel, the funder is likely to decline funding. In that sense, the funder has an indirect influence over the choice of counsel.

However, once having entered into the funding agreement, it is unheard of in the Swedish market that a third-party funder would retain a contractual right to actively change the already appointed counsel.

However, funding agreements commonly contain provisions where the funder would need to consent to the client changing counsel. Failure to obtain such consent would constitute a breach of the funding agreement by the client, with termination rights and other available remedies for the funder as a consequence.

Law stated - 16 December 2024

Participation in proceedings

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

A funder is not a party to the dispute and consequently has no statutory rights to attend hearings or settlement proceedings. The funder and the funded party can agree that the funder shall have the right to attend such events. However, such an agreement would be subject to certain limitations in practice.

Swedish arbitrations are, as a general rule, to be carried out behind closed doors (ie, are not open to the public). This means that only the parties to the arbitration agreement have the right to attend hearings. Unless the opposing party in the arbitration consents to the funder's presence, the funder would not be granted access to attend hearings.

If the hearing takes place in a public court, a funder has the right to attend, as such proceedings are open to the public. There are certain situations where a court could order a hearing, or parts thereof, to be conducted behind closed doors. In commercial litigation, that could be relevant in cases involving trade secrets. 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 such sessions, the funder would be excluded.

Law stated - 16 December 2024

Veto of settlements

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

The extent of involvement in connection with settlements varies from funder to funder. This is therefore something clients and their lawyers should clarify when discussing a potential third-party funding arrangement.

According to recent best practices, funding agreements do not grant the funder any veto rights with respect to settlements, but only a consultation right. The funder's interests remain safeguarded due to the structure of its success fee combined with its priority position in the waterfall payment structure.

More actively involved funders may require their consent before a claimant may accept a settlement offer. Other funders may even require that clients settle above a certain monetary threshold, and may demand to be more actively involved in the negotiation phase.

A funder's involvement as to settlements would be a contractual point between the funder in question and the client. Any agreed 'veto' or other provision on settlements in the funding agreement would not be enforceable on the funded party, but any breach against such veto clause would constitute a breach of the funding agreement.

Law stated - 16 December 2024

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 remedies as a consequence thereof. The terms may thus vary from funder to funder. However, the following are some examples of typical termination grounds:

- a change of circumstances significantly reducing the chance of success in the dispute;
- a covenant breach by the funded party, such as an intentional failure to provide essential information about the dispute to the funder;
- a funded party's material breach of contractual obligations, remaining unremedied;
- the insolvency of the funded party; and
- the insolvency of the opposing party.

Law stated - 16 December 2024

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 commonly required to take an active role in the litigation process. The level of involvement required by the funder differs from funder to funder. 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 binding between the parties.

Irrespective of what has been agreed in the funding agreement, what normally happens in practice is that funders, clients and the counsel commonly work together. As funders have an interest in a successful conclusion of the funded dispute, funders are usually willing to provide input and assistance whenever offered or requested.

Law stated - 16 December 2024

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 attorneys are not, unless in extraordinary circumstances, allowed to work with contingency fee arrangements (ie, damage-based arrangements). Extraordinary circumstances would, for instance, be in a situation where the attorney acts on behalf of a group in a collective redress action.

Conditional fee arrangements are allowed under the CPC to a limited extent, but precise guidance is not available and the situation is unclear. Pursuant to section 4.2.2 of the CPC, an agreement where the attorney assumes some degree of financial risk in relation to the outcome of the case is allowed, provided that the attorney's interest in the matter does not become disproportional or otherwise has an adverse effect on the attorney's performance of its mandate. Our experience is that attorneys in Sweden are willing to provide a 10–20 per cent discount on their normal hourly rates, in consideration of charging full fees (or an additional bonus on top of these) should the case go well.

Law stated - 16 December 2024

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.

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General business insurance policies commonly include coverage of legal costs. Such coverage is typically limited, in most small and medium-sized businesses to roughly 250,000 kronor and the typical insurance also excludes certain types of disputes (such as labour disputes and disputes related to intellectual property). The policyholder must notify the insurance company in connection with the dispute arising to make use of the insurance.

- Legal expense insurance (LEI) is included in all household insurance policies and covers litigation costs up to a stipulated limitation similar to general business insurance or less. The terms of LEI vary between the insurance companies offering it. LEI normally covers certain types of disputes in general court and usually excludes disputes handled by administrative courts.
- Legal aid is available to natural persons with a low annual income (260,000 kronor per annum). Legal aid is a public support from the Swedish state. Legal aid may not be granted if the claimant has LEI or any other similar legal protection that covers the matter.

Law stated - 16 December 2024

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 2023 data from the Swedish National Courts Administration, the turnaround time for civil actions in the first instance of the public courts is around six months (in 75 per cent of the cases). However, this data refers to all civil actions and there is no further breakdown available for different case types. In our experience, parties to more complex commercial disputes will have to factor in a turnaround time of 18 to 24 months in the first instance, depending on which district court the case is brought before.

Sweden has a strong institutional arbitration tradition, with the Stockholm Chamber of Commerce (SCC) as the dominant institution in both international and domestic contexts. Pursuant to SCC's statistics of 2023, 65 per cent of the arbitrations conducted under the SCC Arbitration Rules were finally resolved in less than 12 months.

Law stated - 16 December 2024

Time frame for appeals

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

According to data from the Swedish National Courts Administration, the number of civil actions appealed to the second instance in public courts has been steady at 5 per cent during the period 2020 to 2023. The data applies to civil actions in general.

Most civil actions in Sweden require leave to appeal from the higher instance to be tried. A decision to leave to appeal shall be rendered no later than two months, which also is complied with in most cases. The average turnaround time during 2023 in the second instance (in 75 per cent of cases) was around 14 months from the decision to leave to appeal. The data applies to civil actions 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. According to statistics provided by Westerberg & Partners (et al) the average processing time for challenge proceedings was 11.6 months during 2023. Pursuant to said report, 10 arbitral awards were challenged during 2023, and two were successfully challenged (albeit one of which is due to *Achmea* – the prohibition against intra-EU investment arbitration). There are no official statistics on what proportion of arbitral awards are challenged.

Law stated - 16 December 2024

Enforcement

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

There is no published data on the proportion of judgments necessitating contentious enforcement procedures.

If a party does not comply with a domestic court judgment voluntarily, the opposing party can seek enforcement through the Swedish Enforcement Authority (SEA), for both monetary claims and specific performance. Upon submitting the application, the SEA will normally get in touch with the opposing party and set a time frame for them to fulfil their obligations. Failure to do so will cause the SEA to perform a foreclosure of the party's assets.

For judgments from courts in other EU member states, Regulation (EU) No. 1215/2012 of 12 December 2012, dealing with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, applies.

To enforce a judgment from a foreign court outside the European Union, there must be a treaty in force between Sweden and the foreign state in question. In the absence of such a treaty, the judgment cannot be enforced in Sweden unless the parties have an exclusive jurisdiction agreement. Additionally, for a foreign court judgment to be enforceable, it must pertain to a civil law matter and must not conflict with Swedish public policy.

An arbitral award issued by an arbitral tribunal based in Sweden is considered a Swedish award and can be enforced in Sweden upon its delivery. This applies even if none of the parties involved are Swedish and the underlying contract has no connection to Sweden, as well as irrespective of which substantive laws were applied in the award. The SEA can

enforce a Swedish award upon application by a party, provided that the award meets the formal requirements: namely, it must be in writing and signed by the arbitrators.

A foreign award (from an arbitration outside Sweden) cannot be enforced until it has undergone a recognition procedure. To enforce foreign arbitral awards in Sweden, a party must submit an application for recognition and enforcement to the Svea Court of Appeal. The requirements in sections 54 and 55 of the Swedish Arbitration Act are equivalent to those in article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. An exception applies to awards from the International Centre for Settlement of Investment Disputes, which do not require an exequatur procedure.

