IN-DEPTH

Third Party Litigation Funding

EDITION 7

Contributing editor
Erik Bomans
Deminor

Third Party Litigation Funding

EDITION 7

Contributing Editor

Erik Bomans

Deminor

In-Depth: Third Party Litigation Funding (formerly The Third Party Litigation Funding Law Review) provides an overview of and an annual guide to the law and practice of third party funding in jurisdictions where it is reasonably well established. With a focus on significant recent cases and developments, it examines the key features of the legal and regulatory regimes governing funding agreements, as well as practical considerations when structuring these agreements.

Generated: January 2, 2024

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at November 2022, be advised that this is a developing area. Enquiries concerning reproduction should be sent to customersuccess@lexology.com. Enquiries concerning editorial content should be directed to the Content Director, Clare Bolton – clare.bolton@lbresearch.com.

Explore on **Lexology**

Contents

Editor's Preface
Erik Bomans
Deminor

Australia
Jason Geisker, Dirk Luff
Maurice Blackburn

Austria
Malte Stübinger, Patrick Rode
Deminor

Belgium
Olivia de Patoul
Deminor

Brazil
Rodrigo de M Carneiro de Oliveira, Eider Avelino Silva, Rafael Curi Savastano, Guilherme Fonseca Schaffer
Pinheiro Neto Advogados

Canada
Hugh A Meighen, Glenn Gibson
Borden Ladner Gervais LLP

France
Olivia de Patoul
Deminor

Germany
Malte Stübinger, Tim Willing
Deminor

Hong Kong

Irene Lee Wing Yun

Deminor

Italy

Giacomo Lorenzo

Deminor

Luxembourg

Olivia de Patoul

Deminor

Mexico

Paloma Castro

Deminor

Netherlands

Rein Philips

Redbreast Associates

New Zealand

Jason Geisker, **Simon Gibbs**

Maurice Blackburn

Poland

Zbigniew Kruczkowski, **Paula Czyz**

Linklaters LLP

Singapore

Irene Lee Wing Yun

Deminor

Spain

Cristina Soler, **Carlos Llorente**

Ramco Litigation Funding

Switzerland

Urs Hoffmann-Nowotny, **Louis Burrus**

Schellenberg Wittmer

Explore on **Lexology**

United Arab Emirates - DIFC

Mohamed El Hawawy , **Natalie Jensen**

Ince

United Kingdom - England & Wales

Emily O’Neill

Deminor

USA

Lina Bensman, **Patrick C Swiber**, **Katerina Wright**

Cleary Gottlieb Steen & Hamilton LLP

Explore on **Lexology**

Editor's Preface

Erik Bomans

Deminor

Having practised litigation funding in Europe for more than 15 years, I am pleased to see that its use continues to expand across a wide range of claim types, as legal practitioners become increasingly aware of the benefits that funding can provide to their clients. In addition, corporations are also discovering litigation funding as a new tool to manage legal risks.

The advent of modern-day collective actions for investors, small businesses and consumers can be traced back to Europe, where litigation funding has been practised for many years. European and national legislation adopted during the past decade in the areas of antitrust laws and consumer protection further facilitated bringing damages claims, also for groups of victims. In such actions, there is a natural requirement for funding as the legal expenses of individual plaintiffs may outweigh the value of individual claims.

While we continue to see growing activity in these actions, litigation funding has now made greater inroads within B2B litigation and arbitration. In addition, it is becoming more commonly appraised by larger corporations as a way to manage risks. While, within Europe, this particular application of litigation funding is still very much considered a fledgling arena, it is truly exciting to see how funding for commercial litigation and arbitration is becoming part of the conversation among legal practitioners on a more frequent basis.

This is all to be welcomed, as it will help the sector achieve the critical size required to offer diversification across a wider range of claim types. Litigation funding is far from becoming mainstream, but we are, without doubt, now experiencing the first signs of a maturing asset class.

However, the road towards becoming a mature practice is not as smooth as some would have expected. In response to plaintiffs' increasing use of litigation funding, certain interest groups have called for strict limitations on the application of litigation funding. They have also demanded that litigation funding should be made subject to strict regulation based on fears that the practice will lead to excessive litigation and unnecessary costs for businesses, all of which have led to unwelcome uncertainty within the sector.

One may wonder how a practice that does not represent more than 1 per cent of total litigation activity in Europe (based on Deminor's own research) can be held responsible for a 'rising litigation culture'. The truth is that Europe has adopted legislation aimed at protecting consumers and small businesses, and facilitating bringing damages actions as a result of such breaches should be considered an essential part of that protection. In addition, this will lead to actions being initiated that otherwise could not have been brought. This is a deliberate public policy that should be welcomed, not one that should be branded as being manufactured by the litigation funding industry.

It was interesting to observe that funding was recently mentioned in several pieces of legislation regarding collective actions, both at European and national levels. I believe this is only the start, and expect more legislation, at both levels, aimed at clarifying the rights

and duties of users and providers of litigation funding while also addressing how funding can be used in bilateral and collective legal actions. I anticipate that over the next several years we will witness developments at the courts that are likely to play a key role in driving the need for such legislation.

Indeed, defendants (especially in collective actions) have increasingly challenged the use of funding structures before the courts. Several funding agreements have already been successfully challenged in certain jurisdictions, such as specific types of assignments of claims in Germany and damages-based agreements in the United Kingdom, and in Germany the legislator has already intervened to clarify certain matters. While this has led to some volatility and uncertainty in the immediate term, I remain convinced that, in the longer term, such challenges are likely to help shape a more robust legal framework.

In response to growing demand, not only in Europe (where I believe growth is strongest) but also on a global basis, litigation funders have continued to raise more capital over the past decade. In spite of the temporary slowdown caused by the covid-19 pandemic, funders returned to raise record amounts of capital in 2022. However, because of the challenging conditions imposed on financial markets since mid-2022, new capital raises were almost brought to a halt in the first half of 2023 (a period when the demand for litigation funding has grown strongly). This means, in the short term, that available capital is increasingly being consumed and that less capital will be available to be deployed in the funding of new cases. We are now seeing the recommencement of new capital raises, albeit still far below previous levels. I expect that the situation will normalise as financial markets find a new equilibrium after the strong rise of interest rates witnessed throughout 2022–2023.

Although the sector continues to undergo these challenges and changes, I personally believe that they are all positive indicators for the long-term future of litigation funding. As capital is likely to be used more efficiently due to increased competition, and while the sector matures and attains more critical size and diversification, investors will increasingly realise that litigation funding can bring long-term, sustainable returns. I also firmly believe that regulators will grow to understand the role funding plays in helping to facilitate a healthy and efficient litigation market and, above all, in improving access to justice. Finally, corporations, whether small or large, will understand that, far from being the cause of a rising litigation culture, litigation funding is a business proposition that helps them to manage their legal risks in a responsible manner.

Erik Bomans
Deminor
Brussels
December 2023

d e m i n o r

LITIGATION FUNDING

Erik Bomans

erik.bomans@deminor.com

Deminor

Read more from this firm on Lexology

Australia

Jason Geisker and **Dirk Luff**
Maurice Blackburn

Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
CONCLUSIONS AND OUTLOOK
ENDNOTES

Introduction

Australia is home to one of the world's most sophisticated third party litigation funding markets. Initially, litigation funding was used by insolvency practitioners to pursue insolvency-related legal claims, but since the turn of the millennium litigation funding has been utilised in a far broader range of civil and commercial disputes and arbitrations. Even so, third party litigation funding services remain relatively underutilised in Australia.[2] In 2021, the total legal market spend on litigation in Australia was estimated at A$4.8 billion, with the addressable market for third party litigation funding estimated at half that amount, or A$2.4 billion.[3] In contrast, the Australian litigation funding market had an estimated revenue of only A$221 million in 2020–21.[4] The litigation funding market is estimated to have grown by 9.3 per cent per annum between 2018 and 2023. That trend is predicted to continue, albeit at a significantly slower rate of 2.9 per cent per annum, over the next five years.[5]

In 2019, the Australian Law Reform Commission (ALRC) estimated there were approximately 33 litigation funders active in the Australian market,[6] a number that has remained stable.[7] The use of litigation funding for a broad range of class actions[8] is a well-known aspect of the Australian market. Around five years ago, class actions represented just under half of the litigation funding market, although contrary to popular belief, funded class actions have since declined to represent less than 36 per cent of the market in 2023.[9] The balance of the market continues to comprise of small to large businesses and individuals.[10] Similarly, in the 12 months ending 3 March 2018, approximately 72.5 per cent of the class actions filed in Australia were supported by third party litigation funders.[11] However, over the past five years there has been a steady decline in funded class actions as a proportion of the overall class actions commenced in Australia, such that they now represent less than half of all class actions filed.[12] Indeed, in 2022, total class action filings themselves (funded and unfunded) were at the lowest level since 2017–2018, reflecting the broader slowdown of this market segment.[13] In 2023, that slowdown appears to have somewhat abated, although the data requires careful analysis given the prevalence of 'competing' class actions in the 2023 period to 30 June.

Despite dealing with covid-19 comparatively well from a public health perspective, Australia did not completely avoid the economic shockwaves from the pandemic experienced around the globe. Factors influencing the demand for litigation funding in Australia include the strength of the local economy, the rate of corporate insolvencies, the demand for legal services, regulatory settings and the level of government intervention.[14] Yet, despite the biggest economic downturn since the great depression, surprisingly for the Australian business community covid-19 did not result in the tsunami of corporate insolvencies originally expected. Largely due to unprecedented levels of government assistance and intervention, external administrations in 2020 and 2021 were kept at record lows,[15] resulting in a reduced demand for litigation funding in the insolvency market segment. In the 2022–2023 financial year this trend has reversed, with corporate insolvency appointments returning to pre-covid-19, long-term average levels.[16] This was in-part driven by the Australian Taxation Office adopting a more aggressive approach towards recovery of overdue tax debts,[17] but has also been driven by increased insolvencies in the construction, food and accommodation, and retail sectors.[18] This recent increase in corporate insolvencies and deteriorating economic conditions, along with an increase in

demand for legal services[19] and predicted improved regulatory settings, is expected to drive growth in the litigation funding industry over the coming years.

Year in review

i Corporations Amendment (Litigation Funding) Regulations 2022

In a further major shift in the regulation and reform of litigation funding in Australia, on 16 December 2022, changes to the regulation of litigation funding schemes under the Corporations Act 2001 (Cth) (the Corporations Act) were introduced by the commencement of the Corporations Amendment (Litigation Funding) Regulations 2022 (the Funding Regulations). The broad effect of the Funding Regulations is to return the regulatory position back to that which existed immediately prior to the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (the 2020 Regulations). The Funding Regulations once again provide litigation funding schemes with an explicit exemption from the managed investment scheme (MIS), Australian financial services licence (AFSL), product disclosure and anti-hawking provisions of the Corporations Act.[20] In part, this is to ensure that the Corporations Regulations 2001 (Cth) (the Corporations Regulations) reflect the status of the law following the Full Court of the Federal Court's decision in *LCM Funding Pty Ltd v. Stanwell Corporation* Limited (Stanwell).[21]

The explanatory statement, issued by the authority of the Assistant Treasurer and Minister for Financial Services, states that the MIS and ASFL regimes were not designed or intended to regulate the litigation funding industry.'[22] The Funding Regulations bring arrangements for litigation funding schemes in line with arrangements for other types of funding schemes (i.e., insolvency funding schemes) and litigation funding arrangements.

ii ASIC amends relief for litigation funding schemes

On 19 December 2022, following the commencement of the Funding Regulations, the Australian Securities and Investments Commission (ASIC) announced amendments to existing legislative instruments that provided relief that was not covered by the Funding Regulations. Two critical instruments due to expire on 31 January 2023 were extended for three years until 31 January 2026:

1. ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37, which exempts litigation funding arrangements and proof of debt arrangements from the application of the National Credit Code; and
2. ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/38, which exempts litigation funding arrangements funded by conditional costs arrangements (no-win no-fee retainers) from MIS obligations, AFSL requirements, product disclosure and anti-hawking requirements.

In its announcement, ASIC stated that the purpose of the extension of the relief was 'to provide certainty for litigation funders, lawyers and members of litigation funding and proof

of debt funding arrangements while the Government considers further its policy position for these types of arrangements'.[23]

iii Common fund orders

A significant evolutionary step in the Australian legal system has been the judicial consideration of common fund orders (CFOs) in class actions. CFOs can provide for the legal costs of the proceedings and the commission charge of a litigation funder to be shared by all members of a class who succeed in, or achieve a settlement in, a class action, irrespective of whether they have signed any legal retainer or funding agreement. However, the ability of the court to make a CFO at an early stage of a class action proceeding was successfully challenged in the High Court (by a 5:2 majority) in the *Lenthall* and *Brewster* class actions on 4 December 2019.[24]

The first CFO in a class action was made by the Full Court of the Federal Court on 26 October 2016 in the *QBE* class action.[25] The order was made at an early stage of the proceedings to assist group members in making an informed decision as to their participation in the class action prior to opting out. In approving the order, Murphy, Gleeson and Beach JJ stated that upon any successful settlement or judgment in the proceedings, the applicant and class members must pay a reasonable court-approved funding commission from any monies received, prior to distribution of those monies.[26] The Full Court declined to set the funding commission rate, preferring to determine that issue at a later stage, 'when more probative and more complete information will be available to the Court, probably at the stage of settlement approval or the distribution of damages'.[27]

Following the QBE class action, a number of CFOs were made in a range of class actions, including *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)*,[28] *Camping Warehouse v. Downer EDI (Approval of Settlement)*-,[29] *Lenthall v. Westpac Life Insurance Services Limited*[30] (the *Lenthall* class action) and *Catherine Duck v.* Airservices Australia.[31]

In 2019, the judicial power enabling CFOs at an early stage of the proceeding was ultimately challenged in a landmark series of cases involving the *Lenthall* class action and *Brewster v. BMW Australia Ltd* (the *Brewster* class action),[32] where a separate question for determination as to the power to make CFOs was referred directly to the NSW Court of Appeal. In a historic first joint sitting of the Full Federal Court of Australia (via *Lenthall*) and the NSW Court of Appeal (via *Brewster*), the courts heard these challenges. On 1 March 2019, both courts concluded that there is sufficient statutory power enabling CFOs to be made. Allsop CJ, Middleton and Robertson JJ were unanimous in dismissing the *Lenthall* appeal, finding that Section 33ZF of the Federal Court of Australia Act 1976 (Cth) (the FCA Act) (the basis for the general power of the courts to make orders appropriate or necessary to ensure that justice is done in the proceedings) enabled the courts to make such orders.[33] Likewise, Meagher JA, Ward JA and Leeming JA agreed that CFOs were authorised pursuant to Section 183 of the Civil Procedure Act 2005 (NSW) (CPA).[34] It was held that the making of CFOs was a proper exercise of judicial power and in no way contravened Chapter III of the Commonwealth Constitution.[35]

The High Court subsequently granted special leave to hear appeals in both the *Lenthall* and *Brewster* matters as to whether the courts had erred in concluding that Section 33ZF of the FCA Act and Section 183 of the CPA validly enabled the making of CFOs. On 4

December 2019, a majority of the High Court of Australia (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) held that neither Section 33ZF of the FCA Act nor Section 183 of the CPA empowers a court to make a CFO.[36] In a joint judgment, Kiefel CJ, Bell and Keane JJ held that although the power conferred on the court by those sections is broad, considerations of text, context and purpose all point to the conclusion that it does not extend to the making of a CFO.[37] However, the High Court's judgment left two questions unresolved:

1. whether the court has power to make a CFO at the conclusion of a representative proceeding, pursuant to Section 33ZF of the FCA Act and Section 183 of the CPA (following a judgment) or Section 33V(2) of the FCA Act and Section 173(2) of the CPA (following a settlement); and
2. whether the making of a CFO would be unconstitutional.

Following the High Court's decision in the *Brewster* and *Lenthall* class actions, on 20 December 2019, the Federal Court issued a new class actions practice note (GPN-CA) to indicate that the Court will still consider appropriate applications for orders sharing the costs of class actions at the conclusion of proceedings of this kind.[38]

Different approaches have been taken by judges in interpreting the scope of the High Court's decision in *Brewster* and Lenthall.

Justice Beach, Justice Murphy and Justice Lee of the Federal Court have expressed the view that the court has the power to make CFOs (sometimes referred to as 'expense sharing orders') at the time of settlement under Section 33V(2) of the FCA Act,[39] with those Justices making such orders in recent cases.[40] Other Federal Court judges have taken a different view,[41] with some considering that the majority of the High Court gave strong reasons favouring a funding equalisation order over a CFO.[42] The question of whether the court has the power to make CFOs at the time of settlement under Section 33V(2) was recently referred for consideration by the Full Court of the Federal Court of Australia in the *McDonald's* employment class action.[43] The Full Court, comprised of Justice Lee, Justice Beach and Justice Colvin, unanimously affirmed this proposition. Justice Beach noted the wide judicial discretion conferred by Section 33V(2), finding that 'none of the terms used in Section 33V(2) would, as a matter of natural meaning, be read as precluding a settlement CFO.'[44] His Honour also considered the context and purpose of 33V(2), in that it is a provision addressing the settlement of proceedings[45] and, while there is no specific guidance on 33V(2) from extrinsic materials, the purpose of Part IVA is not in doubt.[46] Justices Lee and Colvin made similar assessments of Section 33V(2), in that it confers a broad discretion[47] and that its purpose is obvious.[48] Submissions made by the court-appointed contradictor included that making a settlement CFO would not constitute an exercise of judicial power, principally because it would involve the creation of rights and obligations for which the FCA Act does not provide, and that it also involves the weighing of policy considerations in quantifying the amount of commission to be paid. The Court rejected this position, finding that the making of a settlement CFO was simply the exercise of a discretionary power (in accordance with the requirements of Section 33V(2)), and noting that courts very commonly 'set rates of return of interest, calculate economic loss, and fix the remuneration of executors, trustees, liquidators and salvors, which tasks can involve commercial assessments and considerations of risk'.[49] Finally, it is important to note that the Court also considered the meaning of the decision in *Brewster*, and clearly

distinguished it as being limited to the question of whether CFOs could be made early in a proceeding under the 'gap-filling' power in Section 33ZF(1).[50]

Separately, the question of whether CFOs can be made at settlement under Section 173 of the CPA was referred to the Court of Appeal of the Supreme Court of NSW in *Brewster*,[51] although the Court of Appeal promptly declined to decide the issue because no settlement had been reached and therefore the Court was effectively being asked to deal with the issue in a factual vacuum.[52] This issue was subsequently considered in the case of *Haselhurst v. Toyota Motor Corporation Australia Ltd*, where Justice Rees confirmed that the court had the power to make a CFO at settlement under Section 173(2) of the CPA.[53]

Given these decisions and practice notes, the Federal Court of Australia and Supreme Court of NSW seem to have endorsed the view that both courts have the power to make CFOs at the time of settlement, and that the High Court's earlier decision in *Brewster* is limited to commencement CFOs. However, this issue may ultimately be referred to the High Court of Australia for determination.[54]

In *Pearson*[55] (the stolen wages class action), Murphy J of the Federal Court also considered whether a CFO made pre-Brewster had continuing effect. His Honour found that although it is apparent, as a result of the decision in *Brewster*, that the extant CFO made earlier in the proceeding was beyond power, as an order of a superior court, the CFO remained valid until and unless set aside,[56] and as no party had sought to have the CFO set aside, it continues in effect.[57]

Notwithstanding these subsequent developments, the High Court's decisions in the *Brewster* and *Lenthall* class actions have constrained the courts' ability to adopt CFOs and to deal with commission rates. The decisions have also been viewed as being likely to substantially reduce the interest of litigation funders in the Australian class action market.-[58] With some judges now calling for legislative intervention on the issue,[59] there appears to be a strong basis for regulatory change.

iv Contingency fees in the Supreme Court of Victoria (class actions)

Another evolutionary step in the Australian system occurred on 18 June 2020 with the introduction of damages-based contingency fees in class actions applicable in the Supreme Court of Victoria. These changes were introduced via a new Section 33ZDA of the Supreme Court Act 1986 (Vic) allowing for group costs orders in class actions. Group costs orders can now be made where it is 'appropriate or necessary to ensure that justice is done'. This is a first in Australia and, consistent with recommendations from academics,[60] the Productivity Commission, Victorian Law Reform Commission (VLRC) and ALRC, permits the court to make orders allowing a plaintiff law firm to charge its fees as a percentage of the amount recovered rather than on a time or scale fee basis. Fundamental to the making of a group costs order is that the plaintiff law firm must assume liability for adverse costs risks as a condition of the order and be prepared to satisfy any security for costs orders.[61] Consequently, comparisons with no-win no-fee contingency fee arrangements (which do not require the plaintiff's lawyers to provide security or cover adverse costs exposure) are not apt. At an early stage in the proceeding, the court will determine the percentage to be allocated to the plaintiff law firm that can be charged as a contingency. It may revisit this percentage at a later stage.[62] Guidance as to procedural matters is set out in the Supreme

Court's practice note,[63] (the Practice Note), which came into operation on 1 July 2020 with the commencement of Section 33ZDA.

Since the introduction of Section 33ZDA, the Supreme Court has considered several applications for group costs orders made in varying circumstances, including where law firms were self-funded, funded by a litigation funder and where multiple firms were acting jointly under differing funding arrangements:

1. in September 2021, in the matter of *Fox v. Westpac Banking* Corporation (Fox);[64]
2. in February 2022, in the matter of *Allen v. G8 Education Ltd* (G8 Education);[65]
3. in April 2022, in the matter of *Bogan v. The Estate of Peter John Smedley (*Deceased) (Bogan);[66]
4. in August 2022, in the matters of *Nelson v. Beach Energy and Sanders v. Beach Energy* (Beach Energy);[67]
5. in August 2022, in the matters of *Lay v. Nuix Ltd, Batchelor v. Nuix Ltd* and *Bahtiyar v. Nuix* Ltd (Nuix);[68]
6. in November 2022, in the matter of *Gerhke v. Noumi* Ltd (Gerhke);[69]
7. in December 2022, in the matter of *Mumford v.* EML Payments;[70]
8. in December 2022, in the matter of *Liberman v. Crown* Resorts Ltd;[71]
9. in March 2023, in the matter of *Fox v. Westpac Banking Corporation (No.* 2);[72] and
10. in September 2023, in the matter of *DA Lynch v. Star Entertainment Group*; *Drake v. Star Entertainment Group*; *Huang v. Star Entertainment Group*; and *Jowene v. Star Entertainment* Group (Star).[73]

Whether the making of a group costs order is appropriate or necessary to ensure that justice is done (the criterion for the exercise of the discretion) will depend upon a broad evaluative assessment of the relevant facts and evidence before the Court. The price, or the costs that group members are likely to pay, is relevant but not the only consideration.[74] A review of the decisions to date provides several key takeaways, as given below.

First, the Court has approached the question of whether to make an order in a similar manner as when asked to approve a settlement and deductions for legal and funding costs under Section 33V of the FC Act. The decisions (and the Practice Note) acknowledge that disclosing matters relevant to an application for a group costs order involves a similar degree of transparency as a Section 33V application. Absent a confidentiality regime, this is prejudicial to the interests of the plaintiff, therefore the Practice Note (Section 14.2) allows for the plaintiff to approach the Court regarding confidentiality arrangements. The court has often delivered its decisions in a public version of the judgment with a separate and further confidential schedule provided only to the plaintiff. Similarly, the Court developed a practice, in the early applications (though also utilised recently in *Star*), of appointing a contradictor, which allowed the Court to consider arguments independently made in the interest of group members.

Secondly, while Section 33ZDA specifically refers to the setting of a percentage, the Court has emphasised that there is no set range. This reflects the fact that each circumstance presented to the Court is unique. A survey of the decisions where an order has been made

shows that the range, so far, has varied from a low of 14 per cent in *Star*, to a high of 40 per cent in *Bogan*. None of the decisions in which an order has been made have proceeded to trial or settlement approval. The factors considered relevant by the Court in determining whether a percentage is fair and reasonable have included:

1. the risks that the proceeding will not progress without an order. In *Bogan*, Justice Dixon approved a percentage of 40 per cent, on the basis that there was evidence before the Court from the funder that they would cease to fund the proceeding if a group costs order was not made (either via the existing funding agreement or via a proposed cost-sharing agreement). His Honour considered it highly relevant to assess the risk that if the application were refused the funder would terminate the funding agreement;
2. the costs to group members under alternative funding arrangements. The counterfactual where alternative funding arrangements would be available to group members has been a key feature of submissions and evidence in support of funding applications. In *Fox, Nuix, G8 Education, Beach Energy* and *Gerhke*, predictive modelling under alternative funding arrangements and different recovery scenarios were utilised in favour of the proposed orders. Since *Fox*, the Court has consistently cautioned about the inherent uncertainty in predictive modelling. Indeed, as was emphasised in *Gerhke*,[75] while it remains a relevant consideration, a comparison of potential financial outcomes of alternative funding models should not 'subsume the place of the evaluative inquiry required by section 33ZDA', which must consider the effects of the order holistically; and
3. the investment evaluation principles relevant to law firms. In *Bogan*, Justice Dixon compiled a list of the risks he considered would inform a lawyer's investment evaluation.[76] These included the prospect of the claims failing at trial, the responsibility for the payment of legal costs disbursements (of either side) falling to the law practice, the capital requirement of security for costs, the expectations as to the net return on the investment sum as well as the timing of the receipt of any resolution sum. These types of matters, to be addressed in confidential materials filed by the applicants, are all relevant to the Court's consideration of what is fair and reasonable in the circumstances.

Thirdly, and further to the above observation regarding the relevance of investment principles, the Court expects a high degree of candour in the provision of supporting evidence for it to be satisfied that an order is fair and reasonable. In *Nuix*, the evidence provided in support of the application failed to satisfy Justice Nichols that the plaintiffs' lawyers had sufficient financial resources to fund the proceedings. Critical evidence such as financial statements from the funder and precise details of the relevant insurance policy were not forthcoming.

Finally, and further to the above observation regarding the relevance of predictive alternative outcome modelling, the return to group members is not the sole determining factor in group costs order applications. This was emphasised in *Fox*, and has been reinforced in subsequent decisions, as follows (at [8(a)]):

> Whether the making of a group costs order (at all or at a particular percentage rate) is appropriate or necessary to ensure that justice is done in the proceeding (the statutory criterion for the exercise of the discretion), will

> depend upon a broad, evaluative assessment of the relevant facts and the evidence before the court. In making that assessment the interests of group members must be given primacy. In that assessment price, or the costs that group members are likely to pay, is a relevant consideration, but not the only consideration.

v Abolition of torts of maintenance and champerty and new class action regime in Western Australia

A further development towards aligning the states with the federal jurisdiction occurred in September 2022, when the Western Australian parliament followed the Victorian, NSW and Queensland jurisdictions by establishing a legislative framework for class actions for the Supreme Court of Western Australia.[77] In an effort to seek uniformity, the Western Australian government chose to model its own class action regime on the federal system as detailed in Part IVA of the FCA Act, although with some minor variations. Additionally, as part of the same reforms in September 2022, the Western Australian parliament also abolished the torts of maintenance and champerty in that state as part of the government's civil procedure reforms.[78] This legislation was careful not to interfere with the common law restrictions on contracts that might be found to be contrary to public policy or otherwise treated by the courts as illegal.[79] These statutory abolitions followed the path taken in other Australian states such as NSW, Victoria, South Australia and the Australian Capital Territory and adopted earlier recommendations of the Western Australia Law Reform Commission.-[80]

Legal and regulatory framework

i The legal basis and limits of third party funding

Prior to 2006, encouraging litigation and funding another's claim for profit were prohibited in Australia by the common law doctrines of maintenance and champerty.[81] These doctrines prevented the courts from being used for speculative business ventures. Maintenance and champerty were the foundation for numerous challenges to the legitimacy of litigation funding before being progressively abolished as crimes and torts in most Australian states.[82] More than 20 challenges to funding agreements were mounted[83] in the eight years leading up to the 2006 landmark decision of the High Court in *Campbells Cash and Carry Pty Ltd v. Fostif Pty* Limited (Fostif).[84]

In a pivotal moment in the development of Australian jurisprudence, the High Court held in *Fostif* that third party litigation funding of a class action was not an abuse of process or contrary to public policy.[85] The Court stated that notions of maintenance and champerty could not be used to challenge proceedings simply because they were funded by a litigation funder.[86] Following *Fostif*, litigation funding has become an entrenched part of the Australian legal system, playing a crucial role in providing greater access to the courts and bringing equality of arms to claims often against well-resourced respondents.

Even so, courts may still intervene in funded litigation where funding arrangements are contrary to the public policy considerations upon which the previous prohibitions were based at common law.[87] *Fostif* reserved the question as to what those public policy

considerations might be in the Australian states that have not abolished the torts of maintenance and champerty by statute. Hence, challenges to litigation funding agreements still arise from time to time.[88] A more recent example arose in the Queensland Court of Appeal decision in *Gladstone Ports Corp Ltd v. Murphy Operator Pty Ltd*[89] (*Gladstone*). That case involved a challenge to the adequacy of security for costs provided by way of a deed of indemnity from the funder. The defendant joined the funder to the proceeding and sought a declaration that its funding arrangements supporting the class action were unenforceable by reason of public policy. Gladstone argued the funder had been given an impermissible level of control, particularly in relation to settlement and other decision making, in the litigation.

The Court of Appeal rejected these arguments. To the extent that 'maintenance offends against the law', the Court considered this can be adequately dealt with through the doctrine of abuse of process and should be subsumed into that body of law, rather than dealt with as a separate tort of maintenance.[90] The Court said a litigation funder was not in any substantially different position from 'an insurer defending a claim or suing to recover under a right of subrogation'.[91] An application for special leave to appeal was subsequently dismissed, with the High Court concluding Gladstone's arguments had insufficient prospects of success.[92]

Likewise, the extent of a lawyer's ability to fund claims, in the same way that third party funders might, has been reviewed by the Court too. Apart from Victoria, legal practitioners in all other Australian states and territories are presently prohibited from entering into any arrangement for payment of damages-based contingency fees (where fees are calculated by reference to a percentage of the amount recovered).[93] Unsurprisingly, practitioners in all states are still entitled to enter into conditional billing arrangements whereby their ordinary fees are payable upon a successful outcome.[94] These arrangements, known as no-win no-fee agreements, sometimes permit an uplift of up to 25 per cent of the lawyer's ordinary fees where a successful outcome is achieved.[95] For obvious reasons, such arrangements are often not commercially viable for practitioners, particularly for larger or more complex claims such as class actions. Victoria has been the only state to address this issue. Victorian practitioners have been permitted to enter into damages-based contingency fee arrangements for class actions since 1 July 2020.[96]

The extent to which a lawyer may be associated with a litigation funder was extensively tested by a Melbourne-based solicitor, Mark Elliott (now deceased), who was formerly a sole director and shareholder of Melbourne City Investments Pty Ltd (MCI). In 2014, two securities class actions were commenced by MCI, as the representative plaintiff, against ASX listed Treasury Wine Estates (TWE) and Leighton Holdings (LEI). MCI had acquired shares in TWE and LEI. Mr Elliott also appointed himself as the legal representative for MCI, which was receiving litigation funding to conduct the claims. In December 2014, the Victorian Court of Appeal stayed the proceedings as an abuse of process. The stay was granted because the proceedings had been commenced with the predominant purpose of earning legal fees for Mr Elliot, rather than the fees being an incident or by-product of the vindication of legal rights. In their majority judgment, Maxwell P and Nettle JA emphasised the importance of maintaining public confidence in the fairness of court processes; confidence that 'would undoubtedly be shaken' if the enrichment of a solicitor were held to be a legitimate purpose for bringing proceedings.[97]

Separately, Mr Elliott trialled a different funding model for a class action brought against *Banksia Securities*.[98] He again sought to act as the lead plaintiff's solicitor, while also being a director and secretary of the litigation funder and holding an indirect shareholding in the funder. The litigation funding agreement entitled the funder to a 30 per cent commission and to exercise control over the conduct of the proceeding. The Supreme Court of Victoria restrained Mr Elliott from acting in the *Banksia Securities* class action owing to conflicts of interest. Justice Ferguson considered that the main risk arising from Mr Elliott's pecuniary interest in the outcome of the class action was that he might not fulfil, or might not be perceived to fulfil, his duties to the court or be independent and objective.[99] Her Honour found 'it would be inimical to the appearance of justice for lawyers to skirt around the prohibition on contingency fees by this means; particularly where the legal practitioner's interest in the funder is sizeable'.[100]

In February 2018, a A$64 million settlement of the *Banksia Securities* class action was approved but then made subject to judicial review following an appeal from a disgruntled group member. The review involved the appointment of a contradictor to assist the Court to consider the amounts to be paid for legal costs and funding commission. In the dramatic developments that followed, allegations were presented to the Court suggesting the plaintiff's solicitor and counsel had engaged in serious misconduct in connection with their billing practices. In response, both the plaintiff's senior and junior counsel elected not to dispute the allegations and offered to have their names removed from the roll. The review hearing before Supreme Court Justice Dixon, which examined the funder's and lawyers' conduct, including whether they should be ordered to forego all costs and commission and pay additional damages to the 16,000 class members, concluded on 18 March 2021, with judgment delivered on 11 October 2021.[101] In his judgment, Justice Dixon found that the litigation funder and five lawyers involved engaged in egregious conduct in connection with a fraudulent scheme, intending to claim more than A$19 million in purported legal costs and funding commission from the settlement sum. Justice Dixon noted that their conduct had shattered confidence in, and expectations of, lawyers as an honourable profession, and corrupted the proper administration of justice. The Court concluded that the lawyers' and funder's actions were appalling breaches of their respective duties to the court, particularly the paramount duty and overarching obligations imposed on them by the Civil Procedure Act 2010 (Vic). As well as removing some of the lawyers involved from the roll of admitted practitioners, Justice Dixon also referred the matter on to the Director of Public Prosecutions for further investigation and appropriate action.[102]

ii Post-Fostif developments in litigation funding regulation

As providers of financial services and credit facilities, litigation funders are subject to the consumer provisions of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act), which contains protections against unfair contract terms, unconscionable conduct, and misleading and deceptive conduct.[103] These provisions provide avenues for redress against unfair or false and misleading terms or omissions in funding agreements. Funders are also subject to the general regulatory requirements under the Corporations Act and the general law, including equity.[104]

In 2009, litigation funding regulation prompted national debate following the landmark decision in *Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pte Ltd* (*Multiplex*), which determined that litigation funding agreements

and the lawyer's retainer in a funded class action constituted managed investment schemes within the meaning of Section 9 of the Corporations Act.[105] Managed investment schemes are required to be registered[106] and managed by a public company holding an AFSL.[107] Failure to comply is an offence.[108]

A second landmark case involving a dispute between a funder and client raised similar questions at the time regarding the nature and regulation of funding arrangements. In *Chameleon Mining NL (Receivers and Managers Appointed)* (*Chameleon*) the funded client sought to rescind a funding agreement under Section 925A of the Corporations Act and thereby avoid payment of the funder's commission.[109] The client argued that the funding agreement was a financial product and that the funder did not hold an AFSL. The High Court concluded that the funding agreement constituted a credit facility rather than a financial product and, while it did not need an AFSL, the funder did require an Australian credit licence.

In the aftermath of these two landmark decisions the federal government intervened, announcing that it would protect funded class actions from too heavy a regulatory burden.[110] In 2010, ASIC issued class orders granting transitional relief to the lawyers and litigation funders involved in funded class actions, exempting them from the managed investment regulatory obligations. ASIC subsequently granted transitional relief from the financial product regulatory requirements of the Corporations Act. More recently, those protections have been significantly scaled back and subsequently reinstated, as discussed below.

The *Multiplex* and *Chameleon* cases also led to the introduction of a conflict management regime. In 2012, regulations were enacted exempting litigation funders from the managed investment scheme provisions of the Corporations Act subject to compliance with certain conflict management requirements.[111] During this time litigation funders providing both single-party funding[112] (litigation funding arrangements) and multiparty funding[113] (litigation funding schemes) were required to conduct reviews and maintain written procedures identifying and managing conflicts of interest.[114] In April 2013, ASIC released a regulatory guide detailing how litigation funders may satisfy these obligations.[115]

However, in a dramatic policy change on 22 May 2020, the then Federal Treasurer, the Honourable Josh Frydenberg, announced significantly expanded regulatory requirements were to be imposed on litigation funding via the 2020 Regulations. The stated effect of the 2020 Regulations was twofold: to require third party litigation funders to hold an AFSL, and to require funders to comply with the managed investment scheme regime under Chapter 5C of the Corporations Act. The 2020 Regulations were published on 23 July 2020 under a cloud of controversy,[116] and took effect on 22 August 2020.[117] The 2020 Regulations rejected the detailed recommendations of the ALRC report 'Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders' (ALRC report) delivered to the Federal Attorney-General on 21 December 2018.[118] A number of applications were made in connection with funded class actions to determine if they contravened the 2020 Regulations or were protected by the transitional provisions.[119] At the time, some funded class actions also experienced delays due to compliance with the managed investment scheme regime.[120]

Subsequently, in *Stanwell Corporation Ltd v. LCM Funding Limited*,[121] one of the respondents to the class action, Stanwell, alleged that the funding arrangements for the class action were unlawful, in that they constituted a managed investment scheme that failed to comply with the 2020 Regulations. In response, the litigation funder (LCM) filed

a cross-claim seeking a declaration that the funding arrangements did not constitute a managed investment scheme, and contended that the earlier Full Court decision of *Multiplex* was wrong. Justice Beach dismissed Stanwell's claims, holding that the litigation funding arrangements were grandfathered by reason of the transitional provisions in the 2020 Regulations.[122] As such, his Honour found that it was not necessary to deal with the litigation funder's cross-claim and dismissed the cross-claim.[123] Justice Beach did, however, state that there is a strong case for arguing that it is appropriate for a Full Court to reconsider the majority decision in *Multiplex*.[124] His Honour then went on to identify (in some detail) the problematic aspects of the reasoning in *Multiplex*, including the 'unresolved conceptual incoherence in applying Chapter 5C [of the Corporations Act] to litigation funding schemes'.[125] On 13 December 2021, the litigation funder appealed from the dismissal of its cross-claim.

In 2022 in the landmark decision of *Stanwell*,[126] the Full Court of the Federal Court of Australia unanimously held that the decision in *Multiplex* was plainly wrong, and that a litigation funding scheme did not constitute a managed investment scheme.[127] The Court agreed with Justice Beach's analysis of the deficiencies in the reasoning in *Muliplex*. [128] Justice Lee found that the 'characterisation of litigation funding arrangements as managed investment schemes is a case of placing a square peg into a round hole'.[129] His Honour also dismissed the idea that litigation funding schemes are unregulated, citing the Court's close protective and supervisory role '. . . to ensure that any class action is conducted in a way which best facilitates the just resolution of the disputes according to law and as quickly, inexpensively and efficiently as possible. Relatedly, the Court is also obliged to protect group members and manage the class action recognising that conflicts of interest, or conflicts of duty and interest, between and among representatives, group members, funders and solicitors can arise.'[130]

Following the *Stanwell* decision, the federal government has clarified the regulatory position to align with *Stanwell* by introducing amendments to the Corporations Regulations. This has been implemented via the Funding Regulations, which commenced on 10 December 2022. The Funding Regulations (among other things) exempt litigation funding schemes from the managed investment scheme provisions of the Corporations Act, effectively bringing the arrangements for litigation funding schemes in line with the regime prior to 22 August 2020 and the law following Stanwell.

iii Reviews into the regulation of litigation funding

The regulation of litigation funding in Australia has evolved through a long history of reviews and reports.

Productivity Commission report

In September 2014, the Productivity Commission delivered a comprehensive report regarding access to justice, which favoured two major reforms which, if implemented, would greatly impact litigation funding.[131] The two proposed reforms were the introduction of a licensing regime for litigation funders,[132] and the removal of the ban on lawyers charging damages-based contingency fees, thereby introducing another funding option for clients.[133] Both reforms (and an array of other proposals) received further independent consideration at state and federal level by the VLRC and the ALRC.[134]

VLRC

On 16 December 2016, the Victorian Attorney-General commissioned the VLRC to report on litigation funding and the conduct of class actions and to consider how regulators might better protect litigants from unfair risks or disproportionate costs burdens.[135] The VLRC report, 'Access to Justice: Litigation Funding and Group Proceedings', tabled in the Victorian parliament on 19 June 2018 (VLRC report), recommended that, subject to careful regulation, legal practitioners be permitted to charge contingency fees so as to provide another funding option for clients who are unable to bring proceedings without financial assistance in appropriate cases. The VLRC report also supported industry-wide, national regulation of litigation funders and recommended that Victoria advocate for stronger national regulation through the Council of Australian Governments.[136]

ALRC

On 11 December 2017, the federal government announced that the ALRC would conduct a similar federal review into litigation funding and the conduct of class actions. The ALRC Inquiry, led by the Honourable Justice Sarah Derrington QC, consulted broadly with judicial and expert panels, regulators, stakeholders and interested parties in the United Kingdom and Canada. A discussion paper released on 1 June 2018 (ALRC paper)[137] attracted more than 70 formal submissions from a broad range of industry stakeholders, including funders, law firms, insurers, industry super funds, non-government organisations, business lobby groups, and regulatory bodies and professional associations.

The ALRC report was delivered to the Attorney-General on 21 December 2018 and makes 24 recommendations, predominantly relating to the reform of class action law and procedure.

Consistent with the earlier recommendations of the VLRC and the Productivity Commission, the ALRC report recommends that percentage-based fee arrangements or contingency fee arrangements for solicitors be permitted in Australian class action proceedings with some limitations.[138] This would allow solicitors to receive a proportion of the sum recovered at settlement, subject to court approval, to ensure arrangements are reasonable and proportionate. The four key arguments advanced in favour of contingency fee arrangements are that they will: increase access to justice for prospective group members of medium-sized class actions (between A$30 million and A$60 million); promote competition; increase returns for group members; and provide clarity and certainty for group members.[139] The recommended limitations to be placed on contingency fee arrangements include that the contingency fee be the one and only form of funding; the solicitors are precluded from also recovering any professional fees on a time-cost basis; and the solicitors bear the onus of paying for the disbursements and must account for these within the contingency fee.[140]

Notably, in relation to the regulation of litigation funders, the ALRC report recommends against the introduction of a licensing regime (contrary to the initial proposal in the ALRC paper). It suggests improved court oversight of litigation funders on a case-by-case basis.-[141] The ALRC considers this will 'achieve at least the same level of consumer protection without the regulatory burden of a licensing regime'.[142] The ALRC report suggests a suite

of amendments to the FCA Act aimed at strengthening the Federal Court's supervision of litigation funders, including to provide that litigation funding agreements for class action proceedings are enforceable only with the approval of the court; expressly empowering the court to award costs against litigation funders (and insurers) who fail to comply with the overarching purposes of the FCA Act (to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively and efficiently as possible); and a statutory presumption that litigation funders who fund class action proceedings will provide security for costs in a form that is enforceable in Australia.[143]

The ALRC report also recommends that the ASIC Guide 248 be strengthened to require that litigation funders who fund class action proceedings report annually to ASIC on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.[144] In recognition of the wide range of funding models emerging since the 2012 conflict management procedures were introduced, the ALRC also recommends that the scope of Regulation 5C.11.01 of the Corporations Regulations be amended to include law firm financing and portfolio financing within the definition of a litigation funding scheme, so that litigation funders who provide such funding are also required to implement conflict management procedures.[145]

PJC review

In May 2020, the former federal government announced yet another review of 'litigation funding and the regulation of the class action industry' – this time via a referral to the Parliamentary Joint Committee on Corporations and Financial Services (PJC).[146] A four-week period was allowed for short submissions followed by a series of short hearings in July and August 2020. The stated terms of reference of the inquiry were to consider whether the current level of regulation applying to Australia's growing class action industry is impacting fair and equitable outcomes for plaintiffs.[147] In mid-2020, the hastily convened PJC review[148] considered the regulation of 'litigation funding and the class action industry' prior to the federal government responding to the 24 detailed recommendations contained in the ALRC report.[149]

On 21 December 2020, precisely two years after the ALRC report was completed, the PJC delivered its own, far briefer report (PJC report). In it, the PJC recognised that litigation funders close the considerable gap in financial resources between the two sides of a class action, reducing the defendant's ability to defeat the case through superior economic power and recognised that, in many instances, a class action in Australia may not proceed without a litigation funder. However, in many respects, the PJC report took a major departure from many of the earlier recommendations of the ALRC report.

The PJC report recommended a series of additional legislative, regulatory and practice requirements be introduced with the stated objective of constraining litigation funders and class actions. These recommendations include:

1. that a new concept of 'procedural proportionality' be legislated for class actions to require that the potential costs and drawbacks of proceedings be balanced against the benefits to class members, as well as the impact on court resources, regulatory outcomes and public interest;
2.

a presumption that litigation funders provide security for costs and fully indemnify representative plaintiffs;

3. enhanced Federal Court legislative powers to oversee and reject, vary or amend any term of a litigation funding contract in the interests of justice, including commissions and fees, and to require Federal Court approval orders as a condition of the funding agreement being enforceable;
4. permitting the appointment of court-appointed referees with market capital or finance expertise to act as litigation funding fee assessors;
5. legislating to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members;[150]
6. enhanced use of contradictors to appear at class action settlement approval hearings;
7. a review of the ability of lawyers to obtain an uplift fee of 25 per cent of their costs on no-win no-fee retainers;
8. subjecting lawyers to financial services regulation (including AFSL and managed investment scheme compliance obligations) where they conduct class actions on a contingency basis;
9. requiring litigation funders and lawyers to make disclosures to the Federal Court as to any potential conflicts of interest (on an ongoing basis) and to provide their conflict management policy to the court when applying for approval of funding agreements;
10. imposing on litigation funders the same standards and duties that are owed by lawyers to their clients;
11. limiting the forum for claims brought under the Corporations Act to the Federal Court; and
12. working with state and territory governments to achieve consistent class action regimes across jurisdictions.

In contrast to the ALRC report, the PJC report adopts a far more aggressive stance on what the PJC report authors consider to be the appropriate level of regulatory intervention. The authors cite evidence of a 'systemic and inappropriate' skewing of successful class action proceeds in favour of litigation funders at the expense of class members' share of the proceeds.[151] The PJC's conclusion appears to be based on a selected extract from the earlier ALRC report, which noted the median return to class members in funded claims was 51 per cent, compared to 85 per cent in unfunded claims.[152] The PJC's somewhat simplistic comparison appears to have informed its rationale for some of its more hard-line reform recommendations, without recognising the fundamental differences between funded claims and claims pursued without third party funding (TPF) support. For instance, claims pursued without TPF offer no litigation expense assistance, no adverse costs protection and no security for costs support to class representatives. These benefits come with a cost, generally in the form of a funding commission. Hence, it is unsurprising that funded claims tend to result in lower median percentage net returns to class members than unfunded claims (once commissions are factored in). However, can the median percentage returns be looked at in isolation or used as a proper comparator without regard to the other benefits litigation funding might provide? The PJC report authors do

acknowledge that in many instances a class action in Australia may not proceed at all without a litigation funder.[153] The federal government is yet to comprehensively respond to aspects of the PJC report and previous recommendations of the ALRC report.

Structuring the agreement

i Typical structure

Funded litigation can involve a contractual relationship between the litigation funder, the lawyer and the funded client, whereby the funder agrees to provide for some or all of the client's legal costs and disbursements in return for receiving a percentage of any damages recovered. The remuneration can take any form, although more common forms include a multiple of the funding, a percentage of the proceeds, a fixed amount, or a combination of these.[154] Percentages typically range between 20 and 45 per cent of the settlement proceeds depending on the risks and time involved and the type of funding required.[155] The ALRC report noted that the median commission rate for third party litigation funding of Federal Court class actions between March 2017 and March 2018 was 30 per cent.-[156] However, in the context of insolvency litigation funding, commission rates can be considerably higher.[157] In contrast, the median rate for 'common fund' orders in class actions during the period October 2016 to December 2019 was 21.9 per cent.[158]

In class actions, the funder may also assist with project management, administration and pre-claim investigation and may charge a project management fee. Litigation funders routinely agree to provide security for costs and an indemnity to cover the risk of adverse costs orders if the proceeding is unsuccessful.