Law stated - 16 December 2024

COLLECTIVE ACTIONS

Funding of collective actions

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

Third-party funding (TPF) is recognised in regulation (Law 2023:730) that implements the EU Collective Redress Directive. A TPF agreement with the group representative is binding for the entire group.

For group actions not covered by the aforementioned Act, group actions are permitted and regulated by the Swedish Group Proceedings Act of 2002. The Swedish Group Proceedings Act has been in force since January 2003, but has seldom been used. Under the existing law, TPF is allowed, but a funding agreement will not automatically be binding on the entire group. This means a funder must enter into a funding agreement with each individual group member (which essentially makes TPF impossible to utilise in group actions in Sweden, in practice).

Law stated - 16 December 2024

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?

Sweden applies the English rule (loser pays principle) and the general rule is that the successful party shall be compensated in full for costs of the preparations and conduction of the proceedings, as well as costs for counsel, provided the costs are deemed 'reasonable and necessary' to protect the interests of the party in the dispute (Chapter 18, section 8 of the Swedish Code of Judicial Procedure (SCJP)). Such costs may be both external costs for counsel and evidence (experts etc) and also costs for internal resources, such as management and in-house counsel.

The courts have wide discretion as to the allocation of costs, both in determining what is a reasonable and necessary cost and who the successful party is (in the event of partial success). Therefore, the cost exposure is particularly complicated to foresee for a party litigating before the Swedish courts.

Under Swedish law, a party with third-party funding (TPF) would most likely be able to claim compensation for the actual costs in the case, irrespective of such costs having been borne by another party (the funder). A prerequisite for this position is that the litigating party has the obligation to pay these costs to the funder in the event of success (which is the case in TPF arrangements). This conclusion rests on case law from the lower courts and legal literature, but there is no precedent on the subject matter.

The situation in respect of the funder's success fee (ie, the funding costs in excess of the reimbursement of funding deployed) is likely different. The SCJP explicitly refers to reimbursement for the costs of preparing and conducting the proceedings, which implies that the costs shall be directly associated with the litigation as such. Indirect costs, such as funding costs (whether through a TPF arrangement or other financing costs, such as interest paid to lenders), would likely not be covered by the wording of said provision. Although the position is not unanimous under Swedish law, it would be very unlikely that a Swedish court would regard the funder's success fee as a reimbursable cost under the SCJP.

Although the SCJP is not directly applicable to arbitrations in Sweden, and the provisions governing costs in arbitrations (the Swedish Arbitration Act) and institutional arbitrations are drafted somewhat differently, it would be safe to assume that the position on allocation of costs, and funding costs, as described further above would be the same in arbitration as in courts.

Law stated - 16 December 2024

Liability for costs

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

Under Swedish law, a disputing party initiating litigation or 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). As a general rule, the obligation to pay security or potential 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.

As an exception to the general rule, in its ruling at NJA 2014, p 877, the Swedish Supreme Court held shareholders of a company liable for an adverse cost of a limited liability company which had been the unsuccessful party to a (previous) litigation. The case related to the shareholders of a special purpose vehicle (SPV) established solely for the purposes of conducting a litigation. The original claimant assigned the claim to the SPV prior to the litigation and the shareholders capitalised the company only to the extent necessary for the SPV to bear its own costs. After the successful party in the dispute was not compensated for the costs awarded, it sued the shareholders of its counterparty in a separate dispute.

The Supreme Court in this subsequent case found that the SPV arrangement had been set up with the intention of avoiding liability for adverse costs and circumventing the rules on reimbursement of costs as set forth in the Swedish Code of Judicial Procedure. The case is an unusual example of a piercing of the corporate veil.

It is likely that the effects of the case will be limited to situations where a corporate structure is set up with illicit intentions in the same way as the facts at hand in the case. Former Chief Justice Lindskog has expressed that in situations where the claim at all times has been with the original claimant, as opposed to a structure tailored for the dispute, it should be excluded to place liability for costs on someone else than the litigating parties. This situation is common in bankruptcy situations, where neither the trustee nor the creditors are liable for the cost obligations of the bankruptcy estate under established case law.

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. Such action would have to be brought against the funder in subsequent court proceedings.

Law stated - 16 December 2024

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 domestic court litigation, on the request of the defendant, the court may order a claimant domiciled outside of the EEA to provide security for the defendant's estimated adverse costs (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, irrespective of its financial situation.

According to article 38 of the Stockholm Chamber of Commerce (SCC) Arbitration 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:

- the prospects of success of the claims, counterclaims and defences;
- the claimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award;
- whether it is appropriate in all the circumstances of the case to order one party to provide security; and
- any other relevant circumstances, including timing, conduct, etc.

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'. This is further illustrated in the SCC Practice Note of 2024, which examines security for costs decisions between 2017 and 2022. In this period, only two out of 23 requests for security for costs were granted.

The arbitral tribunal may, under section 38 of the Swedish Arbitration Act of 1999 and 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.

Law stated - 16 December 2024

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

Security may not be ordered from a claimant who is an EEA country national. For non-EEA nationals, security may be ordered by the court if requested by the other party. The security shall, according to the law, consist of a pledge or a guarantee. The fact that a claim is funded by a third party does not influence the court's decision on security for costs. A third-party funder (or ATE insurer) may, however, be the party that could issue the guarantee to be submitted to the court. Unless accepted by the defendant, it is up to the court to determine whether said security constitutes proper security to safeguard the defendant's interests.

In arbitration proceedings, the mere existence of a TPF agreement is not in itself a decisive reason for granting a security request. Instead, the deciding factors will be on a holistic level, including the party's financial situation, the availability of assets and whether or not the funder has made a commitment to cover adverse costs.

Law stated - 16 December 2024

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 Sweden, albeit not commonly used.

Business insurance policies and legal expenses insurances cover legal costs generally, including adverse costs.

Law stated - 16 December 2024

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 obligation to disclose the existence of a litigation funding agreement to the opposing party or to the court. The issue has been tried in the Svea Court of Appeal as a procedural decision in Case No. ÖÄ 7709-19 (*The Republic of Kazakhstan v Ascom Group SA and Others)* and the court dismissed a motion where a party requested production of the funding agreement.

That said, should a court be convinced that a funding agreement would be of importance as evidence relating to the matter in dispute, general rules on document production would provide an obligation to disclose the funding agreement accordingly.

With regard to arbitral proceedings, in 2024 the SCC adopted a new policy for the disclosure of third parties with an interest in the outcome of the dispute. The policy requires a party to disclose the identity of any funder in its first written submission to the tribunal.

Law stated - 16 December 2024

Privileged communications

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

Communications obtained by a Swedish attorney in his or her professional capacity are protected by privilege. Swedish attorneys 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 an attorney is consequently safe from having to be disclosed. Attorneys cannot be ordered to testify in a national court or in front of an arbitral tribunal in regard to privileged information.

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 to protect their exchange of information. To better protect sensitive information shared between the party and the funder, it may be considered if such communication shall go through the funded party's attorney or with the attorney in copy.

Law stated - 16 December 2024

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.

Law stated - 16 December 2024

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 in and of itself and little to no case law, the funding agreement is of central importance. Swedish law takes a liberal approach to contracts. Accordingly, practitioners should draw up the funding agreement making sure that the contract thoroughly regulates the parties' respective obligations and rights. Normally the funded clients are advised by their attorney when negotiating the funding agreement.

Law stated - 16 December 2024

UPDATE AND TRENDS

Current developments

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

Until as late as 2018, it was noted that no domestic market for third-party funding existed in Sweden. See Josefsson/Neway Herrman, 'Extern finansiering av tvister och riskavtal – en möjlighet att stärka Sverige som säte för internationella skiljeförfaranden?' ('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). Over time, international funders, such as Burford, Deminor and Nivalion, have increased their presence in Sweden. On the domestic level, Kapatens and Litigium Capital are the main market players with headquarters in Sweden.

Law stated - 16 December 2024

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UPDATE AND TRENDS

Current developments

REGULATION

Overview

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

The permissibility of third-party litigation funding is not an issue in Switzerland. In a landmark decision rendered in 2004, the Swiss Federal Supreme Court made clear that litigation funding by third-party funders is permissible, provided that the funder acts independently of the client's lawyer (BGE 131 I 223). The court even stated that litigation funding could be advantageous for a claimant, offering the benefit of an independent, expert assessment of the financial risk of the litigation, and thus giving a claimant an additional, objective view of the claim (BGE 131 I 223 consid. 4.6.3).

In 2014, the court expressly confirmed this earlier decision and emphasised that, indeed, litigation funding has become common practice in Switzerland. The court further concluded that it is part of the lawyer's professional duties under the Federal Act on the Freedom of Movement for Lawyers (BGFA) to inform claimants about the possibility of litigation funding as the circumstances may require (Federal Supreme Court decision 2C_814/2014 of 22 January 2015 consid. 4.3.1).

Meanwhile, litigation funding continues to grow, both in its use by private and corporate parties and its acceptance by the courts, but also as a recognised industry within Switzerland. At the judicial level, the Federal Supreme Court has repeatedly endorsed the use of litigation funding, offering a rather comprehensive and detailed legal analysis. This has established a quite favourable environment for the use of third-party litigation funding in Switzerland. As a consequence, the Swiss litigation funding market has grown, with a number of new local funders, as well as global players, entering the Swiss market over the past few years.

Law stated - 21 October 2024

Restrictions on funding fees

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

There is no explicit limit on what is acceptable as compensation for a funder's services. However, as a general rule stated by the Swiss Penal Code (article 157), a third-party funding agreement – as any other agreement under Swiss law – must not constitute profiteering (ie, exploitation of a person in need).

While not explicitly stating a limit, the Federal Supreme Court 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, the court cited this opinion without any additional confirmation or comment (BGE 131 I 223 consid. 4.6.6).

In most cases, the funder's share is dependent upon the point in time at which the dispute comes to an end: the sooner a case can be settled or resolved, the lower the third-party funder's share. Over the past few years, the pricing of third-party litigation funders in Switzerland has become increasingly sophisticated. Pricing structures vary depending on the particularities of a given case. Typically, a third-party funder's success fee is calculated on the basis of a time-dependent multiple of the amount committed by the funder, combined with a percentage share of the proceeds recovered, where appropriate.

Law stated - 21 October 2024

Specific rules for litigation funding

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

There are currently no specific provisions applicable to third-party litigation funding under Swiss law. 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) may apply should a litigation funding agreement violate certain principles of Swiss law (BGE 131 I 223 consid. 4.6.6).

With regard to regulatory provisions, the court explicitly stated that third-party litigation funding cannot be considered an insurance offering as defined by the Swiss Insurance Supervision Act (ISA), since there is no payment of a premium for the coverage of future risks (BGE 131 I 223 consid. 4.7). Further, the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, the Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on their structure, funders may qualify as asset managers of collective investment schemes, and if so, must be granted a licence from the Swiss Financial Market Supervisory Authority (FINMA).

Law stated - 21 October 2024

Legal advice

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

A lawyer's professional conduct in Switzerland is governed by article 12 of the BGFA. According to several Federal Supreme Court decisions, a lawyer's independence in acting on behalf of their client is crucial; this also applies to cases involving third-party funding. The court determined that a lawyer advising their client in relation to a funder has no conflict of interest provided that there is a clear separation of roles between the lawyer and the funder. According to the court, it is part of the lawyer's professional duty to support their client in negotiations with a third-party litigation funder.

In addition, the court made clear that the claimant's obligations under the litigation funding agreement (to fully inform the funder about all the aspects and developments of the case, to not enter into a settlement agreement without the funder's prior approval, etc) do not jeopardise the lawyer's independence from the funder.

Law stated - 21 October 2024

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. Accordingly, there is no interest from the Swiss financial market regulator to generally oversee litigation funding, unless a funder's capital market activities (eg, as an asset manager) fall within its scope of regulation and require specific authorisation.

However, the Federal Supreme Court (BGE 131 I 223 consid. 4.6.6), as well as recent developments across Europe and within the European Union, do not seem to exclude the possibility of future regulation.

Law stated - 21 October 2024

FUNDERS' RIGHTS

Choice of counsel

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

Independence when acting on a client's behalf is an important principle of a lawyer's professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that a litigant's lawyer must be able to act free from any instructions of the third-party funder and solely in the interest 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 approved by the funder, or that if the litigant intends to replace counsel, funding will only be further granted if the new lawyer is approved by the funder.

Law stated - 21 October 2024

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 hearings are conducted in private. However, if the counterparty does not object, a litigant might invite the funder to participate in such a hearing based on a respective clause in the litigation funding agreement.

The latter also applies to arbitration. While arbitration hearings and settlement proceedings are generally held in private, funders may participate if there is no objection by the counterparty.

However, it must be kept in mind that in the majority of funded cases in Switzerland, the funder's involvement is not disclosed (at least insofar as no international arbitration proceedings are concerned). As such, the relevance of the funder's permission to attend or participate in hearings and settlement negotiations is quite limited.

Law stated - 21 October 2024

Veto of settlements

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

According to recent best practices, funding agreements do not grant the funder any veto rights with respect to settlements, but only a consultation right. The funder's interests remain safeguarded due to the structure of its success fee, which is typically based primarily or exclusively on a time-dependent multiple of the committed amount, combined with the funder's priority position in the waterfall payment structure.

Law stated - 21 October 2024

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.

The first category comprises events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or other 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.

Under such circumstances, a funder may terminate the funding agreement while bearing any costs incurred up through the point of, and as a result of, termination. Accordingly, such clauses might prevent the funder from continuing to finance proceedings that have become clearly unpromising.

In the second category, the funded party breaches its obligations under the funding agreement. In such a case, the funder may terminate the funding after due notice and typically has no duty to cover any further costs. Given these circumstances, the funded party might even be obliged to reimburse the funder for its costs and expenses.

Law stated - 21 October 2024

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 lawyer from the litigation funder is considered crucial by the Federal Supreme Court, Swiss law does not allow for direct instructions from the funder to the lawyer during the course of the funded proceedings. A lawyer would violate the professional duties under the Federal Act on the Freedom of Movement for Lawyers if their actions were based on a funder's instructions, as opposed to those of a client.

Therefore, any rights and actions a funder may exercise during the course of the proceedings must be agreed upon in the litigation funding agreement. This may include rights to otherwise confidential information, access to documents and the power to preclude certain actions that a litigant is usually free to take.

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding in Switzerland, funders need only 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 or the counterparty in the majority of cases pending before state courts further limits the funder's role within the litigation process.

Law stated - 21 October 2024

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, 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 their services that covers the actual costs of their practice and allows for a reasonable profit, are they permitted to agree on a premium. This would be 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 consid. 2.7.5).

Consequently, the litigation funding agreement must neither directly, nor indirectly, provide a model resulting in a purely conditional or contingent fee for the lawyer. Conversely, it is permissible to agree on a success-related premium for the lawyer within the limits set out by the court.

Law stated - 21 October 2024

Other funding options

12 | What other funding options are available to litigants?

Legal cost insurance options 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. Further, the insurance policy typically must be arranged before a party 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 may comprise an exemption from the obligation to pay an advance on costs and to provide security for costs, an exemption from court costs and the appointment of a lawyer by the court, if deemed necessary to adequately protect the rights of the requesting party. It does, however, not exempt the litigant from paying the legal fees of the opposing party in case of defeat. In theory, legal aid is also available to companies, provided that the matter in dispute relates to the company's only remaining asset. Such circumstances are, obviously, extremely rare.

Law stated - 21 October 2024

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 complex or 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.

Law stated - 21 October 2024

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 practices of the various cantons within 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 Swiss Federal Supreme Court. Before the Federal Supreme Court, an average appeal takes less than one year.

Challenges to an arbitral award are heard exclusively by the Swiss 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.