As litigation funders do not act as the legal representatives for the funded litigant, clients generally enter into two agreements: a standard retainer agreement with their lawyer recording the scope and terms under which the legal services are to be provided; and a litigation funding agreement with their funder recording the terms on which litigation funding is to be provided. Commonly, the funder and lawyers have no direct contractual relationship, although clients often authorise their lawyers to report directly to the funder and agree to funder-approved standard lawyer terms. Funders may agree to pay a proportion, or all, of a lawyer's fees during the claim. Where legal fees are partially deferred, they are generally recovered from any resolution sum if a successful outcome is achieved. The client usually authorises the lawyer to receive any resolution sum on the client's behalf to be applied in accordance with an agreed priority. [159]

Funding agreements often allocate project management responsibilities and day-to-day administrative control over the litigation to the funder, allowing the funder the right to provide instructions and administrative support to the lawyers, subject to the client's overriding instructions. In theory, the ultimate level of control given to the funder might be seen to give rise to potential conflicts between the interests of the client, in achieving the best possible outcome, and the interests of the funder, in resolving the claim for an acceptable return on its investment. In *Fostif*, the Court of Appeal recognised that a high level of control by the funder is expected and permissible but cautioned that it would be contrary to public policy for the lawyers to fully abdicate to the funder the obligation to act for the representative party.[160] Therefore, while it is permissible for a funder to maintain day-to-day control of a

claim, the legal representatives are expected to consult with the client on key issues. Hence, funding agreements often preserve the client's right to override the funder's instructions and commonly include dispute resolution mechanisms.

More recently, some litigation funders have purchased claims as an alternative to traditional litigation funding.[161] This has largely occurred in the context of insolvency litigation as a result of amendments to the Corporations Act allowing external administrators (including liquidators) to assign rights to sue.[162] The agreement to purchase or assign the claim may be structured in a number of ways, including providing for the funder to pay an upfront payment, a back-end payment contingent on success (such as a percentage of any damages recovered), or a combination of both.

ii Judicial intervention

Over the past decade, Australian courts have shown a willingness to scrutinise the commercial terms of litigation funding agreements and, in some instances (somewhat controversially), intervene if they consider funding commissions to be excessive. In *Earglow Pty Ltd v. Newcrest Mining Ltd* (*Newcrest*), Justice Murphy considered that the court had power to reduce a litigation funder's commission rate in the context of a class action when approving the settlement.[163] His Honour held that the court was not limited to the binary choice of either approving or rejecting the settlement – instead, the court had power to approve the settlement, while at the same time varying, of its own motion, the amount payable to the funder (thus, in effect, overriding the contractual arrangements between the funder and group members).[164] Justice Murphy considered that this power derived from a combination of Sections 23, 33V, 33Z and 33ZF of the FCA Act, and was analogous to the court's power to fix the amount of costs payable to the lawyers.

In deciding whether to exercise that power in the context of a class action settlement approval, Australian courts have also shown a willingness to review and consider legal costs, the amount that funded litigants will receive 'in hand', the risks assumed by the funder, the amount of adverse costs exposure, and the sophistication and experience of funded litigants. Applying these principles to the Newcrest settlement approval application, Justice Murphy concluded that the aggregate funding commission of A$6.78 million, at rates of between 26 and 30 per cent, was fair and reasonable. His Honour considered the published empirical research into the funding commission rates paid in Australian class actions, and previous settlement approval decisions, before concluding that those rates were at the lower end of the range. His Honour also emphasised the need for transparency about matters relating to funding in settlement approval judgments to allow proper benchmarking.

In contrast, in *Mitic v. OZ Minerals Ltd (No. 2)*, Justice Middleton agreed that the court had power to vary the amount payable to a litigation funder out of a settlement in a class action,[165] but preferred to base that view on Section 33V(2) of the FCA Act, rather than on the other provisions referred to by Justice Murphy.[166]

This issue appears not to be settled. In *Liverpool City Council v.* McGraw-Hill*Financial Inc (now known as S&P Global Inc)*,[167] Justice Lee approved a comparatively large funding commission of A$92 million out of a total settlement of A$215 million (about 43 per cent) through a funding equalisation order, but, in doing so, considered that Section 33V(2) of the FCA Act did not give the court the power to interfere with the amount of a funding

commission to make a settlement reasonable, or to alter a valid contract between parties (including a funding agreement).[168] In doing so, Justice Lee noted that there were no objections or applications to set aside the agreement and that a large portion of the class were sophisticated institutional investors. Although his Honour did not ultimately decide on whether the court has an inherent power to alter a funding agreement,[169] he did express significant doubt about the existence of such a power, which would allow the court to interfere and vary funding agreements in the context of a settlement by altering the contractual promises of group members to pay a commission.[170]

Consequently, the question (and extent) of judicial power to vary terms of litigation funding agreements remains somewhat controversial and unresolved in Australia.[171] The courts have since considered this question in a number of cases and have either declined to vary the commission rate,[172] or, in some cases, varied the commission rate.[173] On 30 September 2021, the former federal government responded to the specific recommendations of the ALRC report and PJC report that the Federal Court be given an express statutory power to reject, vary or amend the terms (such as the commission rate) of such litigation funding agreements, and that litigation funding agreements (for class action proceedings) be enforceable only with the approval of the Federal Court, via the new Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funders (Funders Bill), which, among other things, aimed to provide the court with express statutory power to do so.[174] The Funders Bill was introduced into Parliament on 27 October 2021 but did not pass the Senate.

A recent decision gives an example of the overriding consideration of whether a proposed order is reasonable and just in all of the circumstances. In *Gill v. Ethicon Sarl (No. 12)*,[175] the Federal Court rejected an application under Section 33V(2) by solicitors (being a wholly owned subsidiary of an ASX listed entity) acting for a group of plaintiffs affected by serious and chronic complications caused by pelvic mesh implantations. The solicitors sought approval for a deduction of well over A$32 million out of a $300 million settlement amount, representing the accrued interest payable on two disbursement loan facilities taken out by the solicitors, which carried interest charges initially calculated at rates between 22.4 per cent and 31.8 per cent per annum. Evidence was led as to the circumstances that led to the solicitors having to resort to sourcing disbursement funding at such exorbitant rates. In a judgment that raised a range of concerns, including as to the potential for a conflict of interest for the solicitors, the calculations as to the net proceeds for the plaintiffs, whether the proposed arrangements were properly notified to the plaintiffs and the reasonableness of the settlement itself (even before the proposed deduction of the interest), Justice Lee dismissed the application in its entirety and discouraged the solicitors from making a further application.[176]

Scrutiny of the commercial terms of litigation funding agreements has also arisen in the insolvency context. In *Re Jabiru Satellite Limited (in liq) and NewSat Limited (in liq)*,[177] the Supreme Court of New South Wales (NSW) dismissed an application for the appointment of a special purpose liquidator seeking to pursue claims available to the companies against secured lenders. The Court determined that the appointment was not beneficial to creditors of the companies, placing considerable weight on the onerous proposed funding terms. In particular, Justice Black was concerned with the size of the potential funding fee (of at least 70 per cent of the net resolution sum), which the Court found would be 'wholly disproportionate' to the costs the funder would likely incur.[178]

Disclosure

The Federal Court's Class Action Practice Note requires the disclosure of legal costs and any litigation funding charges to current and potential clients in class actions, in clear terms, as soon as is possible.[179] Broader disclosure to the court and other parties is also required in any class action.[180] Funded applicants are entitled to redact these materials to conceal information that might confer a tactical advantage on another party.-[181] Commercial terms such as the litigation budget, the commission and the costs structure are generally redacted, whereas the court is given a complete version.[182] On occasion, the Federal Court has been prepared to order production of unredacted litigation funding agreements where relevant, for example, where funding rates were relevant to the respondent's application to set aside the proceeding as an abuse of process,[183] or where an application to de-class the proceeding on the ground that a closed class was said to be an abuse of process.[184]

Conversely, outside the class action realm, there are few mandatory requirements for disclosure of funding agreements, with the notable exception of proceedings advanced in the insolvency context.[185] Under Section 477(2B) of the Corporations Act, a liquidator must obtain the approval of the court, the committee of inspection or a resolution of creditors before entering into any agreement that has a term (or obligations which may be discharged) beyond three months. The approval process requires an assessment by the court that entry into the agreement is a proper exercise of power and not ill-advised or improper, rather than involving the exercise of commercial judgment.[186] Applications for approval to enter into funding agreements are often made together with further requests for that material to remain confidential and for the application to be heard in camera. This is because liquidators in Section 477(2B) applications may need to disclose commercially sensitive details such as the terms and conditions of funding, including, for instance:

1. any limit of funding, the terms of repayment to the funder and the funder's success fee and the terms of the provision of security for costs;
2. privileged legal advice;
3. confidential details of insurance policies; and
4. confidential investigations and the liquidator's proposed strategy for future investigations.

As explained by Justice Barrett in *McGrath & Anor re HIH Insurance Ltd*,[187] it is often the case that liquidators are in the unenviable position of needing approval from the court to fund claims against third parties where disclosing the details of that funding and the terms on which it is to be provided is an incidental part of obtaining approval. This sets their case apart in such a way that justice will best be served by an examination of the matters the liquidators are bound to raise with the court, in an atmosphere where they can lay them before the court fully and frankly and without any apprehension that the interests they are bound to serve will thereby be prejudiced. In considering whether to grant suppression orders, the court will consider what is necessary to prevent prejudice to the proper administration of justice[188] and the authorities show that where the liquidators can demonstrate that the proposed proceeding would be undermined by the publication of the materials, then the entirety[189] or the sensitive parts of the material[190] will be suppressed.

Parties have successfully resisted production of funding agreements and documents associated with the funding relationship, such as investigative reports and correspondence between the funder and a funded party, on the ground of legal professional privilege under Section 119 of the Evidence Act 1995 (NSW) (the Evidence Act). In *Hastie Group Ltd (in liq) v. Moore*, the respondent successfully obtained orders at first instance for production of an expert report that had been provided to the prospective litigation funder.[191] However, the NSW Court of Appeal overturned that decision and upheld a claim of legal professional privilege. It did so on the ground that the report was prepared for the dominant purpose of the provision of professional legal services in relation to proceedings or anticipated proceedings under Section 119 of the Evidence Act, having regard to the engagement letter attached. Importantly, the Court of Appeal also held that the disclosure of the report to a litigation funder was not sufficient to waive privilege in circumstances where it was clear that the report was being provided on a confidential basis.[192]

Costs

Superior Australian courts generally have power to order costs against a non-party, including a third party funder. In *Knight v. FP Special Assets Ltd*, the High Court held that the relevant provisions of the Supreme Court Act 1867 (Qld) empowered the court to award costs against a non-party where the party to the litigation is an insolvent person or 'man of straw', and the non-party has played an active part in the conduct of the litigation and has (or some person on whose behalf that non-party has been appointed has) an interest in the subject of the litigation.[193]

This principle was applied in *Jin Lian Group Pty Ltd (in liq) v. ACapital Finance Pty Ltd (No. 2)*,[194] where the Court held a third party funder jointly and severally liable for the defendant's costs from the date security for costs was provided.[195] In this case, security for costs was ordered in the sum of A$149,000. As the plaintiff was an insolvent company and the liquidators were without funds to pay the security, the liquidators entered into a funding agreement pursuant to which the funder provided funding for the security and an adverse costs indemnity up to A$150,000. The plaintiff was ultimately unsuccessful at trial, and the defendant's costs exceeded the amount of security provided. The Court considered the matters relevant in determining whether it is appropriate to make a non-party costs order, including that the funder provided funds for the litigation, had a direct interest in the fruits of the litigation and had agreed to provide an adverse costs indemnity, and determined that each of the matters were present in this case.[196] The Court formed the view that 'but for the intervention of the Funder . . . . the proceeding would not have continued',[197] and stated that 'Litigation funders should be aware that if they involve themselves in pending court proceedings in circumstances where their intervention is the factor that causes those proceedings to continue and go to trial, they risk an adverse costs order.'[198]

Most recently, the Federal Court, in *Hardingham v. RP Data Pty Limited (Third Party Costs)-*,[199] made a third party costs order against a funder in circumstances where the funding agreement expressly excluded the funding of an adverse costs order. Again, the Court emphasised that 'one obvious risk for any commercial litigation funder is that, if the funded litigation is unsuccessful, the funder might face an application that it pay the successful parties' costs. That risk arises whether or not it has agreed to indemnify the applicant against an adverse costs order.'[200]

The limits of this principle have been tested on the related question of whether security for costs can, and should, be ordered against third party litigation funders in 'no costs' jurisdictions.[201] In *Augusta Ventures Ltd v. Mt Arthur Coal Pty Ltd* (*Augusta*),[202] the Full Court of the Federal Court was asked to consider whether the court has power to make a security for costs order against a third party funder in a no costs jurisdiction[203] and, if so, whether the order should be made on discretionary grounds.[204] The Court reiterated that it retains power to stay proceedings (including by reference to considerations concerning the exposure of a litigation funder to costs) as part of its power to control its own processes.[205] However, the focus is different when exercising discretion to make security for costs orders against third party funders in no costs jurisdictions. It was said the prejudice the claimants themselves would suffer from not being able to vindicate their rights, should the funder not provide such security, is inappropriate where such claimants are not ordinarily liable for costs.[206] Accordingly, the Court upheld the appeal and set aside the order for security for costs originally made against the third party funder.

Similarly, in *Duck v. Airservices Australia (No. 3)*,[207] the Court considered an application for an order that the third party litigation funder pay the respondent's costs of the proceeding in a no costs jurisdiction. The Court held that the no costs jurisdiction did not prevent a costs order being made against the third party funder, but declined to exercise the discretion to make the costs order sought because it was not in the interests of justice to do so in the particular circumstances of the conduct of the proceedings.[208] The Court concluded that the no costs jurisdiction is but one factor to consider in the exercise of the court's broad costs discretion, and that the conduct of the litigation is always likely to be an important consideration.[209] The Court attached considerable weight to the efficient determination of the proceedings, especially by way of a separate question, which saved substantial costs and court time, and stated that it was very much in the interests of justice to encourage this sort of conduct, especially by the potent exercise of the costs discretion.[210] However, the Court recognised that a costs order might be warranted against a funder in certain circumstances, for example, if the proceeding was instituted vexatiously or without reasonable cause, or if there was an unreasonable act or omission in the conduct of the proceedings that caused the respondent to incur costs.[211]

However, examples exist where a litigation funder did not provide any contractual indemnity against adverse costs and where the court subsequently refused to order that third party funder to pay adverse costs. In *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd* (*SST*), the High Court held that it was not an abuse of process where a plaintiff was unable to meet an adverse costs order simply because the funder had not assumed any liability for adverse costs.[212] In that case, the defendant had not sought adequate security for costs during the proceeding. The High Court clarified that a litigation funder does not always have to put the funded party in a position to meet any adverse costs order.[213]

At the time, the High Court's *SST* decision generated apprehension from some quarters, suggesting that funders might refuse to provide indemnities for adverse costs to the detriment of successful respondents. Perhaps as a result of commercial realities and market competition, these fears have not materialised.[214] In practice, litigation funders routinely agree to indemnify clients against adverse costs exposure and provide security for costs that may be ordered. Representative applicants in funded class action claims will often not be prepared to assume personal liability for costs without such indemnities.[215]

Where security for costs has been sought in funded litigation, the adequacy and form of security proposed by some funders has also given rise to disputes. In *Domino's Pizza Enterprises Limited v. Precision Tracking Pty Ltd (No. 2)*, the funded party opposed a security for costs order being made on the grounds that there was no risk that a costs order would not be satisfied because of the combined effect of the litigation funding indemnity, an adverse costs insurance policy and proposed undertakings by Precision Tracking Pty Ltd to notify the parties of any relevant change of funding circumstances.[216] The Court ordered security for costs to be lodged, concluding that Precision Tracking did not have the capacity to meet an adverse costs order; the funding agreement restricted the indemnity to a counterclaim in the proceedings; and the adverse costs insurance was taken out for the primary claim. Additionally, the funder had absolute discretion to terminate its funding arrangements with Precision Tracking at any time, including the adverse costs indemnity and the adverse costs insurance.

The adequacy of adverse costs insurance as a form of security was again tested in *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Ltd* (*Petersen*)[217] and *Equititrust Limited v. Tucker*.[218] In the *Petersen* case, Justice Yates accepted that, depending on the circumstances, 'an appropriately worded ATE policy might be capable of providing sufficient security for an opponent's costs'; but on the facts of *Petersen* concluded that the specific policy offered was not sufficient, noting the beneficiary of the policy was the applicant, not the respondents.[219] His Honour also found that there was no mechanism by which the respondents could compel the applicant to sue on the policy if it were breached. Although this could potentially be overcome by direct proceedings against the insurer under the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW), there were other potential difficulties, including numerous policy exclusions that might be relied on, and a lack of evidence in relation to procurement of the policy that might have an impact on non-disclosure and avoidance rights.

The costs of providing security, including the costs of obtaining an after the event (ATE) policy, will typically be borne by funded clients either indirectly in the sense that they are absorbed in the funding commission, or directly in that they are recovered through a payment made to the funder of an amount in addition to the funding commission.[220] The ability of a funder to recoup the costs of obtaining an ATE policy in a funded class action was recently considered in Asirifi-Otcherev*. Swann Insurance (Aust) Pty Ltd (No. 3)*.[221] In approving a settlement by way of a common fund order, the Court decided that the costs of obtaining an ATE policy should not be passed on separately to group members when the court controls the remuneration, but should be incorporated into the commission paid to the funder. The Court noted that it is a matter for the funder whether to obtain an ATE policy to defray the risk of providing an adverse costs indemnity.[222]

Conclusions and outlook

The litigation funding landscape in Australia continues to grow and evolve into a more sophisticated market. In the past 17 years, the common law has steadily refined and clarified the regime's requirements since the High Court's seminal decision in *Fostif-*. Increased competition coupled with the availability of group costs orders in Victoria have driven innovation, and while the first part of the 2020s saw a dramatic hardening of the regulatory environment, particularly in relation to class action and multiparty

litigation funding, that trend is now reversing under the new federal government with the commencement of the Funding Regulations in December 2022.

Clearly, some important steps in the evolution of litigation funding in Australia have been the progressive abolition of the torts of maintenance and champerty across various states of Australia. Comity and uniformity would hopefully see the remaining states and territories follow suit in this respect. The introduction of damages-based contingency fees for lawyers in Victoria has also been significant with several group costs orders now made since the commencement of Section 33ZDA of the Supreme Court Act 1986 (Vic) in July 2020. The likelihood is that further group costs orders will be made, further entrenching the Supreme Court of Victoria as a jurisdiction of choice for many funded class actions. Changes to harmonise the damages-based contingency fee provisions for class actions in other states and territories, and federally, present an opportunity for lawmakers and regulators to adopt a key ALRC report recommendation, enhance consumer choice and provide new pathways for access to justice.

Key issues for determination in the year ahead will be the new federal parliament's response to the ALRC report. The extent of judicial power available to make CFOs at settlement by reference to Section 33V of the FCA Act is also likely to be further tested. Irrespective of the outcome, the adoption of the common fund doctrine in class actions since the QBE decision has no doubt improved fairness and equity between class members and enabled funders to better consider the commercial viability of multiparty claims, while decreasing the need to engage in costly and time-consuming client book-building. Should the High Court further constrain CFOs in class actions, there will be a stronger case for regulatory change, as recommended by the ALRC report. As Justice Beach lamented in *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy's Australia Ltd*:[223] 'Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play.'

In considering the regulatory pathway ahead it is worth reflecting on the objectives outlined in the second reading speech for the introduction of Australia's class actions regime made back in 1992. During that period, the (then) Attorney General, the Honourable Michael Duffy, said 'the new procedure will enhance access to justice, reduce the cost of proceedings, and promote efficiency in the use of court resources'.[224] Despite these noble objectives espoused by parliament 30 years ago, the ever-changing compliance burdens of Australia's regulated litigation funding market have seen the Australian litigation funding market taken to a crossroads. Since the end of 2022, positive signs are now emerging from the current federal government that a more pragmatic, evidence-based and feasible regulatory environment can be implemented, which will enhance access to justice.

Endnotes

1 Jason Geisker and Dirk Luff are principals at Maurice Blackburn Lawyers, the legal advisers to Claims Funding Australia Pty Ltd. The authors wish to thank and acknowledge the assistance with earlier editions of this chapter received from Jenny Tallis and Samuel Sheridan with this edition. ^ Back to section

2 IBISWorld, Litigation Funding in Australia (June 2022), page 16. ^ Back to section

3 Omni Bridgeway annual report 2021, page 10. The total overall legal market spend was estimated at A$23 billion, making the litigation market just over 20 per cent of the overall legal services market in Australia in 2021. ^ Back to section

4 IBISWorld, Litigation Funding in Australia (May 2023), page 11. ^ Back to section

5 ibid., pages 10–12. ^ Back to section

6 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019) Appendix G. ^ Back to section

7 IBISWorld, Litigation Funding in Australia (May 2023) page 6. ^ Back to section

8 Also known as representative actions, a class action is a procedure whereby a single representative can bring or conduct a claim on behalf of others in the same, similar or related circumstances (Part IVA Federal Court of Australia Act 1976 (Cth) Section 33C(1)). ^ Back to section

9 IBISWorld, Litigation Funding in Australia (May 2023), page 16. ^ Back to section

10 IBISWorld, Litigation Funding in Australia (June 2022), page 19. Specifically, class actions were said to comprise 44 per cent of the litigation funding market in 2022. ^ Back to section

11 Professor Vince Morabito, 'Courts see record number of class actions as shareholder proceedings drop in significance' Lawyerly (20 May 2021), https://www.lawyerly.com.au/courts-see-record-number-of-class-actions-as-shareholder-proceedings-drop-in-significance/. ^ Back to section

12 ibid. In the 12 months ending 3 March 2021 there was a total of 32 funded class actions filed in Australia (approximately 46.3 per cent of all class actions). This number could be lower if more group costs orders are secured in some of the nine class actions commenced in Victoria during this period. ^ Back to section

13 King & Wood Mallesons, The Review: Class Actions in Australia 2021-22, https://www.kwm.com/au/en/insights/latest-thinking/the-review-class-actions-in-australia-2021-2022.html. ^ Back to section

14 IBISWorld, Litigation Funding in Australia (April 2021), pages 6 and 10. ^ Back to section

15 In FY2021 Australia had 4,235 companies entering external administration and controller appointments, the lowest number in the past 20 years: Australian Securities & Investments Commission, Australian Insolvency Statistics, September 2021, Table 1.1, page 2. ^ Back to section

16 In the FY2023, Australia had 7,942 companies entering external administration and controller appointments, returning to base levels: Australian Securities & Investments Commission, Australian Insolvency Statistics, September 2023, Table 1. ^ Back to section

17 Australian Restructuring Insolvency & Turnaround Association, 'Insolvency numbers return to pre-COVID levels' (9 August 2022) https://arita.com.au/ARITA/News-2023/ARITA_News/Insolvency_numbers_return_to_pre-COVID_levels.aspx. ^ Back to section

18 Australian Securities & Investments Commission, Australian Insolvency Statistics, September 2023, Chart 1.2. ^ Back to section

19 Law Partnership Survey, 'Partner boom as top law firms play 'catch-up', (30 June 2022). ^ Back to section

20 Explanatory Statement, Corporations Amendment (Litigation Funding) Regulations 2022. ^ Back to section

21 [2022] FCAFC 103. ^ Back to section

22 ibid. ^ Back to section

23 ASIC Media Release published 19 December 2022, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-368mr-asic-amends-relief-for-litigation-funding-arrangements/. ^ Back to section

24 *BMW Australia Ltd v. Brewster & Anor; Westpac Banking Corporation & Anor v. Lenthall & Ors* [2019] HCA 45. ^ Back to section

25 *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148. ^ Back to section

26 ibid. ^ Back to section

27 ibid., at [11]. ^ Back to section

28 [2017] FCA 330. ^ Back to section

29 [2016] VSC 784. ^ Back to section

30 [2018] FCA 1422 at [25]. ^ Back to section

31 [2018] FCA 1541. ^ Back to section

32 [2019] NSWCA 35. ^ Back to section

33 *Westpac Banking Corporation v. Lenthall* [2019] FCAFC 34. ^ Back to section

34 *Brewster v. BMW Australia Ltd* [2019] NSWCA 35 at [56]–[61], [64]–[67]. ^ Back to section

35 ibid., at [96]–[103]. ^ Back to section

36 *BMW Australia Ltd v. Brewster & Anor; Westpac Banking Corporation & Anor v. Lenthall & Ors* [2019] HCA 45 at [3]. ^ Back to section

37 ibid., at [3] to [94]. ^ Back to section

38 Federal Court of Australia, class actions practice note (GPN-CA) – general practice note, 20 December 2019, [15.4]. ^ Back to section

39 *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy's Australia Ltd (No. 3)* [2020] FCA 461 at [31] per *Beach J; Uren v. RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [47] to [73] per *Murphy J; Smith v. Commonwealth of Australia (No. 2)* [2020] FCA 837 per Lee J; *Webster (Trustee) v. Murray Goulburn* Co-Operative*Co Ltd (No. 4)* [2020] FCA 1053 at [113] to [114] per Murphy J. ^ Back to section

40 *Uren v. RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [47] to [73] per Murphy J; *Smith v. Commonwealth of Australia (No. 2)* [2020] FCA 837 per Lee J; *Webster (Trustee) v. Murray Goulburn* Co-Operative*Co Ltd (No. 4)* [2020] FCA 1053 at [113] to [114] per Murphy J; *Court v. Spotless Group Holdings Ltd* [2020] FCA 1730 at [80] per Murphy J; Asirifi-Otcherev*. Swann Insurance (Aust) Pty Ltd (No. 3)* [2020] FCA 1885 at [13]–[15], [33]–[34] where Lee J ultimately approved the settlement CFO pursuant to Section 33V(1) of the FCA Act, but stated that he would have been prepared to make the order in any event relying on Section 33V(2) or in equity; *Evans v. Davantage Group Pty Ltd (No. 3)* [2021] FCA 70 per Beach J; *Hall v. Arnold Bloch Leibler (a firm) (No. 2)* [2022] FCA 163 per Beach J; *Hall v. Pitcher Partners (a firm)* [2022] FCA 1524 per Beach J. ^ Back to section

41 In*Cantor v. Audi Australia Pty Ltd (No. 5)* [2020] FCA 637 at [395] to [405], Foster J expressed the view that the court does not have the power to make a CFO at the time of settlement approval under Section 33V(2) of the FCA Act. In *Davaria Pty Ltd v.* 7-Eleven*Stores Pty Ltd (No. 13)* [2023] FCA 84, O'Callaghan J expressed a similar view and at [183] concluded that the reasoning of the majority in *Brewster* 'points clearly enough to the conclusion that there is similarly no power to make a common fund order upon settlement under s 33V(2)'. ^ Back to section

42 *Clime Capital Ltd v. UGL Pty Ltd* [2020] FCA 66 at [13] per Anastassiou J; *Fisher (trustee for the Tramik Super Fund Trust) v. Vocus Group Ltd (No. 2)* [2020] FCA 579 at [73] per Moshinsky J. ^ Back to section

43 *Jade* Elliott-Cardev. *McDonald's Australia Ltd* [2023] FCAFC 162. The docket judge, Lee J, referred the following question to the Full Court: 'If it was just to do so, does the Court have the statutory power, pursuant to s 33V of the Federal Court of Australia Act 1976 (Cth), to make an order distributing money paid under a settlement in the form of a "Settlement CFO", as that term is defined in *Davaria Pty Ltd v.* 7-Eleven*Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 (at 506-507 [19], [22]-[25])?' ^ Back to section

44 ibid., at [99]. ^ Back to section

45 ibid., at [101] where His Honour distinguishes Section 33V(1) as being 'qualitatively different' from the 'gap-filling' power in Section 33ZF. ^ Back to section

46 ibid., at [103] where His Honour observed that 'commercial litigation funding has been firmly established as being conducive to the achievement of the legislative objectives of Part IVA. And in that regard CFOs and funding equalisation orders . . . are also conducive to such objectives.' ^ Back to section

47 See Lee J at [394] and Colvin J at [468]. ^ Back to section

48 See Lee J at [388] where the purpose of 33V(2) is analysed together with the operation of 33V(1): 'it is necessary for the Court to be satisfied that any settlement [or discontinuance] of a class action has been undertaken in the interest of the group members as a whole . . . There can only be a settlement if the Court reaches this level of satisfaction, and as a way of providing assurance to the Court that this level of satisfaction should be reached, most provisional settlements the subject of approval applications record, in a contract, promises as to a scheme providing for an amount to be distributed out of the fund in satisfaction of the claims of group members.' ^ Back to section

49 ibid., [383] per Lee J. ^ Back to section

50 See for example, [109] per Beach J: 'What is clear from*Brewster* is that it concerned neither s 33V(2) nor settlement CFOs. The case dealt with the now described gap filling s 33ZF(1) and early CFOs to be made, so it was said, for the purpose of facilitating the interests of funders and to maintain the financial viability of proceedings.' ^ Back to section

51 *Brewster v. BMW Australia Ltd* [2020] NSWSC 1261. ^ Back to section

52 ibid., at [44]–[47]. ^ Back to section

53 *Haselhurst v. Toyota Motor Corporation Australia Ltd* [2022] NSWSC 1076 at [51]. This was adopted by Stevenson J in *Quirk v. Suncorp Portfolio Services Ltd (No. 2)* [2022] NSWSC 1457 at [44] and by Beech-Jones CJ at CL in *Ellis v. Commonwealth of Australia* [2023] NSWSC 550 at [51]. ^ Back to section

54 On 25 June 2021 the High Court of Australia dealt with an application for special leave to the High Court from the decision of the Full Court of the Federal Court of Australia in the 7-Eleven class action. The High Court dismissed the special leave application with costs, finding that it 'does not present a suitable vehicle for the determination of the issue which the applicant seeks to raise': 7-Eleven*Stores Pty Ltd v. Davaria Pty Ltd* [2021] HCATrans 113. ^ Back to section

55 *Pearson v. State of Queensland (No. 2)* [2020] FCA 619. ^ Back to section

56 In accordance with*State of New South Wales v. Kable* (2013) 252 CLR 118; [2013] HCA 26. ^ Back to section

57 *Pearson v. State of Queensland (No. 2)* [2020] FCA 619 at [264]–[268]. ^ Back to section

58 Ben Slade, Simon Gibbs and Vince Morabito, 'Post-Brewster Jurisprudence – The Future of the Common Fund Doctrine' (2022) 96,*Australian Law Journal* 430, page 3. ^ Back to section

59 *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy's Australia Ltd (No. 3)* [2020] FCA 461 at [34] per Beach J. ^ Back to section

60 See, for example, the conclusions of Professor Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the benefit of Vulnerable Persons – An Australian Study' (2016), 35*Civil Justice Quarterly* 61. ^ Back to section

61 Section 33ZDA(2) of the Supreme Court Act 1986 (Vic). ^ Back to section

62 Section 33ZDA(3) of the Supreme Court Act 1986 (Vic), including but not limited to the percentage ordered. ^ Back to section

63 Supreme Court of Victoria, SC Gen 10 Conduct of Group Proceeding (Class Action) (First Revision), July 2020. ^ Back to section

64 *Fox v. Westpac Banking Corporation* [2021] VSC 573, where a group costs order was refused. ^ Back to section

65 *Allen v. G8 Education Ltd* [2022] VSC 32, at 27.5 per cent. ^ Back to section

66 *Bogan v. The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, at 40 per cent. ^ Back to section

67 *Nelson v. Beach Energy; Sanders v Beach Energy* [2022] VSC 424, at 24.5 per cent. ^ Back to section

68 *Lay v. Nuix Ltd*; *Batchelor v. Nuix Ltd*; *Bahtiyar v. Nuix Ltd* [2022] VSC 479, where a group costs order was refused. ^ Back to section

69 *Gerhke v. Noumi Ltd* [2022] VSC 672, at 22 per cent. ^ Back to section

70 *Mumford v. EML Payments Ltd* [2022] VSC 750, at 24.5 per cent. ^ Back to section

71 *Liberman v. Crown Resorts Ltd* [2022] VSC 787, starting at 27.5 per cent and subject to adjustment down to 22 per cent or 16.5 per cent. ^ Back to section

72 *Fox v. Westpac Banking Corporation (No. 2)* [2023] VSC 95, at 24.5 per cent. ^ Back to section

73 *DA Lynch v. Star Entertainment Group*; *Drake v. Star Entertainment Group*; *Huang v. Star Entertainment Group*; *Jowene v. Star Entertainment Group* [2023] VSC 561, after considering alternative proposals from four experienced class action firms, and utilising the assistance of a contradictor, the court approved a group costs order in the amount of 14 per cent. ^ Back to section

74 Fox at [8]. ^ Back to section

75 *Gerhke* at [37]. ^ Back to section

76 *Bogan* at [24]. ^ Back to section

77 The Civil Procedure (Representative Proceedings) Act 2022 (WA), which was given royal assent on 14 September 2022, and which came into operation on 25 March 2023. ^ Back to section

78 Section 36(1) of the Civil Procedure (Representative Proceedings) Act 2021 (WA). ^ Back to section

79 Section 36(2)(b) of the Civil Procedure (Representative Proceedings) Act 2021 (WA). ^ Back to section

80 See recommendation 1, The Law Reform Commission of Western Australia:- *Maintenance and Champerty in Western Australia*, Project 110: final report, February 2020. ^ Back to section

81 Maintenance is assistance in prosecuting or defending a lawsuit by someone with no bona fide interest in the case. Champerty is an agreement to divide litigation proceeds between the owner and another party unrelated to the lawsuit who helps enforce the claim. ^ Back to section

82 Civil Law (Wrongs) Act 2002 (ACT) Section 221; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW) Sections 3–4, 6; Criminal Law Consolidation Act 1935 (SA) Schedule 11 cll 1(3), 3; Wrongs Act 1958 (Vic) Section 32; Crimes Act 1958 (Vic) Section 322A; Civil Procedure (Representative Proceedings) Act 2021 (WA) Section 36; and Civil Liability Act 2002 (Tas) Section 28E(ba) and (bb). The torts have not been abolished in Queensland or the Northern Territory. ^ Back to section

83 Standing Committee of Attorneys-General, Litigation funding in Australia (discussion paper, May 2006), page 4. ^ Back to section

84 (2006) 229 CLR 386; [2006] HCA 41. ^ Back to section

85 ibid., at [1]. ^ Back to section

86 ibid., at [84]–[86]. ^ Back to section

87 For example, see Wrongs Act 1958 (Vic) Section 32(2). ^ Back to section

88 For other examples, see*Murphy Operator Pty Ltd v. Gladstone Ports Corporation Ltd (No. 2)* [2019] QSC 012 at [33]–[38]; see also the 13 September 2019 decision in *Murphy Operator Pty Ltd v. Gladstone Ports Corporation Ltd (No. 4)* [2019] QSC 228, where, in response to a direct challenge to the litigation funding agreements between the funder and the lead applicants and group members, it was held that those agreements are not, by reason of maintenance, champerty or public policy, unenforceable. ^ Back to section

89 (2020) 384 ALR 725; [2020] QCA 250. ^ Back to section

90 ibid., at [81], [82]. ^ Back to section

91 ibid., at [95], [96]. ^ Back to section

92 *Gladstone Ports Corporation Limited v. Murphy Operator Pty Ltd & Ors* [2021] HCATrans 114 (25 June 2021). ^ Back to section

93 See new Section 33ZDA of the Supreme Court Act 1986 (Vic) applying from 1 July 2020 for the exception in Victoria, and Section 183 of the Legal Profession Uniform Law 2015 (NSW) for a New South Wales example of the common prohibition. ^ Back to section

94 See*Clyne v. NSW Bar Association* (1960) 104 CLR 186. ^ Back to section

95 See, for example, Section 182(2)(b) of the Legal Profession Uniform Law 2015 (NSW).- ^ Back to section

96 Justice Legislation Miscellaneous Amendments Act 2020 (Vic), which received royal assent on 30 June 2020. ^ Back to section

97 *Treasury Wines Estates Limited v. Melbourne City Investments Pty Ltd* (2014) 45 VR 585; [2014] VSCA 351 at [22]. ^ Back to section

98 *Bolitho v. Banksia Securities Ltd (No. 4)* [2014] VSC 582. ^ Back to section

99 ibid., at [53]. ^ Back to section

100 ibid., at [51]. That prohibition has since been removed in Victoria. ^ Back to section

101 *Bolitho v. Banksia Securities Ltd (No. 18) (remitter)* [2021] VSC 666. ^ Back to section

102 ibid., at [7]. ^ Back to section

103 Australian Securities and Investments Commission Act 2001 (Cth), Sections 12BF–12BM, 12CA–12C, 12DA. ^ Back to section

104 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019), p 62. ^ Back to section

105 *Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pty Ltd* (2009) 180 FCR 11; [2009] FCAFC 147. ^ Back to section

106 Section 601ED of the Corporations Act, where any of the criteria in Section 601ED(1) are met, subject to Sections 601ED(2) and (2A). ^ Back to section

107 Section 601FA of the Corporations Act. ^ Back to section

108 Section 601ED(5) of the Corporations Act. ^ Back to section

109 *International Litigation Partners Pte Ltd v. Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455; [2012] HCA 45. ^ Back to section

110 Hon Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law 'Government acts to ensure access to justice for class action members', (media release No. 039, 4 May 2010). ^ Back to section

111 Corporations Amendment Regulation 2012 (No. 6) (Cth). ^ Back to section

112 Corporations Regulations 2001 (Cth), Rule 5C.11.01(d) (since repealed and replaced with Rule 5C.11.01(4) and Rule 5C.11.01(5), which are in materially similar terms). ^ Back to section

113 ibid., Rules 5C.11.01(b)–5C.11.01(c) (now repealed). ^ Back to section

114 ibid., Rule 7.6.01AB. ^ Back to section

115 Australian Securities and Investment Commission, Litigation schemes and proof of debt schemes: Managing conflicts of interest (RG 248, 27 March 2013). ^ Back to section

116 See, for example, the criticisms outlined in various submissions by academics, such as Professor Vicki Waye and Professor Vince Morabito in their submissions in response to the 2020 Federal Parliamentary Inquiry into Litigation Funding and the Class Action Industry: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Submissions. The New Regulations were heavily criticised by Beach J of the Federal Court during an interlocutory hearing on 13 September 2021, saying, 'The representative applicant is the one who is supposed to have responsibility . . . subject to the court's supervisory role. If the [representative applicant] doesn't do their job properly then there's the ability to remove them' and 'the [MIS regulation] assumes this is all within the purview of the responsible entity, which simply doesn't work with Part IVA action': Lawyers Weekly, (13 September 2021) https://www.lawyerly.com.au/judge-says-mis-regulation-doesnt-work-with-class-action-regime/. ^ Back to section

117 Corporations Regulations 2001 (Cth), Regulation 10.38.01. ^ Back to section

118 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019). Page 18 of the ALRC report summarised the conclusions on regulation of funders, noting 'a suite of recommendations to improve the regulation of litigation funders and to support the unique role of the Federal Court in protecting the interests of all group members is recommended in lieu of a licensing regime for litigation funders'. ^ Back to section

119 See for example *Brett Cattle Co Pty Ltd v. Minister for Agriculture (No. 3)* [2020] FCA 1628; *White v. UGL Operations and Maintenance Pty Ltd* [2021] FCA 587; *Stanwell Corporation Ltd v. LCM Funding Limited* [2021] FCA 1430. ^ Back to section

120 Miklos Bolza, 'Managed investment scheme rules stall $78M class action against NAB, Walton' Lawyerly (30 September 2021) https://www.lawyerly.com.au/managed-investment-scheme-rules-stall-78m-class-action-against-nab-walton/. ^ Back to section

121 [2021] FCA 1430. ^ Back to section

122 ibid., at [142]. ^ Back to section

123 ibid., at [227]. ^ Back to section

124 ibid., at [175]. ^ Back to section

125 ibid., at [179]-[215]. ^ Back to section

126 [2022] FCAFC 103. ^ Back to section

127 ibid., at [6] and [156]. ^ Back to section

128 ibid., at [6] and [156]. ^ Back to section

129 ibid., at [7]. ^ Back to section

130 ibid., at [22]. ^ Back to section

131 Productivity Commission, Access to Justice Arrangements (inquiry report No. 72, December 2014). ^ Back to section

132 ibid., vol 2, p. 633, Recommendation 18.2. ^ Back to section

133 ibid., vol 2, p. 629, Recommendation 18.1. ^ Back to section

134 Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (report, March 2018), pp. 17–19, paras. 2.23–2.31 and (Chapter 3); Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-party Litigation Funders (discussion paper 85, June 2018), pp. 48–52, paras. 3.21–3.33 and pp. 83–91, paras. 5.9–5.41. ^ Back to section

135 Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (consultation paper, July 2017), p. vi. ^ Back to section

136 Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (report, March 2018), p. xvi, paras. 28–31. ^ Back to section

137 Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-party Litigation Funders (discussion paper No. 85, June 2018), pp. 4–5, and p. 17, para. 1.17. ^ Back to section

138 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019), p. 28, p. 205. ^ Back to section

139 ibid., pp. 199–201; Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-party Litigation Funders (discussion paper No. 85, June 2018), p. 83, paras. 5.10–5.13. ^ Back to section

140 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019), p. 28, p. 205. ^ Back to section

141 ibid., p. 163, para. 6.42. ^ Back to section

142 ibid., pp. 161–162, para. 6.37. ^ Back to section

143 ibid., pp. 153–177. ^ Back to section

144 ibid., pp. 177–183. ^ Back to section

145 ibid., pp. 183–184. ^ Back to section

146 On 13 May 2020, the House referred to the Parliamentary Joint Committee on Corporations and Financial Services an inquiry into litigation funding and the regulation of the class action industry for report by 7 December 2020: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding. ^ Back to section

147 The terms of reference provided that particular reference was to be made to 14 separate considerations: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Terms_of_Reference. ^ Back to section

148 The PJC inquiry into 'Litigation funding and the regulation of the class action industry' was announced on 13 May 2020, with written submissions closing four weeks later on 11 June 2020. Written submissions were limited to four to five pages. ^ Back to section

149 On 13 May 2020, the House referred to the Parliamentary Joint Committee on Corporations and Financial Services an inquiry into litigation funding and the regulation of the class action industry for report by 7 December 2020: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding. ^ Back to section

150 On 28 May 2021 the Federal Treasurer announced a consultation process on recommendations of the PJC report dealing specifically with this proposal: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/consulting-recommendations-parliamentary-joint. ^ Back to section

151 Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, (report, December 2020), paragraphs [5.23]–[5.24]. ^ Back to section

152 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019), page 70. ^ Back to section

153 Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, (report, December 2020), page xiv. Notably many of the PJC report's recommendations were heavily criticised in the minority report authored by Labour members of the PJC, pages 361–371. ^ Back to section

154 United Nations General Commission on International Trade Law – Working Group III (Investor State Dispute Settlement Reform) Thirty-seventh session, Possible reform of investor-State dispute settlement (ISDS) Third-party funding, UN Doc A/CN.9/WG.III/WP.157 (5 April 2019), page 2. ^ Back to section

155 Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (consultation paper, July 2017), p. 115, para. 8.25. In securities class actions, commission rates have declined over recent years as competition in that sector has increased. The courts have considered these rates in the context of class actions settlement approvals: Kuterba v. Sirtex Medical Limited (No. 3) [2019] FCA 1374 at [7] to [16]. See also IBISWorld, Litigation Funding in Australia (April 2021), page 20. ^ Back to section

156 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019) p. 70 and Table 3.7. Professor Morabito also examined a similar review period to the ALRC and concluded that the median percentage of settlement funds 'consumed' by funding fees in funded federal class actions settled during the period from January 2013 to December 2018 was 26 per cent, and the median percentage of settlement funds consumed by funding fees in all funded class actions settled during this period was 25.5 per cent: Professor Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia 'Common Fund Orders, Funding Fees and Reimbursement Payments' (January 2019) p. 12. ^ Back to section

157 The funding fee in insolvency cases can exceed 50 per cent, and has been as high as 75 per cent: see Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (report, March 2018), p. 28, para. 2.74; Standing Committee of Attorneys-General, Litigation Funding in Australia (discussion paper, May 2006) p. 4. See also*Buiscex Ltd v. Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 at 363–364, where Hodgson CJ in Eq held that a commission as high as 75 per cent was not unreasonable in light of the facts; *Re ACN 076 673 875 Ltd (Rec and Mgr Apptd)* (2002) 42 ACSR 296 at [33], where Austin J held that commissions of 15 to 40 per cent (where proceedings are commenced) were not excessive in the circumstances of the case; *Robinson, re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 (1 May 2017) at [18], where Gleeson J approved the plaintiffs' entry into a funding agreement that entitled the litigation funder to 85 per cent of the settlement amount (less costs incurred in pursuing the claim), but the funder was required by the funding agreement to pay a number of creditors, leaving a final net share of no more than 55 per cent. ^ Back to section

158 Professor Vince Morabito, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Litigation Funding and Regulation of the Class Action Industry (10 June 2020). ^ Back to section

159 Similarly, funders may agree to pay a proportion, or all, of the liquidators' fees during the course of the claim. Where liquidators' fees are partially deferred they are generally recovered from any resolution sum if a successful outcome is achieved. In the recent case of *Re HRL Limited (in liq) & Anor* [2022] VSC 693, the Court approved a 5 per cent success fee in addition to the liquidators' fees, in circumstances where the funder had agreed to fund 60 per cent of the liquidators' fees such that the balance of the liquidators' fees were recoverable only if a successful outcome was achieved and there were sufficient recoveries from the litigation. ^ Back to section

160 *Fostif v. Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203; [2005] NSWCA 83 at [94]–[116]. ^ Back to section

161 For example, see Supreme Court of New South Wales Proceeding *LCM Operations Pty Ltd v. Rabah Enterprises Pty Ltd* [2015] NSWSC 1156. ^ Back to section

162 Section 100-5 of the Insolvency Practice Schedule (Corporations) at Schedule 2 to the Corporations Act, which commenced on 1 March 2017, allows external administrators (including liquidators) to assign any right to sue that is conferred on them under by the Corporations Act including, for example, voidable transaction claims and insolvent trading claims. Previously, liquidators only had the power to sell, or otherwise dispose of, property of the company pursuant to Section 477(2)(c) of the Corporations Act, including common law rights of action such as debts. However, it has been suggested by the courts that not all claims are capable of being assigned including, for example, statutory causes of action for misleading or deceptive conduct: see *Pentridge Village Pty Ltd (in liq) v. Capital Finance Australia Ltd* [2018] VSC 633. ^ Back to section

163 *Earglow Pty Ltd v. Newcrest Mining Ltd* [2016] FCA 1433 at [7] and [157]. At [165] Murphy J stated that 'the Court's role to protect class members' interests includes protecting them in relation to excessive litigation funding charges'. ^ Back to section

164 For contrast see *City of Swan v.* McGraw-Hill *Companies Inc* [2016] FCA 343; (2016) 112 ACSR 65 at [30], where it was said that in an appropriate case the court may refuse settlement approval because a funding commission is so disproportionate to the risk and expense to which the funder was exposed in the proceedings that it provides a proper basis for the court to refuse approval. ^ Back to section

165 *Mitic v. OZ Minerals Ltd (No. 2)* [2017] FCA 409 at [28]–[29]; see also *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)* [2017] FCA 330; (2017) 343 ALR 476 at [101]; *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)* [2018] FCA 1842 at [202]. ^ Back to section