Law stated - 21 October 2024

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, while judgments related to the payment of money are enforced pursuant to the provisions of the Federal Debt Enforcement and Bankruptcy Act.

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 inherently burdensome, expensive or risky. Also, it is important to note that an enforceable decision allows for an attachment of known assets of the debtor located in Switzerland.

Law stated - 21 October 2024

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 this type of proceeding 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, particularly to allow for the facilitated enforcement of consumer rights. Thereby, the government identified third-party litigation funding as a driving factor to enable access to justice in mass tort and consumer claims and encouraged its promotion and further development in Switzerland.

Accordingly, 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.

In December 2021, the Swiss Federal Council presented a new draft amendment to the CPC with proposed provisions on collective redress, providing for an extended application of the existing group action, allowing for the assertion of monetary compensation, and offering possibilities for collective settlements. However, in June 2022, the commission in charge requested various clarifications, including a comprehensive legal comparison of collective redress mechanisms of selected EU states, and decided to postpone its debate about the Federal Council's proposal. In light of the decision rendered by the European Court of Human Rights in favour of the Association of Senior Women for Climate Protection in Switzerland against the Swiss Federal State in April 2024, the commission recently asked for further clarifications, namely, an analysis of the decision's impact on the Swiss private law system in general and the Federal Council's collective redress proposal in particular. It is not yet clear when the bill will be re-addressed in parliament and which instruments of collective redress will ultimately be adopted and become part of the Swiss civil procedure landscape.

Law stated - 21 October 2024

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 costs for the taking of evidence and the opposing party's 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 (eg, adverse costs).

Law stated - 21 October 2024

Liability for costs

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

Provided that the litigation funding agreement specifically delineates the 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 to hold the funded party harmless for the adverse costs.

In addition, there may be a situation in which a litigation funder can be held liable for adverse costs directly by the non-funded counterparty: if the unsuccessful claimant assigns their adverse costs claim against the funder 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, under the litigation funding concept developed in Switzerland, there is no legal basis for a court to directly order a third-party funder to pay for the adverse costs of the counterparty.

Law stated - 21 October 2024

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 costs that Swiss courts may order a claimant to provide:

- the courts usually order the claimant to post an advance for the expected court costs, the amount of which will be reduced to half of the expected costs with the entry into force of the impending CPC revision in January 2025. In addition, the claimant must advance the costs for the taking of the requested evidence; or

- at the request of the defendant, the claimant may also be ordered to provide security for the opposing party's legal costs if the claimant has no residence or registered office in Switzerland and no treaty exemption applies, if the claimant 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.

The CPC does not provide for a basis to request such security from the funder directly and there have been no cases reported where Swiss courts considered such a request.

Law stated - 21 October 2024

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 not been disclosed to either the court or 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 funding agreement into account. Accordingly, the fact that a claim is financed by a third-party litigation funder does not, in principle, 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 impact the assessment of a security-for-costs request. The prevailing view seems to be, however, that third-party funding is not sufficient to justify an order for security for costs,per se.

Law stated - 21 October 2024

Insurance

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

Although no legal or regulatory restrictions limit the use of ATE insurances, the product is only used to a limited extent in Switzerland, and there is no standard offering available. However, several insurance companies and third-party litigation funders offer their clients solutions for the coverage of adverse costs by way of ATE insurance.

By contrast, legal cost insurance is commonly used in Switzerland. The insurance product is arranged before the need to litigate arises ('before-the-event' insurance) and provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.

Law stated - 21 October 2024

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 a litigation funding agreement or even disclose if they are 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 such an obligation in domestic arbitration proceedings in specific circumstances, there have been no cases reported where a litigant was obligated to disclose a litigation funding agreement in a domestic arbitration.

In Swiss-based international arbitration proceedings, on the other hand, several sets of institutional rules (eg, the 2021 ICC Rules of Arbitration, the 2021 VIAC Rules of Arbitration and Mediation, etc), as well as the IBA Guidelines on Conflicts of Interest in International Arbitration, may require the disclosure of the existence and identity of a funder.

Law stated - 21 October 2024

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 their client is privileged and is not subject to disclosure to the counterparty 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 their lawyer and a third-party funder must be provided for in the litigation funding agreement.

Obviously, the fact that a funded party shares certain information with a funder cannot be considered as a waiver of the attorney-client privilege.

There have been no cases reported where communications between litigants or their lawyers and third-party funders were ordered to be disclosed by a Swiss court.

Law stated - 21 October 2024

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There are a number of cases recorded in Switzerland that concern disputes between litigants and funders.

In one such case, the Supreme Court of the Canton of Zurich ordered a third-party litigation funder to compensate the unsuccessful claimant for the adverse costs of the respondent that the claimant had been ordered to bear (decision RT180059-O/U of 24 May 2018). In another decision concerning the same dispute, the Supreme Court of the Canton of Zurich opined that – depending on the specific contractual terms – a litigation funding agreement may be qualified as a contract for the benefit of a third party under Swiss law, and as a result, such funded party's lawyer may have a direct claim against the funder for the payment of their fees (decision RT180057-O/U of 17 May 2018).

Other decisions addressed, inter alia:

- a funder's claim for a share of the proceeds awarded in a funded arbitration (Federal Supreme Court decision 5A_14/2018 of 11 March 2019);
- a funder's request for inspection of the (defaulting) funded party's annual reports (decision HE210051-O of the Commercial Court of the Canton of Zurich of 7 May 2021); and
- a funder's request for debt collection against an insolvent funded party (Federal Supreme Court decision 5A_910/2019 of 1 March 2021).

Law stated - 21 October 2024

Other issues

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

No.

Law stated - 21 October 2024

UPDATE AND TRENDS

Current developments

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

During the past few years, third-party litigation funding has become a common business concept and a well-recognised industry in Switzerland and across Europe. Today, it forms an integral part of the Swiss legal landscape. This situation will undoubtedly not change even though the impending revision of the Swiss Civil Procedure Code will facilitate access to justice by reducing the advance on costs to be paid by claimants when initiating state court proceedings.

While the Swiss legislature has thus far refrained from undertaking or announcing any regulatory efforts, a debate on the extent to which third-party litigation funding requires regulation has been gathering pace within the European Union (EU) over the past few years. The constant growth and increased use of third-party litigation funding have

prompted the European Parliament to recommend the adoption of a regulatory framework for the European funding industry. However, the European Commission decided to conduct a mapping study of the existing European litigation funding landscape before rolling out any new rules. The mapping study is conducted by the British Institute of International and Comparative Law and aims to collect and analyse information on the legal framework and practical operation of third-party litigation funding across the EU member states and in selected third countries.

As the EU Commission continues its efforts, it will be crucial to monitor further developments closely. Though future regulations by the EU do not have a direct impact on the Swiss funding industry, regulatory developments within the EU and across Europe will undoubtedly influence the Swiss legislature's standpoint on the need to regulate third-party funding in Switzerland.

Law stated - 21 October 2024

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UPDATE AND TRENDS

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REGULATION

Overview

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

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

In March 2018, Sir Rupert Jackson, while reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime, 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.

In *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28, the Supreme Court recognised that 'funding of litigation by third parties is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice'. It also noted that 'the effectiveness of group litigation may depend on the use of third-party funding, since such litigation often involves high numbers of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial'.

The third-party funding industry 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 16 funder members.

Law stated - 8 October 2024

Restrictions on funding fees

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

The Supreme Court confirmed in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 that, where litigation funding agreements provide for a funder's fee which is determined by reference to the amount of the proceeds (such as a percentage of the proceeds), litigation funding agreements are damages-based agreements within the meaning of the Courts and Legal Services Act 1990 and are subject to the requirements of the Damages-Based Agreements Regulations 2013.

Damages-based agreements must not provide for a payment above an amount which, including VAT, is equal to 50 per cent of the sums ultimately recovered by the client, and are prohibited in opt-out collective actions in the Competition Appeal Tribunal (CAT).

Law stated - 8 October 2024

Specific rules for litigation funding

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

Damages-based Agreements Regulations

As set out above, the Supreme Court confirmed in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 that the Damages-Based Agreements Regulations 2013 apply to certain litigation funding agreements.

In addition to limiting the funder's return (as described above), these regulations impose strict requirements on the form of such agreements. Such agreements must specify:

- the claim or proceedings or parts of them to which the agreement relates;
- the circumstances in which payment, expenses and costs, or part of them, are payable; and
- the reason for setting the amount of the payment at the level agreed.

The Supreme Court's decision is particularly significant for opt-out litigation in the CAT, as section 47C(8) of the Competition Act 1998 provides that a damages-based agreement is unenforceable if it relates to opt-out collective proceedings.

As a result, some litigation funding agreements entered into by class representatives in the CAT collective proceedings regime have been renegotiated and amended to exclude percentage-based returns, while other class representatives have relied on severance provisions in their LFAs or the common law of severance to exclude percentage-based returns, or both. In a series of cases, the CAT has confirmed that a litigation funding agreement will not be considered a damages-based agreement where the funder's return is payable out of the available proceeds based on a multiple of the funding commitment or the funder's outlay (see *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and another* [2023] CAT 73, *Commercial and Interregional Card Claims Limited v Mastercard Incorporated and others* [2024] CAT 3 and *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* [2024] CAT 5). The matter is due to be heard by the Court of Appeal.

It is possible that legislation will be enacted in due course to clarify that litigation funding agreements are not damages-based agreements.

ALF Code of Conduct

Most of the long-standing professional funders in the London market have voluntarily joined the ALF and committed to compliance with the ALF Code of Conduct, which sets out the standards of practice and behaviour required of ALF members in relation to litigation in England and Wales. The voluntary ALF Code of Conduct 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), and published on 23 November 2011. In *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), Mrs Justice Knowles highlighted 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 as to 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* [2019] CAT 26, the CAT described the ALF Code of Conduct as 'a voluntary code', but stated 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'.

In addition to ALF membership, several funders in England and Wales are now also members of the International Legal Finance Association (ILFA), co-founded in September 2020 by Woodsford. 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.

Law stated - 8 October 2024

Legal advice

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

The Solicitors Regulation Authority (SRA) Codes of Conduct 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'. To ensure compliance with these rules, 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, liability for professional negligence.

Law stated - 8 October 2024

Regulators

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

The judiciary provides a layer of oversight of the funding arrangements in litigation. 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.

The ALF is an independent body charged by the Ministry of Justice with delivering self-regulation of funding of disputes whose resolution is to be achieved principally through litigation in England and Wales. The ALF administers self-regulation of the voluntary code of conduct for litigation funders that are ALF members and maintains the procedure governing complaints against ALF members by funded litigants.

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

Law stated - 8 October 2024

FUNDERS' RIGHTS

Choice of counsel

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

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

Once invested in a case, a 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 the ALF Code of Conduct, which provides that funder members must not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

Law stated - 8 October 2024

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 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 funders to also attend.

Law stated - 8 October 2024

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 funder may provide input into the litigant's decision in relation to settlements. It is standard for English litigation funding agreements to provide that 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, therefore, be accepted.

Law stated - 8 October 2024

Termination of funding

9 | In what circumstances may a funder terminate funding?

For ALF members, the only permissible circumstances for terminating funding are set out in the voluntary Code of Conduct, as follows:

- where the 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); or
- where the funder reasonably believes that there has been a material breach of the litigation funding agreement by the funded litigant.

The Code of Conduct provides that, in the absence of the above circumstances, 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 of Conduct 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.

Law stated - 8 October 2024

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 the litigation funding market has matured, it has come to be recognised that in addition to financial assistance, funders can also bring significant professional expertise to litigation proceedings. For instance, the involvement of a funder at an early stage in the process provides claimants with an independent assessment of the risks and cost-benefit analysis of a claim.

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 stated 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)).

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. The Court of Appeal also drew a 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'.

Law stated - 8 October 2024

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 then, there have been significant developments including, in 2013, the implementation of rules permitting and governing the use of damages-based agreements in contentious work.

Conditional fee arrangements

In a CFA, some or all of the lawyer's fees are conditional on success. In the event of success, the solicitor is entitled to payment of the conditional fees, typically the difference between the discounted fees already paid and the fees properly chargeable at normal hourly rates, plus an uplift. The maximum uplift is 100 per cent of base rates.

The success fee payable under a CFA made after 1 April 2013 is not recoverable from the defendant in the litigation.

The Law Society publishes a model CFA and related guidance.

Damages-based agreements

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.

DBAs were seen by Sir Rupert Jackson in his report 'Review of Civil Litigation Costs' (December 2009) as an important litigation funding option. They have, however, been used relatively infrequently. Their lack of popularity can be explained in part by the slow speed at which law firms adopt new business models, and in part by uncertainty as to how the rules governing DBAs apply in practice. More recently, Sir Rupert 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 lawyers to act on a partially contingent basis, charging a reduced fee which could be made whole in the event of a successful outcome.

The judgment in *Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16 confirmed that DBAs can be enforceable when they provide for termination fees that are payable where the client terminates their lawyer's appointment. Previously, there was some uncertainty arising from the fact that Regulation 4 of the DBA Regulations does not permit a DBA to provide for charges that are additional to the percentage of damages. In *Lexlaw Ltd v Zuberi*, the claimant sought to argue a DBA was unenforceable because it provided for a charge in the event of early termination. The Court of Appeal rejected this argument.

In *Candey Ltd v Tonstate Group Ltd* [2022] EWCA Civ 936, the Court of Appeal confirmed that DBAs cannot be used by defendants, because the wording of section 58AA of the Courts and Legal Services Act 1990 precludes their use where the party making the payment to a lawyer under a DBA has not obtained a 'specified financial benefit' from the litigation. The Court of Appeal rejected the argument that a defendant can be said to have received a 'financial benefit' where it has successfully resisted having to make a payment to the claimants.

Law stated - 8 October 2024

Other funding options

12 | What other funding options are available to litigants?

Historically, legal aid was a possible source of funding for litigants, but the availability of legal aid has been significantly restricted in recent years. It is now only available for certain types of litigation, such as judicial review.

Litigants who are members of a professional body or a trade union may benefit from a legal assistance scheme as part of that membership.

Litigants can also benefit from a form of litigation funding if they have purchased an insurance policy (eg, home or car insurance policies) that contains legal expenses coverage and covers the subject matter of the dispute.

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, crowdfunding was used to take a parking dispute to the Supreme Court (*ParkingEye Ltd v Beavis* [2015] UKSC 67).

Law stated - 8 October 2024

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 Civil Justice Council statistics for the second quarter of 2024, the most recent period available, stated that the time for a claim to reach trial from first issue of the claim form was 79 weeks for fast and multi-track claims (ie, higher-value claims).

The time taken by the court to reach a decision after a trial can vary according to the complexity of the issues in the case, the urgency of its determination and the caseload of the court in question. Generally, a judgment can be expected within about six months of the trial. The Court of Appeal has described a 22-month delay between trial and judgment as 'inexcusable', emphasising the maxim that 'justice delayed is justice denied' (*Bank St Petersburg PJSC and Another v Arkhangelsky and Another* [2020] EWCA Civ 408).

Law stated - 8 October 2024

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 proportion of first-instance judgments that are appealed in England and Wales. However, anecdotally, first-instance judgments are more likely to be final than in many civil law jurisdictions in Europe. When a party is unsuccessful at first instance, they must apply to appeal the judgment and permission to appeal is not always granted. Appeals of first-instance decisions are only permitted where the appeals court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

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.

Law stated - 8 October 2024

Enforcement

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

There are no official statistics on the proportion of High Court judgments that require contentious enforcement proceedings. It is relatively easy to enforce judgments or awards in England and Wales. 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.

Law stated - 8 October 2024

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'; and
- representative actions are permitted where one or more claimants can represent other claimants with the same interest (eg, beneficiaries of a trust).