166 In *HFPS Pty Ltd (Trustee) v. Tamaya Resources Ltd (In Liq) (No. 3)* [2017] FCA 650 at [105]–[106], Wigney J appeared to accept that the power existed, and so too did the Full Court in *Melbourne City Investments Pty Ltd v. Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98 at [90]. ^ Back to section

167 [2018] FCA 1289. ^ Back to section

168 ibid., at [51]. ^ Back to section

169 ibid., at [52]–[58]. ^ Back to section

170 ibid., at [47]. ^ Back to section

171 See, for instance, observations of Justice MBJ Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (Speech, IMF Bentham Class Actions Research Initiative with UNSW Law: Resolving Class Actions Effectively and Fairly, 1 June 2017), p. 7. In other instances, the Federal Court has indicated that under Section 33ZF of the FCA Act it has the power, for example, to effectively modify 'any contractual bargain dealing with the funding commission payable out of any settlement proceeds' in the course of a settlement approval:*Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)* (2017) 343 ALR 476, 504. See also Earglow Pty Ltd v. Newcrest Mining Ltd [2016] FCA 1433 at [133]–[134], [157]; *Mitic v. OZ Minerals Ltd (No. 2)* [2017] FCA 409 at [26]–[31]. ^ Back to section

172 *Clarke v. Sandhurst Trustees Ltd (No. 2)* [2018] FCA 511 at [26]–[27]. See also more recently in *Queensland Nickel Sales Pty Ltd v. Park in his capacity as liquidator of Queensland Nickel Pty Ltd (in liq)* [2023] FCAFC 150, where at [122]–[132] the Full Court of the Federal Court held that the primary judge had not erred in her Honour's approach in assessing the evidence as to the reasonableness of the funding premium in question, or in finding that the funding premium was reasonable by ordinary standards. Depending on the circumstances, the funding premium would be an amount equal to the greater of between 15 per cent and 35 per cent of the proceeds or an amount calculated by reference to certain costs. The Court noted that the finding was 'entirely unexceptional' given the absence of: (1) any other funding proposals from the Commonwealth or other creditors; (2) any objectively superior funding proposals; (3) the absence of any available funds to pursue the proceeding; (4) the assessment of the merits made by the liquidator; and (5) the time pressures imposed on the commencement of proceedings by an impending expiry of limitations periods. ^ Back to section

173 *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)* [2018] FCA 1842 at [5]–[16], although that reduction was in the context of a common fund order being made, [14], [75], [217]–[227]; See also *Endeavour River Pty Ltd v. MG Responsible Entity Ltd (No. 2)* [2020] FCA 968, where Murphy J approved a settlement sum of A$42 million inclusive of costs and interest, but initially declined to approve the funder commission of 32.1 per cent and proposed a rate of 25 per cent, which was ultimately agreed by the funder. In providing reasons for approving the settlement and considering the matters that might be relevant to the approval, at [38], Murphy J noted that the court may 'also take into account the funder's rate of return over time as that may assist in understanding the range of fair and reasonable funding rates'. In *Williamson v. Sydney Olympic Park Authority* [2022] NSWSC 1618, Black J did not approve the proposed deductions from a settlement sum for the funder's commission and the costs of after the event insurance, which would have delivered the funder 36.4 per cent of the gross settlement, and determined that a fair and reasonable settlement would be achieved if the total deduction was 25 per cent of the gross settlement sum. His Honour found that the funder had not justified by any evidence the funding commission nor adequately disclosed the potential size of the insurance costs. His Honour observed that no question arose as to the Court's power to override the parties' contractual entitlements in the course of approving the settlement, because the funding agreement expressly provided that the funder's commission was not to exceed any amount that the Court determined to be reasonable in all the circumstances. However, at [69] his Honour said that 'the trend to increased scrutiny of funding arrangements in recent case law is to be welcomed.' In *Augusta Pool 1 UK Ltd v. Williamson* [2023] NSWCA 93, the funder unsuccessfully appealed the decision of Black J. ^ Back to section

174 The new Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funders proposes the introduction of a new Part 5C.7A to the Corporations Act, which, if passed through federal parliament, will introduce a new statutory regime empowering the court to review, approve or vary litigation funding agreements in connection with a new statutory concept known as a class action litigation funding scheme. This proposed legislation appears to respond to, but go beyond, the recommendations in the Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019), pp. 169–177; Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, (report, December 2020), pp. 157–158. ^ Back to section

175 [2023] FCA 902. ^ Back to section

176 ibid., at [205]. ^ Back to section

177 [2022] NSWSC 459. ^ Back to section

178 *Re Jabiru Satellite Limited (in liq) and NewSat Limited (in liq)* [2022] NSWSC 459 at [38] and [44]. ^ Back to section

179 Federal Court of Australia, Class Action Practice Note (GPN-CA) – General Practice Note, 20 December 2019, paras. 5.3 and 6.1–6.7. ^ Back to section

180 ibid., paras. 6.1, 6.4. ^ Back to section

181 ibid., para. 6.4(b). ^ Back to section

182 Federal Court of Australia, Class Action Practice Note (GPN-CA) – General Practice Note, 25 October 2016, para. 6.1. ^ Back to section

183 *Spatialinfo Pty Ltd v. Telstra Corporation Ltd* [2005] FCA 455. ^ Back to section

184 *Dorajay Pty Limited v. Aristocrat Leisure Limited* [2005] FCA 588. ^ Back to section

185 See for example Order 9A Rules 1 & 2(1) of the Western Australian Rules of the Supreme Court 1971 (WA); See also Section 477(2B) of the Corporations Act 2001 (Cth), which requires approval of agreements entered into by a liquidator exceeding three months in duration. ^ Back to section

186 *Kogan, in the matter of Rogulj Enterprises Pty Ltd (in liq)* [2021] FCA 856 at [18]. ^ Back to section

187 [2005] NSWSC 731 at [13]. ^ Back to section

188 The power of the Federal Court of Australia to make confidentiality orders (termed suppression orders and non-publication orders) is contained in Section 37AF of the Federal Court Act and the grounds for making them are found in Section 37AG. ^ Back to section

189 See for example*Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v. Loo (No. 2)* [2022] FCA 1078 (at [48]) where Markovic J held that if the material 'was available to the proposed respondents to the proceeding, [it would] provide them with an unfair forensic advantage and which could well undermine the conduct of the proceeding and the administration of the insolvent estate. In those circumstances it is in the interests of the administration of justice that material of that nature be kept confidential until the conclusion of the proposed proceeding.' ^ Back to section

190 See for example*Thorn (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2022] FCA 143 at [44] where Justice Stewart allowed specific redactions to prevent prejudice to the administration of justice. ^ Back to section

191 *Hastie Group Ltd (in liq) v. Moore* [2016] NSWSC 1315. ^ Back to section

192 *Hastie Group Ltd (in liq) v. Moore* (2016) 339 ALR 635; [2016] NSWCA 305 at [59]–[60].- ^ Back to section

193 *Knight v. FP Special Assets Ltd* (1992) 174 CLR 178; [1992] HCA 28 at [192]–[193]; see also *Gore v. Justice Corporation Pty Ltd* (2002) 119 FCR 429; [2002] FCAFC 83; *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd (No. 2)* [2004] 1 WLR 2807 (on appeal from New Zealand); see also *Fostif Pty Ltd v. Campbell's Cash and Carry Pty Ltd* [2005] NSWCA 83; 63 NSWLR 203 at 230 [120]. ^ Back to section

194 [2021] NSWSC 1202. ^ Back to section

195 ibid., at [73]. ^ Back to section

196 ibid., at [23]. ^ Back to section

197 ibid., at [52]. ^ Back to section

198 ibid., at [68]. ^ Back to section

199 *Hardingham v. RP Data Pty Limited (Third Party Costs)* [2023] FCA 480 (Thawley J). ^ Back to section

200 ibid., at [26]. ^ Back to section

201 See *Green (as liquidator of Arimco Mining Pty Ltd) v. CGU Insurance Ltd* (2008) 67 ACSR 105; [2008] NSWCA 148 at [51], [61] (Hodgson JA), [85]–[88] (Campbell JA) and [80] (Basten JA). ^ Back to section

202 (2020) 384 ALR 340, (2020) 300 IR 446, [2020] FCFCA 194. ^ Back to section

203 Under the Fair Work Act 2009 (Cth). ^ Back to section

204 In the first instance decision the trial judge found that the Court had power to make such an order and exercised the Court's discretion to order security for costs be provided by the funder: *Turner v. Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644. ^ Back to section

205 *Augusta* at [83] (Allsop CJ). ^ Back to section

206 *Augusta* at [68]–[73] (Allsop CJ); at [89] (Middleton J); and at [93], [131]–[134] (White J). ^ Back to section

207 [2021] FCA 304. ^ Back to section

208 *Duck v. Airservices Australia (No. 3)* [2021] FCA 304 at [9] and [69] per Bromwich J. ^ Back to section

209 ibid., at [51] per Bromwich J. ^ Back to section

210 ibid., at [9] and [67]–[69] per Bromwich J. ^ Back to section

211 ibid., at [47] per Bromwich J. ^ Back to section

212 *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd* (2009) 239 CLR 75; [2009] HCA 43. ^ Back to section

213 See also Grave, Adams and Betts,*Class Actions in Australia*, (Law Book Co of Australasia, 2nd ed, 2012) para. 17.1000. ^ Back to section

214 ibid. ^ Back to section

215 ibid. ^ Back to section

216 *Domino's Pizza Enterprises Limited v. Precision Tracking Pty Ltd (No. 2)* [2017] FCA 211. ^ Back to section

217 [2017] FCA 699. ^ Back to section

218 [2020] QSC 269. In this case, Bond J determined that security in the form of a deed of indemnity between a foreign third party insurer of the plaintiff's litigation funder and the defendants was not adequate, and ordered that security be provided by way of payment into court, payment into a solicitors' trust account or bank guarantee. ^ Back to section

219 *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Ltd* (*Petersen*) [2017] FCA 699 at [92]. ^ Back to section

220 See*Perera v. GetSwift Limited* [2018] FCA 732 at [194]–[195] per Lee J; *Kelly v. Willmott Forests Ltd (in liquidation) (No. 4)* [2016] FCA 323 at [105] per Murphy J; *Hardy v. Reckitt Benckiser (Australia) Pty Limited (No. 3)* [2017] FCA 1165 at [13]–[15] per Nicholas J. ^ Back to section

221 [2020] FCA 1885. ^ Back to section

222 Asirifi-Otcherev. *Swann Insurance (Aust) Pty Ltd (No. 3)* [2020] FCA 1885 at [32]; *Williamson v. Sydney Olympic Park Authority* [2022] NSWSC 1618. ^ Back to section

223 [2020] FCA 461 at [34]. ^ Back to section

224 Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174–3175 (Duffy). ^ Back to section

Jason Geisker jgeisker@mauriceblackburn.com.au
Dirk Luff dluff@mauriceblackburn.com.au

Maurice Blackburn

Read more from this firm on Lexology

Austria

Malte Stübinger and **Patrick Rode**

Deminor

Summary

INTRODUCTION

YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

The model of third party litigation financing has also found its way into Austria in recent years. As in Germany, the market was first dominated by litigation funders closely related to big insurance companies. More recently, the market has become more diversified and several large international litigation funders are offering their services to clients in Austria.

The general permissibility of third party funding in Austria has not seriously been questioned in courts other than in the brief period directly following its emergence. Besides some critical discussions that primarily took place solely in academic writing at that time, there has been a stable environment in favour of it. This applies to the use of third party funding in state court litigation as well as in commercial arbitration disputes. Therefore, many details of what is permissible in third party funding have yet to be resolved or even discussed by Austrian courts, resulting in a rather blank canvas as to the outer limits of what a litigation funding agreement may validly regulate.

While most legal scholars had always held that it was perfectly legitimate, litigation funding in Austria only became a relevant market around 15 years ago. Before this, there were simply no providers of funding activity in the market. As a result of the lack of information surrounding the possibility of outsourcing the risk of litigating, there also appeared to be little demand for it, despite the Austrian court system being very well suited for the funding of disputes. It then gained practical significance in the business-to-consumer (B2C) sector, specifically in connection with the enforcement of claims in the wake of the global financial crisis of 2007 and 2008. Austria saw several cases of financial service providers having given unsound investment advice, which resulted in a flood of claims for damages from individuals who had lost significant parts of their retirement savings. Often, the risk of legal costs in those cases was likely to deter small investors from asserting their claims. In such cases, it was and is, to date, often only the option to rely on litigation funding (and, in many cases with rather small individual damages, the possibility to bundle several claims in one action) that makes legal enforcement of a claim commercially possible in the first place.

As with many other civil law jurisdictions, Austria does not have a statutory class action mechanism. To bundle a large number of claims, the mechanism of the 'Austrian-style class action' was developed by Austrian consumer protection associations. In 2001, a large consumer protection group collected several claims for price reduction and damages claims against a travel tour operator and sued the company on its own behalf. This collection of claims was based on the objective accumulation of claims provided for by Section 227 Code of Civil Procedure, which allows a plaintiff to bring several individual claims against a defendant in one joint action. Pursuant to this law, a number of claims of a plaintiff against the same defendant may be asserted in the same action, provided the trial court has juridical rights for all claims and the same type of proceeding is permissible. The plaintiffs used this provision to bundle a large number of claims from numerous plaintiffs into one action. The law further states that such bundling is permissible even if the individual claims are not connected in a way that would allow them to be added up for the purpose of calculating the statutory fees (Section 55 of the Code of Civil Procedure: jurisdiction standard). As long as the sum of all claims filed reaches the necessary thresholds, there would also not be any question regarding the jurisdiction of the district court and no problem with thresholds to support an appeal, even though the individual amounts in dispute may

fall short of this. This modern and plaintiff-friendly interpretation of the statutes, clearly reaching beyond their original historical intention, has been subject to significant scrutiny.

Subsequently, several such class actions were filed and litigated in Austrian courts. Most, if not all, were funded by a third party financier. They were only sometimes met with immediate success. There had been a number of decisions in the lower courts on the question of the permissibility of the model, with first instance courts repeatedly having questioned its viability. However, courts of appeal have regularly reversed those decisions and affirmed the legal construction. This development was accompanied by an extensive discussion in scholarly writing on the subject of class actions.

In 2005, Austria's highest civil court, the OGH,[2] confirmed this form of self-designed class action as being in conformity with the law. It held that the model causes no violation of procedural or substantive law, provided that, in essence, the same questions of fact or law are to be resolved, which are either the main decisive factor or at least a significant preliminary question in all bundled claims. The OGH also resolved the issue of individual claim values in a plaintiff friendly way and held: '[T]he claims of several plaintiffs as formal joint litigants against the same defendant can be enforced before the Court pursuant to section 227 (2) ZPO if the amount in dispute of the claims of even only one plaintiff exceeds the Court's lower limit.'[3]

A relevant advantage of this class action under Austrian law is that it allows the bundling of large numbers of consumer claims with relatively small individual amounts in dispute together into one dispute. This creates procedural efficiency by necessitating only one judge, chamber or senate, by having facts assessed by an expert, and by allowing a unified and homogenous appeal procedure. It also makes supporting a claim commercially interesting for third party litigation funders. The funders offer to assume the active cost to pursue the claim (primarily court fees, own attorneys' fees, experts, plus potential further expenses) to cover the adverse party cost risk and, in the event of a victory or settlement, receive a share in the profits, usually in the form of a certain percentage of the net proceeds. This form of litigation financing against profit sharing is permissible in Austria, beyond doubt.[4]

Consumer protection associations have also been active in different disputes regarding overpaid interest with large commercial banks and investor fraud cases of the WEB scandal, and additionally organising class actions together with third party litigation funders without a cost risk for the joining consumers.

This bundling of claims is often the only realistic way for injured parties without legal protection insurance to successfully claim restitution from corporations that illegally caused them damage, be it personal injury or a purely financial damage. Consequently, it is not surprising that parts of the business community have been outspoken in their opposition to this legal institution. If there is simply no threat of individual legal action as an alternative to a class action, then many wrongdoings will never be redressed – which is, of course, in the interest of the damaging party.

In the Austrian-style class action, the aggrieved investors (or otherwise damaged parties) assign their claims to a special purpose vehicle (SPV), which serves as the plaintiff and then asserts the claims from different victims by way of objective accumulation of claims.-[5] In the majority of cases, this form of action uses third party funding, which enables the victims to shift the financial risk of pursuing the claim to the funder against a share

of the proceeds. The OGH had already decided in 2005 that such models are generally permissible for the bundling and collective enforcement of similar claims (see above); however, this leaves open the role that the litigation funder may legally play in such an action. It is extremely important to note that there are certain strict requirements to be met when choosing this model regarding its construction and design, as otherwise, the assignment of the claim itself to the SPV could potentially be considered void, with massive consequences for the original claim holders. If the assignment was void, then a plaintiff without standing to sue issued proceedings in court, and the claims were never validly made pending in court. Therefore, the limitation clock was not stopped, and after a few years of litigation, most or even all of the claims will be considered time-barred.

In 2013, specialised legal tech service companies started joining the market, usually offering the funded enforcement of certain types of close-to-identical consumer claims, such as flight delay compensation claims or violations of rent control statutes. Currently, several Austrian-style class actions are pending relating to the *Truck* cartel case[6] and the *VW diesel* emission scandal.[7]

More recently, third party litigation funding has become a nuisance for some attorneys in Austria as they feel that third party funders are trying to invade a business sector reserved only for attorneys who have been admitted to the bar. This culminated in 2020, when the Austrian Lawyer's Association, which represents around 900 Austrian lawyers, brought a far-reaching competition law action against a third party funder. They accused the third party funder inter alia of advertising in an aggressive manner, offering inadmissible assignment transactions and carrying out activities exclusively reserved for lawyers. These accusations were rejected by the OGH on all counts and the OGH used this case to clarify a few key legal questions relating to the business model of funders who are assigned claims by customers and the relationship of the funder and the attorneys representing the funder in court.[8]

As in other jurisdictions, in Austria, the willingness of a funder to invest in a dispute will depend on a bundle of relevant criteria. These are, of course, the strength of the case on the merits, the enforcement strategy and perspective, the expected duration of a case until recovery, and a minimum amount in dispute, which is often an essential prerequisite for a litigation funder to accept the financing. In addition, there is the further requirement that the expected proceeds of the case must be enough to allow for a satisfactory sharing of the proceeds between the claim holder and the litigation funder.

Year in review

While the 2013 Supreme Court decision had been less concerned with the general permissibility of litigation funding than with the effectiveness of the assignment of a claim to a litigation vehicle, the Supreme Court in 2021[9] clearly ruled in favour of the permissibility of litigation funding. In the proceedings before the OGH, the bar association as plaintiff wanted to prohibit a litigation funder from financing proceedings for a contingency fee in such cases where the litigation financier attracts claimants in a book-building process and then appoints a lawyer to represent those parties in court. This is how litigation funders typically proceed in the Austrian-style class action system. The bar association argued that this combination of funding and active involvement in the case would result in a violation of the *quota litis* prohibition.[10] The courts of the first and second instances had already

rejected the request of the bar association, and the Supreme Court also ruled that a litigation financier, even in this model, was not subject to the *quota* litis prohibition.

The bar association itself had conceded in the proceedings that a litigation funder would, in any case, not be covered by the *quota litis* prohibition if it did not offer comprehensive legal advice subject to the lawyers' monopoly on representation. As long as the funder only examines the prospects of success before taking a funding decision, then assigns the case to a lawyer and subsequently does not exert any direct influence on the structure of the proceedings, the bar association agreed that there would be no violation. In such a case, the bar association agreed that the lawyer will always give the highest priority to the client's interests and, importantly, the client will always remain in control of the proceedings.

In its ruling, the Supreme Court found that the litigation funder in the respective case concerning an Austrian-style class action had orderly limited itself to checking the completeness of certain documents of the injured parties and, in consultation with a lawyer, to checking certain formalities (such as whether a certain type of contract is still valid and when it was concluded), after which the case was forwarded to a lawyer. Because of this, in the view of the OGH, the litigation funder was not providing legal advice to the claimants (its contractual partners), and the litigation funder would not be in a position to unduly influence the conduct of the proceedings by the lawyer. In the view of the OGH, it was also in the nature of a profit-oriented company to actively acquire clients, so the fact that funders often 'build' the cases they fund to reach a certain cumulative claim value was also confirmed as compliant with Austrian law.

Currently, in Austria, individual associations only have the option of filing for injunctive relief in certain cases of alleged discrimination against consumers on the basis of competition law and the Consumer Protection Act. In addition, there is also the possibility for an association model action, in which an aggrieved consumer can assign his or her claim to an association. However, in this model, each additional injured party must assert his or her claim in separate civil proceedings.

This will change when the new European Directive on representative actions is implemented in Austria. The deadline for this expired on 25 December 2022 and currently, Austria – like other Member States – is facing an infringement action launched by the European Commission for missing this deadline. Generally, the high degree of abstraction of the EU legal requirements and numerous options regarding their implementation give national legislators leave for considerable room for implementation. At the time of writing, there has yet to be a publicly available draft for the implementing law.

Finally, in 2023, the OGH used a case brought by the Austrian Lawyers' Association to clarify some key aspects relating to the business model of third party funders working under the assignment model. The OGH – to the relief of third party funders – decided that these funders were in fact not performing services reserved for attorneys admitted to the bar, thus strengthening the position of funders operating on the Austrian market.

Legal and regulatory framework

As stated above, it was initially disputed, mostly in scholarly writing, whether litigation funding is permissible in Austria. Some authors considered it problematic that this relatively new model had yet to be regulated by special law or been made subject to any supervision,

despite its steadily growing importance. There are also no regulations on the legal form of a litigation financing company and on a minimum capitalisation, which created discussions regarding its permissibility. Opponents of the service argued that this lack of regulation would endanger claim holders' interests. It was also argued that litigation funders should be seen as 'friends of the law',[11] similar to lawyers, notaries and tax advisers, and should, therefore, be subject to the strict professional *quota litis* prohibition. A *quota litis* agreement consists of a fee that is calculated as a percentage of the amount won, which is one of the key elements of a typical litigation funding agreement. This has traditionally been prohibited for attorneys. The purpose of the prohibition is to safeguard a minimum level of independence that might be in peril if the attorney had an own financial interest in the outcome of the proceedings.[12]

By 2013, the OGH had already ruled in favour of a consumer claim that was funded by a third party litigation funder. The funder was working on a contingency fee basis in a collective claim organised under the Austrian-style class action assignment model.[13] The defendant had claimed that the litigation funder, as a friend of the law, had violated the prohibition of *quota litis* and had illegally agreed to participate in a share of the proceeds. The defendant claimed that this violation also affected the validity of the assignment and, therefore, the plaintiff had claimed damages without standing to sue. In the decision, the Austrian Supreme Court sided with the plaintiff and decided that irrespective of the qualification of the litigation funder as a friend of the law, the validity of the assignment would not be impacted.

In a more recent decision from 2021, the OGH ruled with even greater clarity that the prohibition of *quota litis* does not apply to litigation funders, thereby greenlighting the business model, provided the following conditions are cumulatively met:

The litigation funder does not offer comprehensive legal advice or a service that is subject to lawyers' right of representation, but only examines the prospects of success of a lawsuit in advance in its own interest; and the litigation funder hands over the case to a lawyer and does not exert any further influence on the structure of the proceedings, so that the clients remain the masters of the process and their interests always take priority over those of the funder.

The fact that litigation funders actively seek and acquire clients for a (collective) case does not harm this assessment because this is in keeping with the nature of a profit-oriented enterprise.

So far, there is no regulatory framework and no guidance from case law beyond this as to any limits on what a funder may receive from the proceeds in return for financing a dispute. It is likely that, based on the European initiative to regulate third party litigation funding, a special regime to regulate litigation funding will be implemented in Austria in the coming years, but it is too early to call in which direction this regulation will go.

Structuring the agreement

After a positive examination of the prospects of a dispute and, usually, an affirmative decision by its internal investment committee, the respective litigation funder concludes a litigation funding agreement with the claimant. The legal qualification of the litigation funding agreement is controversially debated in Austrian legal doctrine. Essentially, the following

classifications have been discussed: a loan, a purchase of receivables or factoring, a contract of good fortune, an insurance contract, a partnership agreement and a contract *sui generis*. The classification under Austrian law as a civil law company and a contract *sui generis* with elements of a contract of good fortune are well established, and the case law on these types of contracts can help guide the interpretation of litigation funding agreements.

As in other jurisdictions, the third party litigation funder in Austria usually contractually assumes all costs of the proceedings, that is, on the plaintiff's side, the court costs, including any witness and expert expenses, as well as the lawyers' costs; and, on the defendant's side, any claims for reimbursement of costs the defendant may have against the claimant after a failed action. In addition to the cost risk of the lawsuit, the funding offer usually also includes the expected costs for any necessary and promising compulsory enforcement mechanisms.

In return for assuming the cost risk, the litigation financier receives a share of the proceeds, that is, either a certain percentage of the amount won or a multiple of the funding capital spent on the case, or a combination of both.

Usually, the funder also receives a security from the client to protect its investment. Typically, funding contracts in other jurisdictions such as Germany provide that the client silently (without disclosing this to the court or the opponent) assigns both the claim and the claim for reimbursement of legal costs to the financier (silent assignment) to secure the financier's claims of his or her share of the proceeds. At the same time, the funder authorises the claimant to pursue the claim in his or her own name. Such an assignment would, however, not be unproblematic under Austrian law because an assignment would arguably have to be disclosed under the stricter transparency standards in force in Austria. A viable and practically used alternative that considers the Austrian standard of transparency is the pledging of the claims to the funder.

In a standard litigation funding agreement, the claimant is subject to numerous obligations. The client promises, among other things, to conduct the proceedings in a risk-conscious and economical manner, to actively promote the proceedings and to provide comprehensive information to his or her own lawyers and the financier. In particular, the lawyer instructed to conduct the proceedings must be released from the duty of confidentiality in favour of the third party litigation funder insofar as the information relates to the funded claim. The claimant must also oblige his or her lawyer to keep the financier informed about the progress of the proceedings and to send the funder all relevant procedural documents.

Key decisions as to the pursuit of the claim, such as the withdrawal and waiver of a claim as well as filing or withdrawing an appeal, may usually only be made with the consent of the litigation funder. Limitations on this may apply where consumers are involved. In addition, typically, the funder has a consent right regarding whether to conclude a settlement with the defendant to safeguard its investment in the case. In practice, to avoid discussions during the proceedings between the funder and the client about whether a certain settlement should be accepted, it is possible, and in many cases advisable, to agree to certain thresholds for a settlement when concluding the litigation funding agreement. This can be designed as a sliding scale, subject to, for example, the duration of proceedings prior to settlement or the funds already spent on the claim. If, in such a situation, the financier wants to conclude a settlement but the client does not, the financier may often terminate

the contract. The financier is then to be placed financially in the position he or she would have been in if the settlement had been concluded. Another often-used contractual options to solve such a situation can be a reciprocal right to buyout.

While clauses such as the above-mentioned are often used and are commercially accepted in business-to-business (B2B) as well as business-to-consumers (B2C) situations, some uncertainty remains as to their permissibility. This is because, under Austrian law, the validity of certain terms of a funding agreement (e.g., the influence of a third party funder on main strategic decisions such as concluding a settlement) has not yet been decided by Austrian courts. This will continue to create some uncertainty as to what the parties can agree to in a litigation funding agreement.

Disclosure

Court hearings in Austria are public (with some limited exceptions), and, as such, the general public has the right of attendance. In contrast, arbitration proceedings in Austria are generally held in private, as in most other jurisdictions.

Each party must offer all evidence necessary to substantiate the statements included in its respective pleadings. In accordance with the jurisprudence of the Austrian courts, no discovery or disclosure process exists. However, at the request of one of the parties, the court can order a party to disclose a certain document if it is in its possession.

There is an unconditional obligation to produce the document if the opponent of the person giving evidence has him or herself referred to the document, if there is an obligation to produce the document under civil law, or if the document is common to both parties. The latter is the case if the document records mutual legal relationships or was drawn up in the interests of both parties. In the case of an unconditional obligation to produce the document, production may not be refused under any circumstances.

In all other cases, there exists only a conditional obligation to produce the document. In this case, the opposing party may refuse to produce the document for certain reasons,[14] but is otherwise obliged to produce the document. If the opponent does not produce the document despite the court's order, the failure to produce is subject to the free assessment of evidence and will, therefore, often be interpreted to the disadvantage of the party refusing to file the applicable document.

The involvement of a third party litigation funder is generally not disclosed, and there is no legal basis that could require a party to disclose the funding of litigation or details of the litigation funding agreement.

Attorneys' privilege is not explicitly regulated under Austrian law. Rather, it is derived from the attorney's duty of confidentiality and the corresponding provisions of procedural law providing for an attorney's right to refuse to give evidence. It does not compare to the strong US-style privileges (attorney–client privilege or attorney work product protection). Under Austrian law, the attorney's duty of confidentiality must not be circumvented by judicial or other measures. Consequently, the duty of confidentiality must not be circumvented by ordering the disclosure of documents or other information. The attorney's privilege also extends to the employees and assistants of the attorney, but not to third party litigation funders.

Some arbitration institutions, including the Vienna International Arbitration Center (VIAC), oblige the party supported by a third party funder to disclose the existence of a funding agreement and the identity of the funder in the statement of claim or the response to the statement of claim, or, if such agreement is made later, immediately after the funding agreement has been concluded.[15] This information is shared with the tribunal (in composition). The purpose of this disclosure obligation is to ensure the impartiality and independence of the tribunal and to avoid any conflicts of interest. Disclosure is limited to the existence of an agreement and the identity of the third party funder. The rules do not require the funding agreement itself to be disclosed.

Costs

i Judiciary proceedings

The procedural costs are divided into court fees, legal fees (e.g., fees of legal representation) and party expenses. In Austria, the party that loses the case will not only bear its own costs of the proceedings, but must also reimburse the costs of its opponent that are necessary for the appropriate prosecution or legal defence (loser pays rule).[16] Thus, litigation, especially in the case of high amounts in dispute, is often associated with a significant cost risk for the parties. In contrast to other jurisdictions, such as Germany, there is no fee cap for claim amounts beyond a certain threshold.

Under certain circumstances, procedural aid is available to parties within the litigation.[17] However, procedural aid only concerns the respective party's own costs and does not release the losing party from the obligation to reimburse the opposing party's costs of the proceedings.

Legal expenses insurance, which is meant to cover the risk of legal costs, does not provide a complete remedy. First, the coverage is usually limited to certain amounts. Moreover, legal expenses insurance does not cover every case, if only because claims from certain areas of law (such as company law disputes) are excluded. In contrast to legal expenses insurance, in litigation funding, no provision is made for future disputes. Rather, the litigation financier assumes the litigation cost risk of a dispute that has already arisen. It is, therefore, also possible to join proceedings that are already underway. An insurer will also try to keep the litigation costs as limited as possible while a third party litigation funder invests in the case for the best possible outcome.

In Austria, a non-EU claimant can be required, at the request of the defendant, to provide a security for cost.[18] This is the amount the defendant will, if the case is lost, be entitled to reclaim from the unsuccessful claimant. In Austria, this institution has been subject to massive criticism, but it remains the law to date. This security for costs cannot be rendered against EU or EEA citizens, but for third-country nationals planning to file a case in Austria, this is a relevant cost risk to consider in the case strategy. This risk can be covered by the funder.

While Austria does follow the loser pays rule, it also limits the types of costs the losing party may owe the opponent to the usual categories of own attorneys' fees, expert fees, own expenses and court fees. Where a party has sustained further expenses over the course

of the pursuit of a claim, it bears those him or herself. Particularly, there has not been a case where the court has ordered the losing party to bear the winner's funder's fees.

ii Arbitration

Austrian domestic arbitration law grants the tribunal broad discretion on the decision on costs,[19] and only requires the tribunal to also take into account in its decision the outcome of the proceedings on the subject matter. The tribunal is free in its decision as to what types of costs and at what amount it deems recoverable, provided those were reasonable expenses for the pursuit or defence of the claim. The provision is not deemed mandatory, so it applies primarily in ad hoc proceedings with a seat in Austria. In institutional arbitration, the specific rules of the chosen institution prevail.

Similarly to the 2021 Austrian Code of Civil Procedure, the Vienna Arbitration Centre (VIAC) Rules[20] provide the arbitral tribunal with the broadest discretion in its cost decision on the question of allocation of the costs among the parties as well as on the issue of what costs are reimbursable: see Article 38 Section 2 of the VIAC Rules. Interestingly, the only explicit examples the Rules mention as guidelines for what the tribunal may take into consideration in this decision are the conduct of the parties and their representatives and their contribution to fast and cost-efficient proceedings – not the outcome of the case on the merits. This does, of course, not at all preclude the tribunal from following the loser pays principle but sets a slightly different focus.

Internationally, there is a growing trend in commercial arbitration to treat one party's costs for third party funding (i.e., the funder's success fee) as recoverable costs, following the landmark English High Court decision in *Essar v. Norscot*.[21] Here, the Court upheld an ICC award that had included one party's costs for obtaining third party funding as recoverable. There are, to our knowledge, no published awards from Austria (ad hoc or VIAC) or court decisions that have dealt with this issue, but from a practical perspective, it is recommendable to consider including these costs in the requests for cost recovery.

Outlook and conclusions

Third-party litigation funding has developed from a niche product that was exclusively used for collective redress in consumer cases into a more broadly used and accepted service that is also present in the B2B world. Funders and advising counsel must carefully draft funding agreements and will often only find little to no practical guidance as to what agreements in the contract are permissible and where the outer limits lie.

The most relevant development to look out for in 2024 will be whether Austria manages to implement the collective redress directive and how that will reshape the regulatory landscape for the funding of bundled individual claims. As at the date of writing, a draft proposal had yet to be published in Austria.

Endnotes

1 Malte Stübinger is general counsel Germany and Patrick Rode is senior legal counsel at Deminor. ^ Back to section

2 OGH 31.3.2005, 3 Ob 275/04v. ^ Back to section

3 OGH 31.3.2005, 3 Ob 275/04v. ^ Back to section

4 OGH 11.12.1984, 4 Ob 358-365/83; Klauser, „Sammelklage" und Prozessfinanzierung gegen Erfolgsbeteiligung auf dem Prüfstand, ecolex 2002, 805. ^ Back to section

5 Section 227 Code of Civil Procedure (ZPO). ^ Back to section

6 In July 2016, the European Commission found that major truck makers including Volvo/Renault, Daimler (today: Mercedes Benz Group AG), Iveco and DAF had colluded on pricing and for the implementation of environmental standards over a period of 14 years. The truck makers settled and were fined €2.93 billion. MAN escaped a fine, as it reported the cartel (leniency applicant). Swedish truck maker Scania, which opted not to settle, was fined €880 million later in 2017. ^ Back to section

7 The*Volkswagen emissions* scandal began in September 2015, when the United States Environmental Protection Agency (EPA) issued a notice of violation of the Clean Air Act to German automaker Volkswagen Group. The agency had found that Volkswagen had intentionally used defeat devices in diesel engines to activate their emissions controls only during laboratory emissions testing, which caused the vehicles' NOx output to meet US standards during regulatory testing. However, the vehicles emitted up to 40 times more NOx in real-world driving. Volkswagen deployed this software in about 11 million cars worldwide, including 500,000 in the United States, in model years 2009 through 2015. ^ Back to section

8 31.01.2023 – 4 Ob 132/22y. ^ Back to section

9 OGH, judgment of 23 Feb 2021, 4 Ob 180/20d. ^ Back to section

10 Section 879 Paragraph 2 of the General Civil Code (ABGB). ^ Back to section

11 Pursuant to Section 879 Paragraph 2 No. 2 ABGB and Section 16 Paragraph 1 RAO (Lawyers' Code) profit-sharing for friends of the law (i.e., lawyers, tax advisers, auditors, notaries and accountants) is immoral and unethical. ^ Back to section

12 As can be seen in most common law jurisdictions and, to a growing extent, also in traditional civil law countries that begin to grant their respective attorneys more commercial freedom, the fear of an overly commercialised legal profession is unfounded, or at least not inherently connected to the permissibility of such*quota litis* agreements. ^ Back to section

13 OGH, 27 Feb 2013, 6 Ob 224/12b. ^ Back to section

14 Section 305 Code of Civil Procedure (ZPO). ^ Back to section

15 cf. Article 13a VIAC Rules 2021. ^ Back to section

16 Section 41 Paragraph 1 Code of Civil Procedure (ZPO). ^ Back to section

17 Section 64 Paragraph 1 Code of Civil Procedure (ZPO). ^ Back to section

18 Section 57 Paragraph 1 Code of Civil Procedure (ZPO). ^ Back to section

19 See Section 609 Code of Civil Procedure. ^ Back to section

20 See https://www.viac.eu/en/arbitration/rules-of-arbitration-and-mediation. ^ Back to section

21 *Essar Oilfield Services Ltd v. Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm). ^ Back to section

d e m i n o r

LITIGATION FUNDING

Malte Stübinger malte.stuebinger@deminor.com
Patrick Rode patrick.rode@deminor.com

Deminor

Read more from this firm on Lexology

Belgium

Olivia de Patoul

Deminor

Summary

INTRODUCTION

YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

Litigation funding is allowed and accepted in Belgium, and it is not currently regulated. However, litigation funding is not yet a mainstream tool of Belgian litigation practice,[2] and there are a couple of reasons for this. First, the costs of litigation are relatively low in Belgium, especially compared to other jurisdictions. Secondly, the exposure to adverse party costs is limited to statutorily defined, incremental lump sums depending on claim value.[3] These lump sums are, again, quite low compared to other countries with similar statutory regimes (e.g., Germany) and jurisdictions with a more onerous 'loser pays' regime such as the UK. The combination of these two factors means there is less incentive for litigants to seek third party funding than in other jurisdictions where the potential financial exposure is more significant.

From the funder's perspective, the reasons set out above imply that capital deployment in a Belgian litigation matter will be relatively limited and may not meet the minimum thresholds of certain funders. In addition, damages awarded by Belgian courts tend to be comparatively low and so potential returns for funders are also at the lower end of the scale. For these reasons, the Belgian market has attracted limited interest from litigation funders.

Nevertheless, there have been several high-profile cases in Belgium where claimants benefited from third party funding. These cases can mainly be found in the field of collective actions – albeit outside of the framework of the Belgian collective redress mechanism,[4] which is limited in scope and does not expressly provide for the possibility of third party funding.[5] The most notable funded cases concern investor losses:

1. A group of approximately 13,000 private investors filed claims in relation to accounting fraud at the speech technology company Lernout & Hauspie during its ensuing bankruptcy. The criminal proceedings led to the conviction of several managers and the auditor of the company. Civil proceedings are still pending against various defendants, including the auditor.
2. A group of over 6,000 investors, both institutional and retail, filed litigation before the Belgian courts in the aftermath of the collapse of Fortis Bank (now Ageas NV/SA). This case was ultimately settled as part of the collective settlement agreement declared binding by the Court of Appeal of Amsterdam on 13 July 2018.[6] This settlement, for a total amount of €1.3 billion, is the largest ever investor claim settlement in Europe.
3. Currently, proceedings in appeal are pending in a case brought by thousands of retail investors in Arco, a financial holding company that invested mainly in the now-defunct Dexia Bank. Arco entered into liquidation in 2011. The investors are seeking damages from, inter alia, Arco, the Belgian state and Dexia's successor, Belfius Bank.

Arbitration cases might also be suitable for funding, whether they are submitted to the proceedings of the Belgian Centre for Arbitration (CEPANI) or not.

The major litigation funders with operations in Belgium or a focus on the Belgian market are Deminor, Nivalion and Liesker Procesfinanciering.

Despite the relatively limited interest in third party litigation funding in the past, there is potential for it to become (more) mainstream in Belgium going forward. Law firms are becoming more familiar with the concept, and in-house legal teams increasingly see the value litigation funding can bring to corporations. It is expected that litigants will start to explore funding options on a more regular basis in the coming years. The same applies for arbitration proceedings brought before the CEPANI, the Belgian centre for arbitration and mediation.

More specifically, the following types of claims could become important drivers for growth in the Belgian litigation funding market:

1. Private enforcement of competition law, and more particularly follow-on actions based on the EU Damages Directive.[7] For example, damages claims have been brought against Mastercard in the Brussels courts in relation to interchange fees, with claimants benefiting from third party funding.
2. Consumer class actions. The new EU Directive on consumer collective redress,[8] which includes some provisions on third party funding, may lead to a revamp of the current Belgian collective redress mechanism and create a framework to facilitate the funding of consumer representative actions.
3. Asset recovery and enforcement. In cross-border asset recovery matters, Belgium is often overlooked while major banking institutions or central securities depositaries have their European headquarters in Brussels (e.g., Euroclear, The Bank of New York Mellon). Compared to other jurisdictions, the legal framework for freezing assets and bank accounts is cost-efficient and relatively creditor friendly. Attachments on the fees collected by the 41 member states of Eurocontrol, the European air traffic management system based in Brussels, are frequent.

Year in review

i Significant developments in legislation

A resolution was passed on 13 September 2022 by the European Parliament, which includes recommendations to the European Commission to propose a Directive to regulate litigation funding within the European Union. These recommendations may be the start of a legislative process at the European level aimed at regulating the litigation funding sector for court proceedings, commercial arbitration and investor–state arbitration.

The Voss Report pushes for:

1. transparency (e.g., an active obligation to disclose the existence and identity of the funder to the court);
2. a cap on the fees (40 per cent, unless in exceptional circumstances);
3. regulation of the management of the claim, with the funder having little influence in the conduct of the proceedings;
4. regulation of conflicts of interest; and

5. oversight (e.g., the authorities shall conduct mandatory annual assessments of each funder; the funders must have sufficient capital).

Each Member State shall be free to decide whether at all to allow third party funding. We note the absence of distinction between claimants that are professional and those who are consumers (a 'one size-fits-all' approach). It remains to be seen whether the European Commission will follow the European Parliament's recommendations, and within what time frame.

ii Notable cases

A judgment in first instance was rendered in the *Arco* case in November 2021, denying the investors' claim on the basis that the investors failed to demonstrate on an individual basis that they were misled. An appeal is pending.

Legal and regulatory framework

i No regulatory framework

Litigation funding is not a regulated activity under Belgian law. Moreover, as a civil law jurisdiction, the concepts of champerty and maintenance are not part of Belgian legal culture. Therefore, there is no prohibition on litigation funding.

Given the lack of a statutory framework, funding arrangements are governed by the general rules of contract in the Belgian Civil Code. The content of the funding arrangement can be freely agreed upon by the parties, so long as it does not result in a violation of public policy. This means, for example, that the funder's control over the litigation and its involvement in the case management and strategy can be contractually defined by the parties.

As set out above, litigation funding is not yet commonly used in Belgium. Consequently, and to the best of our knowledge, Belgian courts have not yet been asked to resolve questions regarding the admissibility of third-party funding or disputes between a funder and its client. Nevertheless, the legality of litigation funding is commonly accepted, and the involvement of the funder in some of the cases highlighted above was openly disclosed and has not generated any criticism.

ii Lawyers' ethical rules

Lawyers working on funded litigation need to abide by the ethical rules enacted by the bar association.[9] These rules include an obligation to act in the best interests of the client (as opposed to their own interests or the interests of a third party, such as a funder), to act independently, and to comply with attorney–client privilege (professional secrecy). Regarding the latter, lawyers are allowed to share information and case materials with a funder with the clients' express consent. This consent will generally be provided in the litigation funding agreement.

iii Contingency fees

Lawyers in Belgium are prohibited from working purely on contingency (*pactum de quota litis* – see Article 446 *ter* of the Belgian Code of Civil Procedure). However, fee arrangements providing for a minimal remuneration that is independent of the outcome of the case topped up with a reasonable success fee are permitted.

Structuring the agreement

In Belgium, litigation funding agreements are considered as *sui generis* agreements and are governed only by the rules of general contract law. Also, some specific provisions governing the lawyer–client relationship might indirectly affect the funding contract (such as the obligation for a lawyer to remain independent, or conflict of interest provisions).

A litigation funding agreement does not qualify as a loan, given that there is no obligation on the funded client to reimburse the funding, which is an essential obligation of the borrower under a loan agreement. The client will only have an obligation to share the proceeds in the event of a successful outcome.

Similarly, a litigation funding agreement cannot be considered legal protection insurance.-[10] Under such an insurance policy, the insured party has the obligation to pay the (usually recurring) insurance premium before the insured risk (i.e., a legal dispute generating legal representation costs) occurs, regardless of the outcome of the outcome of the legal dispute (if any). On the contrary, a claimant will only enter into a litigation funding agreement after a dispute has arisen and the funder will only receive its remuneration if the litigation is resolved successfully.

The parties' respective rights and obligations can be freely defined in the funding agreement. Given the lack of a statutory framework or specific legislation, the funding agreement should be comprehensive and should stipulate all aspects of the parties' relationship. Generally, a funding agreement will include provisions governing the following:

1. The amount of the investment: the funding agreement will generally define the maximum commitment of the funder, the specific items that are included in the budget (legal fees for first instance and appeal, expert fees, adverse party costs, etc.) and the conditions for drawdown of the budget. To avoid budget overruns, and depending on the type of case, funders may work with capped amounts per item or stage of the proceedings.
2. Exposure to counterclaims: the funding agreement will specify whether the funding will cover the costs of defending a counterclaim and whether the funder will cover the financial exposure of a counterclaim.
3. The funder's remuneration: this can be either a percentage of the recovered amounts, a multiple on the invested capital, or a combination of both. The agreement will also set out the 'payment waterfall', which defines the priority of payments to the funder, the law firm (contingency) and the client. Practical arrangements for the distribution of the proceeds will also be provided for.
4. The exchange of information: correspondence between clients and their lawyers, and any written material drafted for a client, are protected by attorney–client privilege. The lawyer, therefore, cannot disclose any of this to the funder without the client's express consent. Consequently, the funding agreement will regulate the

exchange of information between the client, the lawyer and the funder. This enables the latter to be kept abreast of the progress of the case and to monitor its investment.

5. Control or consent rights: to protect its investment, the funder will generally seek to have some degree of control over important decisions in a case, such as filing appeals, terminating proceedings or accepting settlements. Under Belgian law, a funder is not prohibited from having a veto right on certain decisions.
6. Termination rights: in addition to termination for material breach, the funder and the client may also agree on a right for the funder to terminate the agreement if an event occurs that negatively impacts the prospects of the case, or an event that makes the case commercially unviable, or the agreement may even allow for termination for convenience.

As explained above, the most notable funded cases in Belgium so far have been collective actions.[11] In this type of case, the funder will usually have a much more active role in managing and steering the litigation. The agreements between the funder and the individual clients will then generally be structured as a contract for services rather than a mere funding agreement, including provisions that enable the funder to manage the litigation.

Disclosure

i Disclosure of funding – judicial proceedings

Given that there is no legal framework on litigation funding, there is equally no legal obligation for a funded party to disclose the existence of a funding agreement, let alone disclose the content of that agreement. That said, for the sake of transparency, it may be recommended that a litigant discloses that it is benefiting from litigation funding.

ii Disclosure of funding – arbitration

Despite the absence of any express legal provision to that effect, it is generally considered that the existence of a funding agreement and the identity of the funder must be disclosed to the tribunal in arbitration proceedings. Pursuant to Article 1686 of the Code of Civil Procedure, an arbitrator is required to disclose any circumstance that may give rise to justifiable doubts regarding her or his independence and impartiality. An arbitrator's prior relationships or dealings with the funder may qualify as such a circumstance. The funded party's disclosure of the existence of the funding arrangement, including the funder's identity, enables the arbitrators to comply with their own disclosure obligations. As a result, and in the light of the principle of procedural fairness embodied in Article 1699 of the Code of Civil Procedure, the presence of a third party litigation funder must be disclosed in arbitration proceedings. However, the terms of the funding or the funding agreement as such should not be disclosed, as this is not relevant for the arbitrators' conflict check.

Furthermore, there is a general tendency in arbitration worldwide towards the disclosure of funding agreements in arbitration proceedings, evidenced by recent amendments to institutional rules of arbitration providing for the disclosure. For example, the International Chamber of Commerce issued new rules in 2021, including under 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 which 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.

In conclusion, although it is not mandatory to disclose the existence of a funding agreement in an arbitration submitted to Luxembourg law, it would be recommended to do so.

iii No discovery

Civil proceedings in Belgium are governed by the adversarial principle. This means that the parties must provide their own evidence in support of their claims. Discovery or disclosure procedures like those available in the US and the UK, respectively, do not exist in Belgium. Pursuant to Article 877 of the Code of Civil Procedure, a court can order a party to the proceedings or a third party to disclose certain documents or other exhibits if there are serious and specific indications that this party is in possession of those documents or exhibits; and said documents or exhibits constitute evidence of a fact that is relevant for the case. A request for disclosure must relate to specifically identified documents and cannot amount to a fishing expedition.

These conditions are applied narrowly by Belgian courts, and the burden of proof lies with the party applying for disclosure. Although there is no case law on this point, it is highly unlikely that a claimant would be compelled by the court to disclose a litigation funding agreement pursuant to an application based on Article 877 of the Code of Civil Procedure.

Costs

i Judiciary proceedings

As noted above, adverse party cost orders in judicial proceedings are very limited in Belgium. Courts will award the prevailing party a statutorily defined lump sum between €195 to €39,000, depending on the value of the claim and certain other factors (e.g., the complexity of the case). In addition, the prevailing party will be entitled to the reimbursement of procedural costs (court fees, bailiff fees, judicial expert fees). The costs of securing third party funding cannot be recovered from the adverse party.

The Code of Civil Procedure[12] provides a Belgian defendant who is sued by a foreign plaintiff the possibility to request that the claimant posts security for costs (*cautio judicatum solvi*) unless there is a treaty or convention between Belgium and the claimant's home state exempting plaintiffs from posting security. Because of the large number of foreign states (including all EU Member States) benefiting from such an exemption, security for costs is rather rare in practice. Moreover, in 2018 the Belgian Constitutional Court ruled that Article 851 of the Code of Civil Procedure is discriminatory and, therefore, unconstitutional. It cannot be ruled out that the *cautio judicatum solvi* will be abolished altogether.

ii Arbitration

Pursuant to Article 1713(6) of the Code of Civil Procedure, the final arbitral award must determine the costs of the arbitration and decide which party bears what proportion of these costs. The costs of the arbitration include fees and expenses of the parties, their counsel and representatives. Unlike judicial proceedings, therefore, the prevailing party can recover its actual costs (or a significant part thereof) from the adverse party to the extent that those costs are reasonable.

The Code of Civil Procedure does not address security for costs in arbitration proceedings. Nevertheless, it is generally accepted that an arbitral tribunal may impose security for costs.

iii Liability of funders for adverse costs

Third party funders usually do not become a party to the proceedings initiated by their clients, whether they are judicial or arbitration proceedings. Therefore, the court or arbitral tribunal cannot order the funder to pay costs, and the adverse party will not have a direct claim against the funder.

Outlook and conclusions

Although third party litigation funding has been used successfully in the past, the Belgian market for litigation funding remains relatively underdeveloped. The country's relatively low litigation costs appear to be a major factor in this. As both clients and legal practitioners become more acquainted with the practice of litigation funding, significant growth can be expected in the coming years, especially in enforcement, arbitration and follow-on damages claims.

Endnotes

1 Olivia de Patoul is general counsel at Deminor. ^ Back to section

2 There is no publicly available data on the use of litigation funding in Belgium, therefore, this section is based on the author's monitoring of the funding market. ^ Back to section

3 See Article 1022 Belgian Code of Civil Procedure and the Royal Decree of 26 October 2007. The maximum amount of adverse party costs, for claims above €1 million, is currently set at €39,000. ^ Back to section

4 See Article XVII.35-70 Belgian Code of Economic Law. ^ Back to section

5 Although third party funding is not prohibited or excluded, some of the provisions of the current collective redress mechanism make it difficult to structure a funding arrangement that meets funders' requirements. ^ Back to section

6 The Dutch Law on the Collective Settlement of Mass Claims (WCAM) was applied. ^ Back to section

7 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance. ^ Back to section

8 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. ^ Back to section

9 See, e.g., the ethical code enacted by the Flemish Bar Council: https://advocaat.be/DipladWebsite/media/DipladMediaLibrary/Documenten/Deontologie/Codex-Deontologie.pdf. ^ Back to section

10 In Belgium, this type of before-the-event (BTE) legal insurance coverage is commonly included as part of a broader insurance policy. After-the-event (ATE) insurance to cover adverse party cost risks is rather rare in Belgium. ^ Back to section

11 i.e., direct actions initiated by a large group of plaintiffs, not a representative action or class actions. ^ Back to section

12 Article 851. ^ Back to section

d e m i n o r

LITIGATION FUNDING

Olivia de Patoul olivia.depatoul@deminor.com

Deminor

Read more from this firm on Lexology

Brazil

Rodrigo de M Carneiro de Oliveira, **Eider Avelino Silva**, **Rafael Curi Savastano** and **Guilherme Fonseca Schaffer**

Pinheiro Neto Advogados

Summary

INTRODUCTION

YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

In attempting to assess the evolution of third party funding (TPF) in Brazil, we have updated the statistics on its use in arbitration proceedings conducted by some of the major arbitral institutions acting in Brazil:[2]

1. the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada (CAM-CCBC);
2. the Market Arbitration Chamber (CAM) of the B3 – Brasil Bolsa Balcão SA;
3. the Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP (CMA CIESP/FIESP);
4. the Brazilian office (ICA 10) of the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (ICC); and
5. the FGV Mediation and Arbitration Chamber (FGV).

Among all these institutions, the amount of disclosed new cases involving TPF decreased over the past three years, from nine cases initiated in 2020 to two new cases initiated from 2022 to September 2023. CAM, an institution focused on corporate disputes involving listed companies, continuous to administer the largest number of TPF arbitrations – 12 ongoing TPF arbitrations, one of them initiated in the past year. The latest statistics published by CAM indicate that 72 per cent of its arbitrations were multiparty, four of them being class arbitrations.[3] The profile of said disputes, which often involve several minority shareholders against the company or the majority shareholder, is particularly suited to TPF[4] and might explain the predominance of TPF arbitration administered by CAM in comparison to the remaining institutions.

For clarity, it is important to explain from the outset that all references to TPF throughout this chapter refer to the traditional method of TPF. In this type of funding, the funder pays the litigation costs of a non-related party involved in a specific dispute, and receives in consideration a stake of the final amount to be awarded to that party[5] (in contrast to a loan, this method imposes no obligation on the funded party to repay the money received if it does not succeed in the litigation).

Therefore, unless otherwise mentioned, references in this chapter to TPF do not include other methods of funding (funding by lawyers, funding to law firms, funding by parent companies, funding of multiple cases, etc.).

In general, with regard to the Brazilian TPF market, the comments and conclusions presented in last year's edition remain applicable in 2023. Even though there was a decrease in the number of TPF arbitrations, Brazil is still fertile ground for TPF, with considerable potential for growth in the coming years, especially in light of the significant amount of ongoing litigation in Brazil or involving Brazilian parties.

For example, in 2021, the ICC reported that, in terms of the number of parties involved in ICC arbitration proceedings by country, Brazil ranked second (only behind the United States and ahead of Spain, the UAE and Mexico).[6]

The CAM-CCBC, one of the main arbitral institutions in Brazil, reported 115 arbitration proceedings initiated in 2022. The total value of the cases lodged with the CAM-CCBC in 2022 amounted to approximately US$1.5 billion.[7]

Overall, research conducted by Professor Selma Lemes concluded 322 arbitrations were initiated in Brazil in 2021, whose amount in dispute reached approximately US$10 billion.[8] Conversely, TPF arbitrations initiated in the past year reported by the arbitral institutions represent disputes of approximately US$11 million.

When it comes to litigation before judicial courts (as opposed to litigation before arbitral tribunals), Brazil also has huge potential for TPF since it has a significant number of lawsuits ongoing before federal and state courts (in December 2022, there were 81.4 million ongoing lawsuits).[9]

Notwithstanding this potential, we were not able to retrieve any data confirming that TPF has been provided to a party involved in litigation before judicial courts. As was explained by one of the major participants in Brazil's TPF market, the lack of predictability regarding the duration of lawsuits in the Brazilian courts is the biggest challenge to overcome when making a decision about whether to fund a case in the county.[10]

Therefore, in the absence of any information about the use of TPF in disputes in the judicial courts, this chapter concentrates on TPF in disputes heard by arbitral tribunals, since this seems to be the principal arena for TPF in Brazil.

In this context, the major participants in the Brazilian market remain those reported in previous years: Leste Investimentos, the first investment fund specialised in providing this type of service in Brazil;[11] and LexFinance, a Peruvian-based investment fund specialising in investments in Latin America, Portugal and Spain.[12]

It is also important to mention that in recent years we have seen a number of new market participants arriving and investing in disputes within the Brazilian territory, such as the British firm Harbour Litigation Funding, which has invested in two disputes in arbitration in Brazil.[13]

In short, the significant position occupied by Brazil in the international arbitration landscape, the arrival of new market participants and the consolidation of traditional actors in this area confirm the country's potential to attract TPF and develop an industry that is already well established in other countries.

Year in review

In general, the Brazilian TPF landscape has remained relatively unchanged in the past year. However, a project to amend the Brazilian Corporations Act (Federal Law No. 6,404/76) and the Capital Markets Act (Federal Law No. 6,385/76) may have some significant impacts on the market as Brazil's government pushes an agenda to make the legislation compliant with OECD standards.[14] For instance, this reform clarifies minority shareholders' standing to sue the officers and directors, controlling shareholders, and creates a mechanism for class corporate arbitration. Also, the bill under discussion provides for a 'premium' of 20 per cent for the winning party, to be calculated in relation to the amount to be indemnified by the defeated party. If this bill of law is approved, it may boost the number of corporate conflicts, which currently seem to represent the majority of TPF arbitrations in Brazil.

Furthermore, some changes to proceedings imposed during the covid-19 period have apparently remained in place even after the pandemic.

For instance, almost all Brazilian arbitral institutions still maintain some sort of electronic-based proceedings, which are more efficient and tend to reduce costs. The common practice of sending hard copies of the main submissions and attached documents to the parties and members of the arbitral tribunal (entailing significant costs for the preparation and review of these copies) seems to have come to an end.

Even before the onset of the pandemic, wholly electronic-based proceedings were already the reality in state and federal courts, and virtual hearings and private meetings with judges and justices seem to have become common.

Another innovation that also may stay in place after the pandemic is virtual hearings in arbitrations. Again, it will require case-by-case analysis to determine whether a virtual hearing is appropriate. Nevertheless, virtual hearings can be a good option to reduce costs otherwise incurred for travel, hotels, transportation and food, for example. In addition, in some cases, virtual hearings may help streamline proceedings, since the arbitrators and the parties are not going to spend any time in transit, making it easier to coordinate and align the schedules of those involved. Complex arbitrations, on the other hand, apparently favour in-person hearings, especially for the examination of witnesses and experts.

These reductions in costs may also affect the TPF market positively since, in theory, the amount spent on each case would be reduced, allowing more cases to be funded.

Legal and regulatory framework

Brazil does not have any statutes or regulations dealing specifically with TPF. As mentioned above, in Brazil, TPF is mostly used to fund arbitration disputes. As such, the existing TPF legal regime is based on guidelines and international soft law issued by arbitral institutions and international bodies.

The guidelines and soft law applicable to TPF in Brazil are mainly concerned with the disclosure of the existence of a third-party funder to allow the members of the arbitral tribunal to assess any conflicts of interest with the funder.

For instance, the new CAM-CCBC Rules of Arbitration set forth that a party should disclose if it is receiving TPF on the request for arbitration or its answer (if obtained at the commencement of the arbitration), or at the first opportunity (if obtained after the commencement of the arbitration).[15] Resolution No. 6/2019 issued by the CMA CIESP/FIESP, updating the CAM CIESP/FIESP Code of Ethics, provides a similar recommendation.[16] In addition, CAMARB has published Administrative Resolution No. 14/20 to the same effect.

The current 2021 ICC Arbitration Rules has a provision that expressly encompasses TPF and the duty to inform arising from it. As per Article 11(7),[17] the party is obliged to inform the secretary, the arbitral tribunal and the parties involved in the arbitration about the existence and identity of the funder, and its economic interest in the outcome of the dispute.

Accordingly, the 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration confirms and reiterates the duty to inform about TPF.[18] Section II(D), Article 21 of the ICC Note indicates that the duty to inform about any funder provided in Article 11(7)

of ICC Arbitration Rules does not encompass '(i) inter-company funding within a group of companies, (ii) fee arrangements between a party and its counsel, or (iii) 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'.[19] The inclusion of these provisions in the 2021 ICC Arbitration Rules and ICC Note confirms the growing trend of TPF and the need of regulations and specific guidelines regarding the matter.

In addition, it is worth mentioning that the IBA Guidelines on Conflicts of Interest in International Arbitration (which are referenced by decisions on the challenge of arbitrators-[20] and several court rulings on the annulment of arbitration awards[21]) provide that third party funders should be put in a position of equivalence with the party to the arbitration when assessing any potential conflicts of interest with the arbitral tribunal.[22]

The discussion about the duty to disclose the existence of a funder is relevant in the Brazilian context, since the lack of disclosure in a timely manner may, in some cases, jeopardise the integrity of the arbitral award. The Brazilian Arbitral Act (BAA) provides that individuals should not act as arbitrators if their involvement with either the dispute or the parties to the dispute would disqualify them from acting as a judge.[23] The standards for disqualification, or to cause the recusal, of a judge are provided in the Brazilian Code of Civil Procedure (BCCP).[24]

Specifically, Article 145, Items II and IV of the BCCP provide that the recusal of a judge may occur when 'she or he provides funds to bear the litigation expenses' or 'she or he has an interest in adjudication of the case in favour of any of the parties'. As such, if a judge has invested in a litigation fund, for instance, and this fund is funding a dispute that is to be adjudicated by that judge, a conflict of interest can be inferred and the judge should not be allowed to hear that case.

Although TPF (as defined above) is not commonly used to fund cases in federal and state courts in Brazil, it should be noted that contingency fees (or *honorarium quota litis*) are well established and widely used in Brazil's litigation practice. In this type of agreement, the lawyer usually agrees to receive its legal fees (in total or in part) as a share of the economic benefit to be received by the client at the end of the proceeding. Thus, the lawyer shares the risk with the client, since the lawyer will not be paid if the client does not ultimately receive any economic benefit.

The Superior Court of Justice (STJ), Brazil's highest court for non-constitutional matters, has confirmed the validity of contingency fees contracted by lawyers.[25]

Resolution No. 02/2015 of the Federal Council of the Brazilian Bar Association of 19 October 2015 (the Brazilian Bar Association Code of Ethics) authorises the existence of *quota litis* fees but establishes that the fees should be paid in cash (goods or assets are only admissible as payment in exceptional circumstances); and when there is a contingency fee, and the lawyer also receives the 'loss of suit' fees from the opposing party (i.e., an award of legal fees for the prevailing party, determined by the court and paid by the losing party), the amount received by the lawyer should not be greater than the amount received by the client.[26]

The matter of the award of legal fees for the prevailing party is peculiar to Brazil's legal system. At the end of the proceeding, the judge orders the defeated party to pay an amount to the lawyer for the prevailing party as legal fees. The judge will determine the amount to

be paid, but it should not exceed 20 per cent of the value of the judgment, the economic benefit or the value of the dispute ascertained in the complaint.[27]

In this context, given that the award of legal fees for the prevailing party should not exceed 20 per cent, and Article 50 of Brazilian Bar Association Code of Ethics provides that the lawyer should not receive a greater amount than the client, taking into account any contingency fee and the award of legal fees for the prevailing party, it is possible to conclude that the contingency fee should usually be limited to 30 per cent of the amount in dispute (i.e., a 30 per cent contingency fee plus a 20 per cent award of legal fees for the prevailing party equals a value of 50 per cent in legal fees to the lawyer).

Of course, a contingency fee of 30 per cent should not be interpreted as a cap since in some situations the legal fees of the prevailing party may be awarded as a percentage smaller than 20 per cent or may not be awarded at all (in arbitration, for instance, there is no legal obligation for the arbitral tribunal to make an award of legal fees for the prevailing party, and the parties are free to contract otherwise).

However, a 30 per cent contingency fee probably serves as a reasonable standard, since the STJ has stated that a *quota litis* of 50 per cent would be excessive and reduced a fee of this amount to a percentage of 30 per cent in a specific case.[28]

Finally, from a business perspective, it should be noted that a contingency fee of 30 per cent may also sound reasonable, since the funders usually want the party to the arbitration to remain with a larger sum of the economic benefit, so the party would remain engaged in the litigation.

Structuring the agreement

As reported, Brazilian law does not have any regulation concerning TPF. In the absence of specific legislation, the parties are free to choose their own binding contractual provisions, as long as the general principles of Brazilian law are observed, together with the requirements established in Article 104 of the Brazilian Civil Code (BCC)[29] for the validity of legal transactions.

In this context, as discussed by legal scholars, the TPF can be interpreted as either an atypical contract (i.e., *sui generis*) or it can fit into a pre-existing contractual type under Brazilian law (such as an assignment of credit or partnership contract).[30] We are not aware of any case law discussing or interpreting the legal contractual framework applicable for TPF under Brazilian law.

Although not legally required, it is recommended that TPF agreements are made in writing, so the parties have no doubts regarding the terms. Furthermore, it is important to preserve written evidence of the TPF agreement (if not in writing itself), in the event that it is necessary to prove the contractual relationship before a court of law. This precaution would avoid any debate on whether the TPF agreement could be proved through oral evidence alone.

Generally, the negotiation of the provisions of a TPF agreement will be within parties' discretion and may vary from case to case. It is recommended that the main terms (i.e., total amount funded, how the funds should be applied, the share or amount to be received by the funder, payment events, and dispute resolution methods) are thoroughly negotiated

by the parties and written in a clear manner. Some additional best practices regarding TPF agreements are detailed below.

As reported, Brazilian law does not have any regulation concerning TPF. In the absence of specific legislation, the parties are free to choose their own binding contractual provisions, as long as the general principles of Brazilian law are observed, together with the requirements established in Article 104 of the Brazilian Civil Code (BCC)[29] for the validity of legal transactions.

In this context, as discussed by legal scholars, the TPF can be interpreted as either an atypical contract (i.e., *sui generis*) or it can fit into a pre-existing contractual type under Brazilian law (such as an assignment of credit or partnership contract).[30] We are not aware of any case law discussing or interpreting the legal contractual framework applicable for TPF under Brazilian law.

Although not legally required, it is recommended that TPF agreements are made in writing, so the parties have no doubts regarding the terms. Furthermore, it is important to preserve written evidence of the TPF agreement (if not in writing itself), in the event that it is necessary to prove the contractual relationship before a court of law. This precaution would avoid any debate on whether the TPF agreement could be proved through oral evidence alone.

Generally, the negotiation of the provisions of a TPF agreement will be within parties' discretion and may vary from case to case. It is recommended that the main terms (i.e., total amount funded, how the funds should be applied, the share or amount to be received by the funder, payment events, and dispute resolution methods) are thoroughly negotiated by the parties and written in a clear manner. Some additional best practices regarding TPF agreements are detailed below.

i Confidentiality

It is advisable that, before disclosing information to a potential funder, the parties enter into a non-disclosure agreement (NDA). This is important because almost all arbitration proceedings in Brazil are confidential. Here, it should be considered that although the BAA does not impose a specific and express duty of confidentiality in relation to the proceedings, the parties are free to contract otherwise. An agreement on confidentiality is usually made in the arbitration agreement (directly or by reference to arbitral rules providing for confidentiality).

Therefore, considering that the majority of the parties agree to maintain the confidentiality of the proceedings, the potential funder should execute an NDA to have access to the relevant documents. The duty of confidentiality should be reinforced in the funding agreement itself. An arbitral institution reported to us that, in one case, the funder was expressly asked to sign an NDA before being granted access to the documents.

ii Independent counsel

It is also recommended that the party seeking funding is advised by independent counsel during the negotiations with the funder. Depending on the context of the case, it may even

be advisable for this independent counsel to be different from the one handling the litigation, to avoid any conflicts of interest between the litigation counsel and the client.

iii Award of legal fees for the prevailing party

The agreement should also clearly establish entitlement to the award of legal fees for the prevailing party (if any). That is, the parties should expressly agree that these fees are to be awarded to the lawyer handling the dispute, and should agree on whether this amount is to be taken into consideration when calculating the funder's share in the dispute. This is crucial, because under Article 23 of Federal Law No. 8,906 of 4 July 1994, the lawyer for the prevailing party is entitled to the award of legal fees for the prevailing party and has the autonomous right to claim these fees in court from the convicted party, without needing the client's authorisation. The awarding of legal fees for the prevailing party and the method for its calculation have been seriously debated by the Brazilian arbitration community.[31] In particular, it currently focuses on whether Federal Law No. No. 8,906/94 is a material or procedural law and the application of legal fees for the prevailing party in international disputes in connection to Brazil. Said context reinforces the incentive to clearly establish the applicability of said legal fees on a case-by-case basis.

iv Additional funding sources

Parties interested in obtaining TPF should disclose any other sources of funding that they may be receiving at the time of concluding the agreement. For instance, if the party's lawyer is to receive any amount as a contingency fee, the funder should be informed of this arrangement, and potentially it should be referred to in the funding agreement.

Disclosure

As mentioned in Section III, disclosure of the existence of TPF is recommend, since the lack of disclosure may, in some cases, jeopardise the enforceability of an arbitral award and compromise the integrity of the proceedings. It is precisely for that reason that Brazil's main arbitral institutions have issued administrative resolutions recommending disclosure of third party funders.

However, there is no obligation under Brazilian law to disclose the funding agreement in litigation. In this context, CAM disclosed two cases in which the opposing party requested the disclosure of the financing agreement, but the arbitral tribunal denied the request.[32] Conversely, it was reported that in another case, before a different arbitral institution, the financed party voluntarily presented the financing agreement.

Given that the main purpose of disclosure of TPF appears to be to check for possible conflicts of interest, production of the agreement may appear irrelevant at first glance. It is, however, within the judge's or arbitrator's discretion to determine whether production is needed based on the case before them.

In relation to confidentiality, as most arbitration proceedings in Brazil are confidential (not by law but by agreement of the parties), it is important to sign an NDA to have access to the arbitration documents and information (in one case, reportedly, the signing of a confidentiality clause was needed to allow access to the documents).

Finally, it is important to mention that under Brazilian law, communications between lawyers and their clients are protected by professional secrecy, pursuant to Articles 35 and 36 of the Brazilian Bar Association Code of Ethics. Disclosure of certain confidential information between the lawyer handling the litigation and the funder, however, would probably not be viewed as a violation of professional secrecy – especially after the execution of an NDA – since assisting the client in the process of obtaining TPF can be seen as part of the lawyer's role in providing legal services to the client.

Costs

As a general rule in Brazilian litigation practice, the defeated party should bear the costs of the litigation by reimbursing the prevailing party for the costs it incurred. In cases of partial victory, reimbursement should be proportional to the degree of success. Further, it has been decided by the STJ that the legal fees paid by the party for its attorneys are not reimbursable.[33]

The general term litigation practice is used here because this rule, established in Articles 82 and 86 of the BCCP, is applicable to all civil and commercial cases, in both state and federal courts. Considering that most lawyers working in arbitration come from a litigation background, this practice is also reflected in some arbitration proceedings.

Nevertheless, it should be pointed out that neither the BAA nor the majority of the arbitration rules have any provision determining how costs should be awarded by arbitral tribunals. This is left primarily to the will of the parties or otherwise to the discretion of the arbitral tribunal. The parties are free to agree, for example, that no reimbursement shall occur, regardless of the final result. The parties may also agree that the defeated party shall reimburse the winning party for the legal fees charged by its lawyers.

We are not aware of any case law discussing potential liability of funders for adverse costs (if any).

Finally, in the interviews we conducted with Brazil's major arbitral institutions, we were informed that in 2023 there were no requests for security for costs or discussions on the matter arising from the involvement of a funder in the dispute.

Outlook and conclusions

In conclusion, TPF is still a recent phenomenon in Brazil, but undoubtedly the country has a huge market to develop, especially in light of the volume of ongoing litigation. To date, TPF has mostly been used in arbitration by sophisticated market participants. Perhaps for this reason (and because there are no specific laws on the practice) there are no publicly available cases discussing, for example, the use of TPF, its limits or the funding agreements.

With TPF expected to grow considerably in the years to come, it is likely that new rules, cases and regulations will arise, providing more guidance on the use of this important mechanism.

Modifications to proceedings introduced because of covid-19 may also impact funders' assessment of cases. Virtual hearings and exclusively electronic-based proceedings may bring a reduction in the direct and indirect costs involved in certain disputes.

In contrast, with increased numbers of companies and people in financial difficulty, it is likely that creditors will have a harder time collecting monies awarded by judicial and arbitral tribunals. These factors may produce modifications to or even restrictions on funders' approach to potential cases, despite the scope for the initiative of stress funds.

In the years to come, it seems that TPF will consolidate its position in Brazil, given its still unexplored potential in the field. Exactly how this potential will be developed is a question that will be answered definitively in the near future.

Endnotes

1 Rodrigo de Magalhães Carneiro de Oliveira and Eider Avelino Silva are partners, Rafael Curi Savastano is a senior associate and Guilherme Fonseca Schaffer is a junior associate at Pinheiro Neto Advogados. ^ Back to section

2 Data regarding arbitrations initiated between September 2022 and September 2023. ^ Back to section

3 Information available at https://www.camaradomercado.com.br/assets/pt-BR/2022-estatisticas-camara-do-mercado-versao-final.pdf (accessed 9 October 2023). ^ Back to section

4 Grion, Renato Stephan; Zanelato, Thiago Del Pozzo. 'Breves Notas sobre o Uso de Third Party Funding em Arbitragens Coletivas Societárias'. In Monteiro, André Luís et. al. Arbitragem Coletiva Societária. São Paulo. Ed.*Revista dos Tribunais*. 2021. pp. 557–570. ^ Back to section

5 For a full review of the main types of funding available, see Cardoso, Marcel Carvalho Engholm.*Arbitragem e financiamento por terceiros*. São Paulo. Ed. Almedina. 2020. pp. 53–76. ^ Back to section

6 Preliminary dispute resolution figures for 2021 from the ICC Dispute Resolution Statistics report, available at https://iccwbo.org/media-wall/news-speeches/icc-unveils-preliminary-dispute-resolution-figures-for-2021/ (accessed on 3 October 2022). ^ Back to section

7 Information available at: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/facts-figures/ (accessed on 9 October 2023). ^ Back to section

8 Information available at: https://www.migalhas.com.br/arquivos/2022/10/78B3FD4545063E_pesquisa-arbitragem.pdf (accessed on 9 October 2023). ^ Back to section

9 Information available at https://www.cnj.jus.br/wp-content/uploads/2023/09/sumario-executivo-justica-em-numeros-200923.pdf (accessed on 3 October 2023). ^ Back to section

10 As explained in a webinar held on 18 August 2020, and available at https://www.youtube.com/watch?v=E_cwDGjm8SU. ^ Back to section

11 https://www.leste.com/pt/ (accessed on 9 October 2023). ^ Back to section

12 https://www.lex-finance.com/BR/#our-products (accessed on 9 October 2023). ^ Back to section

13 Information available at https://valor.globo.com/legislacao/noticia/2019/10/20/fundos-nacionais-e-estrangeiros-decidem-apostar-em-arbitragem.ghtml (accessed on 9 October 2023). See also https://www.harbourlitigationfunding.com/ (accessed on 9 October 2023). ^ Back to section

14 Bill of Law No. 2,925/2023, under debate before the Brazilian House of Representatives. ^ Back to section

15 '7.1. The party that wishes to commence an arbitration shall submit a request for arbitration to the CAM-CCBC, which shall contain the following items: […] (h) Information on related parties and third-party funding (as per articles 9.5 and 9.6).''8.1 The CAM-CCBC secretariat shall notify the other party as to the request for arbitration and the documents that support it, requesting that it presents its response, within 15 (fifteen) days, which shall contain: […] (g) Information on related parties and third-party funding (as per articles 9.5 and 9.6).''9.6 The parties must promptly disclose the existence of third-party funding in order to allow the arbitrators to verify and disclose any conflict of interest.'Available at https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/arbitration/arbitration-rules-2022/ (accessed on 9 October 2023). ^ Back to section

16 The new Article 3-A.1 of the CMA CIESP/FIESP Code of Ethics states: 'The presence of a third-party funder may be relevant to an assessment of the arbitrator's independence and impartiality, especially if there is any previous or current relationship between the arbitrator and the third-party funder. Therefore, it is recommended that the party to the arbitration being funded by a third party reveals, in writing and at the first opportunity, the existence of the funding and complete qualifying information about the third-party funder' (free translation). Original Portuguese version available at: http://www.camaradearbitragemsp.com.br/pt/res/docs/Resolucao_n_6.2019.pdf (accessed on 3 October 2022). ^ Back to section

17 'Article 11(7) – In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which 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.' Available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (accessed on 9 October 2023). ^ Back to section

18 'Section II(D) Article 20 – To assist arbitrators and prospective arbitrators in complying with their duty of disclosure (see section III(A)), each party must, pursuant to Article 11(7), 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 and defences and under which that non-party has an economic interest in the outcome of the arbitration. For example, the non-party is entitled to receive all or part of the proceeds of the award'. Available at: https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (accessed on 9 October 2023). ^ Back to section

19 'Section II(D) Article 21 – Subject to any different determination that may be made by the arbitral tribunal in the circumstances of any given case, Article 11(7) would normally not capture (i) inter-company funding within a group of companies, (ii) fee arrangements between a party and its counsel, or (iii) 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'. Available at https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (accessed on 9 October 2023). ^ Back to section

20 The IBA Guidelines on Conflict of Interests in International Arbitral were mentioned in the reasoning of four of the latest five decisions on challenges to arbitrators in CAMARB arbitrations (https://camarb.com.br/wpp/wp-content/uploads/2021/11/2021-11-29-digesto-camarb-consolidado-rev-ceparb-final-v2.pdf. Accessed on 9 October 2023). ^ Back to section

21 The São Paulo Court of Appeals has been applying the IBA Guidelines on Conflict of Interests in International Arbitration in high-profile arbitral award annulment proceedings (appeal No. 1076161-35.2017.8.26.0100. Rapp. Justice Francisco Casconi, 31st Private Law Chamber, judgment dated 8 September 2020; appeal No. 1097621-39.2021.8.26.0100. Rapp. Justice Jorge Tosta, 2nd Comercial Chamber, judgment dated 22 November 2022). ^ Back to section

22 'Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms "third-party funder" and "insurer" refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.' Available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed on 9 October 2023). ^ Back to section

23 Article 14 of the BAA: 'The persons in any way related to the litigants or to the litigation itself in such a way as to fall within the applicable disqualification or recusation criteria shall be disqualified from acting as arbitrators, and shall be subject – to the extent applicable – to the same duties and responsibilities as set out in the Code of Civil Procedure' (free translation). ^ Back to section

24 Article 144 and 145 of the BCCP. ^ Back to section

25 See Special Appeal No. 805,919/MG, Reporting Justice for the decision: Justice Raul Araújo, Fourth Panel of the SCJ, judgment dated 13 October 2015. ^ Back to section

26 Article 50 of the Brazilian Bar Association Code of Ethics. ^ Back to section

27 Article 85, Paragraph 2 of the BCCP. ^ Back to section

28 See Special Appeal No. 1.155.200/DF, Reporting Justice for the decision: Justice Nancy Andrighi, Third Panel of the SCJ, judgment dated 22 February 2011. ^ Back to section

29 Brazilian Civil Code: Article 104. 'A valid legal transaction requires: I – a person with legal capacity; II – a lawful, possible, determined and determinable subject matter; III – a form prescribed or not proscribed by law.' ^ Back to section

30 Cardoso, Marcel Carvalho Engholm.*Arbitragem e financiamento por terceiros*. São Paulo. Ed. Almedina. 2020. pp. 91–102. ^ Back to section

31 For an overview, see Nogueira, Daniel Jacob. 'A mais doce das jabuticabas: os honorários de sucumbência na arbitragem comercial brasileira'. In Casado Filho, Napoleão et. al.*Direito Internacional e Arbitragem: Estudos em Homenagem ao Prof. Cláudio Finkelstein*. São Paulo. Quartier Latin. 2019. pp. 521–538. ^ Back to section

32 Information available at https://www.camaradomercado.com.br/assets/pt-BR/5-edicao-ementario.pdf (accessed 9 October 2023). ^ Back to section

33 See EREsp No. 1.507.864/RS, Reporting Justice Laurita Vaz, Special Court of the SCJ, judgment dated 20 April 2016. ^ Back to section

PINHEIRO NETO
ADVOGADOS

Rodrigo de M Carneiro de Oliveira rcarneiro@pn.com.br
Eider Avelino Silva eavelino@pn.com.br
Rafael Curi Savastano rsavastano@pn.com.br
Guilherme Fonseca Schaffer gschaffer@pn.com.br

Pinheiro Neto Advogados

Read more from this firm on Lexology

Canada

Hugh A Meighen and **Glenn Gibson**
Borden Ladner Gervais LLP

Summary

INTRODUCTION
THE YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

Third party funding (TPF), or dispute finance as it is increasingly termed, has been embraced into the mainstream of Canadian litigation, including in terms of the types of parties using litigation funding, the scenarios in which parties rely upon litigation funding and the perspectives expressed by courts and lawmakers. As discussed in greater detail below, the law has confirmed the suitability of TPF in the context of class proceedings, bankruptcy proceedings and single-party commercial litigation, subject to certain requirements. As a result, the opportunities in the Canadian market for TPF are increasing.

International funders have taken note. Recent case law refers to a number of international litigation funders, including an Irish funder, Claims Funding International, British funders, Redress and Harbour, an American funder, Galactic TH Litigation Funders LC and an Australian funder, Omni Bridgeway (formerly known as Bentham IMF), which was the first to open a Canadian office, in 2016, and expanded to Quebec (Canada's only civil law jurisdiction) in 2018. Other funders have since followed with operations in Canada, such as Augusta Ventures, and have developed locally, such as Nomos Capital.

The development of Canadian law and the Canadian legal market for TPF has been self-reinforcing. Increased funding opportunities have resulted in greater opportunities for the Canadian courts to scrutinise third party funding agreements (TPFAs), and to develop more sophisticated rules governing them. This exposure has brought the opportunity of funding to the fore. As one class actions lawyer recently noted, contingency fees are becoming increasingly insufficient to meet the costs of litigating a matter, and law firms are increasingly concerned with the risk involved in contingency fees: 'it is now beyond the capacity of most firms to self-fund . . . they have to get funding'.[2] Moreover, in one judgment involving a TPFA,[3] the court noted that 'anecdotal evidence suggests that indemnity agreements became more popular than resorting to the Class Proceedings Fund'.[4] One reason for the popularity of TPF over the Class Proceedings Fund is that the latter has relatively limited resources, does not provide compensation for legal fees and covers only limited disbursements during the proceedings.

The jurisprudence regarding TPF has been typically considered in the context of class proceedings, as courts in Canadian common law jurisdictions (all provinces aside from Quebec) must approve a TPFA at the outset of the case for it to be binding on the class. At the same time, however, litigation funding for single-party commercial litigation and bankruptcy proceedings is becoming more commonplace in Canada. In this connection, litigation funders report seeing increased appetite from commercial claim holders, including many who are financially well-resourced, looking at funding to advance their claims, just as they might finance any other corporate asset.

The year in review

In past years, the development of the law on TPF has been defined by the consolidation of jurisprudence regarding TPFAs in different types of legal proceedings, including class actions, single-party commercial litigation and bankruptcy. The courts in Canada are grappling with the issue of how involved they should be in scrutinising the commercial

bargain of the parties to a TPFA. Significantly, the decisions in *Goldenkey Oil Inc. (Re)* and *Gebien* suggest that the courts will take a hands-on approach and scrutinise the terms and broader context of an agreement. The disposition of the court as it relates to commercial terms of a TPFA and how these terms reflect access to justice, which remains a primary concern of the courts when considering TPFAs (especially in the class actions context) will be an important trend to follow in coming years.

The Court of Appeal's decision in *Davies* also opens the door to the risk that litigation funders will face adverse costs awards. Although the funders were not held liable for the defendants' costs in that case, funders should carefully consider their conduct and role in the litigation. How courts interpret *Davies* will be an important area of TPF law in Canada, and should be followed closely.

Legal and regulatory framework

i Maintenance and champerty

For most of the 20th century, the legal landscape regarding TPF was overshadowed by the common law doctrines of maintenance and champerty.[5] The Court of Appeal of Ontario described these concepts *in McIntyre Estate v. Ontario (Attorney General)* as follows:[6]

> maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation

The concept of and prohibition on champerty have long been codified in the Act Respecting Champerty RSO (1897) (Champerty Act), which states that:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
>
> 2. All champertous agreements are forbidden, and invalid.

As outlined in jurisprudence and in the Champerty Act, the prohibition on maintenance and champerty is intended to discourage 'unnecessary' litigation[7] in Canadian courts as a result of the 'officious intermeddling' of a third party. The law took a particularly dim view of an individual deriving a profit from this misconduct, so much so that champerty was criminalised in Canada until the mid-20th century.

Notwithstanding the prohibitions against maintenance and champerty, the concept left open the possibility of 'proper' forms of litigation support. More specifically, the courts' early analysis of the issue in *Newswander v. Giegerich* emphasised the concern over a maintainer (i.e., the third party that maintains the party with a direct interest in the claim) who is 'stirring up strife'.[8] In other words, the motive of an alleged maintainer was particularly important to determine if the act was, in fact, maintenance.

Champerty in Canada is a 'subspecies' of maintenance, as there cannot be champerty without maintenance.[9] Accordingly, the concept of champerty in Canadian law similarly invokes the concept of proper and improper motives underpinning litigation funding. In *Goodman v. R*,[10] Goodman was charged with champerty after agreeing to assist an improvident claimant injured by a streetcar in exchange for a share of any proceeds. However, the Supreme Court of Canada (SCC) quashed Goodman's conviction and held that his conduct did not amount to officious intermeddling as he had not stirred up strife.[11] Following *Newswander and Goodman*, maintenance and champerty were removed from the Criminal Code in 1953.[12]

The prospect of TPF in Canada was significantly enhanced in the early 2000s when helpful jurisprudence developed in the context of contingency fee arrangements and class proceedings. Most notably, in 2002, the Ontario Court of Appeal found that the interests of justice can, in fact, be served by allowing third parties to fund litigation. In *McIntyre Estate*,[13] a plaintiff who intended to commence an action against Imperial Tobacco and Venturi Inc for wrongful death of her husband first sought a declaration from the Court that the contingency fee arrangement with her lawyers was not prohibited by the Champerty Act. The Ontario Court of Appeal found that a determination of the proposed agreement as champertous depended on the outcome of the litigation. It considered the funder's motive as a proper consideration and confirmed that a decision as to whether a particular agreement is champertous is a fact-dependent determination, requiring the court to inquire into the circumstances and the terms of the agreement.[14] In making these findings, it was clear that the Court was aware of increasing concerns over access to justice and the potentially beneficial role of contingency fee agreements in this regard. This evolution in the priorities of the Canadian justice system necessitated a more flexible understanding of champerty and the applicability of the Champerty Act.

ii Class action funding

Class proceedings have provided a fruitful area for the development of Canadian jurisprudence regarding TPFAs. Much of the law has developed around this model in the class proceedings context, as TPFAs concluded between a representative plaintiff and a TPF are subject to the requirements of judicial review and approval.[15]

In 2009, the courts considered the legality of TPFAs in *Metzler Investments GMBH v. Gildan Activewear Inc* in detail.[16] In *Metzler*, a representative plaintiff moved for the approval of a costs indemnification agreement entered into with an Irish company whose main business was litigation funding in Europe. Relying upon the analysis of *McIntyre*, the court applied the existing law on contingency fee arrangements to third party involvement in litigation. It found that case law pointed to 'two crucial elements' that constitute a champertous agreement:[17] the involvement must be spurred by some improper motive; and the result of that involvement must enable the third party to possibly acquire some gain following the disposition of the litigation.

As a TPFA has, by its very nature, the purpose of gain for the third party following the disposition of the litigation, the first consideration was most vital to the assessment of champerty in the context of TPF. *Metzler*, therefore, confirmed that the principles of fairness and reasonableness, the importance of the motive underpinning the funding arrangement and the increasingly relaxed application of the Champerty Act – all of which developed in

the context of the *McIntyre Estate* analysis of contingency fee arrangements – could apply equally in the context of TPFAs.

Since 2009, the judicial review of TPFAs between funders and representative plaintiffs in class proceedings has provided useful guidance on the law applicable to TPF. For example, the courts have provided useful commentary in the following cases.

1. In *Dugal v. Manulife Financial Corp*,[18] Strathy J approved a funding agreement under which a third party agreed, inter alia, to indemnify the plaintiffs against their exposure to the defendants' costs, in return for a 7 per cent share of the proceeds of any recovery in the litigation.[19] The court built upon the principles articulated in *McIntyre Estate* and *Metzler*,[20] and recognised that funding agreements had been approved in other provinces of Canada, albeit without reasons,[21] as well as in other common law jurisdictions around the world.[22]
2. In *Fehr v. Sun Life Assurance Company of Canada* (*Fehr*),[23] the court discussed the law on litigation funding and reviewed the key judgments (identified as *McIntyre Estate* in 2002, *Metzler* in 2009 and *Dugal* in 2011).[24] It concluded that TPFAs are not categorically illegal on the grounds of champerty or maintenance, but a particular TPFA might be illegal as champertous or on some other basis, and that a plaintiff must obtain court approval to enter into a TPFA.
3. In *Labourers' Pension Fund v.* Sino-Forest,[25] the representative plaintiffs moved for approval of a funding agreement that was described by the court as being nearly identical to the one approved by Justice Strathy in *Dugal*.[26] The court nevertheless identified individual key terms of the funding agreement, including the grounds of the funder's agreement to pay the plaintiffs' adverse costs orders and the terms of recovery on a settlement or judgment in favour of the plaintiffs. Upon doing so, the court approved the funding agreement.
4. In *Bayens v. Kinross Gold Corporation*, the court noted that the 'concept of third party funding is a work in progress' and that 'courts have been left to develop the approval criteria for third party funding largely on their own initiative, relying on common sense, knowledge of the problems of access to justice and of the administration of justice, and academic commentary'.[27] While the court did not go into the same detail regarding the terms of the funding agreement, it nevertheless approved the agreement based on principles derived from the above-mentioned cases (and particularly, *Fehr, Metzler* and Dugal).
5. In *Houle v. St Jude Medical Inc*,[28] the Ontario Superior Court (ONSC) provided a thorough analysis of the law regarding approval of TPFAs and specific terms contained therein. The ONSC once again confirmed that 'deciding whether to approve a [TPFA] will depend upon the particular circumstances of each case';[29] however, it also opined that, based on the foregoing case law, the court must be satisfied of at least four criteria to approve a TPFA.[30] On appeal, the Divisional Court seemingly confirmed the above analysis by noting that the ONSC 'applied the proper principles and provided a roadmap to the parties if they wish to proceed under the proposed type of arrangement'[31] and upheld the decision of the ONSC.
6. The law on TPF developed significantly in Quebec, Canada's only civil law jurisdiction, in 2014. In *Marcotte v. Bank of Montreal*, a class action against chartered banks was funded by two third parties. Like the analysis of funding arrangements

in common law provinces, the Superior Court of Quebec determined that, without funding from third parties, the plaintiffs could not have pursued the case and been reimbursed fees that had been illegally collected by the financial institutions, and that funding provided a 'path to justice'.[32]

7. In *Difederico v. Amazon.com Inc*,[33] the Federal Court in a class action claiming damages of C$12 billion approved a funding agreement wherein the funder agreed to pay disbursements and adverse costs up to a confidential maximum, as well as security for costs if required. In approving the funding agreement, the Federal Court noted that funding was required to facilitate access to justice as the case would otherwise not be prosecuted without a funder's support. Without developing the basis for the observation, the Court commented that TPF ought not to be approved if it is not necessary for a particular proceeding, which is arguably a novel formulation of the test in that it elevates this factor to being determinative or 'paramount', as discussed by the Divisional Court in *Houle* [34] at paragraph 31.

For further examples of court consideration of TPFAs, see *Stanway v. Wyeth Canada Inc*,[35] *Schneider v. Royal Crown Gold Reserve Inc*,[36] *Berg v. Canadian Hockey League*,[37] *David v. Loblaw*,[38] *JB & M Walker v. TDL Group*,[39] *Drynan v. Bausch Health Companies Inc*,[40] *Tidd v. Regional Health Authority*,[41] *Heller v. Uber Technologies Inc*,[42] *Lilleyman v. Bumble Bee Foods LLC*,[43] *Galloway v. AB*,[44] *Flying E Ranche Ltd v. Canada (Attorney General)*,[45] *Kan v. Kew Media Group Inc.*[46] and, most recently, *Lewis v. Uber Canada et al*,[47] *Wasylyk v. Lyft Inc.*,[48] *Hoy v. Expedia Group*,[49] *Lochan v. Binance Holdings Limited*[50] and *Pinnizzotto v. Tilt* Holdings Inc.[51]

In July 2020, Ontario introduced amendments to the Class Proceedings Act 1992 (CPA), including various new provisions concerning TPF and requirements for the approval of TPFAs.[52] Under the new legislation, which came into force in October 2020, a court will not approve a TPFA unless it is satisfied that the agreement is fair and reasonable, the agreement does not impair the solicitor–client relationship and the funder will be able to satisfy adverse cost awards to the extent it has agreed to provide an indemnity for such risks. The amended CPA also allows successful defendants in class actions to recover any awarded costs directly from the unsuccessful claimant's funder.

A notable recent case is *Gebien v. Apotex Inc.*,[53] where a group of defendants successfully objected to certain provisions in a TPFA. The court agreed with the objection to the provision that entitled the funder to disseminate documents to broadly defined affiliated companies, with no limits on what use could be made of the disclosed confidential information. Perell J adjourned the motion to approve the TPFA to provide the parties with the opportunity to resolve the objections.

iii Single-party commercial litigation

Despite the above jurisprudence in the class proceedings context, as at 2015, the law on TPF in Canada remained relatively underdeveloped in the context of single-party commercial litigation. However, that year, the courts took a step forward in *Schenk v. Valeant* (*Schenk*).[54]

In *Schenk*, the court case drew upon the jurisprudence in the class proceedings context and extended similar principles to single-party commercial litigation. Justice McEwen

commented that 'typically, such agreements have arisen in class proceedings' but that he saw 'no reason why such funding would be inappropriate in the field of commercial litigation.'[55] McEwen J also commented that 'the statutory and common law prohibition on champerty and maintenance in the Province of Ontario must be considered'.[56] In applying this law to the facts of the particular TPFA at issue in *Schenk*, the ONSC declined to approve the agreement.[57] However, McEwen J granted the plaintiff, Schenk, the opportunity to revise the agreement and bring a further motion for approval. In other words, there is no reason why TPF cannot exist in the single-party commercial litigation context, but TPFAs must be based upon reasonable and fair terms.