There is also a separate statutory regime covering collective proceedings before the Competition Appeal Tribunal (CAT), as discussed below.

Group litigation orders (GLO)

CPR 19.11(1) provides that 'the court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues'. A GLO must (according to CPR 19.11(2)):

- contain directions about the establishment of a register (the group register) on which the claims managed under the GLO will be entered;
- specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
- specify the court (the management court) that will manage the claims on the group register.

The court may also give further directions as to the management and publicity of the GLO under CPR 19.11(3).

Seven GLOs were ordered in the first half of 2024 – all of which relate to group litigation against automotive companies.

Representative actions

A representative action is an action brought by a class representative on behalf of a defined class of represented parties, generally without a requirement for the represented parties to take any steps to be included in the action. The scope for pursuing such representative actions in claims for damages was clarified by the Supreme Court in *Lloyd v Google* [2021] UKSC 50, where Leggatt LJ noted that the use of representative actions was not suitable in claims for damages where claimants have sustained different levels of loss and are therefore entitled to claim different amounts of compensation:

> The potential for claiming damages in a representative action is, however, limited by the nature of the remedy of damages at common law. What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded with the object of putting the claimant – as an individual – in the same position, as best money can do it, as if the wrong had not occurred. In the ordinary course, this necessitates an individualised assessment which raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. A representative action is therefore not a suitable vehicle for such an exercise.

On the other hand, Leggatt LJ commented that '[t]here is no reason why damages or other monetary remedies cannot be claimed in a representative action if the entitlement can be calculated on a basis that is common to all the members of the class', giving the example of a claim alleging that all the class members acquired the same product with the same defect, which reduced its value by the same amount.

Leggatt LJ provided guidance on a potential use of the representative action process in bifurcated proceedings. In particular, he identified that it may be possible for a

representative action to be used to decide common issues of law or fact, with any further issues that require individual assessment (such as determinations on the amount of damages) to be dealt with at a subsequent stage of the proceedings. This type of bifurcated proceeding was recently approved by the Court of Appeal in *Commission Recovery Ltd v Marks & Clerk LLP* [2024] EWCA Civ 9 and the Supreme Court has denied permission to appeal.

In *Lloyd v Google*, Legatt LJ also noted that the use of the representative action procedure is not confined to opt-out claims, emphasising the flexibility afforded to the courts in matters of case management:

> if there are circumstances which make it appropriate to limit the represented class to persons who have positively opted into the litigation, it is open to the judge to make this a condition of representation. The procedure is entirely flexible in these respects.

Claims before the CAT

Following changes to English competition law in 2015, collective proceedings can also be brought in the CAT in respect of breaches of competition law. These cases require a Collective Proceedings Order (CPO) to be made by the CAT in order to proceed. The CAT approved the first application for a CPO in *Walter Hugh Merricks v Mastercard and Others* following guidance provided by the Supreme Court in *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51.

Law stated - 8 October 2024

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?

Orders for costs

In litigation, 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 that the court will have regard to, including the conduct of the parties.

Funding costs

Following amendments made to the Courts and Legal Services Act 1990 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, successful parties to litigation are unable to recover the success fee payable under a conditional fee agreement or the premium due to an after-the-event (ATE) insurer (other than in certain clinical negligence proceedings).

Law stated - 8 October 2024

Liability for costs

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

Yes, a litigation funder can be held liable for adverse costs in English litigation. As a result, funders may seek ATE insurance to cover this risk, whether directly or via the claimant that it funds.

Arkin Cap

In the case of *Arkin v Borchard Lines*, where a claimant was impecunious and not in a position to pay the defendants' costs, the funder's liability to pay the defendants' costs was considered by the Court of Appeal. 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 reduced.

In *Excalibur Ventures LLC v Texas Keystone Inc and others*, the Court of Appeal made two key findings in respect of a funder's liability for adverse costs. First, it held that the Arkin cap should be calculated by reference to both the funded costs and the amount provided by way of security for costs. Second, the court found that funders are liable to pay indemnity costs awarded against the claimant. The court's reasoning was that a funder cannot dissociate itself from the conduct of those on whom the funder relies to make a return on its investment. 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 *Chapelgate Credit Opportunity Master Fund Ltd v Money and Others* [2020] EWCA Civ 246, Lord Justice Newey in the Court of Appeal stated that he did 'not consider that the Arkin approach represents a binding rule'. The Court of Appeal highlighted the discretion retained by judges who, depending on the facts, 'may consider it appropriate to take

into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding'. In that case, the funder's willingness to waive a provision requiring the claimant to procure ATE insurance (thereby exposing the defendants to a significant costs risk) had been taken into account by the first instance court in making an order against the funder, which the Court of Appeal confirmed was correct.

More recently, the Supreme Court referred to the Arkin Cap in *Lloyd v Google*, stating 'a commercial litigation funder who finances unsuccessful proceedings is likely to be ordered to pay the successful party's costs at least to the extent of the funding', which confirms that the cap may yet be applied in some cases, but the court retains discretion as to its application.

In *ECU Group PLC v HSBC Bank PLC & Ors* [2022] EWHC 1616 (Comm), the High Court considered two other questions in relation to potential caps on a funder's liability for adverse costs and found the funder to be jointly and severally liable with the claimant for the entire period covered by the litigation funding agreement, despite the involvement of other funders:

- First, the court considered whether the funder's liability for adverse costs should be restricted to costs incurred after its entry into a litigation funding agreement with the claimant. In the circumstances, the funder had agreed in a litigation funding agreement dated 19 September 2019 to provide funding up until the end of the trial and to reimburse the claimant for certain costs incurred since 30 November 2018. The court held that the funder should be liable for adverse costs incurred since 30 November 2018 because it had the potential benefit of a contingency fee in respect of the period from 30 November 2018 onwards.
- Second, the court considered whether, where there are other funders involved in the claim, a funder's liability for costs should be limited in proportion to its contribution to the total funding. The court found in this case that the main funder should be jointly and severally liable with the claimant for the costs of the proceedings, irrespective of the involvement of other funders, because it 'had far and away the dominant financial interest in the outcome of the proceedings and effectively controlled the proceedings through the LFA'. Further, the defendants 'were given no choice but to incur costs in defence of the claim and it would not be fair to make recovery of those costs dependent on pursuit of numerous individuals and entities'.

Law stated - 8 October 2024

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;
- 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 their address with a view to evading the consequences of the litigation; or
- the claimant has taken steps in relation to their assets that would make it difficult to enforce an order for costs against them.

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

The amount awarded is usually calculated by reference to the amount of costs the defendant would likely be awarded in the event that the claimant's case is unsuccessful.

Security for costs by a litigation 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 the *RBS Rights Issue Litigation*, Mr Justice Hildyard set out the following factors as relevant in assessing whether an interlocutory order against a non-party under CPR 25.14(2)(b) is appropriate and just:

- Whether it is sufficiently clear that the non-party (ie the funder) is to be treated as 'having in effect become in all but name a real party motivated to participate by its commercial interest in the litigation'.
- Whether there is a real risk of non-payment such that security against the contingent liability should be granted.
- Whether there is sufficient link between the funding and the costs for which recovery is sought to make it just for an order to be made.
- Whether a risk of liability for costs has sufficiently been brought to the attention of the non-party, either by express warning, or by reference to what a person in its position should be taken to appreciate as to the inherent risks. However, most English judges now assume that commercial litigation funders are alive to the risk of a costs order against them, and the requirement for express warning has gradually been diluted.

- Whether there are factors, including, for example, a delay in the making of an application for security, or likely adverse effects, that tip the overall balance against making an order.

In *Rowe v Ingenious Media Holdings PLC* [2020] EWHC 235 (Ch), the court ordered Therium, a funder, to provide security for costs. In his judgment, Mr Justice Nugee described it as 'striking' that no financial information about Therium was adduced in evidence. Therium's membership of ALF was not sufficient to persuade the court that it would be able to meet a costs order.