There have been further decisions in the single-party commercial context. For example, in *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc* (*Seedlings*),[58] the court considered the enforcement of the plaintiff's patent against an international pharmaceutical company. Seedlings sought approval of the agreement, but, as explained in Section V.ii, the Court ultimately concluded that it did not need to approve the funding agreement. This case demonstrates the growth of funding beyond the class action context, which has contributed to an increasing divergence in the law applicable to TPFAs in the class action context and those in the context of single-party litigation. Indeed, following *Seedlings*, it would be surprising for a commercial user of funding to seek court approval of how a claim is to be financed.

The developing common law has also applied to bankruptcy proceedings. In a March 2018 decision, *Re 9354 9186 (formerly Bluberi Gaming Technologies Inc) and 9354 9178 (formerly Bluberi Group Inc)*,[59] the Quebec Superior Court relied upon *Kinross* (cited above under class actions) and *Hayes v. City of Saint John*[60] to find that TPFAs 'should be approved, subject to [certain] principles' that reflect the considerations addressed in common law jurisprudence. The SCC ultimately upheld the judgment of the Quebec Superior Court, by focusing on the fairness of the TPFA in its reasons, which harkens back to the guiding principles first articulated in *McIntyre Estate*. The Court unanimously found that the Companies' Creditors Arrangement Act Court properly exercised its discretion to approve the relevant TPFA after finding it to be fair and reasonable. The TPFA was not a plan of arrangement and did not need to be presented to Bluberi's creditors for a vote.

More recently, in *Goldenkey Oil Inc. (Re)*,[61] an Alberta court confirmed that an insolvent company must provide sufficient evidence to enable the court to approve a litigation funding agreement under the Bankruptcy and Insolvency Act (BIA). Specifically, the court must be satisfied that the proposed financing is reasonable, appropriate and furthers the objectives of the BIA. No evidence was provided in respect of whether other financing options were explored, why the agreement was in the best interests of the creditors and the strength of the proposed claim, and the application was therefore dismissed.

Structuring the agreement

i Class actions

Canadian case law demonstrates that parties to a TPFA must conclude an agreement that the courts will approve as being fair and reasonable and non-champertous. In recent

judgments, the courts have focused on the typical clauses in TPFAs in the Canadian market to assess fairness, such as:

1. the terms on which the funder will pay legal fees, disbursements, security for costs (if ordered), costs assessed against the plaintiff and a portion of docketed time of counsel;

clauses governing the flow of information regarding the proceedings;

1. the agreement on the portion of the proceeds granted to the funder if the action is successful;
2. clauses regarding the conduct of proceedings and settlement, including confirming that counsel take instructions from the clients, not from the funder;
3. the representations and warranties of the claimants in respect of the claims and the pursuit thereof; and
4. the termination provisions, both in terms of the right to terminate the TPFA and the consequences thereof.

In construing the above terms and determining whether they are unfair or champertous (or both), the courts will rely upon judgments regarding similar terms captured in other TPFAs. For example, as set out in Section III.ii, the ONSC recognised that the TPFA at issue in *Labourers' Pension Fund* was materially the same agreement as had been approved in *Dugal*.[62] The Court approved the TPFAs, as submitted, in both cases. However, as funding arrangements expand beyond the costs-indemnity-plus-minimal-disbursements model seen in the early class action jurisprudence, comparisons to prior agreements may be more difficult to make. For example, in *JB & M Walker*, the funder agreed to pay all the legal fees and disbursements, in addition to covering any costs awards, so it was more difficult to draw analogies to earlier cases.

ii Single-party commercial litigation

While the courts have a broad supervisory role over class actions, consistent with the responsibility to protect the interest of class members, no such mandate exists in single-party litigation. If called upon to review a funding agreement, it appears that the courts will look to the three key criteria set out in *Schenk*: the funder did not 'stir up' the litigation; the funder cannot control the litigation; and the funder's return must be reasonable. In *Schenk*, the court drew guidance from Ontario's Contingency Fee Regulations, which allow a return of up to 50 per cent of the litigation proceeds.

Disclosure

Disclosure issues and the question of legal privilege have developed differently in the class proceedings setting compared to the single-party commercial litigation setting. In determining what may need to be disclosed, and what aspects of a TPFA may be privileged, the setting of the dispute is important.

Disclosure issues and the question of legal privilege have developed differently in the class proceedings setting compared to the single-party commercial litigation setting. In determining what may need to be disclosed, and what aspects of a TPFA may be privileged, the setting of the dispute is important.

i Class actions

The disclosure obligations vary by province. For example, in Alberta and Nova Scotia, the courts will approve an agreement on an *ex parte* basis.[63] However, in New Brunswick, the defendants must be given notice, but are not provided with a copy of the TPFA and can therefore only address overall principles without application to the specific agreement.[64]

Ontario and British Columbia require notice to the defendants, who must receive a copy of the agreement. As set out in *Kinross*, in the class proceedings context, 'a TPFA must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed to ensure that there are no abuses or interference with the administration of justice. The TPFA is not itself a privileged document.'[65] Under the amended CPA, plaintiffs are required to share a TPFA with defendants and file a copy of the agreement, subject to redaction of information that may reasonably be considered to confer a tactical advantage.-[66]

The issue of privilege in a class proceeding context also arose in *Fehr*. In this case, the court reaffirmed that TPFAs are not privileged and even if they were, that privilege has either been rebutted or waived.[67] Consequently, the court cautioned that 'as a matter of best practices, an applicant for third party funding should not include extraneous and otherwise privileged information in a third party funding agreement'.[68]

In *David v. Loblaw*,[69] the court was confronted with an objection by defendants in a proposed class action over an undertaking for security for costs by Bentham IMF (now Omni Bridgeway), arguing that the redaction of the cap on funding obligations raised concerns over the sufficiency of the undertaking. In response to the objection, the court confirmed that it had reviewed the unredacted version submitted to the court under seal and that it was satisfied that the funder's obligations to fund the litigation would be sufficient to address any adverse costs award. Therefore, the parties may redact terms that provide insight into budget and strategy, as long as those terms are disclosed to the court.

ii Single-party commercial litigation

In the commercial litigation setting, the Federal Court has found that 'there are no procedural requirements for the approval of a party's funding agreement outside of class proceedings'[70] and that the question is strictly a matter of contract between the funder and the plaintiff. In *Seedlings Life Sciences Ventures LLC*, the Federal Court declined to approve the TPFA, ruling that 'where the Plaintiff is asserting its own rights against the Defendant, th[e] Court has no jurisdiction to make any determination in respect of any funding agreement to which the Plaintiff is a party'.[71] To the apparent benefit of funded litigants in the commercial litigation setting, the Court questioned why its approval would be necessary and confirmed that a 'defendant has no legitimate interest in enquiring into the reasonability, legality or validity of [the plaintiff's] financial arrangements, its counsel's fee

structure or the manner in which [the plaintiff] chooses to allocate the risks and potential returns of the litigation'.[72]

In both *Schenk* and *Seedlings*, the agreement came before the court because the funder and plaintiff chose to make the agreements subject to court approval. The finding in *Seedlings* appears to narrow the applicability of the champerty and maintenance issue to the funder and funded plaintiff only, rather than being a relevant consideration in the action between the funded plaintiff and defendant. While not yet conclusively resolved, this narrowing of the champerty issue seems to limit the need to disclose terms of a TPFA in the context of single-party commercial litigation (although clients and their funders may continue to voluntarily disclose their agreements in any event as a strategic consideration).

On the issue of privilege in the commercial litigation setting, the Federal Court has found that litigation privilege attaches to certain aspects of the TPFA at issue, particularly in respect of the details regarding the funding commitment and the temporal variables of the indemnity provisions, which, if disclosed, would provide a tactical advantage to the opposing party.[73]

Costs

In Canada, costs awards typically follow the event, such that the successful party is entitled to recover a portion of its legal costs. In the litigation context, the recovery is determined on a partial, substantial or full indemnity basis. Substantial indemnity on costs is typically reserved for exceptional cases, particularly where there is reprehensible conduct by a party either in the circumstances giving rise to the claim or during the course of the proceedings.

In the context of TPFAs in class proceedings, the courts have required a funder to provide security for costs as a precondition for approving a TPFA[74] or, more recently, an undertaking for security for costs.[75] In a Quebec insolvency proceeding the court emphasised the importance of a funder bearing responsibility for potential adverse costs orders, approving the funding agreement only after this expectation was clarified in the funding agreement.[76] The issue of whether a defendant would be given a direct right against the security was previously unresolved in case law,[77] but has been addressed in Ontario by the revised CPA, which indicates that a defendant has a direct right of action against a funder, to the extent of the indemnity provided by the funder.[78]

The issue of costs in the context of funded class proceedings have more recently been raised as a factor in determining costs allocations. As set out in *MacDonald et al v. BMO Trust Company et al*,[79] it should be 'self-evident observation — that third-party funding should be a relevant factor in the "risks incurred" analysis" for determining recoverable costs. However, the principle should not be applied retroactively where the proceedings commenced under different circumstances: 'it may be unfair to impose this new risk metric retroactively on a class action that was undoubtedly commenced under a very different expectation.'[80]

In *Davies v. Clarington (Municipality)*,[81] the court of appeal denied the defendant's right to recover costs against a TPFA funder where funding that was not court-approved was obtained after certification of a class proceeding and for the purposes of the individual damages assessment. The court of appeal found that, while a non-party can be ordered to pay costs to the successful party, those circumstances are limited to when (1) the non-party

was the true litigant, and put forward the named party to protect against liability for costs; or (2) the non-party initiated or conducted the litigation as an abuse of process. The court of appeal found that the individual's extravagant claims, litigated in 'an outrageously time-consuming manner', were not controlled by the lenders, barring recovery of costs against the lenders.[82]

In arbitration, the issue of costs is determined at the discretion of the tribunal. Domestic arbitration statutes typically grant the tribunal the discretion to award costs. In Ontario, the Arbitration Act, 1991 further sets out factors, such as the value of a prior offer to settle, that may be taken into consideration by the tribunal when considering a costs award. The presence or absence of a funding agreement is not expressly included in the factors that a tribunal may consider when rendering a costs award.

Outlook and conclusions

Overall, the law regarding TPFAs continues to develop favourably for the funding industry in Canada. For commercial matters, we see little new law on funding, as these arrangements have come to be viewed as financial arrangements that are not within the purview of the judge deciding a case. In class proceedings, there are further examples of successfully approved TPFAs (e.g., *Lewis v. Uber Canada et al*,[83] *Wasylyk v. Lyft Inc.*[84] and *Lochan v. Binance Holdings Limited*[85]), which provide further clarity on the components of an acceptable TPFA in that context.

It will also be important to watch the extent to which legislatures guide the evolution of TPF in Canada. Legislatures have begun amending existing statutes to address TPF. For example, the recently amended British Columbia International Commercial Arbitration Act modified recognition and enforcement provisions to expressly confirm that 'for the purposes of subsection (1)(b)(ii), third party funding for an arbitration is not contrary to the public policy in British Columbia'.[86] Similar reforms are being considered in other provinces, including Alberta. Additionally, in May 2021, the government announced a new model bilateral investment treaty known as the foreign investment promotion and protection agreement model, which includes obligations for claimants to disclose TPF.

Finally, following the Final Report of the Law Commission of Ontario released in July 2019, which made a number of recommendations for the amendment of the CPA to permit TPF, Ontario introduced an amended CPA in 2020 with specific provisions[87] dealing with TPFAs. All of these developments suggest a greater role and interest in TPF from Canadian legislatures (both federal and provincial), which could take a more active role in steering this area of law into the future, either to capture the principles that have been articulated in jurisprudence to date or introduce additional considerations in response to the growing dispute finance market.

Endnotes

1 Hugh A Meighen is a partner and Glenn Gibson is an associate at Borden Ladner Gervais LLP. The author wishes to thank Paul Rand and Aryan Ziaie of Omni Bridgeway Canada for their assistance in preparing this chapter. ^ Back to section

2 'Third-Party Litigation Funding',*Canadian Lawyer Magazine*, 3 January 2017. ^ Back to section

3 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974 (*Kinross*). ^ Back to section

4 ibid. at para. 31. The Class Proceedings Fund, which has been established by the Law Foundation of Ontario, 'provides financial support to approved class action plaintiffs for legal disbursements' and 'indemnifies plaintiffs for costs that may be awarded against them in funded proceedings'. Class Proceedings Fund, 2017 Law Foundation of Ontario, online source: www.lawfoundation.on.ca/class-proceedings-fund. ^ Back to section

5 It is worth noting that champerty is a common law concept and, as confirmed by the Quebec Court of Appeal in*Montgrain v. Banque Nationale du Canada*, 2006 QCCA 557, 'the concept of champerty is inapplicable in Quebec civil law' (para. 63). ^ Back to section

6 *McIntyre Estate v. Ontario (Attorney General)*, 61 OR (3d) 257 (*McIntyre Estate*), at para. 26. ^ Back to section

7 *Fischer v. Kamala Naicher*, 8 Moo Ind. App. 170 at p. 187, cited in *Newswander v. Giegerich* [1907] 39 SCR 354 at p. 361. ^ Back to section

8 *Newswander v. Giegerich* [1907] 39 SCR 354 (*Newswander*). ^ Back to section

9 *McIntyre Estate*, at para. 34. ^ Back to section

10 [1939] SCR 446 (*Goodman*). ^ Back to section

11 'Maintenance and Champerty' Bentham IMF (12 September 2017), online source: https://omnibridgeway.com/docs/default-source/insights/regulation/legal-landscape-canada/legal-landscape-canada_maintenance-and-champerty-article-(002).pdf?sfvrsn=14d4ad5b_2. ^ Back to section

12 The Criminal Code was consolidated in 1953, at which time all common law offences were abolished. However, under the Champerty Act, champerty remained a tort in common law jurisdictions and has typically had the effect of acting as a shield against the enforcement of champertous agreements (rather than serving as the basis of an action for damages, as in Newswander). ^ Back to section

13 61 OR (3d) 257; 218 DLR (4th) 193; [2002] OJ No. 3417 (QL); 116 ACWS (3d) 527; 164 OAC 37;23 CPC (5th) 59 (Ont CA) (*McIntyre* Estate). ^ Back to section

14 *McIntyre Estate*, at para. 27, 32, and 79-80. See also R Agarwal and D Fenton, 'Beyond Access to Justice: Litigation Funding Agreement Outside the Class Actions Context' 59 CBLJ 65 (Thompson Reuters), at p. 65. ^ Back to section

15 R Agarwal and D Fenton, 'Beyond Access to Justice: Litigation Funding Agreement Outside the Class Actions Context' 59*CBLJ* 65 (Thompson Reuters), at p. 65. ^ Back to section

16 *Metzler Investment GMBH v. Gildan Activewear Inc.*, 2009 CanLII 41540 (ON SC) (*Meltzer*). ^ Back to section

17 ibid., at paras. 44–45. ^ Back to section

18 *Dugal v. Manulife Financial Corp*, 2011 ONSC 1785 (Ont SCJ), at paras. 16 and 37 (*Dugal*); see also *Dugal v. Manulife Financial Corp*, 2011 ONSC 3147 (Ont SCJ), at para. 5. ^ Back to section

19 ibid., at para. 1. ^ Back to section

20 ibid., at paras. 19–20. ^ Back to section

21 For example,*MacQueen v. Sydney Steel Corp* (19 October 2010), Action 218010 (NSSC), cited at ibid., at para. 22. ^ Back to section

22 *Dugal* at para. 24. ^ Back to section

23 2012 ONSC 2715 (*Fehr*). ^ Back to section

24 See*Labourers' Pension Fund v.* Sino-Forest, 2012 ONSC 2937, para. 11. ^ Back to section

25 2012 ONSC 2937 (*Labourers' Pension Fund*). ^ Back to section

26 ibid., at para. 9. In fact, the funder in*Labourers' Pension Fund* was the same entity as had appeared in *Meltzer* and Dugal. ^ Back to section

27 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974. ^ Back to section

28 *Houle v. St Jude Medical Inc*, 2017 ONSC 5129, para. 18. ^ Back to section

29 ibid. at para. 72. ^ Back to section

30 ibid., at para. 63. (1) the agreement must be necessary to provide access to justice; (2) the access to justice facilitated by the TPFA must be substantively meaningful; (3) the agreement must be a fair and reasonable agreement and facilitate access to justice while protecting the interests of the defendants; and (4) the third party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching and champertous. ^ Back to section

31 *Houle v. St. Jude Medical Inc*, 2018 ONSC 6352 (CanLII), at para. 52. ^ Back to section

32 *Marcotte v. Banque de Montréal*, 2015 QCCS 1915. ^ Back to section

33 *Difederico v. Amazon.com Inc*, 2021 FC 311 (CanLII). ^ Back to section

34 *Houle* (2018 CarswellOnt 17713 (Ont. Div. Ct.). ^ Back to section

35 2013 BCSC 1585. ^ Back to section

36 2016 SKQB 278. ^ Back to section

37 2016 ONSC 4466. ^ Back to section

38 2018 ONSC 6469. ^ Back to section

39 *JB & M Walker Ltd/1523428 Ontario Inc. v. TDL Group*, 2019 ONSC 999. ^ Back to section

40 *Drynan v. Bausch Health Companies Inc*, 2020 ONSC 4379 (*Drynan*). ^ Back to section

41 2020 NBQB 140, at paras. 8–10. This case also summarised factors in determining whether to approve a TPFA, which were set out in Houle. ^ Back to section

42 2021 ONSC 5434. ^ Back to section

43 2021 ONSC 4968. ^ Back to section

44 2021 BCSC 320. ^ Back to section

45 2020 ONSC 8076. ^ Back to section

46 2020 ONSC 5591. ^ Back to section

47 2023 ONSC 4627. ^ Back to section

48 2023 ONSC 3597. ^ Back to section

49 2021 ONSC 2840. ^ Back to section

50 2023 ONSC 2142. ^ Back to section

51 2021 ONSC 8001. ^ Back to section

52 Class Proceedings Act, 1992, S.O. 1992, c. 6, at s. 33.1 (CPA). ^ Back to section

53 2023 ONSC 4651. ^ Back to section

54 *Schenk v. Valeant*, 2015 ONSC 3215. ^ Back to section

55 ibid., at para. 8. ^ Back to section

56 ibid., at para. 8. ^ Back to section

57 In*Schenk*, the plaintiff and the funder revised the TPFA in accordance with the ONSC's directions and resubmitted it to the Court for successful approval. ^ Back to section

58 2017 FC 826. ^ Back to section

59 2018 QCCS 1040, 16 March 2018. This matter proceeded under the rubric of the Companies' Creditors Arrangement Act, which grants the courts a broader approval and oversight role (as in class actions) than that found in standard commercial disputes. ^ Back to section

60 2016 NBBR 125. ^ Back to section

61 2023 ABKB 263. ^ Back to section

62 *Labourers' Pension Fund*, at para. 9. ^ Back to section

63 See, e.g.,*Hobshawn v. Atco Gas and Pipelines Ltd* (14 May 2009), Case No. 0101-0499 (ABQB), cited in *Dugal* at para. 21. ^ Back to section

64 *Hayes v. The City of Saint John et al*, 2016 NBQB 125. ^ Back to section

65 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, at para. 41; see also *Fehr*, at paras. 89–90. ^ Back to section

66 CPA, s. 33.1(4) and (5). ^ Back to section

67 *Fehr* at para. 141. ^ Back to section

68 *Fehr* at para. 142. Underscoring the importance of disclosure, in *Davies v. The Corporation of the Municipality of Clarington* (2019 ONSC 2292, at para. 71.), the court refused to award loan interest as a properly recoverable disbursement in a costs decision following a class action proceeding on the basis that the loan agreements were not disclosed to the court. ^ Back to section

69 2018 ONSC 6469. ^ Back to section

70 *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*, 2017 FC 826 (*Seedlings*), at para. 28. ^ Back to section

71 *Seedlings*, at para. 25. ^ Back to section

72 2017 FC 826, at para. 23. A similar perspective was articulated in the court of first instance in the*Bluberi* case, which was ultimately upheld by the Supreme Court: 'considering the litigation at issue here is similar in nature to an oppression dispute, Callidus should not know how much money Bentham is investing, what its percentage of return is or how any recovery would be apportioned' (see 2018 QCCS 1040, 16 March 2018, at para. 85). ^ Back to section

73 *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*, 2017, T-608-17 Order, at pp. 3–4. ^ Back to section

74 *Dugal v. Manulife Financial Corp*, 2011 ONSC 1785 (Ont. S.C.J.), at para. 35. ^ Back to section

75 *David v. Loblaw*, 2018 ONSC 6469. ^ Back to section

76 *Restructuration de Fortress Global Enterprises Inc*, 2021 QCCS 4613 (CanLII). ^ Back to section

77 ibid. ^ Back to section

78 CPA, at s. 33.1(11) and (12). ^ Back to section

79 2021 ONSC 3726. See also*Baroch v. Canada Cartage*, 2021 ONSC 7376 at para. 31. ^ Back to section

80 ibid. ^ Back to section

81 2023 ONCA 376. ^ Back to section

82 ibid at para. 66. ^ Back to section

83 2023 ONSC 4627. ^ Back to section

84 2023 ONSC 3597. ^ Back to section

85 2023 ONSC 2142. ^ Back to section

86 International Commercial Arbitration Act, RSBC 1996, c. 233, at s. 36(3). Subsection 36(1)(b)(ii) states that: 'recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only . . . if the court finds that . . . the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.' ^ Back to section

87 CPA, s. 33.1. ^ Back to section

Hugh A Meighen hmeighen@blg.com
Glenn Gibson ggibson@blg.com

Borden Ladner Gervais LLP

Read more from this firm on Lexology

France

Olivia de Patoul
Deminor

Summary

INTRODUCTION
THE YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

When considering litigation funding in France, a distinction should be made between third party funding in international arbitration, focused on Paris, and the financing of domestic court litigation. The use of third party funding in international arbitration has grown in recent years and it is now a well-established financing tool enabling companies to file claims without paying all the costs of doing so. Arbitration teams in the French offices of international law firms and boutique firms (which are usually based in Paris) have found their way to litigation finance solutions offered by UK and US-based litigation funders that are internationally active (e.g., Burford Capital and Fortress) as well as funders based in the EU (Nivalion, Deminor, and Paris-based Ivo Capital and Profile Investment).

Compared to international arbitration, the market for funding French domestic court cases is still fairly small, which is probably due to the limited adverse costs risks (compared to UK courts or arbitral tribunals). However, there is a growing interest in legal finance in certain fields such as the private enforcement of antitrust cases, and certain types of mass consumer claims of cases aimed at recovering damages on behalf of investors who have suffered a loss as a result of their investment. For example, Deminor is funding a legal action involving a group of investors (more than 6,000 in the first group) who suffered substantial losses following investments made in certain funds managed by H2O Asset Management, part of the Natixis group.

The year in review

i Significant developments in legislation

As litigation funding has become a more commonly used tool, especially in international and investment treaty arbitration, the market has become more sophisticated and alternative funding structures have emerged such as portfolio funding, co-funding, defence funding and law firm funding. There is a constant goal of responding to the needs of new players.

The growing interest in third party litigation funding has also led to a call for regulation. There are two types of regulation:

1. self-regulation by actors in the litigation funding sphere (possibly in combination with industry-standardised documentation, as in structured finance operations in the banking sector); and
2. (partial) government-imposed regulation.

In this respect, a resolution was passed on 13 September 2022 by the European Parliament, which includes recommendations to the European Commission to propose a directive to regulate litigation funding within the European Union. These recommendations (contained in the Voss Report) may be the start of a legislative process at the European level, aimed at regulating the litigation funding sector for court proceedings, commercial arbitration and investor–state arbitration.

The Voss Report pushes for:

1. transparency (e.g., an active obligation to disclose the existence and identity of the funder to the court);
2. a cap on the fees (40 per cent, unless in exceptional circumstances);
3. regulation of the management of the claim, with the funder having little influence on the conduct of the proceedings;
4. regulation of conflicts of interest; and
5. oversight (e.g., the authorities shall conduct mandatory annual assessments of each funder and the funders must have sufficient capital).

Each Member State shall be free to decide whether to allow third party funding. There is an unfortunate absence of distinction between claimants who are professional and those who are consumers (a 'one size-fits-all' approach). It remains to be seen whether the European Commission will follow the European Parliament's recommendations, and within what time frame.

ii Notable cases

As stated above, an action is to be filed by more than 6,000 investors, private and institutional, grouped in a French association named 'Collectif Porteurs H20'. The action seeks damages on behalf of those investors, who suffered losses from their investments in the H20 Asset Management 'side-pockets' funds. The litigation is being funded on a 'no cure, no pay' basis.

A question relating to the rights of an impecunious party that agreed to an arbitration clause led to an important decision from the French Supreme Court on 20 September 2022, in the *Carrefour Proximité France* case. The question was whether an allegedly impecunious party may be excused from participating in an arbitration because of its lack of money, and then claim the incompetence of the court by referring to the arbitration agreement. The French Supreme Court said that, based on the principle of loyalty, while the impecuniosity of a party does not make the arbitration clause unenforceable, the failure of this party to pay its advance on costs precludes it from relying on the arbitration agreement if it then challenges the jurisdiction of French courts.

Legal and regulatory framework

France does not have a specific legislative or regulatory framework governing third party funding. The French civil law principles governing commercial contracts will apply, with contractual freedom as an overarching starting principle. It is worth noting that French courts are not bound by the parties' classification of their contracts. The courts have the power to reclassify a contract when the contractual relationship is found to be governed by a specific legal regime, such as that relating to an insurance or partnership contract. Given the implications of this reclassification (from a legal and regulatory perspective), it is of the utmost importance to verify whether the litigation funding agreement at hand includes any provisions that could lead to reclassification as a specific type of contract.

While there is no direct regulation of third-party litigation funding, the regulations governing the legal profession (essentially the Bar rules; see hereunder) may have an impact on the trilateral relationship between funders, lawyers (members of the Bar) and clients.

The professional ethics rules and specific legislation (in particular the Law of 1971 governing the legal profession) apply to lawyers (members of the Bar) advising and assisting clients with third party litigation funding. The most relevant rules concern the duty of professional secrecy and independence, and the prohibition on charging (full) contingency fees.

Professional secrecy applies to all oral and written communications between a lawyer and a client. This is a mandatory rule of public order that cannot be waived. Violation of professional secrecy can give rise to disciplinary or even criminal sanctions. However, the client is free to communicate documents and information received from his or her lawyer to third parties, including funders.

The duty of independence applies to any strategic decision regarding proceedings, including advice on settlement. This duty implies that a lawyer should receive instructions from the client, not the third party funder. This was confirmed in a resolution of the French National Bar Council of 20 and 21 November 2015. This resolution makes clear that, although there is no legislative framework regulating the funding practice in France as such, its development does not contravene French law. However, it also calls for the adoption of regulation to uphold lawyers' ethical obligations and the legal privilege surrounding the client relationship. Therefore, a lawyer (member of the Bar) may not advise the client and the third party funder simultaneously and should refrain from meeting with the funder in the client's absence.

The Paris Bar Council has explicitly recognised the use of third party litigation funding in the context of international arbitration, stating that 'it is favourable to the interest of litigants and lawyers (members of the Paris Bar), particularly in international arbitration' (Paris Bar Council Resolution dated 21 February 2017).[2] This did not come as a surprise, as international arbitration is a relatively mature market for third party funding. As mentioned above, Paris is a key international arbitration hub, and a significant number of Paris-based law firms are active in the field.

The Resolution insists on the aforementioned ethical principles and obligations towards clients. It also recommends the disclosure of funding arrangements to arbitral tribunals and suggests managing money flows with the funder via the lawyers' trust account,[3] which is traditionally used to handle client funds.

French lawyers (members of the Bar) are prohibited from entering into full contingency agreements. However, partial contingency fee arrangements are allowed provided that they are entered into in advance. International arbitration is again a notable exception to the full contingency fee prohibition. In 1992, the Paris Court of Appeal ruled against applying this principle in international arbitration when such agreements are voluntarily entered into and not abusive since they are internationally recognised and accepted in numerous countries, regardless of the legal system.[4]

Contingency fee arrangements are, therefore, another way for a law firm to fund the case, whether partially (in domestic litigation and arbitration) or entirely (in international arbitration).

Other funding possibilities include legal costs insurance, or a before-the-event insurance policy where parties agree with an insurer to cover the costs of legal proceedings before the need arises. After-the-event insurance, offering protection against a potential adverse costs award if the case is unsuccessful, is mostly used as specialist insurance in international arbitration where adverse costs awards can be much higher than in domestic court litigation.

Legal aid is a mechanism of state-provided financial support to (partially or fully) cover a litigant's court costs and fees. It is only open to physical persons who must evidence insufficient personal resources.

Class actions were introduced by Law 2014-344 dated 17 March 2014, which modified the French Consumption Code in matters of consumer protection. This has been extended to class actions in healthcare, the environment, data protection and discrimination cases (Law No. 2016-1547 of 18 November 2016). Third party funding of such actions is not formally prohibited. However, consumer protection class action provisions provide for certain direct payouts that make the possibility of the direct payment of proceeds to a funder doubtful.

Structuring the agreement

Litigation funding agreements as such are not regulated by French law. However, as noted above, the principle of contractual freedom set forth in French civil law (e.g., Articles 1101–1104 Civil Code) allows the parties to tailor the funding agreement to their specific needs.

As mentioned above, parties should be aware that if a dispute arises between the funder and the client, the court will not be bound by the parties' classification of their agreement. Rather, the court can decide, depending on the specific elements of the case, that the agreement qualifies as a specifically regulated contract (e.g., insurance or partnership). That said, we are unaware of existing case law on this particular subject.

The litigation funding agreement will often be structured as a financing operation, as selling the claim may give rise to the *retrait litigieux* (i.e., litigious withdrawal right). According to Article 1699 of the Civil Code, 'the person against whom a litigious right has been assigned may be held harmless by the assignee, by reimbursing him the actual price of the assignment together with costs and interest from the day on which the assignee has paid the price of the assignment made to him'.[5] In other words, the Civil Code allows the debtor to terminate the debt and the lawsuit the debtor may be facing simply by reimbursing the assignee the price paid to the assignor.

This may be interesting for a debtor (a defendant in a lawsuit) where an assignment has taken place at a relatively low price (compared to the value of the litigious right). At the same time, this is potentially harmful for the assignor (who would take the place of the initial creditor) as the lawsuit will end and there is no further possibility of recovery.

In two rulings handed down on 28 February 2018, the French Court of Cassation accepted that the debtor of a claim assigned during arbitration proceedings is entitled to exercise its right to withdrawal in post-award proceedings, at the stage of the dispute over the annulment[6] or the exequatur[7] of the arbitral award. However, in two judgments of 7 December 2021,[8] the International Chamber of the Paris Court of Appeal ruled against the aforementioned position of the Court of Cassation, judging that it is not within the powers

of the annulment judge to examine an application for a contentious withdrawal. According to the Court, however, such an application may be decided by the enforcement judge, provided that the assignment of the claim is governed by French law. A petition to quash these decisions has (again) been filed with the Court of Cassation.

In a remarkable decision dated 25 January 2022,[9] the Paris Court of Appeal also decided that a third party funder was not a co-claimant in arbitral proceedings. Rather, the extension of an arbitration clause to a third party funder requires exceptional circumstances. The existence of the third party funder, the fact that the funder's interest is not simply financial, and the fact that the third party only acts as a funder occasionally, are not considered to be exceptional circumstances.

French courts have already been asked to rule on a dispute regarding the funder's remuneration and whether they have the power to reduce a contractually agreed funder's fee if it would be considered disproportionate in light of the funder's obligations. On 23 November 2011, the French Court of Cassation ruled that the agreement to pay 30 per cent to a funder (a physical person) of all net amounts recovered in an inheritance dispute could be subject to a reduction by the court if the latter found it disproportionate.[10] While the Versailles Court of Appeal had refused to reduce the contractually agreed funder's fee of 30 per cent, the Court of Cassation quashed the decision. The Paris Court of Appeal eventually reduced the remuneration to 15 per cent, taking into account the relatively short duration of the proceedings and the limited services to be provided by the funder.[11] Given the specific circumstances of the case, it remains to be seen whether this case law will set a lasting trend.

Clients have the right to retain the counsel of their choice. This does not prevent the funder from proposing counsel, provided that the client is not yet represented. Funders will often request that both they and the client must agree on any new legal team if there is a change of counsel during the litigation. In practice, clients often turn to funders for advice on the best representation if no lawyer has been retained yet, but the final decision will always remain with the client.

The funder's attendance at hearings can also be covered in the litigation funding agreement. However, unlike domestic litigation where court hearings are open to the public (subject to certain exceptions), arbitration hearings will generally remain confidential. There is no possibility of a funder attending unless otherwise agreed between claimants and respondents, which is not common in our view.

One of the key provisions parties will address in their litigation funding agreement is the funder's rights regarding settlement. Generally speaking, the funder will not play an active role. However, questions over the initiation of settlement discussions, settlement thresholds and the acceptance of a settlement offer will often find their way into the litigation funding agreement. Provisions concerning settlement, especially in terms of value, are often directly linked to the financing provided by the third party funder. The latter will seek to protect itself against the client accepting unreasonably low settlement offers. Thus, it will often be a question of finding the right balance between the client's power to enter a settlement and the protection of the funder's investment. This balance could be subject to review by the French courts.

Parties to a litigation funding agreement are free to agree on the circumstances in which the litigation funding agreement can be terminated. Usually, parties agree on a predefined list of

circumstances that may adversely impact the funded proceedings. The following examples are frequently cited: full or partial dismissal of the claim, the revelation of previously unknown facts or circumstances, the loss of evidence or the appearance of previously undisclosed evidence, and events adversely affecting the enforcement position (e.g., loss of creditworthiness, a composition with creditors, restructuring or bankruptcy). Under these circumstances, the funder may lose the financing provided up to the terminating event and will bear the costs resulting from such termination. A breach of the litigation funding agreement by the funded party may also lead to termination, either with or without notice depending on the importance of the breach, as well as the duty to reimburse costs and expenses to the funder.

There is no equivalent in France of the common law doctrines of champerty and maintenance that still apply in some jurisdictions. Therefore, parties may contractually agree on a more active role for the funder in the proceedings (e.g., offering certain administrative support, or acting as a sounding board for strategy purposes). In any event, however, this will be limited by French professional (ethics) rules applying to members of the Bar. Those rules include a prohibition on taking instructions from the funder rather than the client or meeting the funder without the client, legal privilege in the relationship between the lawyer and the client, and, more generally, the fact that in the case of a conflict of interests between the client and the funder, the lawyer will need to follow the client's instructions.

Given the extensive contractual freedom of the parties, the funder's other rights and obligations in relation to the conduct of the proceedings will need to be agreed upon. This is especially important for information rights, access to documents (which can be complex in arbitration proceedings), confidentiality and consultation rights on certain strategic decisions.

Disclosure

In French domestic court litigation, French law does not contain a formal obligation to disclose the litigation funding agreement.

In arbitration proceedings, a distinction should be made between the professional (ethics) rules and the arbitration rules parties agree to apply to the arbitration proceedings. The Paris Bar Council Resolution of 21 February 2017 encourages members of the Bar who represent funded parties to advise their clients to disclose the existence of third party funding to the arbitral tribunal to allow arbitrators to identify potential conflicts as a result of certain ties with a funder.

As to the applicable arbitration rules, an illustration can be found in the recently amended ICC Rules, which apply to any ICC arbitration commencing from 1 January 2021 (unless otherwise agreed between the parties) (2021 ICC Rules). One of the most significant changes in the 2021 ICC Rules is the focus on third party funding. This confirms a trend of acknowledging the existence of third party funding and the need for transparency surrounding its use. With the 2021 ICC Rules, the ICC joins other renowned arbitration institutions such as CIETAC, HKIAC, CAM-CCBC and the Milan Chamber of Arbitration.

The trend in favour of increased transparency regarding third party funding is expressed in Article 11 (7) of the 2021 ICC Rules, which now provides that parties:

> must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which 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'.

This provision aims to prevent a conflict of interests between the arbitral tribunal, the parties to the dispute and non-parties such as third-party funders. This includes situations where an arbitrator has connections to an entity providing third party funding. If he or she is a member of the funder's investment committee, advises the funder on its investments or owns shares in the funder, this should be identified and disclosed to avoid possible follow-on proceedings (i.e., the setting aside of the arbitral award or proceedings challenging the arbitrator).

This stance in the 2021 ICC Rules echoes a previous Paris Bar Council recommendation and takes a clear position in the ongoing debate regarding the extent of disclosure (i.e., disclosure of the provisions of the litigation funding agreement, as against disclosure of the existence of the funder and the identity of the funder). It appears that Article 11(7) of the 2021 ICC Rules favours a balanced approach reflecting existing practice.

However, the new ICSID Arbitration Rules, which were approved by the Member States on 21 March 2022 and entered into force on 1 July 2022, go further. Rule 14 (1) classically requires a funded party to provide 'a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding (“third-party funding”)'. If the funder is a juridical person, Rule 14 (1) moreover provides that the notice should also include 'the names of the persons and entities that own and control that juridical person'. More importantly, Rule 14 (4) grants the power to an ICSID arbitral tribunal to request additional information on the content of any funding agreement once the notice of funding has been filed. Such broad powers are questionable, as funding agreements tend to reflect the outcome of the analysis of the case by a third party funder (e.g., potential weaknesses and settlement thresholds), which – once disclosed – may influence the arbitral tribunal and negatively affect its impartiality.

Finally, client–lawyer communications are privileged and should not be disclosed to third parties (including funders). The communication between funded litigants, their lawyers and third-party litigation funders is not covered by any privilege. Again, the litigation funding agreement offers a way to organise this confidentiality contractually.

Costs

According to Article 696 of the French Code of Civil Procedure, 'the losing party shall be ordered to pay the costs, unless the court, by reasoned decision, orders another party to pay all or part of them'. These legal costs are listed in Article 695 of the Code of Civil Procedure and include court fees, translation fees, expert fees, and lawyers' fees 'to the extent they are regulated'.[12]

Article 700 of the Code of Civil Procedure allows additional lawyers' fees and other sums not covered by Article 695 to be claimed. Costs under Article 700 are usually not awarded based on actual costs incurred, but rather they are somewhat discretionary. If granted, they

are generally only a fraction of the actual costs incurred by the winning party. It remains to be seen whether funding costs could be claimed as part of Article 700.

In both domestic and international arbitration, the parties are free to agree the terms and conditions of the allocation of costs, including by reference to arbitration rules. If they do not, under French law the arbitral tribunal has a wide discretionary power and can award adverse costs (including lawyers' fees) to the prevailing party in the proportion it deems fit.

Unless the litigation funding agreement provides otherwise, the funder has no obligation to cover adverse party costs, and the prevailing adverse party has no enforceable right against the funder to cover such costs. From the factual background of a ruling dated 1 June 2006 rendered by the Versailles Court of Appeal, it appeared that in a matter related to payment of costs in an international arbitration, the successful respondent in that arbitration (Onyx, which later became Veolia Propreté) attempted to obtain payment of the costs of the arbitration from the third party funder (Foris AG) before the French courts. At first instance, the Nanterre Commercial Court decided in favour of Veolia Propreté (the successful respondent in the underlying arbitration) and ordered provisional enforcement against the third party funder. However, the Court of Appeal remanded the lower court's judgment for lack of jurisdiction.

Domestic French court proceedings have no specific rules for imposing a security for costs order on a third party. However, a provision for security for costs can be requested from the opposing party by way of a request for interim measures requiring the requesting party to prove that the substantive obligation that is subject to the dispute is undeniable.

In international arbitration proceedings, parties can request the arbitral tribunal to make security for costs orders as part of a request for provisional measures. This generally requires the requesting party to demonstrate that it is urgently needed given the circumstances of the case and the requesting party's exposure to irreparable harm in the absence of the order.

Outlook and conclusions

The French third party litigation funding market is characterised by a mature segment for international arbitration with Paris as a hub (not least due to the presence of the ICC) and a developing segment for international and domestic arbitration and litigation, with class actions and the private enforcement actions of antitrust actions being developments to watch.

France appears to have chosen a professional obligations-driven approach, which does not prevent funders from developing their activities but impacts the relationships and interactions funders necessarily have with litigants and lawyers (members of the Bar). This has caused the Paris Bar (whose lawyers are involved in the bulk of international arbitration cases seated in Paris) to reconcile professional ethics rules with international arbitration practice to maintain Paris' competitive position. Regulation is, therefore, mostly soft law or derived from professional ethics rules, which leaves much room for contractual freedom but may cause some uncertainties.

Endnotes

1 Olivia de Patoul is general counsel at Deminor. ^ Back to section

2 Free translation. ^ Back to section

3 i.e., the Caisse Autonome des Règlements Pécuniaires des Avocats (CARPA). ^ Back to section

4 Paris Court of Appeal (1er Ch. B), 10 July 1992. It appears that this is not the only source of tension between traditional bar rules and international arbitration where French lawyers could be disadvantaged. The same applies to the traditional prohibition on French lawyers preparing witnesses for cross-examinations, leading the Paris Bar Council to conclude unanimously that preparing witnesses fell within a French lawyer's duties as it was a common practice in international arbitration proceedings (*Bulletin du Barreau* 2008 No. 9, 4 March 2008, at 45–46). ^ Back to section

5 Free translation. ^ Back to section

6 Cass. Civ. 1, 28 February 2018, No 16-22.112. ^ Back to section

7 Cass. Civ. 1, 28 February 2018, No16-22.126. ^ Back to section

8 Paris Court of Appeal (Pôle 5), Ch. 16, 7 December 2021 No 18/10217 and No 18/10220. ^ Back to section

9 Paris Court of Appeal, 25 (Pôle 5), Ch. 16, 25 January 2022, No 20/12332. ^ Back to section

10 Cass. Civ. I, 23 November 2011, No 10-16.770. ^ Back to section

11 Paris Court of Appeal, (Pôle 3), 1st ch. 17 October 2012, No. 11-22443. ^ Back to section

12 Free translation. ^ Back to section

deminor

LITIGATION FUNDING

Olivia de Patoul olivia.depatoul@deminor.com

Deminor

Read more from this firm on Lexology

Germany

Malte Stübinger and **Tim Willing**

Deminor

Summary

INTRODUCTION

YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

CONCLUSIONS AND OUTLOOK

ENDNOTES

Introduction

While litigation funding services have been around in Germany for more than 20 years, the market has only recently seen strong growth in terms of funded cases and funding budgets. Today, the market for litigation funding in Germany is rapidly expanding, and funders are competing over attractive cases and market segments.

More and more companies in Germany are discovering the advantages of litigation funding and making use of the service in the commercial litigation and arbitration space. One area with strong growth in Germany is private enforcement of follow-on antitrust claims, in which companies claim for damage that they incurred as victims of a cartel after the cartelists have been fined by either the German Federal Cartel Office or the European Commission. Not only consumers but also corporations have used litigation funding to claim damages relating to the diesel emission scandal of large carmakers, notably Volkswagen and other German original equipment manufacturers. Furthermore, part of the recent success story of litigation funding are the several legal tech companies operating in Germany that offer consumers no-win no-fee arrangements for enforcing certain (more or less identical) rights and claims using highly automated systems, such as claiming compensation for violation of air passenger rights, the repayment of illegal above-market rental fees or the recovery of losses from illegal online gambling activities. In addition, private and institutional investors are seeking third party funding to recover their losses in the aftermath of corporate scandals that have lately emerged in Germany and harmed investors (e.g., Wirecard, Volkswagen, Bayer and Daimler).

There have been many changes in the roster of litigation funding providers in recent years. Numerous litigation financiers have exited the market, but new ones have also entered. While some years ago, it was predominantly subsidiaries of large insurance groups that offered funding services in Germany, presenting the service a bit as an *ex post* alternative to a legal protection insurance, over the years, more companies with different backgrounds and global reach have entered the market. With that also came a diversification of offers, conditions and target markets.

Overall, the strategic orientation and fields of the law of the funders operating in Germany differ significantly. Some of the litigation funders are very targeted on certain types of disputes or areas of the law, while others fund all types of cases. Most have minimum (and maximum) thresholds as to the claim values or funding budgets they are comfortable funding. The minimum amount in dispute is often over €100,000, but even smaller claims are partly eligible for funding, especially now with several legal tech companies operating in Germany. Importantly, the specific appetite for risk and for complexity can also differ significantly across providers.

A noteworthy trend we observe on the demand side of the market is that more and more companies are seeking funding not primarily because they lack the necessary funds to pursue their claim, but rather for strategic reasons. A key advantage to using litigation funding for companies is that pursuing a fully funded dispute is balance-sheet neutral, so no accruals need to be made for the expected costs of enforcing a claim. Often, disclosing the involvement of a litigation funder can also bring momentum into the development of a dispute and help nudge defendants to move towards negotiations for a potential settlement. With growing education and maturity of the market also comes increased competition for

cases, as more and more companies seeking funding for their disputes will pitch their case to several litigation funders.

Year in review

The year 2023 brought some significant changes to the legal landscape and a number of critical questions for the future of litigation funding in Germany to the German and European courts.

For the first time in German history, consumers will have access to collective action for redress. The Consumer Rights Enforcement Act passed the federal parliament and the federal council and entered into force in October 2023. Before that, German law had not provided for class action systems. The only relevant exceptions are the financial investor model proceedings for violations of securities law and the model declaratory action for certain wrongdoings affecting large groups of consumers, but both types of actions have a limited scope and are limited to declaratory judgments.

Notably, the new law will also include an amendment of Section 10 of the Act against Unfair Competition on the confiscation of profits from illegal commercial practices in such a way that the financing of lawsuits for the surrender of these profits are to be facilitated. The new provision in Section 10 (6) Act against Unfair Competition expressly permits the use of litigation funders who, in the event of a successful outcome, can agree to be entitled to a portion of the proceeds. With this, the legislator reacts to a decision of the Federal Court of Justice (BGH),[2] which had ruled that the involvement of litigation funding is inadmissible and made the already low number of confiscation proceedings come to a standstill. However, the new law requires that, in each case, the Federal Office of Justice must approve the involvement and financing conditions of the litigation funder as reasonable and customary.

Without a regime for collective redress actions, lawyers still widely used the assignment of claims model to bundle and collectively enforce claims. In this model, claimants assign their claim to an special purpose vehicle (SPV), which then serves as the plaintiff in litigation. It can be used to bundle the claims of hundreds or even thousands of victims in one action with only one plaintiff. The particular advantage of an assignment of claims is that the respective legal proceedings can be managed more efficiently. Instead of thousands of individual plaintiffs, there is just one. The assignment of claims model is especially used in the context of the private enforcement of antitrust claims and mass consumer litigation.

In a number of cases, especially its *Lexfox*,[3] *Wenigermiete*[4] and *Air Berlin Inkasso*[5] decisions, the highest German civil court, BGH, ruled that the assignment of claims model was valid. In the latter case, several consumers had purchased flight tickets from an airline company shortly before it became insolvent and ceased operations. To reclaim their flight fees, the claimants assigned their claims to a claim vehicle for enforcement in court. The legal tech company that collected and bundled the individual claimholder's claims offered to fully fund the collections. It agreed to assume all costs and financial risks in connection with the enforcement in return for a 35 per cent share in the net proceeds. The BGH found that the assignment model was in line with the Legal Services Act, even if the purpose of the assignment was to claim damages in court from the very start. It argued that in court, the claim vehicle is represented by a lawyer who ensures the necessary qualified legal advice. The BGH further held that the debt collection service provider's fundamental

right of professional freedom must be taken into account and cannot be restricted without sufficient justification. The court found that any potential conflict of interest that may arise between the damaged parties and the claim vehicle or conflict of interest between holders of stronger and weaker claims are offset by other advantages of the assignment model, such as efficiency gains.

However, some lower courts in Germany still argue that the principles set by the BGH should not apply to antitrust damages actions because of the complexity of the underlying claims. In the *Round Timber* case, the District Court of Dortmund found that this interpretation of the law does not comply with the principles of effective legal protection and effectiveness under EU law (Directive 2014/104) and, therefore, referred this question to the European Court of Justice (ECJ).[6] The cartel victims of the *Round Timber* cartel are sawmills that assigned their damages claims to a claim vehicle which bundled these claims for enforcement purposes. Different from most antitrust damages actions, the plaintiff in this case cannot base its claim on a formally binding decision by the Federal Cartel Office (FCO), a follow-on action, but must rely on facts from a commitment decision of the FCO in a stand-alone action regarding the infringement of antitrust law by the defendant. Therefore, the District Court of Dortmund submitted its questions to the ECJ distinguishing between the two different types of antitrust damages claims. It assumes that, in both cases, the assignment of antitrust damages claims to a claim vehicle must be valid under EU law for cartel victims being able to effectively enforce their claims.

In antitrust damages actions, Section 33g of the Act against Restraints of Competition could become more relevant for plaintiffs seeking information and evidence from the other side. While the provision did not attract much attention or even practical relevance in the past, the BGH now clarified on the requirements for these claims in favour of potential plaintiffs.[7] The BGH ruled that it is sufficient to establish a prima facie case that a claim for cartel damages may exist if there is a certain probability of this on the basis of concrete indications. It found that Section 33g of the Act against Restraints of Competition must be interpreted autonomously in conformity with EU law and, therefore, the claim does not require the higher degree of probability laid down in Section 294 Code of Civil Procedure.

A fundamental question regarding the litigation funding landscape in Germany lies with the ECJ. In Germany, law firms are prohibited from third party ownership. Although, in the course of the reform of Federal Lawyers' Act (BRAO) in August 2022, the circle of professions that may become partners in a law firm was expanded to liberal professions, capital owners with purely financial interests (i.e., without their own active involvement, and those who are simply capital providers without belonging to a liberal profession, continue to be excluded).

In April 2023, the Bavarian Bar Court (AGH) referred the question to the ECJ of whether the prohibition of third party ownership in Germany violates the European freedoms of capital movement and services. In the underlying case, the German bar association revoked the admission of a Rechtsanwalts-UG based on the regulations of the BRAO[8] after an Austrian GmbH, which was not itself admitted to the bar, had taken over 51 per cent of the shares in the UG. The UG filed an action against the revocation of the admission with the competent court.

Legal and regulatory framework

i No regulatory framework

To date, third party litigation funding is not a regulated business in Germany, and hence there is no particular designated set of rules or a competent body for government supervision regarding litigation funding. Administrative authorities and courts have confirmed in several decisions that litigation financing is permissible and cannot be viewed as either an insurance or banking product, which would entail the application of certain bodies of regulation. However, there are currently aspirations by European lawmakers to regulate the European market for litigation funding,[9] which would also impact the German market. At this point, it is too early to tell whether and what kind of regulation will come out of this proposal eventually. It appears that the European Commission wants to sufficiently explore and understand the market for third party litigation funding and consult with the relevant interested parties first before moving towards legislative action.

In 2021, the renewed Legal Services Act,[10] for the first time in German statutory law, acknowledged the existence and business of litigation funders. The law states, regarding the relevant area of consumers' collective redress against corporations by means of a third party, as debt collection service providers are referred to, that the involvement of a litigation funder in a case does not per se imply a conflict of interest that would taint the claim vehicle's standing to sue. The lawmaker thereby invalidated a key defence argument that defendants in collective actions had often pleaded.

ii Lawyers' ethical rules

In contrast to other jurisdictions, attorneys in Germany are rather strictly prohibited from offering litigation funding services to their clients outside of very narrow exceptions. They must not work for contingency fees and are under no circumstances allowed to offer to clients to advance court fees or pay the adverse party costs if a dispute is lost. The traditional line of argument for this prohibition has been the desire to protect the market for legal advice from excessive commercialisation, which could negatively affect the attorneys' independent role in the legal system – which, looking at today's law firm market, seems somewhat outdated. As of 2008, following a decision by Germany's Constitutional Court,-[11] lawyer and client can agree on a contingency fee for an individual case if the client would otherwise be deterred from pursuing legal action on the basis of his or her individual circumstances, particularly his or her financial situation.[12] With the recent implementation of the renewed Legal Services Act, the broad ban was carefully lifted further, and lawyers were permitted, under certain conditions, to agree to success-based renumeration. Primarily, lawyers are now permitted to work for a contingency fee (no-win-no-fee) for (undisputed) monetary claims up to €2,000. Here, however, the no-win-no-fee only applies if an appropriate surcharge on the statutory fee is agreed in the case of a successful outcome. Additionally, lawyers are now allowed to offer out-of-court debt collection services.

In principle, lawyers in Germany are obliged to inform their clients about the possibility of seeking litigation funding when discussing the strategic options available in advance of a dispute. However, this obligation does not go as far as checking and informing the client as to which specific litigation financier is particularly favourable for the client and the specific case. Without an explicit mandate, the lawyer cannot be expected to conduct extensive

market research and contact several litigation financiers.[13] It is advisable for attorneys, however, to at least mention the possibility of trying to get funding to clients when discussing the potential cost of litigating a dispute.

iii Collective Redress Regime

Based on the European collective redress directive, Germany's new law on the collective action for redress with a new collective claim type will enter into force in 2023. This is the next step for collective actions after, in 2018, Germany already introduced a model declaratory action that provided a mechanism for collective suits for declaratory relief. Now, the new regime will allow for collective redress claims that can lead to a final court decision ordering the defendant to pay monetary compensation to a group of individuals – either consumers or SMEs with a staff of up to 10 and an annual turnover of up to €2 million – whose claims are defined by mutual criteria, and who have registered to participate in the action of a consumer protection agency (an opt-in mechanism).

Formally, litigation funders are permitted to provide the necessary funds for these actions in return for a limited compensation. However, important provisions of the law were changed last minute in the legislative process to the effect that it is de facto impossible to fund collective actions for redress as a commercial third party funder. This is especially due to the fact that the law strictly limits the share from the proceeds of the successful claim a litigation funder may agree to receive to 10 per cent,[14] potential members of the class actions are always able to free-ride a collective action by registering to the class without entering into a financing agreement with a funder and the distribution mechanism does not allow for the funder to receive his or her share of the proceeds. Additionally, it is required that the funding agreement must be fully disclosed to the court.[15]

iv Assignment model

As the conception of the collective redress regime will, if at all, not attract many actions funded by third parties in Germany, the assignment model will most likely stay an often-used construction for the purpose of collective redress actions. In this model, all claim holders who wish to participate in an action assign their individual claims to one entity, often an SPV exclusively used for this purpose, which will serve as a claimant. Many of those claims are funded by a third party litigation funder. Sometimes, the funder requires a small administrative fee for entering a party's claims into the group action. In the event of success, a fee becomes due, which usually is calculated as a certain percentage of the amount successfully recovered. In the event of a defeat, no success fee is due.

This construction has been the subject of numerous court decisions, in consumer cases, antitrust cases and more, and its admissibility has been questioned across cases. In recent decisions (in 2019 *Lexfox*,[16] in 2021 *Airdeal*[17] and in 2022 *Diesel*),[18] Germany's highest civil court, the BGH, has unequivocally made clear that such funding models are generally lawful in Germany. For the special case of antitrust damages actions, the issue of legality of the assignment model is currently pending before the ECJ (see details in Section II).

Structuring the agreement

Unlike lawyers, third party litigation funders are not fundamentally subject to a professional duty of confidentiality. Therefore, an interested party should enter into a non-disclosure agreement with the funder before exchanging sensitive information on the respective case. In practice, this is often done as one of the first steps, after the funder has signalled a general interest in the case based on a high-level description of the nature of the dispute.

Once the case review on the side of the funder has led to a positive indication, the parties usually negotiate a non-binding term sheet to agree on the relevant commercial parameters of the funding. Most funders will, in the term sheet, require the client to agree to an exclusivity period of one to two months, during which the client is prohibited from entering into a funding agreement with a different litigation financier. During this exclusivity period, the funder usually conducts an in-depth due diligence of the claim, often supported by third party experts, such as attorneys and economic experts, to identify the relevant risks and chances of pursuing the claim.

When the parties have found an agreement in principle, they start negotiating the litigation funding agreement (LFA). German law does not contain any specifics as to LFAs, so the parties are free to structure their agreement as they wish and to include any topics they want to cover. The LFA is viewed as a mixed-type contract similar to that for the formation of a civil law partnership under German law in the form of an internal company[19] without any joint and several assets or liability.

Once the litigation funder has decided to fund the case, the essentials an LFA usually covers are, among others, the following elements:

1. the total budget and its allocation (e.g., court fees, lawyer fees, expert fees, adverse party costs) for each court instance;
2. the funder's return, which often depends on the duration of the proceeding or at what instance the legal dispute is resolved;
3. a security for the funder's return in the case of success. Usually, the funded claim is silently assigned to the litigation funder but the client stays the plaintiff and claimholder in the litigation;
4. the client usually agrees not to initiate cost-triggering measures in the litigation without first obtaining the financier's consent;
5. under German law, it is important that the claimant and not the litigation funder retains the lawyer to litigate the claim. At the same time, the client usually agrees to relieve the attorney from any confidentiality duties in relation to the funder;
6. the grounds based on which each party shall be entitled to terminate the agreement;
7. provisions on coordination and consent requirements (e.g., acceptance of a settlement offer, appeal after an unsuccessful first instance or a withdrawal of the claim). Here, it is important to find the right balance between the funder's security interest and the claimant's sovereignty. The claimant's general freedom to make its own decisions as to the claim must remain untouched. This last point is highly sensitive in the assignment of claims model, and German courts and lawmakers have not yet developed clear guidelines as to what level of influence a funder may be granted under German law; and
8.

furthermore, litigation funding agreements generally contain certain disclosure and confidentiality duties, as well as warranties and guarantees.

With regard to the funder's fee, a number of renumeration mechanisms have become market standards. Parties usually either agree that the funder will (usually after the return of all expenses paid) receive a certain percentage of the proceeds of the dispute, a multiple on the capital deployed or the capital committed, or a combination of both. This can be staggered and modified based on, for example, time passed or expenses paid. While there is no fixed standard for remuneration in case law or statutory law, it is advisable to have a transparent and clear renumeration clause. One key element of funding, and of the renumeration clause, is that any amounts owed by the plaintiff to the funder will only come from the proceeds of the case and under no circumstance exceed this amount.

When a consumer wishes to sign up for a collective action organised by a registered debt collection service provider and funded by a third party financier, a couple of newly introduced transparency obligations apply: among others, the claimholder must be informed about other potential options he or she can utilise to enforce his or her claim, especially any that would allow the consumer to receive the full claim amount without paying a funder's fee; the consumer is entitled to full information on the funding agreement, including the funder's fee; and if the debt collection service provider will be entitled to accept settlements on behalf of the individual claimholders, further information requirements as to the potential financial consequences of such a settlement for the claimholder and on the revocability of any settlements apply.[20]

Disclosure

i Disclosure of funding – judiciary proceedings

There are no statutory requirements in German law to disclose the existence, let alone the specific terms, of a litigation funding agreement to either the court or the defendant in a litigation.

In group proceedings working with an SPV serving as plaintiff after the claimholders have assigned their claims to it, disclosure of funding has become a relevant issue. Courts have requested funded plaintiffs to disclose the identity of the funder and the respective funding terms. The background is that German law considers it as a breach of *bones mores* to assign claims to an underfunded entity to appear as plaintiff, because this could potentially deprive the defendant of its cost reimbursement claim if the case is lost.[21] The practical implication of this jurisprudence is enormous. If the plaintiff vehicle was, at any point in time during the assignment process, not sufficiently funded to satisfy the respective adverse party reimbursement claim, a court can declare the assignment itself invalid and dismiss the claim as unfounded because the plaintiff never held the claim. This also means that the initiated litigation did not suspend the limitation periods for the claims in question, because the rights to the individual claim were still with the original claim holders. In a number of cases, this has resulted in the full loss of the claims without a possibility to re-initiate a new action.

ii No discovery

Germany is a civil law jurisdiction. There is no general concept of discovery or production of documents that parties to a dispute can rely upon to receive information from the other side. Courts may, upon request of one party, order the other party to produce specific documents that are relevant to the case (Section 142 of the Code of Civil Procedure, Section 33g of the Act against Restraints of Competition), but so far these provision are only applied by the courts in rare instances.

iii Disclosure of funding – arbitration

The German civil procedure rules on Arbitration (Sections 1025–1066 of the Code of Civil Procedure) do not require the claimant to disclose the existence or identity of a litigation funder to the arbitral tribunal or the respondent in the proceedings.

Arbitral institutions may, in their rules, order that the involvement of a funder be made transparent. The rules of DIS, the leading German arbitration centre, do not provide for any such duty, in line with most institutional arbitration rules. However, should the parties have agreed to implement the 2014 IBA guidelines on conflicts of interest in international arbitration[22] into their agreement, they should observe Guideline 7a of the rules, which will, under certain circumstances, provide a duty to disclose any third party that has a financial interest in the outcome of the arbitration. In most cases, however, arbitration panels and parties will only refer to those (and comparable) rules as soft guidelines, without firm obligations arising from them.

Costs

i Judiciary proceedings

Litigation in Germany is significantly cheaper than in some common law jurisdictions such as the United Kingdom or the United States, but costs are at the upper end of the spectrum among civil law countries. A benefit in Germany is that costs and adverse party risks for litigation are highly foreseeable and static, with only minor exceptions, such as fees for court-ordered expert opinions. Of course, as far as attorneys are paid by the hour instead of the statutory renumeration, parties' own attorneys' fees are also only foreseeable to a certain extent. Time-based billing is the market standard in complex disputes, especially in certain areas of law, for example, competition law, intellectual property law and commercial arbitration, but also in other fields. In addition, the plaintiff is obliged to advance court fees,-[23] which, for some claimants, can make it difficult in certain cases to pursue a claim from the very start.

As a rule, the bearing of costs follows the parties' success in the case (loser pays). This applies to attorneys' fees, court fees and potential further expenses, and the court will usually allocate the costs proportionally to the specific monetary outcome on the merits. Attorneys' fees are reimbursable up to the statutory fees only, which are calculated based on a claim's value. Note that each party will bear its own attorneys' costs beyond the statutory fees, regardless of the outcome of the litigation.

It is common in LFAs to also include any adverse party risk, that is, the cost reimbursement claims of the defendant, primarily for his or her own attorneys, but potentially also for court fees, as far as the defendant had to pay them. Funders often seek insurance (after the event insurance) for this cost risk to limit their total exposure. If requested by the other party, the funder will often also provide security for adverse costs, which the defendant can ask for in certain situations (e.g., if the seat of the plaintiff is located outside of the European Union). Under German law, the funder cannot be held liable directly for any cost claims from the court or the adverse party, so the LFA between funder and client should fully address those issues.

When working with a funder, the contingency fee is often between 20 and 35 per cent of the case's proceeds, but it can increase to as much as 50 per cent, especially when smaller amounts are in dispute or where the prospects of a dispute are very insecure due to unforeseeable legal or factual issues. When the claim amount reaches a certain level, individual solutions are negotiated between funder and its client and depend on, among other things, the risk profile, the potential upside and the expected duration of a case.

ii Arbitration

The cost of arbitration in Germany depends heavily on the arbitral institution chosen by the parties. The best-known institution in Germany, the DIS, provides rules for the allocation and repayment of costs in Articles 32 to 36 of the Arbitration Rules and gives the tribunal very broad discretion as to what costs in relation to the arbitration shall be deemed recoverable, and which party bears what part of the costs. The tribunal shall, to this end, take into consideration all relevant circumstances of the case, including but not limited to the outcome of the case and the efficiency of the conduct of proceedings.

If the parties conduct non-institutional ad hoc arbitration, the tribunal decides on the allocation of costs among the parties in its free discretion. Unless otherwise agreed upon by the parties, a main factor in this decision shall be the outcome on the merits.

In contrast to state court litigation, the sum of recoverable fees is not capped at a certain (statutory) level. As part of its decision on costs, the arbitral tribunal also decides what expenses of a party were useful and reasonable, and can, therefore, be recovered (in full or in part) from the other side. There is a growing trend that arbitral tribunals also award (parts of) the cost for procuring third party funding to the prevailing party, provided its decision to seek funding was reasonable and the terms were adequate. A prevailing party in an arbitration dispute should, therefore, consider adding the funder's fee to its request for cost compensation.

Conclusions and outlook

The modernisation and competitiveness of Germany as a legal forum is at a crossroads. The German implementation of the EU Directive on representative actions for the protection of consumers[24] did not fully live up to the high expectations and, for collective consumer actions, it must be feared that the general potential of the new collective redress regime will not materialise because, in practice, consumer will not be able to bring claims with the necessary financial support of litigation funders. Therefore, it can be expected that parties will continue to battle over the validity of different assignment models. With regard to

antitrust damages cases, in which this issue is often critical for the restitution of the victims of antitrust infringements, the ECJ will hopefully provide clarity on this issue soon.

In the same way, the ECJ will likely lead the way on the question of third party ownership in German law firms. However, an answer from the ECJ is not expected until 2024 at the earliest. It remains to be seen whether the Federal Ministry of Justice will use the time to take the matter into its own hands and review the limitations of third party ownership in Germany.

Endnotes

1 Malte Stübinger is general counsel and Tim Willing is senior legal counsel at Deminor. ^ Back to section

2 Federal Court of Justice (BGH), decision from 13 September 2018 – I ZR 26/17. ^ Back to section

3 BGH, decision from 27 November 2019 – VIII ZR 285/18. ^ Back to section

4 BGH, decision from 8 April 2020 – VIII ZR 130/19. ^ Back to section

5 BGH, decision of 13 July 2021 – II ZR 84/20. ^ Back to section

6 District Court of Dortmund, decision of 13 March 2023 – 8 O 7/20 (Kart). ^ Back to section

7 BGH, decision of 4 April 2023 – KZR 20/21. ^ Back to section

8 Section 59e BRAO (old version in force until 31 July 2022). ^ Back to section

9 See Initiative 2020/2130(INL), Responsible private funding of litigation, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html#title1. ^ Back to section

10 BGBl. I 2021, p. 3415. ^ Back to section

11 Federal Constitutional Court (BVerfG) decision of 12 December 2006 – 1 BvR 2576/04: the Constitutional Court saw a violation of Article 12 of the Constitution (freedom of work and profession) in the strict prohibition without any exceptions, especially where a client would otherwise not be able to pursue the intended litigation. ^ Back to section

12 See § 4aRVG, 49b BRAO; importantly, if the client is eligible for statutory legal aid due to his or her financial standing, this is considered as the predominant way to receive access to justice, and the contingency or success fee path is barred. ^ Back to section

13 Higher Regional Court of Cologne, decision of 5 November 2018 (5 U 33/18). ^ Back to section

14 § 4 Sec. 2 No. 3 VRDuG. ^ Back to section

15 § 4 Sec. 3 VRDuG. ^ Back to section

16 BGH, decision of 27 November 2019 – VIII ZR 285. ^ Back to section

17 BGH, decision of 13 July 2021 – II ZR 84/20. ^ Back to section

18 BGH, decision of 13 June 2022 – VIa ZR 418/21; BGH, decision of 10 October 2022 – VIa ZR 184/22. ^ Back to section

19 See, among others, District Court Hamburg, decision of 17 July 2018 – 411 HKO 9/17. ^ Back to section

20 See Section 13b Legal Services Act (RDG). ^ Back to section

21 Düsseldorf Court of Appeals, decision of 18 February 2015 – VI U 3/15, in a funded case. ^ Back to section

22 https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918- . ^ Back to section

23 Section 12 (1) of the Code of Court Fees (GKG). ^ Back to section

24 Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. ^ Back to section

deminor

LITIGATION FUNDING

Malte Stübinger
Tim Willing

malte.stuebinger@deminor.com

Deminor

Read more from this firm on Lexology

Hong Kong

Irene Lee Wing Yun

Deminor

Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
THIRD PARTY FUNDING IN MAINLAND CHINA
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

Third party funding is relatively new in Hong Kong compared to a lot of other jurisdictions. Hong Kong remains one of the few common law jurisdictions that maintains the common law doctrines of maintenance and champerty, which prohibit third party funding of legal proceedings. It was not until 2017 that the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (Amendment Ordinance) was passed, legalising third party funding of arbitration, mediation and related proceedings in Hong Kong.[2] The Amendment Ordinance effectively excludes third party funding of arbitration and mediation proceedings from the doctrines of maintenance and champerty and presents a framework for these funding arrangements. The new version of the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, published in 2018, works to provide further guidance for arbitral tribunals, parties to arbitration and third party funders.[3]

The 2021 Queen Mary International Arbitration Survey ranked Hong Kong among the five most preferred and widely used seats of arbitration, while HKIAC was ranked as one of top five most preferred arbitral institutions.[4] The report indicates a steady growth in popularity and an established preference for Hong Kong as an arbitration seat in both the Asia-Pacific region and worldwide. According to statistics released by the HKIAC, in 2022, a total of 344 arbitrations were submitted to HKIAC and parties made disclosure of third party funding in 74 of them.[5] In 2021, 277 arbitrations were submitted to the HKIAC and parties made disclosure of third party funding in six of the arbitrations.[6] In 2020, 318 arbitrations were submitted to the HKIAC. Out of the 318 arbitrations, parties made disclosures of third party funding in three arbitrations.[7] According to HKIAC records, there was no disclosure of third party funding in the administered arbitrations submitted to the HKIAC in 2019.[8] The use of third party funding in arbitrations seated in Hong Kong is clearly becoming increasingly common.

Year in review

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings (Arrangement) was signed between the Supreme People's Court of the People's Republic of China and the Hong Kong Special Administrative Region (HKSAR) on 2 April 2019 and came into force on 1 October 2019. Pursuant to the Arrangement, any party to an arbitration seated in the HKSAR and administered by designated arbitral institutions[9] may apply to the Intermediate People's Court of the place of residence of the party against whom the application is made or the place where the property or evidence is situated for interim measures.[10] Similarly, any party to an arbitration administered by a mainland Chinese arbitral institution may apply to the High Court of the HKSAR for interim measures.[11] The available interim measures include, in the case of mainland China, property preservation, evidence preservation and conduct preservation. In the case of the HKSAR, they include injunctions and other interim measures for maintaining or restoring the status quo pending determination of the dispute, preserving assets and evidence.[12]

As of 6 September 2023, the HKIAC has issued letters of acceptance in support of applications for interim measures in mainland China in respect of 99 applications since 1 October 2019: 94 applications were made for the preservation of assets, two were for the preservation of evidence and three were for the preservation of conduct. The total value of assets requested to be preserved amounted to 25 billion yuan. The HKIAC is aware of 69 decisions issued by mainland courts. The mainland courts granted applications for preservation of assets upon the applicant's provision of security in 65 applications, while rejecting four applications. The total value of assets preserved by the 65 decisions amounted to 15.8 billion yuan. The average time taken by mainland courts to issue a decision was 20.5 days from receipt of an application based on the information available in respect of 50 of the 65 decisions.[13]

Legal and regulatory framework

While the common law doctrines of champerty and maintenance have been abolished in a lot of other common law systems around the world, the two doctrines remain actionable as crimes and torts in Hong Kong. Maintenance occurs when one 'officiously intermeddles' in a legal action by maintaining or assisting a party with money (or otherwise) to prosecute or defend the action, when one has neither an interest in the action nor any other motive recognised by the law justifying such interference.[14] Champerty is a type of maintenance. It occurs when 'the person maintaining another takes as his reward a portion of the property in dispute'.[15]

As discussed above, it was not until 2017 that the Amendment Ordinance amended the Arbitration Ordinance[16] to expressly provide that the two doctrines no longer apply to arbitration and related court proceedings in Hong Kong. Third party funding of arbitration and related court proceedings in Hong Kong is thus no longer an offence. However, while the Amendment Ordinance also amends the Mediation Ordinance to allow for third party funding in mediation, the commencement of these new provisions has been deferred to a date to be determined pending further consultation with the mediation community.[17] Third party funding of most court proceedings continues to be prohibited in Hong Kong, with limited exceptions as discussed below.

While the common law doctrines of champerty and maintenance have been abolished in a lot of other common law systems around the world, the two doctrines remain actionable as crimes and torts in Hong Kong. Maintenance occurs when one 'officiously intermeddles' in a legal action by maintaining or assisting a party with money (or otherwise) to prosecute or defend the action, when one has neither an interest in the action nor any other motive recognised by the law justifying such interference.[14] Champerty is a type of maintenance. It occurs when 'the person maintaining another takes as his reward a portion of the property in dispute'.[15]

As discussed above, it was not until 2017 that the Amendment Ordinance amended the Arbitration Ordinance[16] to expressly provide that the two doctrines no longer apply to arbitration and related court proceedings in Hong Kong. Third party funding of arbitration and related court proceedings in Hong Kong is thus no longer an offence. However, while the Amendment Ordinance also amends the Mediation Ordinance to allow for third party funding in mediation, the commencement of these new provisions has been deferred to a

date to be determined pending further consultation with the mediation community.[17] Third party funding of most court proceedings continues to be prohibited in Hong Kong, with limited exceptions as discussed below.

i Arbitration and related proceedings

Following the amendment in 2017, the Arbitration Ordinance now permits third party funding of arbitration and related proceedings where the place of arbitration is Hong Kong. However, funding may not be provided by a lawyer or legal practice acting for a party to the arbitration.[18] It must be provided by a third party. The Arbitration Ordinance defines the third party funding of arbitration as the 'provision of arbitration funding for an arbitration (1) under a funding agreement; (2) to a funded party; (3) by a third party funder; and (4) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement'.[19] A funding agreement is an agreement for third party funding of arbitration that is '(1) in writing; (2) made between a funded party and a third party funder; and (3) made on or after the commencement date of the relevant provisions'.[20] A third party funder is a person 'who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement'.[21] The Arbitration Ordinance also expressly provides that a code of practice setting out 'the practices and standards with which third party funders are ordinarily expected to comply' may be issued.[22]

ii Code of conduct

The Code of Practice for Third Party Funding of Arbitration (Code) was issued on 7 December 2018 pursuant to Part 10A of the Arbitration Ordinance to assist with the implementation of the new amendments. It applies to all third party funders within the definition set out above. Section 98S of the Arbitration Ordinance provides that non-compliance with the Code does not, of itself, render any person liable to any judicial or other proceedings. However, the Code is admissible as evidence in proceedings before any court or arbitral tribunal, and any compliance or non-compliance may be taken into account in the relevant decision-making process of the court or tribunal.[23] Consistent with other common law jurisdictions, Hong Kong has also adopted a light-touch[24] or self-regulating approach towards third party funding in arbitration.

The Code imposes several requirements on third party funders. The requirements include maintaining access to a minimum of HK$20 million of capital, maintaining the capacity to cover all its aggregate funding liabilities under all its funding agreements for a minimum of 36 months, and setting out in the funding agreement the level of involvement of the funder, etc. Further guidance is also set out in the code regarding the structure of the funding agreement and the disclosure obligation of the parties, as discussed in further detail below.

iii Advisory body

An advisory body on the third party funding of arbitration and mediation was set up on 24 August 2021 pursuant to Section 98X(1) of Part 10A of the Arbitration Ordinance by the

Secretary for Justice. The advisory body is responsible for monitoring and reviewing the operation of third party funding of arbitration, and the implementation of the Code.

iv Third party funding of court litigation

While the change in rules governing the third party funding of arbitration proceedings has come into force, the funding of court litigation remains restricted in Hong Kong to instances where:

1. the claimant and the party providing funding have a legitimate interest in the outcome of the proceedings as a result of certain pre-existing relationships;
2. there are legitimate access to justice considerations; and
3. there is a miscellaneous category of proceedings including, most notably, insolvency proceedings.[25]

Insolvency has been a long-standing exception to the doctrine of maintenance and champerty. It has been well established by case law that a party can seek third party funding for proceedings in insolvency cases.[26] Thus, for example, a liquidator may seek funding from a third party to file a negligence liability claim against the previous management of the company for damages. Similarly, a trustee may seek funding to commence litigation to recover assets of a bankrupt. To do so, the trustee may directly discuss the terms of the funding agreement with the funder, and no approval from the court on the funding terms is needed. The Hong Kong courts have recently confirmed again in *Re Patrick Cowley and Lui Yee Man, Joint and Several Liquidators of the Company*[27] that it is within the powers of a liquidator to negotiate the terms of a funding agreement, and court sanction is not required for a liquidator to enter into a third party funding agreement.

The access to justice exception is recognised judicially to help claimants with meritorious claims but insufficient resources to fund a litigation. The legal aid schemes in Hong Kong fall within this exception. The legal aid schemes provide legal funding to parties that can satisfy their merits and means tests. However, outside of the legal aid schemes, Hong Kong courts have always adopted a restrictive view in their interpretation and application of this exception. In a recent Hong Kong case, the applicant claimed that he was unable to pursue his matrimonial litigation without third party funding. He sought permission from the court to seek funding under the access to justice exception.[28] The Secretary for Justice granted leave to intervene in the proceedings. The applicant drew on examples of other common law jurisdictions to argue that Hong Kong's current restrictions on the third party funding of court litigation were falling behind global developments in the field. The court held that while a civil court has jurisdiction to grant an advisory declaration on the non-criminality of third party funding in a particular case, such a declaration will not bind the prosecuting authority in bringing or stopping any criminal prosecution with regard to maintenance and champerty. The court also noted that such a declaration would only be granted in very exceptional circumstances.[29]

The court refused to allow third party funding in this case. The court recognised that a balance had to be struck between access to justice and preventing abuses that may result from maintenance and champerty. It was of the view that the Hong Kong courts are not well-placed to prevent abuses without a statutory or regulatory framework for third party

funding in court litigation. Liberalisation of the laws in this regard should be left to the legislature to develop comprehensive procedural safeguards against abuses before the application of third party funding can be extended.[30]

v Contingency fee

Contingency fee arrangements are generally prohibited in Hong Kong. According to Section 64 of the Legal Practitioner's Ordinance, any agreement by which a solicitor retained for any contentious process stipulates payment only in the event of success in that action shall not be valid. This position is also reflected in the Hong Kong Solicitors' Guide to Professional Conduct (Solicitors' Guide) issued by the Law Society of Hong Kong. The Solicitors' Guide expressly prohibits a solicitor from entering contingency fee arrangements for acting in contentious proceedings.[31] However, it is worth noting that this prohibition only extends to agreements that involve the institution of proceedings. The Solicitors' Guide provides that it would not be unlawful, for example, for a solicitor to enter into an agreement on a commission basis to recover debt for a client provided that the agreement is limited strictly to recovery of debt without the institution of legal proceedings.[32] Similarly, the Code of Conduct issued by the Hong Kong Bar Association also provides that a practising barrister may not accept a brief or instructions on terms that the payment of fees shall depend upon a contingency.[33]

The Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 (ORFS Amendment Ordinance) was issued on 25 March 2022 and came into effect on 16 December 2022 to allow certain types of outcome-related fee structures (ORFS) for arbitration proceedings in Hong Kong. Although the ORFS regime in Hong Kong has been in force for close to one year and there has been a lot of interest in the new regime, the arrangements are yet to be widely adopted by clients or law firms.

Structuring the agreement

When it comes to the content of a funding agreement, pursuant to Article 2.7(5) of the Code, a third party funder must ensure that the terms of the funding agreement are reviewed to make sure they are consistent with Part 10A of the Arbitration Ordinance and the Code. While the Code does not set out how a funding agreement should be structured, it requires the funding agreement to set out clearly that the funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration to the funder except to the extent permitted by law; that the funder will not cause the funded party's legal representative to act in breach of professional duties; and that the funder will not seek to influence the arbitration body and any arbitral institution involved.[34]

The funding agreement must also set out the funder's liability for adverse party costs, any premium for adverse costs insurance, security for costs and any other relevant financial liability.[35]

Any grounds for termination of the funding agreement must also be clearly set out and the funding agreement must not establish a discretionary right for a funder to terminate the agreement. The permitted grounds for termination of the funding agreement are limited under the Code. A funder is only allowed to terminate should it reasonably cease to be

satisfied about the merits of the case, if it reasonably believes that there has been a material adverse change in the prospects of success, or if it reasonably believes that the funded party has committed a material breach of the funding agreement.[36] However, the funder is to remain liable for all funding obligations accrued up to the date of termination unless termination is due to a material breach of the agreement by the funded party.[37]

The funding agreement must also set out the right for the funded party to terminate the agreement if it reasonably believes that the funder has committed a material breach of the Code or the funding agreement that may lead to irreparable damage.[38] A dispute resolution mechanism for the settlement of disputes arising under the funding agreement must also be included in the funding agreement.[39]

Once these limited requirements set out in the Code are satisfied, the funder and the funded party are free to agree on the remaining terms of the funding agreement subject to, of course, any other requirements of the applicable law.

Disclosure

Section 18 of the Arbitration Ordinance specifies that any disclosure of information relating to the existence of any arbitration proceedings and any subsequent awards made following the arbitration proceedings is prohibited.[40] However, following developments in third party funding in Hong Kong, Section 97T of the Amendment Ordinance establishes an exception for disclosure in the case of third party funding, stating that information referred to in Section 18(1) can be disclosed to a funder by a party for the purpose of having or obtaining funding from the funder.[41] Section 97T nevertheless continues to enforce the importance of confidentiality of arbitration proceedings as no further information can be communicated by a person except 'to protect or pursue a legal right or interest of the person' or to 'enforce or challenge an award made in the arbitration' in legal proceedings before any court in or outside Hong Kong.[42] Section 98T also allows for the disclosure of information 'to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication'[43] or 'to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding or arbitration'.[44]

Further specification of the disclosure is provided under Section 98U. The funded party needs to give written notice to each party to the arbitration and the arbitration body of the funding agreement being made and the name of the third party funder.[45] Notice must be given for funding agreements made on or before the commencement of arbitration proceedings as well as funding agreements entered into after the commencement of the arbitration within 15 days of the funding agreement being made.[46]

These changes in the rules of disclosure for arbitration proceedings aim to balance the parties' confidentiality rights with the need for funders to access relevant information. The statutory changes are also supported by the HKIAC Rules, which allow for the publication and disclosure of relevant information needed to obtain or maintain a funding agreement with a third party.[47] The HKIAC Rules similarly support the disclosure procedures in requiring that the funded party discloses the establishment of the funding agreement and the identity of the funder to all other parties to the arbitration, the arbitral tribunal, the emergency arbitrator and the HKIAC, as well as ensuring the notice is made as soon as practicable after the establishment of the agreement or in the notice of arbitration or the answer to the notice of arbitration, depending on which event occurs first.[48] The

current system represents a commitment to a practical application of third party funding while regulating the spread and circulation of sensitive and confidential information. The disclosure of funder information allows for a better review of the conflicts of interest between the funder and the arbitrator, and ensures the two are separate.

Article 2.8 of the Code requires a third party funder to observe the confidentiality and privilege of all information and documentation relating to the arbitration to the extent the applicable law permits.

The funded party is under an obligation to disclose information about third party funding under Sections 98U and 98V of the Arbitration Ordinance. Section 98U requires the funded party to give written notice of the fact that a funding agreement has been made and the name of the funder to each other party to the arbitration as well as to the arbitration body. Similarly, written notice has to be given when the funding agreement ends.[49] Non-compliance with the disclosure requirement, while it may be taken into account by the arbitral tribunal in its decision-making process, does not of itself render any person liable to any judicial proceedings.[50] The funder is required to remind the funded party of its disclosure obligation.[51] The funded party, however, is not obliged to disclose details of the funding agreement except as required by the funding agreement, ordered by the arbitration body or required by law.

Costs

Section 98Q of the Amendment Ordinance states that the funding agreement between a party and a third party funder must outline if, and to what extent, the funder will be liable for 'adverse costs, insurance premiums, security for costs and other financial liabilities'.[52] The Law Review Committee refrained from granting arbitral tribunals the right to assign security for costs to funders. Arbitration agreements function on the basis of consent from all the parties involved. Funders are not parties to such agreements, and so it was deemed inappropriate for arbitrators to make funders liable for costs. The HKIAC Rules, however, enable the arbitral tribunal to consider any third party funding arrangements when apportioning costs.[53]

Third party funding in mainland china

In recent years, third party funding has attracted more and more attention in mainland China. The market has also seen a handful of local PRC funders being newly established, predominantly by Chinese lawyers who possess extensive expertise in dispute resolution in the market. There are currently no specific laws or regulations that explicitly prohibit third party funding in mainland China.

In *Company A v. Company B*,[54] which was decided in May 2022, the Second Intermediate People's Court of Shanghai held that litigation investment agreement in relation to a court litigation was invalid because it violated principles of public policy. The Court found that the funders of the case were closely tied to the law firm representing the funded party, and that there was no mechanism in place to prevent conflict of interest. Further, the Court determined that the litigation investment agreement included a confidentiality provision that restricted the sharing of information related to third party funding with the Court. This provision had the potential to obscure facts that could affect the independence and

impartiality of the Court, thereby posing a risk to the fair and proper conduct of the litigation process. The agreement further restricted the funded party's right to instruct a new law firm and make certain decisions regarding the proceedings. The Court held that the agreement wrongly limited the funded party's freedom of litigation.

In contrast, in *Dongrunjintai (Shenzhen) Investment Management Centre LP v. Bangying Internet Technology (Beijing) Holdings Co, Ltd*,[55] the Beijing Second Intermediate People's Court ruled that the litigation funding agreement was valid, and the funded party was liable to pay the funder's investment return. Similarly, in *Winfirefly Information Technology (Shanghai) Co, Ltd v. Changzhou Aino Textile Co, Ltd*,[56] the Shanghai Songjiang District People's Court had no hesitation in upholding the legality and validity of the litigation funding agreement for funding in an arbitration. In *Sunan Ruili Airlines Limited et al v. Silver Aircraft Leasing (Tianjin) Co, Ltd*,[57] the Jiangsu court held that the CIETAC arbitral award was enforceable despite the fact that the claimant was being funded by a third party funder. The Jiangsu court concluded that third party funding did not violate the CIETAC Arbitration Rules (effective as of 1 January 2015) and therefore did not impact the procedural fairness of the hearing.

There are various arbitration rules in Mainland China that contain express provisions regarding third party funding, including the Beijing Arbitration Commission's International Investment Arbitration Rules, the China International Economic and Trade Arbitration Commission's International Economic and Trade Arbitration Rules (Trial) and the Shanghai Arbitration Commission's Arbitration Rules.

Outlook and conclusions

The amendments to the Arbitration Ordinance allowing third party funding in arbitration, and the light touch regulatory approach adopted by the Code, have been welcomed by both the legal profession and parties in Hong Kong. While the number of funded arbitrations is steadily increasing, it is yet to be seen how third party funding will affect the arbitration landscape in Hong Kong more broadly.

Hong Kong and Singapore are both very popular venues for parties to resolve disputes. Both jurisdictions have maintained the common law doctrines of maintenance and champerty. The two jurisdictions passed legislation to allow third party funding in arbitration and related proceedings at around the same time. Singapore is extending the scope of third party funding to proceedings commenced and remaining in the Singapore International Commercial Court (SICC), appeals arising from decisions made in SICC proceedings and mediations relating to these proceedings, from 28 June 2021. The legal profession in Hong Kong is optimistic that Hong Kong will take steps to investigate extending the third party funding framework to certain types of commercial court proceedings in the near future to maintain Hong Kong's competitiveness as a leading dispute resolution centre.

The ORFS reforms are a very positive development in strengthening Hong Kong's position as a leading arbitration hub. ORFS provide another funding option for parties. From our experience in other jurisdictions, parties in bigger cases are likely to benefit from a combined financial arrangement of ORFS and third party funding to manage the financial risks of arbitrating in Hong Kong. Together with the special arrangement between Hong Kong and mainland China in relation to interim measures in aid of arbitration, Hong Kong will remain an attractive venue for arbitration.

Endnotes

1 Irene Lee Wing Yun is general counsel at Deminor. She would like to thank Alanna Lau, legal counsel at Deminor, for her assistance in writing this chapter. ^ Back to section

2 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Amendment Ordinance). ^ Back to section

3 Hong Kong International Arbitration Centre, Administered Arbitration Rules (1 November 2018) https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (HKIAC Rules). ^ Back to section

4 White & Case, Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World 12* (2021), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf. ^ Back to section

5 2022 statistics, HKIAC, https://www.hkiac.org/about-us/statistics. ^ Back to section

6 2021 statistics, HKIAC, https://www.hkiac.org/about-us/statistics. ^ Back to section

7 2020 statistics, HKIAC, https://www.hkiac.org/about-us/statistics. ^ Back to section

8 2019 statistics, HKIAC, https://www.hkiac.org/about-us/statistics. ^ Back to section

9 Article 2 of the Arrangement. ^ Back to section

10 Article 3 of the Arrangement. ^ Back to section

11 Article 7 of the Arrangement. ^ Back to section

12 Article 1 of the Arrangement. ^ Back to section

13 https://www.hkiac.org/Arbitration/interim-measures-arrangement-faqs#What%20categories%20of%20interim%20measures. ^ Back to section

14 *Unruh v. Seeway* [2007] 2 HKC 609. ^ Back to section

15 *Neville v. London Express Newspaper Ltd* [1919] AC 368. ^ Back to section

16 Cap. 609. ^ Back to section

17 The Government of the Hong Kong Special Administrative Region, press release: Code of Practice for Third Party Funding of Arbitration issued (7 December 2018) https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm. ^ Back to section

18 Section 98O of the Arbitration Ordinance. ^ Back to section

19 Section 98G of the Arbitration Ordinance. ^ Back to section

20 Section 98H of the Arbitration Ordinance. ^ Back to section

21 Section 98J of the Arbitration Ordinance. ^ Back to section

22 Section 98P of the Arbitration Ordinance. ^ Back to section

23 Section 98S of Arbitration Ordinance. ^ Back to section

24 Law Reform Commission report, paragraph 4.14. ^ Back to section

25 Law Reform Commission of Hong Kong, report: Third Party Funding for Arbitration (October 2016) www.hkreform.gov.hk/en/docs/rtpf_e.pdf (Law Reform Commission Report), paragraph 1.5. ^ Back to section

26 *Akai Holdings Ltd (in compulsory liquidation) & Ors v. Ho Wing On Christopher & Ors* [2009] HKCU 172; *Re Cyberworks Audio Video Technology Ltd* [2010] 2 HKLRD 1137. ^ Back to section

27 [2002] HKCFI 922. ^ Back to section

28 *Re A (SJ as intervener)* HCMP 2728/2017; [2020] HKCFI 493. ^ Back to section

29 Paragraphs 113, 117-119 of Re A. ^ Back to section

30 Paragraphs 374-379, 392-394, 436-437 of*Re* A. ^ Back to section

31 Principle 4.17 of the Solicitors' Guide. ^ Back to section

32 Commentary 2, Principle 4.17 of the Solicitors' Guide. ^ Back to section

33 Code 9.9 of the Code of Conduct issued by the Hong Kong Bar Association. ^ Back to section

34 Article 2.9 of the Code. ^ Back to section

35 Article 2.12 of the Code. ^ Back to section

36 Article 2.13 of the Code. ^ Back to section

37 Article 2.15 of the Code. ^ Back to section

38 Article 2.16 of the Code. ^ Back to section

39 Article 2.17 of the Code. ^ Back to section

40 Section 18 of the Arbitration Ordinance. ^ Back to section

41 Section 98T(1) of the Amendment Ordinance. ^ Back to section

42 Section 98T(2)(a) of the Amendment Ordinance. ^ Back to section

43 Section 98T(2)(b) of the Amendment Ordinance. ^ Back to section

44 Section 98T(2)(c) of the Amendment Ordinance. ^ Back to section

45 Section 98U of the Amendment Ordinance. ^ Back to section

46 Section 98U of the Amendment Ordinance. ^ Back to section

47 Article 45.4(e) of the HKIAC Rules. ^ Back to section

48 Article 44 of the HKIAC Rules. ^ Back to section

49 Section 98V of the Arbitration Ordinance. ^ Back to section

50 Section 98W of the Arbitration Ordinance. ^ Back to section

51 Article 2.10 of the Code. ^ Back to section

52 Section 98Q of the Amendment Ordinance. ^ Back to section

53 Article 34.4 of the HKIAC Rules. ^ Back to section

54 *Company A v. Company B* [2021] Hu 02 Min Zhong No. 10. ^ Back to section

55 *Dongrunjintai (Shenzhen) Investment Management Centre LP v. Bangying Internet Technology (Beijing) Holdings Co, Ltd* [2020] Beijing Second Intermediate People's Court, Jing 02 Min Zhong 807. ^ Back to section

56 *Winfirefly Information Technology (Shanghai) Co, Ltd v. Changzhou Aino Textile Co, Ltd* [2021] Hu 117 Min Chu No. 12,067. ^ Back to section

57 *Sunan Ruili Airlines Limited et al v. Silver Aircraft Leasing (Tianjin) Co, Ltd* [2022] Su 02 Zhi Yi 13 Hao. ^ Back to section

Irene Lee Wing Yun irene.lee@deminor.com

Deminor

Read more from this firm on Lexology

Italy

Giacomo Lorenzo

Deminor

Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
CONCLUSIONS AND OUTLOOK
ENDNOTES

Introduction

Over the past year, Italy has been one of the most dynamic countries in southern Europe when it comes to litigation funding. Indeed, 2023 has witnessed a significant surge in interest from law firms and companies in this innovative solution to legal disputes. Numerous conferences and meetings have tackled the subject of litigation funding, providing a platform for the exchange of knowledge and ideas among key players in the legal industry. Furthermore, a significant trend has emerged with the establishment of new partnerships between law firms and litigation funders, marking a significant step toward widespread adoption of this practice in the Italian legal context.

Furthermore, another significant change has characterized the Italian litigation funding landscape during the last year: there was the first mention of litigation funding in an Italian legislative decree. Indeed, although discussed by academics and professionals, litigation funding had never been mentioned or expressly recognised by Italian law before.

The above-mentioned developments clearly indicate that litigation funding has secured a prominent place in the Italian legal market.

In the subsequent sections of this chapter, we will delve deeper into the unique challenges and opportunities that characterise the litigation funding environment in Italy and explore the factors that will shape its future evolution.

Over the past year, Italy has been one of the most dynamic countries in southern Europe when it comes to litigation funding. Indeed, 2023 has witnessed a significant surge in interest from law firms and companies in this innovative solution to legal disputes. Numerous conferences and meetings have tackled the subject of litigation funding, providing a platform for the exchange of knowledge and ideas among key players in the legal industry. Furthermore, a significant trend has emerged with the establishment of new partnerships between law firms and litigation funders, marking a significant step toward widespread adoption of this practice in the Italian legal context.

Furthermore, another significant change has characterized the Italian litigation funding landscape during the last year: there was the first mention of litigation funding in an Italian legislative decree. Indeed, although discussed by academics and professionals, litigation funding had never been mentioned or expressly recognised by Italian law before.

The above-mentioned developments clearly indicate that litigation funding has secured a prominent place in the Italian legal market.

In the subsequent sections of this chapter, we will delve deeper into the unique challenges and opportunities that characterise the litigation funding environment in Italy and explore the factors that will shape its future evolution.

i Litigation funders in Italy

The majority of international litigation funders remain sceptical about expanding their operations in Italy, as it is not yet part of their business strategy. This scepticism may be attributed to the well-known length of Italian legal proceedings, making it challenging to predict when a return on investment will be realised. Moreover, the Italian market carries

greater risk, as judges may deviate from previous decisions, making it more difficult to anticipate case outcomes based on precedents.

However, in 2023, the number of litigation funders operating in Italy continued to rise. An interesting development is the entry of a few international funds into the Italian market, seemingly overcoming concerns related to the notorious slowness of the Italian justice system. These international litigation funders primarily focus on large disputes involving Italian companies, often with cross-border implications. Concurrently, the number of purely Italian litigation funders is also on the rise. Unlike international funds, the majority of Italian funds concentrate on small to medium-sized domestic disputes.