However, in an appeal to the Court of Appeal that related specifically to cross-undertakings by the defendant, the Court of Appeal noted that 'a properly run commercial funder should rarely if ever need to be ordered to put up security', because it should be adequately capitalised (*Rowe and others v Ingenious Media Holdings plc and others* [2021] EWCA Civ 29).

Security for costs by a litigation funder that has been assigned claims

In cases where a litigation funder is assigned claims by a liquidator, the litigation funder is the claimant and the court may make an order for security for costs on the basis of CPR 25.13 (see, eg, *Asertis v Bloch* [2024] EWHC 2923 (Ch)).

Security for costs by a law firm funder

In the *NOx Emissions Group Litigation* [2024] EWHC 695 (KB), the High Court considered whether a third-party funder that had provided funding to a law firm, but was not funding the claimants directly, could be the subject of an application for security for costs under CPR 25.14(2)(b). It found that 'to the extent it was suggested that the court's power under CPR 25.14 is limited to those in a direct contractual relationship with the claimants, there seems to be no good reason for such a limitation'.

It determined that the question of whether a funder had contributed or agreed to contribute to a claimant's costs in return for a share in the money was one of 'substance, and not form', and that it would be necessary to examine the arrangements in question to resolve that question. However, in the circumstances, the court declined to order disclosure of the funding arrangements and indicated that, if the defendants continued to pursue the application, it could be revisited after (1) budgets through to 2025 had been fixed and (2) the claimants had had the opportunity to obtain sufficient ATE insurance to cover the defendants' costs, at which point the question of security would be rendered redundant.

The relevance of ATE insurance and deeds of indemnity

In *Premier Motorauctions Ltd and another v PricewaterhouseCoopers LLP and Another* [2017] EWCA Civ 1872, 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 insurance policy provided 'sufficient protection' to the defendant for the claimant being unable to meet the defendants' costs. Whether an ATE insurance policy would provide that protection will depend on the terms of the 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 of 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.

The court echoed some of these concerns in *Rowe v Ingenious Media Holdings PLC* [2020] EWHC 235 (Ch), where Mr Justice Nugee highlighted that in general, ATE insurance policies are not designed to provide security for costs and cited his concerns about a 'real, and not a fanciful risk, that the ATE insurance policies will not respond in full'. Mr Justice Nugee did not write off the potential that sufficient protection could be provided by ATE insurance and encouraged funders and ATE insurers to 'develop a form of policy that could both act as insurance for claimants and sufficient protection for defendants'.

In *Recovery Partners GB and Another v Rukhadze and Others* [2018] EWHC 95 (Comm), the High Court held that an ATE insurance 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 insurance policy itself).

More recently, in *Saxon Woods Investments Limited v Francesco Costa and Ors* [2023] EWHC 850(Ch)), the High Court confirmed that an ATE policy may also be sufficient security for costs where the insured party has obtained specific additional policy language in the form of an anti-avoidance endorsement.

Law stated - 8 October 2024

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 funders to orders for security for costs against them does not, of course, of itself mean that an order for security for costs should be granted. In the High Court decision of *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), the court examined factors it might consider in exercising its discretion, under CPR 25.14, as to whether or not to order security for costs against a 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.

Law stated - 8 October 2024

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 insurance is both permitted and commonly used. There is a well-established and competitive market for ATE insurance 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, including:

- WIP insurance, which is purchased by lawyers acting on contingency fee agreements or damages-based agreements to limit their downside risk in the event that the claim is lost;
- judgment default insurance, which covers the risk that the defendant does not comply with a judgment against it; and
- judgment preservation insurance, which is purchased to secure a first-instance award against the risk of being overturned on appeal.

Generally, London insurers will consider insuring any high-value risk relating to litigation. There are specialist brokers who can liaise between litigants and insurers.

Law stated - 8 October 2024

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?

Except in the Competition Appeal Tribunal (CAT), there is no general requirement for a litigant to disclose its litigation funding arrangements to any opposing party or to the court.

In *Excalibur Ventures LLC v Texas Keystone and others* [2012] EWHC 2176 (QB), the court considered that three issues are likely to arise in considering disclosure (in the following order):

- relevance of the documents;
- if relevant, whether they are privileged; and
-

if relevant and not privileged, whether, as a matter of discretion, they should be disclosed either wholly or subject to redaction.

On the specific facts of that case, the court found that the funding arrangements were relevant and not privileged, but that certain terms (including the success fee, settlement and termination provision) could be redacted to avoid the defendants obtaining any tactical advantage from reviewing the terms.

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 funder, holding that it was irrelevant to the wider dispute. In *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), an application was made, and subsequently withdrawn, seeking disclosure of documents relating to the funding arrangements. Mrs Justice Knowles said that if that application had not been withdrawn, she would have rejected it on the basis that the funding arrangements, being agreements between the solicitors and the funder, were not in the litigant's control.

There may be a requirement to disclose the identity of a funder after a trial in circumstances where the claimant has failed to meet an order for adverse costs. For instance, in *Global Energy Horizons Corporation v Gray* [2019] EWHC 3295 (ChD), the claimant was ordered to make a payment on account of the defendant's costs and, 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.

The courts may also order disclosure of certain funding arrangements in the context of security for costs:

- In *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm), the claimant was ordered to reveal the identity of funders to facilitate the defendant's application for security for costs against the funder. However, the court made clear that its power to order disclosure of such information should not be used to enable a 'fishing expedition' and that such disclosure would only be ordered where there was good reason to believe the claimant was in receipt of litigation funding and an application for security for costs would have reasonable prospects of success.
- In *NOx Emissions Group Litigation* [2024] EWHC 695 (KB), the High Court declined to order disclosure of the law firm's funding agreement but indicated that it would be appropriate to revisit the issue relatively shortly, to the extent it was still pursued by the defendants, following (1) a costs management hearing at which the parties' budgets would be determined and (2) the claimants having had an opportunity to obtain sufficient ATE insurance to cover the defendants' costs, after which the question of security would be rendered redundant.

Finally, disclosure of the identity of a funder may be ordered in the context of a worldwide freezing injunction (*JSC BTA Bank v Ablyazov and another* [2018] EWHC 1368 (Comm)).

Competition Appeal Tribunal

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 sets out the process for providing documents on a confidential basis.

In some circumstances, redactions may be made to the litigation funding arrangements before they are provided. For instance, in *Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd* [2021] CAT 37, the CAT had regard to the *Excalibur* judgment referenced above. In its judgment, it found that the ATE premia and 'solicitors excess provision' were not relevant to the issues at the CPO hearing and could be redacted. Further, the CAT found that it may exercise its discretion in permitting redactions even where information is relevant and there is no privilege, taking into account any unfair tactical advantage that would be caused by the disclosure of the information. In the case of the ATE premia and solicitors excess provision, the CAT considered that these could also be redacted on the grounds of their strategic sensitivity.

In the subsequent case of *Elizabeth Coll v Alphabet Inc and others* [2022] CAT 6, the CAT refused to order disclosure of the ATE deposit premium or the success fees. The CAT found that while ATE premia had been disclosed in other cases, the premia in this case were not relevant to the question of whether the proposed class representative would be able to fund the required legal costs and be able to meet the defendants' costs, as that information could be gleaned from other materials. It balanced the risk of giving an unfair tactical advantage to the defendants against the relevance of the amount of the ATE deposit premium and declined to order disclosure. It also refused to order disclosure of success fees as it did not accept the defendants' arguments as to their relevance.

Law stated - 8 October 2024

Privileged communications

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

In England and Wales, there are two types of privilege: legal advice privilege and litigation privilege. Legal advice privilege applies to confidential communications between client and lawyer that are made for the purpose of giving or obtaining legal advice. Litigation privilege applies to documents produced by litigants or their lawyers, and communications with third parties, where litigation is reasonably in prospect at the time a document is created and the document is created for the dominant purpose of conducting litigation.