Lastly, another emerging trend pertains to the increasing presence of book building companies in Italy. These firms specialise in identifying businesses interested in adopting litigation funding solutions. While book building companies do not directly finance disputes, they rely on capital from litigation funders. Over the past year, foreign book building companies have also entered the Italian market, likely attracted by the dynamism of the Italian market in private enforcement actions.

ii Collaboration between Italian lawyers and litigation funders

Lawyers play a pivotal role in the expansion and evolution of litigation funding in Italy: typically, it is lawyers who inform companies and individuals about the possibility of obtaining support from a litigation funder and externalising the risks and costs associated with a dispute. Moreover, in 2023, several leading law firms organised conferences focused on litigation funding, contributing to educating the Italian market.

Another emerging trend involves lawyers specialising in this field, offering assistance to companies and individuals interested in exploring litigation funding solutions. Keeping abreast of market trends and developments enables them to provide new services to their clients. Likewise, possessing an in-depth understanding of the mechanisms and diverse solutions that litigation funding can offer can confer a competitive advantage upon lawyers and law firms. It appears, therefore, that litigation funding is becoming a new practice area on which several law firms are specialising.

Finally, in the past year, new strategic partnerships have formed between law firms and litigation funders, underscoring the trend of Italian law firms recognising funders as reliable partners capable of delivering innovative solutions to their clients and enhancing the services provided by lawyers. Indeed, law firms can rely on the expertise and support of litigation funders in managing litigation, particularly in collective actions that inherently demand greater effort owing to their multitude of clients. Moreover, even law firms with banks, large corporations or major insurance companies among their clients face challenges in collecting their fees, which are still based on an hourly billing model. The primary reason is that Italian companies today are increasingly conscious of their legal department costs and are moving towards cost reduction. In this context, litigation funding can be a viable solution, as litigation funders cover lawyers' fees.

iii Growing interest of Italian companies in litigation funding

Upon inspection of Italian companies, there is an increasing trend of exploring the opportunity to use litigation funding solutions for various needs.

In the landscape of litigation funding in Italy, the prevalence of small and medium-sized enterprises (SMEs) takes on added significance. Italy's economic fabric is predominantly woven with SMEs, which not only constitute the backbone of its industries but also often find themselves in need of financial support when navigating complex and potentially expensive legal disputes.

These SMEs, while agile and innovative, may encounter legal challenges that require substantial financial resources to address effectively. Litigation can be a costly endeavour, and for smaller businesses, the financial burden of mounting a legal defence or pursuing a claim can be particularly daunting. This is where litigation funding plays a crucial role.

In addition to the financial support, litigation funders can provide valuable expertise in managing intricate legal disputes, especially those with international dimensions. SMEs, which often operate on a regional or global scale, may find themselves embroiled in disputes that span multiple jurisdictions, languages and legal systems. Navigating these complexities demands not only financial backing but also strategic insight and legal acumen.

In the world of litigation funding, the Italian economic landscape serves as a testament to the symbiotic relationship between SMEs and financial backers, illustrating how this partnership can empower smaller enterprises to navigate complex disputes and preserve their competitive edge on the global stage.

Small and medium-sized Italian businesses, especially in this period of crisis and economic uncertainty, struggle to pursue legal actions as this would mean taking away financial resources for their core activities. Therefore, the intervention of a funder could be crucial as it would allow them to concentrate financial resources on their business.

Likewise, Italian large corporations are interested in the optimisation of their legal costs. Within these circumstances, the externalisation of the legal expenses and the financial risk of losing a case can become an interesting option for them. Moreover, besides the financial aspect, the advantage of working with a litigation funder also relates to litigation management. Typically, in-house lawyers are generally busy and do not have the time to give quick answers to the external lawyers, review their briefs and respond to their requests for clarification. This may prejudice the outcome of litigation or arbitration. With litigation funding, the funded party has the possibility of outsourcing these activities to be overseen by professionals who share the same interests in the favourable outcome of a case.

iv Fertile sectors for litigation funders

Regarding investment opportunities that the Italian market can offer funders, litigation funding could find fertile ground in the following legal sectors: insolvency proceedings, arbitration and private enforcement antitrust.

Insolvency procedures

Litigation funding has traditionally been used within the context of insolvency proceedings. Indeed, insolvencies lack financial resources to initiate and pursue legal disputes that could enable the recovery of substantial sums, thereby better satisfying the interests of creditors.

In the same way, many Italian companies in insolvency proceedings are considering the intervention of litigation funders, and there are three financial solutions that can be beneficial for them.

First, pure litigation funding by which the litigation funder provides financial support covering the legal expenses for complex and time-consuming litigations or arbitrations.

Second, another financial solution offered by the litigation funders consists in the payment of an upfront fee to the funded party besides covering all the costs related to the disputes. This could be interesting for the insolvency procedure, which can use the money received upfront for the satisfaction of the creditors.

Finally, insolvency procedures may be interested in selling their claims, and litigation funders can be interested in buying claims if the case is particularly interesting also from a financial perspective. This solution could have beneficial effects on insolvencies by speeding the conclusion of the procedure and ensuring better economic satisfaction for creditors.

Arbitration

Italian companies have started to make frequent use of both institutional and *ad hoc* arbitration. However, state court proceedings remain the most popular method of dispute settlement in Italy. Litigants, indeed, cannot afford – or do not want to pay – the costs of arbitration,[2] which are more expensive than those of state courts' proceedings. In this context, litigation funding may be a viable option.

Moreover, many Italian companies are involved in international arbitrations abroad. Thus, the support of litigation funders could be essential as litigation funders have an international team of professionals with in-depth experience in the legal field that may represent a great advantage for the company in the management of international disputes. Indeed, they usually have connections with leading law firms all over the world, and this can be beneficial for the outcome of a case since the knowledge of foreign law and access to experienced lawyers can make a tangible difference.

Antitrust: private enforcement

Private enforcement continues to be one of the areas where litigation funding is finding fertile ground in Europe, and Italy is no exception.

One of the most significant cases in Italy is the *Corrugated Cardboard* cartel case: on 17 July 2019, the Italian Competition Authority (ICA) concluded an investigation, finding that two separate agreements had been implemented to distort competition in the market for corrugated cardboard sheets and the market for corrugated cardboard packaging respectively.[3]

In the light of ICA's decision, companies that purchased corrugated cardboard sheets and corrugated cardboard packaging from members of the cartel in the years from 2004 to 2017 may be entitled to claim compensation for damage suffered. Since ICA's decision, several litigation funders (at least five) and book building companies (at least two) have worked on the cartel case, offering companies the opportunity to join group actions while externalising the costs and risks associated with the damages claim. Among the companies

that have chosen to utilise litigation funding solutions, there are large Italian groups as well as SMEs. This trend confirms that Italian businesses, regardless of their size, are interested in exploring these new solutions.

Generally, companies harmed by an antitrust violation (e.g., a cartel) are discouraged from bringing a lawsuit owing to the costs of this type of action. Indeed, in addition to the cost of legal advice, the companies must pay the cost of an economic expert for the calculation of the damage suffered. Typically, this type of economic counselling is very complex as, in many cases, it is also necessary to assess whether the injured party has passed on its actual loss resulting from the antitrust infringement (overcharge) to the next level of the supply chain by increasing the price of its products or services sold to its customers at the downstream market level (indirect purchasers).[4]

Furthermore, one of the obstacles that victims of antitrust violations usually face is that they would have to sue their business partner and, consequently, jeopardise their business relations.

Joining an action initiated by a litigation funder may have numerous advantages in this respect. Indeed, litigation funders generally initiate collective actions involving several plaintiffs. In this way, the individual party's position is 'diluted' in the collective action. Therefore, this could at least reduce the risk of jeopardising the business relationship with the defendants that have been sued by all – or most of – their clients or suppliers. Moreover, the collective action will also have an impact on the judge, as the larger number of parties involved and, consequently, the higher value of the claim will give more strength to the plaintiffs' position.

Another solution offered by the litigation funder is the assignment of the claim. Through the assignment of the claim, the Italian victim of the antitrust violation obtains compensation for the damage suffered (more precisely, it obtains a sum of money as the price of the assignment of the compensatory claim) without starting legal actions against a business partner, and without having to bear the costs and risks of litigation. Indeed, in these cases, the assignee litigation funder of the claim sues in its name and on its behalf. As a result, it is likely that the assignment of the antitrust damages claim can at least mitigate the risk of undermining the business relationship between the victim of the infringement and the company that is being sued.[5] Altogether, by selling the claim, the company can monetise the claim immediately and collect the money, avoiding wasting time in lengthy proceedings and jeopardising relationships with business partners.

Year in review

In the past year, we have seen Italian professionals and companies becoming more interested in third party funding as a solution to the costs and risks related to the disputes. The sector that saw the most activity was antitrust private enforcement, followed by commercial litigation and arbitration. Additionally, the increased interest from legal firms in this new tool and the first recognition by Italian regulations have contributed to the proliferation of litigation funding in the market.

Legal and regulatory framework

i First recognition of litigation funding in Italy

On 23 March 2023, the Legislative Decree No. 28/2023 (the Decree), transposing Directive (EU) 2020/1828, was published on the Italy's Official Journal. The Decree amends the Consumer Code by introducing the possibility to file a claim to protect the collective interests of a group of consumers (class action). The Decree is of interest for litigation funders operating in the Italian market as it is the first ever recognition of their existence in Italian legislation.

The Decree neither defines nor regulates litigation funding but mentions it twice, thus considering it licit. The only references pertain to the:

1. provision in the statutes of entities' by-laws that can bring cross-border actions, measures aimed at preventing and resolving conflicts of interest between the association, its funders and consumer interests; and
2. inadmissibility of actions brought in a conflict of interest, especially if the funding entity is a competitor of the accused company in the violation.

In particular, with regard to (a), Italian national consumer and user associations that wish to file representative actions in other EU jurisdictions will have to comply with the requirements listed in Article 140-quinquies. Among these, entities must provide for rules in the by-laws suitable to ensure their independence and the absence of influence by professionals who have an economic interest in bringing representative actions, as well as appropriate measures to prevent and resolve conflicts of interest that could arise between the entity, its funders and the interests of consumers (Article 140-quinquies (2), Letter (d)). To comply with this provision, consumer and associations will also have to disclose on their website information on the source of their financings (Article 140-quinquies (2), Letter (f)).

Furthermore, with regard to (b), Article 140-septies regulates the procedural aspects of this action. In particular, Article 140-septies (5) states that the qualified entity that is pursuing the claim must disclose during the proceedings the amount of funding received or promised by third parties. Moreover, Article 140-septies (8), Letter (e), states that a judge must deem a claim as inadmissible when, inter alia:

> the action is brought in con ict of interest, particularly if it appears that the person who has funded the action is a competitor of the defendant or depends on him. In this case, the court officially raises the issue and gives the plaintiff a time limit within which to re nance or modify the funding.

ii Litigation funding agreement

Litigation funding and litigation funding agreements are not regulated under Italian law and still represent an unexplored scenario for the Italian authorities.

Given the peculiar features of the litigation funding agreement, it is no easy task to qualify for such a contract. There might be observable similarities with typical contractual structures governed by the Italian Civil Code. Therefore, it is necessary to clarify what litigation funding is not.

Although there is funding, the contract cannot be considered a loan, according to Article 1813 of the Civil Code.[6] Indeed, the funder provides financial support, but a typical loan mandates a duty to return money or fungible goods, which does not exist in litigation funding agreements. In addition, differently to what is usual in a loan, the potential payment of the funded party is normally not connected to the invested capital or to interests (it is a share of what the client is entitled to by the judgment or by the settlement). These elements exclude the possibility of qualifying the litigation funding agreement as a loan.

Moreover, the litigation funding agreement does not amount to an insurance contract, according to Article 1882 of the Civil Code.[7] In this regard, some essential elements are also missing: in particular, the litigation funder must cover the expenses related to the disputes.[8] On the other hand, in a typical insurance contract, the insurer is obliged to pay only under the condition of a future and uncertain event. Another difference from an insurance contract is that pursuant to Article 1882 of the Civil Code the insured must pay a premium. In the case of litigation funding, the funded party does not have to pay anything and will only be obliged to pay a portion of the sums recovered at the outcome of the proceedings if the case is successful.

As a result, the litigation funding agreement is considered an 'atypical' contract, which cannot be qualified regarding the categories of the Civil Code. According to Article 1322(2) of the Civil Code, parties are free to conclude an atypical contract if it fulfils interests that are worthy of protection according to the legal system. Therefore, it is important to understand whether the litigation funding agreement is consistent with Italian law.

Litigation funding aims at enabling claimants with a meritorious claim to bring litigation that might otherwise stall, as well as avoiding unfair settlements because of an intervening lack of funds. As such, the funder supports a party to be involved in litigation who wishes to remove any of the costs or risks associated with litigation, or both. If the case succeeds, the funder recovers the costs it has borne and takes an additional agreed success fee. If the case fails, the funder loses its investment and is not entitled to receive any payment. In essence, the litigation funding aims to transfer to the funder the cost and (financial) risk involved in pursuing justice, level the playing field and enhance access to justice for meritorious claimants.

As a result of the above, among Italian scholars there is the belief that litigation funding agreements fulfil interests that are worthy of protection.[9]

iii Assignment of claims in Italy

Italian companies have shown particular interest in the assignment of claims and, on the other hand, litigation funders are also interested in offering this solution if the merit of the case is solid and there are no major obstacle to the recovery of the litigious sums.

In this regard, in Italy the assignment of claims is governed by Articles 1260–1266 of the Civil Code. According to Article 1260, a creditor may assign any and all of its claims without the consent of the debtor. However, this principle is subject to certain limitations deriving from specific characteristics of the claim or depending on the fact that the assignment is forbidden under Italian law.[10]

Moreover, Article 1261 of the Civil Code prohibits the assignment of claims to judges, attorneys, notaries and other professionals involved in legal matters. The provision points

out that the aforementioned subjects cannot even be assignees of claims through a different entity or person.

Regarding the assignment of claims, Decree No. 53, dated 2 April 2015, of the Italian Ministry of Economy and Finance provides a list of activities that need to be regarded as financing activities. The list includes any financing related to assignment of claim for consideration.

However, the Italian courts addressed this specific issue in several cases concluding that, in certain circumstances, assignment of claims is not considered a financing activity.[11]

In particular, Italian courts that have addressed the issue emphasised that the assignment of claims *causa* (i.e., the contract's underlying purpose) is variable and that can serve various purposes (e.g., sale, donation or guarantee). Therefore, the purchase of claim can occur for consideration or not.

Given the neutrality of the *causa contractus* of the assignment of claim, to determine whether the activity can be qualified as financial activity, it is essential to examine the individual economic function pursued by the parties through it, representing the interests (*causa* in concreto).

Legal precedents have made it clear that what is important in determining whether the assignment of claim agreement can be characterised as having (also) a financing purpose is the upfront provision, in favour of the assignor, of a sum of money or another asset that will be subsequently reimbursed within a specified time frame.

Therefore, the Italian courts denied the existence of a financing cause when the contract provides that:

1. the consideration for the assignor is equal to the amount of the credit actually recovered, minus a percentage to be paid to the assignee for the services provided;
2. if the credit recovery action brought by the assignee is unsuccessful, the assignor will not be entitled to receive any consideration for the same assignment; and
3. the assignee is entitled to receive compensation for the services provided – calculated as a percentage of the credit recovered – solely upon the successful recovery of the credit.[12]

Therefore, according to Italian case law, the assignment of a claim cannot be considered a financial activity when the aforementioned conditions are met.

Structuring the agreement

In the early days of litigation funding, litigation funding agreements were fairly streamlined and simple. Later, as the industry evolved, contracts became increasingly sophisticated and complex. The reason for this is that efforts have been made to meet the specific needs of clients and, at the same time, to prevent any pathological phases that could lead to problems for the funder or the funded party, or both, being confronted.

Consequently, there is no unique litigation funding agreement structure, nor is there a specific structure for this form of contract in Italy. However, certain precautions must be

considered when operating in the Italian market,[13] and it is possible to identify certain clauses that are common in all litigation funding agreements.

In the early days of litigation funding, litigation funding agreements were fairly streamlined and simple. Later, as the industry evolved, contracts became increasingly sophisticated and complex. The reason for this is that efforts have been made to meet the specific needs of clients and, at the same time, to prevent any pathological phases that could lead to problems for the funder or the funded party, or both, being confronted.

Consequently, there is no unique litigation funding agreement structure, nor is there a specific structure for this form of contract in Italy. However, certain precautions must be considered when operating in the Italian market,[13] and it is possible to identify certain clauses that are common in all litigation funding agreements.

i Claimant-side funding

Most litigation funding agreements are entered into by litigation funders and claimants. In such a structure, we can identify two main obligations:

1. funder's obligation: to pay all costs related to the litigation or arbitration; and
2. obligation of the claimant: to share the proceeds with the litigation funder if the case is successful.

Additionally, a funding agreement will more often include provisions governing the following issues:

1. The amount of the investment: the funding agreement will generally define the maximum commitment of the funder, the specific items that are included in the budget (legal fees for the first instance and appeal, expert fees, adverse party costs, etc.), and the conditions for a drawdown of the budget. To avoid budget overruns, and depending on the type of case, funders may work with capped amounts per item or stage of the proceedings.
2. Exposure to counterclaims: the funding agreement will specify whether the funding will cover the costs of defending a counterclaim and whether the funder will cover the financial exposure of a counterclaim.
3. The funder's remuneration: this can be either a percentage of the recovered amounts, a multiple on the invested capital, or a combination of both. The agreement will also set out the payment waterfall, which defines the priority of payments to the funder, the law firm and the client. Practical arrangements for the distribution of the proceeds will also be provided.
4. The exchange of information: correspondence between the client and his or her lawyer and any written material drafted for the client are protected by the attorney–client privilege. The lawyer, therefore, cannot disclose any of this to the funder without the client's express consent. Consequently, the funding agreement will regulate the exchange of information between the client, the lawyer and the funder. This enables the latter to be kept abreast of the progress of the case and to monitor its investment.

5. Control or consent rights: to protect its investment, the funder will generally seek to have some degree of control over important decisions in a case, such as filing appeals, terminating proceedings or accepting settlements. Under Italian law, a funder is not prohibited from having a veto right on certain decisions.
6. Dispute resolution clause: usually, these clauses provide for English law as the applicable law and arbitration as the dispute resolution method. However, to meet the needs of the client, some international litigation funders are starting to insert clauses that provide for Italian law as the applicable law and the Court of Milan as the competent court or, alternatively, arbitration at the Chamber of Arbitration of Milan (CAM).
7. Payment of an up-front fee: in which case the litigation funder advances a portion of the expected proceeds to the claimant.
8. Termination rights: in addition to termination for material breach, the funder and the client may also agree on a right for the funder to terminate the agreement if an event occurs that negatively impacts the prospects of the case or an event that makes the case commercially unviable, or the agreement may even allow for termination for convenience.[14]

ii Defence-side funding

Although it is not widely practised enough to be exhaustive, it should be mentioned that there is the possibility of structuring the litigation funding agreement also for the defendant.

Of course, in this case, the difficulty comes from defining the 'success of the case'.-[15] Indeed, it is necessary to determine when the litigation funder will be entitled to compensation and how this compensation shall be calculated.

The most common way is the reverse contingency fee. With such an agreement, the funder's profit will be a percentage of the difference between the total value of the claim and the sums paid by the defendant at the end of the proceedings.[16]

Disclosure

i Domestic proceedings

To date, there are no laws or regulations in Italy that require funded parties to disclose the existence of a litigation funding agreement or the identity of the funder.

In the absence of any obligation, the disclosure of the existence of a litigation funding agreement can be a strategic choice. In this way, the counterparty will know the litigation will be pursued until its conclusion (since the time and the money are not an obstacle) and that the funded party will not settle the case if the conditions proposed are not satisfactory.

Nonetheless, the terms and conditions of a litigation funding agreement should always be treated as confidential information by the funded parties and the appointed lawyers. The disclosure of this information can be used by the counterparty against the funded party.

ii Arbitration

In arbitration proceedings, there is also no general duty to disclose the existence of any litigation funding agreement.

However, given the arbitrators' obligations of impartiality and independence (in both national[17] and international[18] proceedings), the existence of a litigation funding agreement might be relevant for the purpose of evaluating any possible conflicts of interest on the part of the arbitrators. Therefore, Article 43 of the 2019 Arbitration Rules of CAM expressly states:

> The party that is funded by a third party in relation to the proceedings and its outcome shall disclose the existence of the funding and the identity of the funder. Such a disclosure shall be repeated along the proceedings, until its conclusion, where supervening facts so require or upon request by the Arbitral or the Secretariat.

This Article broke ground on litigation funding's acceptance in Italy in 2019, at least in the context of commercial arbitration, further confirming the importance of litigation funding in the Italian market.[19]

Costs

Pursuant to Article 91 of the Italian Code of Civil Procedure, the loser pays concept underlies the Italian legal system (i.e., the judge orders the losing party to pay the legal fees and expenses of the successful party). The topic of how the expenses of a litigation funding agreement would be considered under Article 91 of the Code of Civil Procedure has not yet come up because litigation funding in Italy is still in its infancy, and there are no precedents.

More precisely, a scale is used to determine these charges, which include legal fees and court costs, based on the amount that is in dispute. This approach can give all litigants a high level of predictability regarding the legal costs that they must pay if they lose a case.

Ministerial Decree No. 55/2014 governs the calculation of legal expenses. This Decree sets out parameters and criteria for the calculation of fees based on, inter alia, the value of the proceedings, the complexity of the dispute and the number of parties involved. This amount should be added to the court administrative costs and legal charges (subject to value-added tax, which is currently 22 per cent) together with a mandatory contribution (currently 4 per cent) to the Italian social security pension fund for lawyers.

Furthermore, it should be mentioned that on 8 October 2022, Decree 147/2022 was published, which entered into force on 23 October 2022. This Decree updates the forensic parameters to the cost of life and introduces hourly rates, fees for insolvency proceedings and incentives in the case of settlement.

Conclusions and outlook

As mentioned at the beginning of this chapter, 2023 has been an extremely important year for the Italian litigation funding market and, given the latest trends, there could be exponential growth in litigation funding in Italy in the near future.

In this regard, a variety of fields may be covered by litigation funding.

First, litigation funding may play a crucial role in insolvency proceedings, which may increase as the recession becomes more severe.

Second, litigation funding will increasingly take hold in domestic and international arbitrations, solving the problem of the excessive cost of such procedures. Many Italian companies do their business abroad and find themselves in difficulty when they must litigate in foreign jurisdictions.

Most notably, the area that appears most targeted is private enforcement for antitrust violations. These cases, by their nature, are complicated and costly; therefore, support from litigation funders can be essential for victims.

Furthermore, numerous Italian businesses have been struggling financially over the past few years as a result of the covid-19 outbreak, the start of the war in Ukraine and the rise in costs. These businesses need to focus their financial resources on strategic areas that are more crucial to company development than litigation costs in this environment of extreme economic uncertainty. In these circumstances, litigation funding may represent an interesting option.

In conclusion, Italy is ready to embrace this new financial solution, which could bring several benefits to the country. Indeed, Italy could become a more attractive venue for dispute resolution, and Italian companies and individuals with meritorious claims could bring legal actions to protect their rights without incurring any costs.

Endnotes

1 Giacomo Lorenzo is senior legal counsel at Deminor. ^ Back to section

2 See R Sali, 'Il finanziamento di terzi in arbitrato', in*Rivista Trimestrale di Diritto e Procedura Civile*, No. 2, 2022, p. 339. In that article, the Deputy Director of the Chamber of Arbitration of Milan (CAM) reports on the difficulties of parties paying the costs related to arbitration on time. ^ Back to section

3 Italian Competition Autorithy: Case I805/2019 (you can find the decision at the following link: https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/BE9F021100ACF4F8C1258454005D2B01/$File/p27849.pdf).- ^ Back to section

4 G Afferni, 'La cessione del credito risarcitorio per violazione del diritto antitrust',*Diritto del Commercio Internazionale*, XXI, Fas. 4, 2017. ^ Back to section

5 id. ^ Back to section

6 G De Nova, 'Il finanziamento della lite: il Litigation Funding Agreement', in*Rivista trimestrale di diritto e procedura civile* No. 2, p. 268. G M Solas, 'Finanziare il contenzioso: esperienze a confronto', in *Contratto e impresa - Europa*, 2016, p. 184 ss.; L Coppo, 'Il contratto di finanziamento della lite da parte di terzi: profili sostanziali': http://fundit.unito.it/, p. 41; L Castelli, S Monti, 'Third party litigation funding: quali prospettive in Italia?', in*I contratti*, 2019, p. 585. ^ Back to section

7 L Coppo, 'Il contratto di finanziamento della lite da parte di terzi: profili sostanziali': http://fundit.unito.it/, p. 42. ^ Back to section

8 The qualification of the litigation funding contract as an insurance contract was excluded by the German public authority for insurance in 1999: see the comparative remarks of E D'Alessandro,*Contratto di finanziamento della lite*, (No. 2), p. 152. ^ Back to section

9 G De Nova, (No. 7), p. 268. G M Solas, (No. 7) pp. 267–268; L Coppo, (No. 8), p. 48; L Castelli, S Monti, (No. 7) p. 588. ^ Back to section

10 More precisely, types of claims that cannot be assigned are: claims of a personal nature; claims in which the assignment is forbidden by law, (inter alia, maintenance claims pursuant to Article 447 of the Civil Code; claims relating to salaries, pensions and any other remuneration of employees and pensioners of the state, of public entities and of undertakings entrusted with a public communications or transport service and of private undertakings pursuant to Article 1 of Presidential Decree, No. 180 of 5 January 1950; claims of contractors against the state or other public bodies, unless the administration concerned agrees to the assignment pursuant to Article 9, L. 20.3.1865, No. 2248, Annex E; and family allowance claims pursuant to Article 22 of Presidential Decree No. 797 of 30 May 1955); and if the parties agree to exclude the assignment of claims pursuant to Article 1260, last paragraph, of the Civil Code. In this case, the agreement is not enforceable against the assignee, unless it is proved that he or she was aware of it at the time of the assignment. ^ Back to section

11 Italian Supreme Court No. 27892/23; Italian Supreme Court No. 21765/2019; Court of Bergamo, 5 February 2021, No. 225; Court of Bergamo, 8 February 2021, No. 234; Court of Busto Arsizio, 22 December 2021, No. 1816; Court of Busto Arsizio, 17 February 2022, No. 232; Court of Busto Arsizio, 28 March 2022, No. 481; Court of Milan, 28 February 2022, No. 1734; Court of Milan, 27 December 2021, No. 10869; Court of Milan, 9 September 2021, No. 7187. ^ Back to section

12 Court of Milan No. 1734/2022; Court of Milan No. 10869/2021. ^ Back to section

13 For instance, if the litigation funding agreement involves a weaker party, such as a consumer, the funding agreement should therefore be tailored accordingly. ^ Back to section

14 J Benoot, 'Spotlight: structuring litigation funding agreements in Belgium', Lexology, 22 November 2021: https://www.lexology.com/library/detail.aspx?g=18718dbf-37da-49c8-a50d-bce941c4bd5c (2 May 2022). ^ Back to section

15 E Samra, 'The Business of Defense: Defense-Side Litigation Financing',*University of Chicago Law Review*, Vol. 83, No. 4, October 2016: 2299–2341. ^ Back to section

16 id. ^ Back to section

17 See, for instance, Article 18 of the Regulations of the Milan Chamber of Arbitration. ^ Back to section

18 Namely, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. ^ Back to section

19 F Banti,*The Third Party Litigation Funding Law Review*: Italy, 2021: https://www.lexology.com/indepth/the-third-party-litigation-funding-law-review/italy. ^ Back to section

d e m i n o r

LITIGATION FUNDING

Giacomo Lorenzo giacomo.lorenzo@deminor.com

Deminor

Read more from this firm on Lexology

Luxembourg

Olivia de Patoul

Deminor

Summary

INTRODUCTION

THE YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

Litigation funding is not regulated by law in Luxembourg and the validity of litigation funding agreements has never been discussed by local courts. This, however, does not mean that litigation funding is not used in this jurisdiction but that it remains submitted to the contractual freedom of the parties provided they comply with public policy and general civil provisions applying to contracts submitted to Luxembourg law.

Even if valid and enforceable, litigation funding agreements are less common than in other jurisdictions,[2] probably because of the relatively low costs of litigation. Litigants therefore have less need to seek external funding to finance their claims.

There have been past examples of funded litigation. Most notably, victims of the late Bernie Madoff's Ponzi schemes instituted legal proceedings in Luxembourg against, inter alia, the investment managers and custodian banks of the Luxembourg funds that, unknown to the investors, invested in Madoff. Some of these proceedings remain ongoing today, pending the outcome of criminal investigations. Also, investors who have invested in Luxembourg funds set up by Credit Suisse with exposure to Greensill are currently exploring their options under Luxembourg law.

Also, with the entry into force in 2023 of the new Arbitration Act, Luxembourg is trying to attract more arbitration disputes, and that could lead to more cases being funded, especially at the enforcement stage. In the arbitration sector, funders are currently most interested in the enforcement of arbitral awards against states.

As Luxembourg is known for its financial services industry, it is expected that the Luxembourg litigation funding market will develop mainly around investment losses and litigation related to financial products (e.g., mis-selling claims). Litigation funding is also increasingly gaining traction in the Luxembourg financial sector, as investment companies regularly join funded collective actions in foreign jurisdictions to recover losses suffered on their investments.

Finally, Luxembourg is an interesting venue for cross-border asset recovery and enforcement matters in general. Luxembourg law contains various provisions to facilitate the enforcement of a final enforcement decision, such as garnishment. Also, Luxembourg courts can issue interim attachment orders to freeze the assets of a debtor while proceedings on the merits are still ongoing. The procedure for obtaining such an interim attachment is quite efficient (either *ex parte* proceedings before the president of the district court or, if the creditor already has a title, notification of the attachment directly by a bailiff without intervention of the court) and the substantive requirements for obtaining an attachment are relatively low. This allows a creditor to rapidly freeze the bank accounts held by a debtor in Luxembourg.

The major litigation funders with operations in Luxembourg or that focus on the Luxembourg market, or both, are Deminor and Nivalion.

The year in review

i Legislative developments

Despite the deadline of December 2022, EU Directive 2020/1828 on consumer collective redress has not been implemented yet. The draft bill introducing consumer class actions was submitted to parliament in August 2020 and considerably amended in January 2022 to comply, inter alia, with the Representative Action Directive of 4 December 2020. Consumer actions against financial institutions and insurance companies are excluded from its scope following the bill latest amendments.

Luxembourg, however, adopted its new arbitration law, aiming to modernise arbitration by offering more speed and flexibility. The most important changes relate to confirmation of the 'competence-competence' principle, creation of the supporting judge, simplification of the appeal procedure to an arbitral award and affirmation that both a request to set aside an arbitral award and an appeal of a decision upholding enforcement do not have suspensive effect, unless the enforcement 'is susceptible to severely prejudice the rights of a party'.

ii Notable cases

It is understood that investors who have invested in the Credit Suisse (Lux) Supply Chain Finance Fund, a sub-fund of a Luxembourg SICAV that was put into liquidation in March 2021 following the bankruptcy of Greensill, have initiated or are the process of initiating legal action funded by litigation funders. It is alleged that Credit Suisse arranged and promoted Greensill-related insured investment funds as safe instruments and as an alternative to money market funds because of their insured character. Investors claim to have been misled about the key characteristics of the fund, notably about the non-renewal of the underlying insurance policies eight months before the collapse of Greensill.

Legal and regulatory framework

i No regulatory framework

There is no prohibition on litigation funding in Luxembourg. Moreover, as a civil law jurisdiction, the concepts of champerty and maintenance are not part of Luxembourg's legal culture. Third party funding of litigation is, therefore, considered allowed and has been used in the past without any issues arising.

There is no legal framework in place for litigation funding in Luxembourg. The general rules of contract law as established in the Luxembourg Civil Code will apply, including the principle of freedom of contract. The parties to the funding agreement are free to determine their respective rights and obligations within the framework of general contract law.

As set out above, litigation funding is not yet commonly used in Luxembourg. Consequently, and to the best of our knowledge, Luxembourg courts have not yet been asked to resolve questions regarding the admissibility of third-party funding or disputes between a funder and its client. Nevertheless, the legality of litigation funding in Luxembourg is commonly accepted.

Regarding arbitration proceedings, on 23 March 2023, the Luxembourg Parliament adopted the new Arbitration Act 2023 to reform, modernise and simplify the arbitration system. It does not, however, include any provisions on third party funding.

Finally, the Arbitration Centre of the Chamber of Commerce of Luxembourg has its own set of rules, which are contained in the Rules of Arbitration of the Luxembourg Chamber of Commerce, in force since 1 January 2020. The Rules do not contain any reference to third party funding either.

ii Contingency fees

Fee arrangements between lawyers and their clients providing that the lawyers' remuneration is exclusively based on the outcome of the dispute are prohibited. However, lawyers are permitted to work for a partial success fee on top of their fixed or hourly-based remuneration.

iii Class actions

Class actions are currently not available in Luxembourg. Given the entry into force of the new EU Directive on consumer collective redress,[3] pursuant to which all EU Member States must ensure that representative actions can be brought by qualified entities, a consumer class action mechanism will need to be adopted in Luxembourg. The deadline to transpose the Directive was 25 December 2022, with measures to apply as from 25 June 2023. A draft bill to that effect was submitted to the Luxembourg Parliament in August 2020 but has not yet been enacted.[4] The bill was amended in January 2022, excluding, for instance, collective recourse by consumers against professionals overseen by the Luxembourg financial and insurance regulatory authorities.

The draft bill does not include a defined framework for third party funding. However, Article L512-2 of the draft bill provides that, for the qualified entity to demonstrate it does not have a conflict of interest, the writ of summons must mention, inter alia, the sources of funding of the action, such as a funding contract. The possibility for third party funding of a consumer class action is, therefore, at least implicitly, taken into account in the draft bill.

Structuring the agreement

Litigation funding agreements are considered as agreements *sui generis* under Luxembourg law, governed only by the rules of general contract law. Also, some specific provisions governing the lawyer–client relationship might indirectly affect the funding contract (such as the obligation for a lawyer to remain independent or conflict-of-interest provisions).

A litigation funding agreement does not qualify as a loan, given that there is no obligation on the funded client to reimburse the funding, which is an essential obligation of the borrower under a loan agreement. The client will only have an obligation to share the proceeds in the event of a successful outcome.

The parties' respective rights and obligations can be freely defined in the funding agreement, the sole limitation being violations of public policy. Given the lack of a statutory framework or specific legislation, the funding agreement should be comprehensive and should stipulate all aspects of the parties' relationship. Generally, a funding agreement will include provisions governing the following issues:

1. The amount of the investment: the funding agreement will generally define the maximum commitment of the funder, the specific items that are included in the budget (legal fees for first instance and appeal, expert fees, adverse party costs, etc.) and the conditions to drawdown the budget. To avoid budget overruns, and depending on the type of case, funders may work with capped amounts per item or stage of the proceedings.
2. Exposure to counterclaims: the funding agreement will specify whether the funding will cover the costs of defending a counterclaim and whether the funder will cover the financial exposure of a counterclaim.
3. The funder's remuneration: this can be either a percentage of the recovered amounts, a multiple on the invested capital, or a combination of both. The agreement will also set out the 'payment waterfall', which defines the priority of payments to the funder, the law firm (contingency fees) and the client. Practical arrangements for the distribution of the proceeds will also be provided for.
4. The exchange of information: correspondence between the client and their lawyer, and any written material drafted for the client, are protected by attorney–client privilege. The lawyer, therefore, cannot disclose any of this to the funder without the client's express consent. Consequently, the funding agreement will regulate the exchange of information between the client, the lawyer and the funder. This enables the latter to be kept abreast of the progress of the case and to monitor its investment.
5. Control or consent rights: to protect its investment, the funder will generally seek to have some degree of control over important decisions in a case, such as filing appeals, terminating proceedings or accepting settlements. Under Luxembourg law, a funder is not prohibited from having a veto right on certain decisions.
6. Termination rights: in addition to termination for material breach, the funder and the client may also agree on a right for the funder to terminate the agreement if an event occurs that negatively impacts the prospects of the case or an event that makes the case commercially unviable, or the agreement may even allow for termination for convenience.

Disclosure

i Disclosure of funding – judicial proceedings

Given that there is no legal framework on litigation funding, there is equally no legal obligation for a funded party to disclose the existence of a funding agreement, let alone disclose the agreement itself. That said, for the sake of transparency, it is recommended that a litigant discloses that it is benefiting from litigation funding.

ii Disclosure – arbitration

Since 2023, arbitration in Luxembourg has been governed by the Arbitration Act 2023, which does not contain any provisions referring to third party funding or the obligation

for parties to disclose their use of third party funding to the arbitrators or the adverse party. That said, arbitrators must act impartially and independently. This general principle is confirmed in the Rules of Arbitration[5] enacted by the Luxembourg Chamber of Commerce. Pursuant to Article 10.10 of these Rules, a prospective arbitrator must disclose 'any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality'. An arbitrator's prior relationships or dealings with the funder may qualify as such circumstance. The funded party's disclosing of the existence of the funding arrangement, including the funder's identity, enables the arbitrators to comply with their own disclosure obligations.[6]

Furthermore, there is a general tendency in arbitration worldwide towards disclosure of funding agreements in arbitration proceedings, evidenced by recent amendments to institutional rules of arbitration providing for such disclosure. For example, the International Chamber of Commerce issued new rules in 2021, including under 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 which 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.'

In conclusion, although it is not mandatory to disclose the existence of a funding agreement in an arbitration submitted to Luxembourg law, it would be recommended to do so.

iii No discovery

Luxembourg does not have discovery proceedings akin to discovery in the United States. Parties to civil proceedings in Luxembourg must produce their own evidence to support their claims. However, at the request of a party to the proceedings, the court can order its opponent or a third party to disclose a specifically identified piece of evidence that the opponent or third party has in its possession.[7]

Costs

i Judiciary proceedings

When it comes to recovery of costs in court proceedings, a distinction should be made between the costs related to the proceedings and lawyer fees.

The losing party will generally be ordered to pay an indemnity for costs to the prevailing party.[8] These costs mainly include bailiff fees, the fees of the expert appointed by the court and witness expenses. Lawyer fees are not included in these costs.

In addition to the indemnity for costs, the court may decide to grant an indemnity for legal fees to one of the parties.[9] The amount of this indemnity is left to the discretion of the court and generally covers only a small portion of the total legal fees incurred by that party. The judge may only grant the indemnity if a request to that order has been made by the parties having won the case and if 'it seems unfair to leave the other party to pay part of the sums it has incurred and not included in the expenses'.

At the request of the defendant, security for costs may be imposed by the court on a foreign claimant, that is, a claimant with domicile or habitual residence in the territory of another state.[10] The court has discretion to determine the amount of the security. However, there are several exceptions to this general rule. Claimants who have their domicile in a Member State of the European Union, a member state of the Council of Europe or any other state with which Luxembourg has entered into an international agreement providing for an exemption to request a security for costs, are excluded from the scope of application of these provisions. As a result, security for costs is rarely imposed in practice.

ii Arbitration

The Luxembourg Arbitration Act does not include any specific provisions regarding the costs of the arbitration. However, it is not debated that arbitrators can issue cost orders establishing which party must carry what part of the costs.

The Luxembourg Chamber of Commerce Rules of Arbitration provide that the final award shall fix the costs of the arbitration and decide which of the parties shall bear them, or in what proportion they shall be borne by the parties. In making decisions as to costs, the arbitrator may consider any such circumstances it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.[11] Moreover, the costs of the arbitration shall be submitted for prior approval to the Council of Arbitration (i.e., the council managing the Arbitration Centre of the Chamber of Commerce) to ensure that the costs remain within reasonable limits, taking into account the nature of the dispute and the degree of difficulty of the issues to be resolved.[12]

iii Liability of funders for adverse costs

Third-party funders usually do not become a party to the proceedings, whether judicial or arbitration proceedings, initiated by their clients. The court or arbitral tribunal, therefore, cannot order the funder to pay costs, and the adverse party will not have a direct claim against the funder.

Outlook and conclusions

Although third party litigation funding has been used successfully in the past, the Luxembourg market remains relatively underdeveloped. As the market for litigation funding in other EU jurisdictions grows, Luxembourg may ride this wave, albeit maybe to a lesser extent than surrounding countries. Litigation regarding investment losses and financial services, as well as commercial arbitration and enforcement procedures, seem to be the most fertile practice areas for the use of third party funding in the near future.

Endnotes

1 Olivia de Patoul is general counsel at Deminor. ^ Back to section

2 There is no publicly available data on the use of litigation funding in Luxembourg; therefore, this section is based on the author's monitoring of the funding market. ^ Back to section

3 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. ^ Back to section

4 Bill No. 7650 introducing class actions in consumer law. ^ Back to section

5 https://www.cc.lu/fileadmin/user_upload/cc.lu/Rules_of_arbitration.pdf. ^ Back to section

6 Although arbitration proceedings in Luxembourg will not necessarily be conducted in accordance with the Luxembourg Chamber of Commerce's Rules of Arbitration, the principles of independence and impartiality apply generally to all arbitration proceedings. ^ Back to section

7 See Articles 284–288 NCPC. ^ Back to section

8 Article 238 NCPC. ^ Back to section

9 Article 240 NCCP. ^ Back to section

10 Article 257(1) NCPC. ^ Back to section

11 Chamber of Commerce Rules of Arbitration, Article 33.2. ^ Back to section

12 Chamber of Commerce Rules of Arbitration, Article 33.3. ^ Back to section

deminor

LITIGATION FUNDING

Olivia de Patoul olivia.depatoul@deminor.com

Deminor

Read more from this firm on Lexology

Mexico

Paloma Castro

Deminor

Summary

INTRODUCTION

THE YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

Third party litigation funding is still a relatively new concept in Mexico. However, a distinction should be drawn between financing for judicial proceedings before local and federal courts, and financing for arbitration proceedings, which has seen massive growth in recent years.

Third party litigation funding is still a relatively new concept in Mexico. However, a distinction should be drawn between financing for judicial proceedings before local and federal courts, and financing for arbitration proceedings, which has seen massive growth in recent years.

i Domestic court litigation

Mexico is a federal country with a civil law legal system. As such, Mexico does not have a specific regulatory framework governing or restricting the use of third party litigation funding, which is generally allowed and accepted. However, litigation funding is not yet well established within Mexican litigation practice. Until a few years ago, there were very few funds with the capacity to underwrite and finance Mexican domestic litigation.

The slow penetration and delayed availability of third party litigation funding in Mexico can be attributed to the following factors:

1. Generally speaking, the costs of litigating in Mexico are low in comparison to common law jurisdictions where high costs have spurred the development of the third party litigation funding financing market. Legal fees are generally lower, and there are no statutory court fees or costs associated with filing civil or commercial lawsuits. Furthermore, it is not possible to request security for costs in commercial litigation.[2]
2. On the other hand, the financial exposure of plaintiffs is substantially low. The recovery of costs and legal fees from the losing party is not generally available unless the judge considers that one of the parties has proceeded with recklessness, bad faith, or both. In any case, the financial exposure is statutorily limited, and it is generally determined by a tariff or a percentage of the claimed amount depending on the state in which the case is heard.
3. The civil law regime in Mexico tends to be quite strict and conservative when it comes to awarding significant amounts of damages as compared to common law jurisdictions.

These factors naturally limit the interest of litigation funders in domestic court cases in Mexico. The costs profile of cases with lower capital deployment and potentially lower returns may explain why litigation funding is still not well established.

Nevertheless, Mexico's legal system has seen some important developments and court decisions that might present interesting opportunities for the litigation finance industry going forward.

The country's historical ties with the US have seen Mexican courts adopt certain notions from the US legal system that could prove to be instrumental in the development of the litigation funding market in Mexico. In the past decade, Mexico has enacted

a comprehensive legal framework for collective redress actions protecting consumer relationships, including antitrust, financial services and product liability cases. As with other countries, litigation funding could play a major role in the development of the Mexican class action system, which has remained mostly untested in these sectors. The Supreme Court has also introduced a particular notion of punitive damages that includes features of the common law concept that are not typically seen in civil law liability systems. As the courts begin to adopt these concepts and criteria, it is expected that damages-based litigation, which has been limited historically, will present opportunities for the third party litigation funding market to develop.

ii Alternative dispute resolution – arbitration

Alternative dispute resolution (ADR) methods have become increasingly popular in Mexico. Arbitration remains the most common method of ADR in Mexico with well-established international and domestic arbitration centres.

Although not well established, third party litigation funding for arbitration is more commonly used in comparison to domestic court litigation. In fact, the increase in the use of arbitration has been one of the main factors contributing to the arrival of third party litigation funding in Mexico due to the higher costs associated with these proceedings.[3] According to statistics published by the ICC, in 2020 Mexico was the third most common nationality among parties to arbitration proceedings registered by the ICC in the American continent. In 2021, Mexico was ranked as the fifth most common nationality in the total new cases registered under the ICC Arbitration Rules.[4] Despite the delayed arrival of litigation funding in Mexico, these trends in the dispute resolution market have started to attract the interest of global litigation funders in recent years, and they see Mexico as an ideal hub for their Latin American practice. The main global litigation funders that are active in Mexico are Deminor, Omni Bridgeway and Nivalion, and there are also Latin America-focused funders such as Lex Finance.

The effects of the covid pandemic have threatened the economic wellbeing of many businesses in Mexico, where there have been limited governmental stimulus programmes. In a country where small to medium-sized companies generate approximately 52 per cent of GDP, the economic effects of the pandemic have pushed companies to look for alternative sources of capital and to interact with litigation funding for the first time. Law firms are also increasingly aware of the litigation finance market, and they are realising the value it can bring to their firms and clients. Although Mexico should still be considered a market under development, it is widely expected that third party litigation funding will continue to progress in the coming years, especially in the following types of claims:

1. International and domestic arbitration: arbitration has become the preferred dispute resolution mechanism for many sophisticated parties conducting business or investing in Mexico. This trend is not only present with foreign parties, but also among domestic companies who prefer this method over the Mexican court system.
2. Investment arbitration: one of the main priorities of the current federal administration has been to strengthen the role of state-owned enterprises in the energy sector. The executive decisions and reform bills proposed by the executive branch have been subject to scrutiny and challenge by private parties before the federal courts.

It is expected that these measures may in some cases harm the rights of investors. Those investors, in turn, might seek redress through investment arbitration.

3. Private enforcement of antitrust violations: the Mexican competition authority has been one of the most active in the region in recent years. Together with class action reform, Mexico now offers a solid legal framework to pursue the private enforcement of competition law via damages claims before the domestic courts.

The year in review

During the past year, Mexico has experienced strong recovery from a pandemic that had deep social and economic impact, including impact on the litigation system.

In recent years, the judicial system had begun to transition to and implement working via electronic means, namely electronic filings and hearings. These efforts had to be fast-tracked because, for example, it has become common to hold virtual hearings and carry out remote hearings for the deposition of expert witnesses. Overall, the impact of the pandemic sped up the modernisation of the court system in Mexico by creating and implementing digital justice initiatives that contribute to lightening the paperwork load and enhancing access to justice in Mexico. In the field of investment arbitration, potential amendments to the energy and lithium sectors in Mexico may potentially impair foreign investors' rights under the more than 40 investments treaties to which Mexico is a party (including those entered into with the United States, Canada, the United Kingdom, China, Germany, France, Spain and Italy). The aim of these investment treaties is to protect foreign investors from, among other things, discriminatory, arbitrary, and unfair and inequitable treatment by the government, as well as from direct and indirect expropriation of their investments. Therefore, if foreign investors suffer damage to their investments as a consequence of the regulatory changes to the electricity, lithium mining and secondary regulations, Mexico could see a number of investment treaty arbitrations being launched by foreign investors to protect their legal and commercial interests.