Some communications with a litigation funder may be covered by litigation privilege, provided the litigation is reasonably in prospect at the time a document is created, and the document is created for the dominant purpose of conducting litigation.

In addition, where documents are covered by legal advice privilege, and the documents are subsequently shared with a funder on a confidential basis, the client will not lose privilege in those documents as against the rest of the world, provided confidentiality in the documents is maintained.

As regards litigation funding agreements, the position may not be entirely settled by case law, but it would appear that litigation funding agreements are not covered by litigation

privilege (*Excalibur Ventures LLC v Texas Keystone and others* [2012] EWHC 2176 (QB)). Nevertheless, the courts have shed light on the circumstances in which legal advice privilege may attach to litigation funding agreements:

- First, in the case *In the Matter of Edwardian Group Ltd* [2017] EWHC 2805 (Ch), the court 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).
- Second, in *Excalibur Ventures LLC v Texas Keystone Inc and Others* [2012] EWHC 2176 (QB), Mr Justice Popplewell held that legal advice privilege may apply 'if and 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'.

Law stated - 8 October 2024

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There have been several publicly reported disputes between litigants and their funders, which generally arise from issues of contractual interpretation or the litigant's refusal to pay the funder its success fees.

The ALF has a procedure for complaints by funded parties against its funder members. While there have been a small number of references, none have been upheld.

Law stated - 8 October 2024

Other issues

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

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

Law stated - 8 October 2024

UPDATE AND TRENDS

Current developments

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

In recent years, there has been an increase in the number of corporate litigants seeking litigation funding for bilateral commercial disputes, because litigation funding is increasingly recognised as a tool for companies to eliminate the risk exposure and expenses that are traditionally associated with pursuing legal claims.

Litigation funding is also increasingly being used by institutional shareholders in listed companies as a means of pursuing escalated engagement, up to and including litigation, with companies that have fallen short of environment, social and governance standards and caused losses for investors. Litigation funding is particularly suitable for this type of litigation because it is often attractive for institutional investors to pursue action without incurring costs off their own balance sheet or bearing any risk in relation to the litigation.

Law stated - 8 October 2024

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REGULATION

Overview

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

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 I v Khorrami LLP*, 48 Misc 3d 1223(A), 9 (NY Sup Ct 2015).

Law stated - 14 November 2024

Restrictions on funding fees

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

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 the 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).

Law stated - 14 November 2024

Specific rules for litigation funding

3 Are there any specific legislative or regulatory provisions applicable to third-party 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 restrictions against champerty prohibit 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 have 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 160 (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 that is the subject of the litigation, 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 underlying asset itself. Further, the nature of the funder's interest is to the proceeds of the litigation, not the underlying asset itself.

In the unlikely event that 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 purchase 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.

Law stated - 14 November 2024

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 (rescinding 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, psychological, 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 judgement 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 funder's involvement in the case will adversely affect the lawyer's professional judgement (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 certain risks), 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 judgment, 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, 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)).

Law stated - 14 November 2024

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.

However, there is a pending bill titled the New York Consumer Litigation Funding Act that would regulate consumer litigation funding. As at November 2024, the bill remains in the legislative committees, so there is no guarantee the bill will be enacted or what provisions any final bill would contain. We note that this legislation targets consumer litigation funding as compared to commercial litigation funding. In particular, these proposed regulations would only apply to cases where the funded amount was under US$500,000, which would exempt just about any funded litigation that is the subject of this article.

Various lobbying organisations and legislative agencies in the United States, 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.

Law stated - 14 November 2024

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 their 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 lawyers, 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.

Law stated - 14 November 2024

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.

Law stated - 14 November 2024

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).

Law stated - 14 November 2024

Termination of funding

9 | In what circumstances may a funder terminate funding?

In general, the funding arrangement, including the right to terminate, is defined by contract. If the terms of a contract call for continued funding, the funder has a contractual 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.

Law stated - 14 November 2024

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.

Law stated - 14 November 2024

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 arrangements.

Law stated - 14 November 2024

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 litigant (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 a non-binding advisory opinion in 2018 that called into question the appropriateness of such an arrangement (NYCBA Formal Opinion 2018-5). 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 I v Khorrami 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 utilised 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' (p23). The group found that 'it would be beneficial for the Rule to be revised', and that 'lawyers and the[ir] clients... will benefit if lawyers have less restricted access to funding' (p23).

Law stated - 14 November 2024

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 approximately 41 months from filing to a trial 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 specialised division that focuses on creating uniformity and predictability in complex commercial disputes.

Law stated - 14 November 2024

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 approximately 13 months.

Law stated - 14 November 2024

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. This is especially true

with funded cases as funders, in deciding whether to fund a case, are generally careful to consider any enforcement risks.

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.

A defendant's ability to satisfy an ultimate judgment can be a key factor in whether or not a litigation funder will agree to fund a case.

Law stated - 14 November 2024

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$270 million arising from an insider trading scandal was funded by a third party). Beginning in 2017, the United States District Court for the Northern District of California has required, via standing order or local rule, or both, the disclosure of a party funding a class action litigation (see ND Cal Standing Order for All Judges of the Northern District of California: Contents of Joint Case Management Statement (30 November 2023); Civil Local Rule 3-15; see also *InfoExpress, Inc v Cisco Systems, Inc*, No. 4:23-CV-02698-YGR (NDCA 20 May 2024) ('Civil Local Rule 3-15's disclosure requirement only requires disclosure of litigation funders in class actions, as litigation funders in class actions often hold the ability to control settlement negotiations in those cases')). To date, there have been at least two other district courts (or individual judges) who have issued standing orders or local rules directed specifically to disclosure of funders (as compared to those requiring general disclosure of anyone with a financial interest in the lawsuit): the United States District Court for the District of New Jersey in June 2021 (see Local Civil Rule 7.1.1) and the United States District Court for the District of Delaware in April 2022 (see Standing Order Regarding Third-Party Litigation Funding

Arrangements, requiring the disclosure of third-party funders in all cases assigned to Chief Judge Colm F Connolly).

Law stated - 14 November 2024

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).

Law stated - 14 November 2024

Liability for costs

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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).

Law stated - 14 November 2024

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)).

Law stated - 14 November 2024

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.

Law stated - 14 November 2024

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.

Law stated - 14 November 2024

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?

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, although there have been efforts to require the disclosure of the existence and identity of a litigation funder – for example, in 2019, the United States District Court for New Jersey declined to require disclosure of third-party funders (see *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation*, No. CV 19-2875 (RBK/JS), 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 limited 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 (although Judge Connolly in the District of Delaware issued a standing order in April 2022 for cases before him that closely tracks the New Jersey local rule).

That being said, 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 lawyer'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). A recent New York appellate decision affirmed an order denying production of litigation financing, as the defendant could not establish how such discovery would 'support or undermine any particular claim or defense'. *Worldview Entm't Holdings Inc v Woodrow*, 204 AD3d 629, 630 (1st Dept 2022); but see *Smartmatic USA Corp. v Fox Corp.*, 2023 NY Slip Op 30886(U) (NY Sup Ct 2023) (where an element of a counterclaim was the motive for bringing a lawsuit, the funding agreement may be materials and necessary and therefore would be disclosed). This appellate ruling reflects the increasing tendency of courts to recognise that litigation financing does not require great disclosure or a separate set of regulations.

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.

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 NY3d 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 protects against the disclosure of a 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. 06 Civ 13114 VM MHD, 2008 WL 465113 (SDNY 15 February 2008).

Law stated - 14 November 2024

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 will likely find that attorney-client privilege will not protect communications with a third-party funder

from disclosure. However, 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 can 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.

Ultimately, 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, which 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.

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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 case. 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 9489791 (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 V LP v Rowe*, No. 4:10-CV-11537, 2012 WL 1068171 (ED Mich 23 January 2012) (same).

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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 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 United States, 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.

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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 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. There is also an increase in the use of insurance as an alternative to, or to supplement, more traditional litigation funding.

Courts are increasingly amenable to third-party funding as well. Each year brings 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.

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