With regard to antitrust cases, in 2021, the judiciary confirmed 84.21 per cent of the Mexican Federal Economic Competition Commission's decisions, which means that 47 out of 58 cases were upheld.[5] Among the most significant cases, it is worth mentioning the following:

1. collusion in the secondary market for the intermediation of government debt securities;
2. abuse of dominance in the market of electric energy and associated products;
3. abuse of dominance in the federal land passenger transport service at Mexico City's Airport; and
4. collusion in the market for the distribution of medicines.

Legal and regulatory framework

Mexico has no regulatory framework applicable to third party litigation funding. Its civil law system does not include historic common law restrictions such as champerty and maintenance. There are no precedents from the Mexican judiciary regarding the use of third party litigation funding, since it is a relatively new concept with a limited track record in the country.

Mexico's civil law system follows the principles of legal certainty, legality and contractual freedom whereby everything that is not expressly prohibited by law should be permitted. Therefore, funding arrangements are normally subject to the general principles of contract law, which is mostly based on this contractual freedom, and is only limited by the general requirements of validity and existence established in the Civil Code.

Mexico has no mandatory bar requirements for lawyers. As such, lawyers and law firms are not subject to any general ethical restrictions regarding the use of third party litigation funding. However, lawyers must abide by the general rules applicable to professionals. For lawyers, these are mainly the obligations to act independently and in the best interests of their clients and to safeguard the principles of professional secrecy (attorney–client privilege). This means that lawyers are required to obtain express consent from their clients before sharing confidential information with a litigation funder. Contingency fee agreements are also permitted in Mexico and are not subject to any particular restriction.

Since third party litigation funding is still not widely used in Mexico, the prospects for a specific regulatory framework in the near future are quite low. As its acceptance grows and it becomes more commonly used, we can expect that some cases regarding the use of third party funding might reach the judiciary. This could drive initiatives for regulation, but this is not expected to happen soon.

Structuring the agreement

Litigation funding agreements are not regulated under Mexican law. Since this type of agreement is not specifically regulated, it should generally be considered an atypical commercial contract governed by the general rules of contractual law. As mentioned above, due to the principle of contractual freedom, the parties should be able to tailor the content of the agreement to their needs.

However, parties should be mindful when structuring a litigation funding agreement in Mexico, particularly when it comes to resolving disputes between parties and the potential tax consequences of the proceeds received through the agreement. There are no rules governing litigation funding, and it is difficult to know what position the court might take regarding these types of agreements. The Mexican legal framework should allow the parties to structure the litigation funding agreement in various ways, including as a non-recourse loan, a joint venture agreement, a trust or even a services agreement depending on the needs of the client and the desired involvement of the funder in the book building and conduct of the litigation. On the other hand, litigation funding agreements face some difficulties in Mexico if the parties seek to implement them as a loan, given that there is no unconditional repayment obligation, and they could be subject to statutory limitations on interest if such a structure is utilised.

In contrast to other civil systems, Mexican law does not include the ancient notion of the right of withdrawal under which the sale or assignment of a claim would allow the debtor

to settle the claim by paying the amount paid by the assignee to the assignor. Therefore, the assignment or sale of litigious rights is permitted under Mexican law and is a relatively common transaction for certain types of collection rights and litigation.

The key provisions that the parties should generally include in the litigation funding agreement are:

1. the consent and control rights of the funder;
2. the legal budget;
3. adverse party costs risk indemnity;
4. the calculation and payment of the funder's remuneration;
5. the collection and distribution of the proceeds of the litigation;
6. the confidentiality of the agreement; and
7. termination rights.

Disclosure

i Domestic court litigation

Since there is no legal framework applicable to third party litigation funding, there is also no formal obligation to disclose the existence of a funding agreement or the identity of a funder under Mexican procedural law. In addition, discovery is not available in Mexico, and this limits the ability of the parties to request or develop information once a complaint has been filed. The litigant may elect to disclose the existence of a funding agreement to the judge if it considers it to be in its best interest.

ii Arbitration

In arbitration, disclosure obligations will depend on the rules governing the proceedings. Mexico has incorporated the United Nations Commission on International Trade Law (UNCITRAL) into Book 5, Title 4 of the Federal Commercial Code, making it a federal law that applies nationwide. The enacted model does not provide for disclosure obligations regarding the existence of third party litigation funding. However, the law does provide that arbitrators must rapidly identify and disclose any circumstances that may affect their impartiality and independence,[6] and this is where the existence of third party litigation funding should normally be considered. Parties may opt to disclose the existence of a funding agreement and the identity of the funder to assist this process if they consider it might give rise to follow-on proceedings that challenge the capacity of the arbitrator.

Mexico is the fifth most frequent nationality among parties in arbitration proceedings conducted under the auspices of the ICC. As of 1 January 2021, arbitration proceedings that follow the recently amended ICC rules must comply with new obligations regarding the disclosure of third party litigation funding. The new ICC rules seek to improve the efficiency and transparency of arbitration proceedings. They include the obligation on the

parties to disclose the existence of third party litigation funding agreements (where funders or insurers, or both, have a direct economic interest in the award) and the identity of the funder. This is done in an attempt to prevent any potential conflicts of interest between the arbitral tribunal and the parties to the dispute. It is important to note that the ICC rules do not provide for the obligation to disclose the terms of the agreement or the agreement itself, as they are not considered relevant to determine if an arbitrator has a conflict of interest.

The trend for including rules around transparency and the disclosure of third party funding arrangements in arbitration proceedings is also followed in the recently amended ICSID rules in the field of investor-state disputes. The new rules go a step further than other arbitral rules by requiring disclosure of the identity of the funder and granting powers to ICSID tribunals to request additional information on the content of any funding agreement once the notice of funding has been filed.[7]

Proceedings conducted before domestic arbitration centres such as the Mexican Center of Arbitration (CAM) and the National Chamber of Commerce (CANACO) follow their own sets of arbitration rules, which do not include any formal obligation regarding the disclosure of third party litigation funding.

Costs

As explained above, there are no costs or court fees associated with filing a civil or commercial lawsuit before domestic courts in Mexico.

The Federal Commercial Code,[8] which governs commercial proceedings, does not require the losing party to reimburse the prevailing party for costs incurred in proceedings unless the judge determines that the losing party proceeded maliciously or in bad faith. The Federal Commercial Code[9] establishes that a party shall be considered to have proceeded in bad faith if it:

1. fails to provide any evidence to justify its claim;
2. submitted false evidence;
3. lost a summary executive action;
4. filed an improper claim; or
5. made unwarranted defences.

In these cases, the judge will usually determine and award costs through ancillary proceedings.

There are no federal rules on how to calculate costs, so the calculation will generally depend on the legislation of the state in which the case is heard. Costs will be awarded pursuant to the provisions of local law rather than on real disbursements. Costs awarded to the prevailing party are generally fixed by reference to a fee schedule or a percentage of the claimed amount, which will vary from state to state. The percentage of the claimed amount ranges anywhere from 2 to 12 per cent of the claimed amount, with some exceptions. In Mexico City, for example, costs awarded will range from 6 to 12 per cent of the claimed amount, depending on the stage of the proceedings in which they are granted.

Mexican procedural law does not contemplate the possibility of imposing a security for costs order on the opposing party. As mentioned above, there are no regulations regarding the use of litigation funding; nor are there judicial precedents. Therefore, third party litigation funders should not be liable to pay any costs awarded in court proceedings in Mexico; nor would they be required to join the proceedings at the discretion of the judge, as in other jurisdictions.

Outlook and conclusions

The market for third party litigation funding in Mexico is still under development. Despite being in its early stages in terms of domestic court litigation, it is showing signs of maturity in the field of both domestic and international arbitration. As the legal market becomes more familiar with the tool, major growth is expected in coming years due to the potential size of the market. We expect to see major growth and interest in third party litigation funding in Mexican arbitration, as well as in relation to damages-based claims in the field of antitrust and consumer litigation. We also expect third party litigation funding to take its first steps in judicial proceedings in Mexico in the coming years.

Endnotes

1 Paloma Castro is senior legal counsel at Deminor. ^ Back to section

2 Article 17 of the Mexican Constitution provides that every person has the right to have justice administered to them by courts that will be ready to impart it within the time limits and terms established by law, and shall issue its decisions in a prompt, complete and impartial manner. Their service shall be free of charge and, consequently, judicial fees are prohibited. ^ Back to section

3 Based on statistics from the ICC, in Mexico costs of arbitration range from 6 to 10 per cent of the claimed amount. ^ Back to section

4 ICC preliminary dispute resolution figures for 2021. ^ Back to section

5 https://one.oecd.org/document/DAF/COMP/AR(2022)25/en/pdf. ^ Back to section

6 Article 1428 of the Federal Commercial Code. ^ Back to section

7 2022 ICSID Arbitration Rules, Rule 14(4). ^ Back to section

8 Article 1084. ^ Back to section

9 Article 1084. ^ Back to section

Paloma Castro paloma.castro@deminor.com

Deminor

Read more from this firm on Lexology

Netherlands

Rein Philips
Redbreast Associates

Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

The Dutch market for third party litigation funding is developing rapidly.[2] Still a relatively unknown phenomenon a few years ago, today, litigation finance has become an accepted tool in the toolbox of lawyers and their clients who lack the means to bring a valid claim. As such, in past years, more lawyers have gained experience working with litigation finance. Some frontier law firms invest significant amounts of time and work into investigating potential claims, in particular class actions, in order to present them to funders and claimants' representative organisations. It is hard to determine the potential market size for litigation funding in general, as no data is publicly available that could serve as a guideline. A clear area of growth is Dutch class actions, on which more data is available, and which are discussed in more detail below.

Owing to a large presence of international (holding) companies, the recognition of judgments across the European Union pursuant to Regulation (EU) No. 1215/2012 and a relatively effective class action settlement mechanism, the Netherlands already was a favoured jurisdiction for the litigation and settlement of anti-cartel litigation, class actions and, more recently, international debt restructurings that include mass litigation claims. On 23 September 2021, the Court of Amsterdam approved the restructuring of Steinhoff's €14 billion debt to 66,000 creditors in suspension of payment proceedings, including certain mass litigation claims and involving various internationally operating litigation funders. The last court-approved settlement of a class action under the Act for the collective settlement of mass damages dates back to 13 July 2018, when the Court of Appeal of Amsterdam approved a €1.3 billion settlement between Ageas (formerly known as Fortis) and institutional and retail investors regarding claims stemming from Fortis' 2007 acquisition of ABN AMRO Bank.

On 1 January 2020, the Act on redress of mass damages in a collective action (WAMCA) entered into force, for the first time allowing claimants' representative organisations, in most cases a Dutch foundation, to seek damages in a collective action. The WAMCA introduces a public register in which writs of summons in new collective actions have to be registered. Multiple writs can be filed by competing claim organisations looking to be appointed as the exclusive representative. From 1 January 2020 to the time of writing, a total of 87 writs have been registered in 74 cases. Of the registered writs, 29 writs were filed in 17 cases by – often competing – claim organisations that are financed by third party funders.[3] Notably, a significant portion of these cases regard Dieselgate-related claims and privacy-related claims. For claims based on wrongdoings that occurred prior to 15 November 2016, the old class action regime still applies, which does not allow a claim for collective damages but can result in a determination of liability and a court-approved collective settlement on an opt-out basis.

Assuming a continuation of the current trend of registrations of class actions financed by third party funders, in a few years, we could easily reach a point where, at any given point in time, 50 or more funded class actions are pending before Dutch courts. As of the date of writing, the courts have not yet appointed an exclusive representative in any of the cases in which competing claim organisations filed writs of summons, the first of which dates back to July 2020, but courts have thrown out cases in the admissibility phase. The question is justified whether Dutch courts can handle the significant increase of complex class action lawsuits that are brought before them under the WAMCA.

Dutch insolvency administrators and supervisory judges in insolvencies have been lagging in the adoption of litigation finance when compared to the widespread use of litigation finance in insolvency in countries such as Australia, Germany and the United Kingdom. While this could in part be due to country-specific differences in insolvency law and practices, there should be potential for further development in this area.

So far, outside the realm of securities litigation for institutional investors and anti-cartel claims, there are no signs that general counsel and the chief finance officers of large Dutch companies are widely embracing litigation finance as an alternative form of corporate finance. The concept seems to be compelling: a company obtains non-recourse financing against its disputed claim portfolio, which would otherwise be sitting dead on its balance sheet while the litigation expenses burden its working capital and profit margins. Depending on how the deal is structured, the financing provided by a litigation funder may be accounted for as income.

One reason why big corporations thus far do not feel compelled to embrace litigation finance could be that the general counsel of a large company is more likely to hear about third party funding in the context of a funded action directed against the company or its peers than as a helpful finance solution for its own business. In this context, it is noteworthy that the American Chamber of Commerce, a powerful US lobby for big corporations, has set up offices in the Netherlands to warn against the widening of the scope of Dutch class action legislation and, in its wake, the perceived threat third party funding poses to businesses that are on the receiving end of such actions.

Notable market participants

Liesker procesfinanciering, founded in 2011, has successfully introduced litigation finance to the broader public of private individuals and small to medium-sized enterprises (SMEs). Liesker procesfinanciering will finance claims starting from €150,000. In recent years, it has successfully financed its growth through crowdfunding. Other litigation finance outfits with a similar focus have opened shop in the past few years, most notably Capaz.

Redbreast Litigation Finance, founded in 2015, finances high-value litigation and arbitration. In 2021, it started a fund exclusively dedicated to Dutch class actions that currently funds three mass litigation claims, two of which have been filed under the WAMCA.

Omni Bridgeway is a firm that built an international reputation for its capability to enforce judgments and awards in difficult areas of the world long before the litigation finance boom. More recently, it has also been active in the funding of anti-cartel class actions and high-value litigation, arbitration and class actions. At the end of 2019 Omni Bridgeway merged with IMF Bentham, thereby becoming one of the larger participants in the world of litigation finance.

From the WAMCA register it appears that a majority of third party funders involved in Dutch class actions are based outside of the Netherlands, including major global funders such as Fortress, Therium, Woodsford and Innsworth.

In some cases, US claimant law firms act as funders in Dutch class actions. US firms such as Bernstein Litowitz Berger & Grossmann and Grant Eisenhofer have had permanent feet on the ground in the Netherlands for some time whereas, more recently, US claimants

law firms Hausfeld, Scott + Scott, Pogust Goodhead and Milberg have set up shop in the Netherlands.

Finally, a number of individuals and organisations have built a reputation for organising or conducting funded consumer class actions. We mention just a couple here: Adriaan de Gier of De Gier Business Law and ConsumentenClaim.

Year in review

From October 2022 to the time of writing in October 2023, six writs have been registered in six different cases by representative organisations financed by third party funders. The claims all regard high-value, high-profile cases, including product liability claims against Bayer (Essure) and AbbVie (Allergan breast implants) and privacy claims against Alphabet and X Corp (formerly Twitter) and the State of the Netherlands.

On 27 July 2022, in the funded group actions known as the *Truck* cartel cases, the Court of Amsterdam dismissed defences that argued that a group action based on assignment of claims should be held to the same standards as collective actions based on Article 3:305a of the Dutch Civil Code. The court further laid out which law applied to the assessment of the validity of the assignment (i.e., the law that governed the assignment agreement pursuant to the choice of law contained therein).

On 20 September 2023, in the funded securities class action against Airbus, the court of The Hague ruled that both representative organisations were inadmissible. With respect to one organisation, the court ruled that the claims that had been assigned to it by institutional investors were not taken into account when determining whether the organisation was sufficiently representative of the class of claimants it purported to represent. The other organisation was thrown out because the court considered that the litigation funding agreement and the governance of the organisation, which notably included two supervisory board members with links to the funder, gave too much control to the the litigation funder.

On 1 February 2023, in the funded class action against Vattenfall, the court ruled that the fact that the representative organisation also gathered mandates from claimants including contingent fee arrangements that could not be terminated by the participants was no ground for inadmissibility.

On 16 August 2023, in the funded class action against Stellantis at al. (Dieselgate), the court of Amsterdam ruled that ad hoc representative organisations as such are not at odds with the admissibility requirements, nor is having a track record a prerequisite for the organisation to be allowed to bring a class action. The court further ruled that the fact that one of the supervisory board members is managing partner and shareholder of the litigation funder is not prohibitive for admissibility, given that Claim Code 2019 allows limited participation by the litigation funder and that the supervisory board consists of three other persons who are independent of the funder.

Legal and regulatory framework

i Funding of individual claims

Dutch law does not put particular restrictions on litigation funding or the degree of control that a third party litigation funder can assume in the funded lawsuit. Common law doctrines of maintenance and champerty did not find their way into the Dutch Civil Code (DCC), therefore a funding agreement will be governed by the general rules of contract, meaning that parties are generally free to shape their funding agreement as they like as long as their agreement does not result in a violation of public policy (including due process).

ii Funding of class actions

For the purpose of this discussion we distinguish two general types of class action:

1. class actions in which a Dutch special purpose foundation or association represents all claimants of a certain class, whether or not the claimants have signed up or are actively involved in any other way (opt-out actions); and
2. class actions in which the claim entity only represents claimants with which it has entered into an agreement to that effect (opt-in actions).

305a class actions

The first type of Dutch class action is based on Article 3:305a of the DCC. This provision allows a Dutch foundation or association that meets certain requirements to represent all claimants (active and non-active) that suffered damage as a result of a certain event or product (representative organisation). Until 2020, a representative organisation could only file a claim for the determination of liability on behalf of its class members, and could not bring a claim for compensation. In the event that, either before or after liability has been established by a court, the representative organisation and the defendants reach an agreement regarding damages, the settlement can be approved by the court and declared binding on the entire class, including inactive claimants, who must be provided with an opt-out period of at least three months. If, after determination of liability, no settlement had been reached, individual claimants had to sue for damage compensation in separate proceedings. Representative organisations have been particularly successful in securities class actions, with notable examples including *Shell's Oil Reserves, Converium* and Fortis/Ageas.

As mentioned above, on 1 January 2020, the WAMCA entered into force, enabling representative organisations to bring damages claims on behalf of an entire class of claimants on an opt-out basis. As a general rule, the WAMCA only applies to damage-causing events that occurred after 15 November 2016. For other cases, the old class action regime applies, which does not allow for damages claims.

While thus expanding the scope of claims a representative organisation can bring, the admissibility requirements for representative organisations have been significantly increased. We mention just a few here.

In addition to the general rule of international private law that a company can be sued where it has its corporate seat, for a Dutch court to have jurisdiction to hear a WAMCA case 'there must be a sufficient connection to the Dutch legal sphere'. The explanatory notes to the WAMCA show that the government felt this addition to the law was necessary

to provide comfort to international businesses that use the Netherlands in their international tax structures. The explanatory notes state that the fact that a company is seated in the Netherlands merely for fiscal reasons is itself not a sufficient connection to the Dutch legal sphere in the required sense.

The WAMCA introduces the appointment of an exclusive representative, who will act as a kind of lead plaintiff. Claimants located outside the Netherlands cannot be included in the collective action on an opt-out basis, but only on an opt-in basis.

From a funding perspective, it is relevant that the WAMCA stipulates that, to qualify as a representative organisation, the entity must have sufficient financial means to bring the claim and must have a professional board whose members do not have a direct or indirect financial interest in the outcome of the lawsuit. This means that the board members must be compensated independently from the outcome of the lawsuit and cannot be representatives of a third party litigation funder financing the suit, although it is allowed to appoint a representative of the funder to the supervisory board. Notably, recently the court of The Hague ruled that the foundation representing institutional investors in litigation brought against Airbus was inadmissible mainly because two of its supervisory board members had links to the litigation funder. The supervisory board had the power to dismiss the board, giving the litigation funder undue (indirect) control over the foundation.

A further restriction on control by the litigation funder is implied by the legislature in the explanatory memorandum to the WAMCA. According to the legislature, a court has the means to review the funding structure if it is concerned that the third party funder is in a position to adversely affect the interests of the claimants. The legislature provides as an example a litigation funder having complete power over the decision to accept a settlement proposal. Although the explanatory memorandum has no force of law, it is an important guideline for the court's interpretation of the law. Further guidelines relevant to the admissibility of the representative organisation can be found in the Claim Code 2019.

The *Fortis/Ageas* settlement showed that the court, when asked to confirm a settlement by a representative organisation, may critically review the compensation received under the settlement by the claimants' organisations, and that this may be cause to deny the confirmation. That being said, after some amendments, the Court of Appeal eventually confirmed a settlement that allowed for a market practice compensation of the representative organisations and their funders.

The litigation funder will generally enter into a funding agreement with the representative organisation and stipulate that it is entitled to a percentage and/or multiple on investment out of the total damages that are realised by the representative organisation. This assumes that the litigation funder is allowed to charge its financing fee on the total realised damages to the representative organisation, and that the representative organisation, provided it is appointed as the exclusive representative, can in turn charge to all claimants who benefit from the action and have not opted out (common fund doctrine). While this would certainly be desirable, it remains uncertain how the courts will evaluate such arrangements and how a common fund approach, if accepted, will apply to fee arrangements of potential other representative organisations involved in the case.

Under the WAMCA, the court may award a claim for compensation of costs by the representative organisation, including costs of funding. It should be noted that the court

has a significant discretion in evaluating such a claim, and it remains to be seen to what extent actual funding costs (i.e., the percentage fee on total damages) will be awarded.

Regular class actions

The second category of class actions is organised by limited liability companies or foundations that bundle claims strictly on an opt-in basis (i.e., not making use of Article 3:305a DCC). Claimants affected by a particular event, such as a cartel in a specific industry (a notable example being the Trucks cartel claims) may assign their claims to a special purpose vehicle incorporated and managed by a litigation funder or provide it with a power of attorney to bring the claim on their behalf. The funder and the claimants are, in principle, free to structure the agreement that forms the basis for such an assignment or granting of a power of attorney as they see fit. In general, the parties agree that the special purpose vehicle will prosecute the claim and, once realised, will transfer the proceeds of the claim to the claimant after deduction of costs and a success fee for the funder consisting of a percentage of the upside. Thus, while lacking the possibility of binding non-active claimants in a settlement, these transactions are not burdened with the formal requirements and uncertainties surrounding a representative organisation, making it the preferred option whenever the class members are relatively easy to identify and not too numerous.

Contingency fees

In the Netherlands, lawyers are prohibited from working for a purely contingent fee. Alternative fee arrangements, including limited upside percentage sharing, are, however, allowed as long as the lawyer always receives a salary sufficient to cover his or her costs independent from the outcome.

Structuring the agreement

This section focuses on the funding agreement regarding an individual claim. While some of what follows will also apply to the funding of a representative organisation in a class action, in that case specific attention is required in the funding agreement with respect to admissibility requirements of the representative organisation as they relate to the relationship with the funder.

There are no industry models or generally accepted best practices for the types of agreements used by Dutch litigation funders. The following is therefore based primarily on the types of agreements that we use, which may be more or less representative for the industry.

There are two types of agreements: a services agreement, whereby we not only fund but also manage the claim, and a plain funding agreement, where we only provide capital to the claimant for the prosecution of the claim. If the deal is structured as a services agreement, the funder acts as a kind of general contractor who contracts to prosecute the claim, including the management of litigation, on behalf of the client for a 100 per cent contingency fee. In this structure, the funder agrees to manage the case and pay for all related costs, including lawyers' and experts' fees, at its own risk, in return for a share of the proceeds actually realised. Litigation counsel is engaged by the funder directly and will

enter into a client–attorney relationship with both the funder and the claimant based on their joint interest.

In the event of a plain funding agreement, the funder agrees to pay for litigation expenses, usually up to a certain maximum amount, in exchange for a share of the proceeds. In this structure the claimant remains in control of the suit and the instruction of counsel.

In both structures, the nature of the agreement is most closely related to a venture capital or joint venture agreement. In this analogy, the claimant is the owner of a promising venture (i.e., the claim) that requires risk capital to realise its value. The litigation funder can be compared to the venture capitalist that provides capital and, sometimes, know-how and management services to the claimant in return for a minority stake in the enterprise. The final settlement of the claim or the final judgment in respect of the claim is analogous to the hoped-for exit in a venture capital transaction. It follows that most provisions in the funding agreement are typical of any type of investment agreement, most importantly:

1. The amount of funding to be provided and conditions for payment: the litigation funder will usually provide the funding through the direct payment of invoices for attorneys' fees and other costs incurred in the litigation.
2. Compensation or return to the funder: the compensation of the funder usually amounts to 20 to 40 per cent of the actually realised proceeds after subtraction of costs. Alternative compensation schemes may include a preferred return out of the proceeds of two or three times the investment or a preferred cumulative interest on the committed capital.
3. Information sharing: in the Netherlands, information exchanged between claimant and funder is not discoverable in the proceedings. In general, the litigation funding agreement will therefore stipulate that the funder is provided with all information regarding the dispute without limitation and is kept fully up to date by litigation counsel on all material progress in the case and any settlement discussions.
4. Governance and control: the litigation funder will demand some kind of control over important decisions such as the acceptance of a settlement offer, the filing of an appeal or the replacement of litigation counsel. Usually the claimant will not be allowed to take such decisions without the consent of the litigation funder and vice versa. The agreement may provide for the appointment of an independent third party adviser or exit, or both, in the event of a deadlock.
5. Representations: the most important representations made by the claimant regard the accuracy and completeness of the information provided in the due diligence process preceding the agreement. Important representations of the funder include the absence of conflicts of interest and the availability of the committed capital.
6. Exit or termination: the agreement will usually allow the funder to terminate the agreement in the event of breach by the claimant or a material adverse change, such as the surfacing of new facts that materially impact the chances of success.
7. Counterclaims and costs orders: the costs of defence against possible counterclaims and liability for costs orders may or may not be covered by the funding agreement. The Netherlands has a loser pays rule. However, outside litigation regarding the infringement of intellectual property rights, where the costs order is

based on actual litigation expenses, costs orders are based on fixed tariffs that are usually less than 10 per cent of the actual costs of litigation.

Disclosure

Outside third party funding of representative organisations, the disclosure of the funding agreement is not a real concern in the Netherlands. Dutch procedural law does not provide for a discovery process in which a claimant or a funder could be forced to disclose the funding agreement or other information exchanged between them, except perhaps in very exceptional circumstances where the defendant has evidence that the funding agreement itself would constitute a wrongful act against it. Hence the claimant's decision to disclose the fact that he or she is being backed by a litigation funder is a strategic rather than legal concern.

Representative organisations are an exception to this general rule. The WAMCA stipulates that, to qualify as a representative organisation, the entity must, among other things, have sufficient financial means to bring the claim, and in its organisation, the interests of the claimants must be sufficiently safeguarded. As mentioned above, according to the Dutch legislature, these requirements imply that the court may review the funding structure if it is concerned that the representative organisation does not have sufficient financial means to prosecute the claim or if the court is concerned that the funder is in a position to adversely affect the interests of the claimants. This has triggered a debate among practitioners as to whether this also implies that the defendant should be allowed to review the funding agreement or the financial means of the representative organisation. Defendants' attorneys in class actions argue that they should be allowed full insight into the finances and funding arrangements of the representative organisation, as it provides them with a potential angle to argue the inadmissibility of the claim. Based on the first interim decisions in cases brought under the WAMCA it seems safe for litigation funders and representative organisations to assume that, if not by the other party, their financing arrangement is likely to be reviewed by the court. We have already seen, in the context of the class action settlement proceedings in the *Fortis/Ageas* case, that the court is not shy about using its power to review the agreed distribution scheme, which, at least in part, will also reflect the funding structure.

Costs

Outside intellectual property infringement litigation, costs orders in the Netherlands are based on fixed tariffs and usually amount to only a fraction of the actual litigation expenses of the parties. Whether the third party funder assumes liability for an adverse costs order against the claimant is a matter of agreement and negotiation between the funder and the claimant. It is not common to obtain after-the-event insurance for costs orders in the Netherlands.

Outlook and conclusions

Litigation finance is on the rise in the Netherlands. Consumers and SMEs lacking the means to litigate claims against bigger opponents are finding their way to an ever-increasing number of providers of third party litigation funding. Securities and complex financial products, such as investment insurance products and interest swaps, have been the focal point of major class actions that were in part funded by third parties in the past. Another type of class action typically funded by third parties and for which the Netherlands has proven to be a popular jurisdiction is follow-on damages claims in anti-cartel cases. With the introduction of the WAMCA, the number of class actions brought in the Netherlands has notably increased and widened in scope to include, among other things, privacy infringement claims, large consumer protection and product liability claims.

The providers of third party funding in the Netherlands are generally professional parties with a solid background in law practice, and so far have caused little legal or public turmoil. Outside local players, a number of globally active third party litigation funds have found their way to the Dutch courts.

The WAMCA has extended the scope of action of representative organisations to claims for actual damage compensation and simultaneously raised the bar for admissibility as a representative organisation. The WAMCA and the increase in claims brought by representative organisations have triggered a debate about the way that these organisations are funded. Although it is generally recognised that third party litigation funding can play a positive role in bringing well-founded class actions to fruition, restrictions have been imposed on the degree of control a third party funder can exercise in these types of cases, and the fee it charges for its services can be subject to scrutiny by the courts. This has not kept representative organisations and third party funders from making large bets on the Netherlands as a jurisdiction for the litigation and settlement of high-stake class actions.

Endnotes

1. Rein Philips is the managing director and co-founder of Redbreast Associates NV. ^ Back to section

2. There is no public data available on the actual use of litigation funding in the Netherlands, hence this overview is to a large extent based on the author's subjective experience and analysis of relevant published events. ^ Back to section

3. Competing representative organisations may file a writ for the same collective claim within three months, or, if an extension is granted, within six months. After that, the court will select one or more exclusive representatives. See further Section III at '305a class actions'. ^ Back to section

Rein Philips rein.philips@redbreast.com

Read more from this firm on Lexology

New Zealand

Jason Geisker and **Simon Gibbs**
Maurice Blackburn

Summary

INTRODUCTION
THE YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

New Zealand is home to an evolving third party litigation funding market, although it remains a small and comparatively new industry, particularly when compared with similar common law jurisdictions such as Australia and Canada. It was not until the turn of the millennium that third party litigation funding appears to have first emerged in New Zealand.[2] Prior to that time, no-win no-fee or speculative fee arrangements had been a feature of the New Zealand legal landscape and had even been said to be 'consistent with the highest professional honour'.[3]

In 2021 the New Zealand legal services market was worth an estimated NZ$3.3–NZ$3.9 billion in annual revenue.[4] The litigation-related portion of that overall market had an estimated NZ$330 million in revenue, with the addressable market for third party litigation funding considered to be two-thirds of that, or approximately NZ$220 million in annual revenue terms.[5] As such, given the paucity of cases[6] that have reportedly received funding over the past two decades, third party litigation funding appears significantly under-utilised in New Zealand.

The market for litigation funding is influenced by a range of factors including the general awareness of the availability of funding, uncertainty as to regulatory requirements, an absence of explicit endorsement of litigation funding by the courts, delays in introducing a comprehensive set of procedural rules for the conduct of representative actions and a lack of significantly sized dedicated plaintiff law firms with experience sufficient to take advantage of litigation funding. Various macroeconomic factors also impact on the strength of the local economy with consequential impacts on the demand for legal services and the number of potential claims meeting the threshold criteria required for commercially viable funded claims. Looking ahead, the legal services market is projected to see a slow return to growth, averaging 2.2 per cent per annum over the next few years, to arrive at a predicted NZ$4.4 billion in annual revenue by 2027.[7] The litigation funding market is expected to grow at least in line with these broader trends.

Given the relatively small size of the market and the fact that third party litigation funding arrangements are not generally disclosed,[8] precise data as to the extent of third party litigation funding is expected to remain difficult to come by.

In terms of market participants, for many years, third party litigation funding options were somewhat limited, with the local incumbent funder, LPF Group Ltd,[9] facing little in the way of competition.[10] However, more recently, other experienced and well-resourced funders have entered the market. These include Claim Funding Australia,[11] Omni Bridgeway,[12] Litigation Lending Services[13] from Australia and Harbour Litigation Funding from England.[14] Most funders in the market require a minimum claim size of between NZ$2–NZ$5 million before they will consider funding applications.[15] Some funders also require a minimum claim value to claim budget of 10:1.[16]

In its 2020 issues paper on Class Actions and Litigation Funding the New Zealand Law Commission (NZLC) identified a total of 40 examples of cases brought in the jurisdiction where the plaintiff had received litigation funding.[17] This collection of third party funded cases included 10 representative actions under High Court Rule 4.24, comprising five consumer claims, three shareholder claims, one investor claim and a claim against the government.[18] The NZLC has also identified at least 11 insolvency cases that have

received third party litigation funding,[19] and at least 15 insurance claim cases[20] that have also received third party funding. Third party funding has also assisted in cases concerning negligence and breach of fiduciary duty,[21] statutory demands for repayment of a loan,[22] a relationship property claim[23] and a land claim.[24]

In May 2022, the final report of the NZLC on Class Actions and Litigation Funding (NZLC R147) declared that, consistent with recent judicial observations, third party litigation funding is desirable for New Zealand 'in principle'.[25] The report concluded that litigation funding has an important role to play in improving access to justice in New Zealand, including by alleviating the costs and risks of litigation.[26] Even those opposed to litigation funding in the jurisdiction acknowledge that it is now here to stay.[27]

As discussed in this chapter, after a decade of inaction, the NZLC's report has certainly paved the way for legislative change to allow more certainty, efficiency and structure for those seeking to utilise the benefits of third party litigation funding services to obtain access to justice. Indeed, in August 2023, the Hipkins Labour government committed to adopting the NZLC's recommendations to enact a statutory regime for class actions and litigation funding if re-elected for another term.[28]

The year in review

The past year has been marked by a common dynamic in legal policymaking: the incremental development of common law in the absence of proactive action on reform. The ambitious reform agenda laid down by the NZLC R147 appears to have, momentarily, lost momentum, which may be explained by a confluence of factors and competing priorities besetting New Zealand policymakers, resulting in litigation funding and class action reforms being de-prioritised. However, the common law jurisprudence has continued to mature in the absence of top-down policy reform.

The past year has been marked by a common dynamic in legal policymaking: the incremental development of common law in the absence of proactive action on reform. The ambitious reform agenda laid down by the NZLC R147 appears to have, momentarily, lost momentum, which may be explained by a confluence of factors and competing priorities besetting New Zealand policymakers, resulting in litigation funding and class action reforms being de-prioritised. However, the common law jurisprudence has continued to mature in the absence of top-down policy reform.

i The Trans-Tasman dynamic – A2 Milk class action and Koper v. Zurich

This year has seen an increase in litigation utilising the Trans-Tasman Proceedings Act 2010 (TTPA). The TPPA is part of the reciprocal legislation regime between New Zealand and Australia that is designed to streamline processes for managing and resolving civil and criminal proceedings, where proceedings involve a 'trans-Tasman element'.[29] The aim of this regime is to reduce the costs associated with litigation, improve efficiency and minimise the existing barriers to enforce judgments and regulatory sanctions between the two countries.[30] The TTPA regime is underpinned by a treaty between New Zealand and Australia, which entered into force in October 2013.[31] The historical function of the TTPA has been to facilitate procedural matters between the jurisdictions, such as the service of

documents, issuance and enforcement of subpoenas, facilitation of remote appearances and registration and enforcement of judgments, inter alia. The decisions in the *A2 Milk* class action[32] and *Zurich v. Koper*[33] series of proceedings have clarified and arguably expanded the scope of the TTPA in relation to the jurisdictional reach of foreign law, forum selection and management of concurrent representative proceedings.

A2 Milk class action

The *A2 Milk* class action (*A2 NZ*)[34] is a recent example of New Zealand courts having to engage on the issue of concurrent class claims in New Zealand and Australia. In a decision handed down in January 2023 in *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 the High Court examined the case-management principles attendant to multiplicity of proceedings and the jurisdictional complexities of litigation involving dual-listed public companies with operations in New Zealand and Australia. The decision (examined below) represents the first application of the TTPA to class proceedings and a novel finding, in that context, that Australian courts are competent to apply New Zealand law.[35]

The *A2 NZ* is a shareholder claim filed in the Auckland High Court alleging that the company breached continuous disclosure obligations and made false, misleading or deceptive statements to the Australian Stock Exchange (ASX) and the New Zealand Stock Exchange (NZX) in relation to its forecast revenue and earnings. There is a concurrent Australian shareholder class action against A2 Milk in the Supreme Court of Victoria (*A2 AUS*).[36] Both proceedings allege materially similar claims against A2 with the distinction that the *A2 AUS* claim alleges breaches of both New Zealand and Australian law, while the *A2 NZ* claim only alleges breaches of New Zealand law. On 23 January 2023 the New Zealand High Court handed down a judgment in the *A2 NZ* proceeding that:

1. granted leave for the *A2 NZ* claim to commence an opt-in representative proceeding; and
2. stayed the *A2 NZ* proceeding pursuant to the TTPA, with immediate effect, pending delivery of a judgment on liability in the *A2 AUS* proceeding, or final settlement of that proceeding, whichever occurs first.[37]

The decision is relevant for many reasons, including that it is the first time a New Zealand court has applied the TTPA to a class action; it is the first reported judicial guidance on concurrent class actions filed in both jurisdictions; and it is novel insofar as it affirmed the power of a foreign court to determine issues and grant relief by applying New Zealand domestic law.[38]

Stay of proceedings

The power to order a stay arises under Section 24 of the TTPA, which enables a New Zealand court to stay a domestic proceeding in circumstances where it is satisfied that an Australian court (1) has jurisdiction to determine the matters in issue between the parties to the proceeding; and (2) is the more appropriate court to determine those matters.[39] The factors the court is required to consider in making this determination are enumerated in Section 24(4) of the TTPA, and involve a multifactorial assessment. The power to stay the New Zealand proceeding is ultimately at the discretion of the court

after completing the multifactorial assessment. The existence of the concurrent Australian claim was determinative in reaching the conclusion that the *A2 NZ* proceeding should be stayed,[40] with multiplicity of proceedings, case management considerations and avoiding duplication of costs and judicial resources the most persuasive factors in favour of granting the stay.[41] The disposition of the High Court on this point was the subject of extensive analysis[42] but may be pithily captured by the following statement by Edwards J:

> A multiplicity of proceedings raises a multiplicity of issues. These include duplication in costs and resources for the parties and for the courts in each jurisdiction, and the 'scandal' of inconsistent judgments.[43]

Concurrent class actions

In practice, New Zealand courts have erred in favour of a preference to stay or consolidate competing claims, reflecting the orthodox view that 'having competing class actions relating to the same dispute is generally undesirable'[44] with the caveat that the response to multiplicity will ultimately depend on the circumstances of each proceeding.[45] The judgment in *Whyte v. The a2 Milk Company Limited* identified three broad categories of concurrent proceedings.[46] This analysis is likely to be highly instructive of how New Zealand courts in the future will categorise and address concurrent claims both under the TTPA and in general.[47] The analysis relied heavily on Australian case law to explore the principles of interpretation relevant to resolving multiplicity issues, which involve a panoply of procedural tools to manage these proceedings, such as: consolidate the proceedings; stay all but one; change the class structure of one proceeding (e.g., from an opt-out to an opt-in proceeding);[48] and 'de-class one or more of the proceedings; hold a joint trial of all proceedings with each left constituted as opt-out (open class) proceedings; and close the classes in one or more of the proceedings (that is, making them opt-in) but leave one of the proceedings as an opt-out proceeding with a joint trial of all.'[49]

Both the *A2 NZ* and *A2 AUS* proceedings were funded and the funding arrangements in place were adjudged to be a neutral factor in the multifactorial analysis to order a stay, on the basis that the contractual arrangements were 'broadly comparable' between the proceedings[50] and the effect of a stay practically conferred a choice upon class members as to which proceeding they would participate in (by opting out of one). Therefore, any prejudice potentially caused by the funding arrangements were 'matters for the plaintiffs to assess and determine for themselves'.[51] Although this conclusion reflects a continued cautiousness of New Zealand courts not to look behind funding arrangements, it is perhaps more accurately a reflection of the fact that the funding arrangements were not interpreted as germane to the question of law before the court, namely whether the Australian court was the more appropriate court to determine the claims for the purpose of granting a stay.-[52]

Ultimately, the court determined that the proceedings fell within the third category of concurrent proceedings[53] and considered that the practicalities arising from the jurisdictional differences and hazard of competing judgments could not be sufficiently ameliorated through parallel case management so as to justify both proceedings remaining on foot.[54] Accordingly, the *A2 NZ* proceeding was stayed.

Competence of a domestic court to apply laws of another jurisdiction

A striking feature of the decision in *A2 NZ*, and cognate decision of the Australian court in relation to the *A2 AUS* proceeding,[55] is that they interpret the conflicts of law doctrine in a manner that may increase the opportunity for trans-Tasman litigation. In particular, the *A2 NZ* decision elevates the special relationship between New Zealand and Australia under the TTPA and is likely to be instructive of how a New Zealand court may make procedural determinations, interpret and resolve substantive questions of law that have a 'trans-Tasman element'.[56]

Both proceedings were substantively similar.[57] However, the fact that the *A2 AUS* proceeding pleaded causes of action under both Australian and New Zealand law was persuasive (as opposed to the *A2 NZ* proceeding, which advanced claims for both NZX and ASX investors but only under New Zealand law). The first question for the court to determine under Section 24(1) of the TTPA is 'Does the Australian Court have jurisdiction to determine the matters in issue between the parties to the proceeding?' The court reframed this question in the following terms: 'The issue is the jurisdiction of the Australian Court to determine claims brought by New Zealand shareholders who acquired shares on the NZSX.'[58] It concluded, with a paucity of supporting reasoning, that 'plainly the Australian Court would, and does, have jurisdiction in this case.'[59] The economy of reasoning given by the New Zealand High Court is perhaps a reflection of the nature of the special relationship under the TTPA and the exhaustive reasoning of Button J of the Victorian Supreme Court in the *A2 AUS* case (on which the High Court relied and agreed).[60] In making its finding, the New Zealand High Court held:

> [68] There is no dispute about the competence and capability of the New Zealand and Australian courts to apply each other's laws. That is a given under the TTPA. Nevertheless, in determining whether the Australian Court is the more appropriate court to determine the matters in issue in the proceeding, this Court must take into account the law that would be most appropriate to apply. The underlying premise of the subsection is that New Zealand courts are best placed to apply New Zealand law, and Australian courts are best placed to apply Australian law. However, having concluded that both New Zealand and Australian law applies to this dispute, this factor does not significantly advance the enquiry in this case.
> [69] Given the trans-Tasman context of the dispute, I do not consider one law to be more appropriate than the other. The laws of both countries apply equally, rendering this factor neutral in the overall balance.

Understanding this conclusion requires an understanding of the Australian decision in the *A2 AUS* proceeding (Victorian Supreme Court decision *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725), which the New Zealand court relied on to conclude that the Australian court had jurisdiction to apply New Zealand law. A brief description of the key findings of the Victorian Supreme Court decision are provided below, so as to better understand how the New Zealand High court came to its consequential finding.

The Victorian Supreme Court was asked to decide three questions as part of an interlocutory process in the *A2 AUS* proceeding. These questions were (paraphrased):

1. Question 1: Does the Supreme Court have jurisdiction to determine claims made under New Zealand statute? Answer: Yes.[61]
2. Question 2: Are those claims enforceable in the Supreme Court of Victoria. Answer: Yes.[62]

3. Question 3: Does the Supreme Court have the power to award compensation under New Zealand law. Answer: Yes.[63]

We highlight relevant aspects of the answers to Questions 2-3 below. The answer to Question 1 turns on an interpretation of Australian constitutional law that is not germane to the New Zealand scope of this chapter.

1. Question 2: The Victorian Supreme Court found that an Australian court can apply New Zealand law in adjudicating claims involving litigants over which it has effective jurisdiction.[64] Whether the Court had 'effective jurisdiction' turned on whether New Zealand courts have exclusive jurisdiction over their own laws. This question was determined by a close textual analysis of the statutes in question[65] to establish whether they conferred exclusive jurisdiction on domestic New Zealand courts (i.e., to the exclusion of all other courts including foreign courts) or whether the statute does no more than provide for the distribution of jurisdiction domestically as between local courts.[66] If the latter, then there is no exclusive jurisdiction and no barrier to a foreign court hearing claims under that statute.[67] The Court found that the latter construction applied[68] in reliance on its own determination,[69] and expert evidence from New Zealand senior counsel[70] that was not contradicted.[71] The Australian court accepted the broad principle expressed by the New Zealand High Court in *Rimini Ltd v. Manning Management & Marketing Ltd*, that 'Where a statute does not expressly or by clear implication exclude its application by foreign Courts, it must be open for foreign Courts of similar standing to apply it, subject to the ordinary limitations of private international law.[72] The position at law in New Zealand was cogently expressed by New Zealand law expert Ms Cooper KC in her opinion, which noted the paucity of New Zealand cases on the issue of foreign courts to applying domestic law.[73]
2. Question 3: The power to grant relief (as opposed to liability) is perhaps one of the more consequential findings. The Victorian Supreme Court framed this power as part of the 'choice of law' question, namely whether the power to award compensation was a matter of substantive law or procedural law.[74] This distinction can be slippery and, as the High Court of Australia has observed, the distinction between these concepts is often elusive.[75] The controversy that lies in this distinction is that substantive matters of law are determined by the *lex causae* (i.e., the governing law, which was assumed to be New Zealand law) and procedural matters are typically determined by the *lex fori* (the law of the forum, i.e., Australian law). The Court determined that the remedial power to award compensation was part of the substantive law,[76] relying on the assumption that the *lex causae* was New Zealand law and that this finding did not offend the 'no advantage' principle that 'a plaintiff should receive no advantage from suing in the Australian forum which the plaintiff would not obtain in the *lex loci delicti* [the law of the place where the wrong occurs].'[77] Importantly, the Australian court did not determine whether any issues such as the heads of damage or quantification would be resolved by reference to the law of New Zealand, or the law of the forum,[78] holding that 'the question does not require that I, and I do not, reach any final view on whether any issues that may arise concerning the "kinds of damage, or amount of damages" that may be recovered would be governed by ss 494 and 495 of the FMC Act (or other principles of New Zealand law) or Australian law (if indeed there is any difference).'[79]

The New Zealand court in A2 NZ and the Victorian Supreme Court in A2 AUS provide a reminder that 'there is nothing novel in the proposition that foreign law may be applied by an [Australian] court if it is the lex causae'; and, secondly, the foreign law to be applied in a domestic court can include statute law (claims under foreign statutes fall under the wide conception of 'torts' in private international law).[80] What is novel is the occasion for its application, which the TTPA facilitates and this decision is likely to increase the incident of its application by (1) clarifying the principles of interpretation that apply to the TTPA and (2) demonstrating the amenability of the court to exercise jurisdiction in the right case. The result may be an increase in concurrent proceedings that have a trans-Tasman element (e.g., involve a dual-listed entity or an entity with operations in both jurisdictions), with the risk of a stay looming large in the overall calculus of whether to commence litigation, and the availability of the TTPA as a case management tool to stymie competing claims.

ii Koper v. Zurich

Koper v. Zurich[81] is an Australian series of proceedings that originated from a New Zealand representative proceeding.[82] It is an example of the TTPA enabling claims to be litigated in a foreign jurisdiction (Australia) when the provenance and elements of the claims are otherwise New-Zealand-based. The question before the Australian court was whether a proceeding commenced in Australia was correctly commenced in that jurisdiction, in circumstances where the representative plaintiff, class members, and defendant were based in New Zealand, the defendant had not submitted to the jurisdiction of the Australian court and the relevant loss and damage occurred entirely in New Zealand.[83]

The original New Zealand claim in *Koper v. Zurich* was filed by the owners corporation and alleged that New Zealand-based construction company Brookfield Multiplex New Zealand (BMX NZ) was negligent in the design and construction of an apartment complex in Auckland. In December 2012, after the class proceeding had commenced, BMX NZ went into liquidation. In a judgment of the New Zealand High Court handed down in March 2017,[84] the owners corporation obtained judgment against BMX NZ, in the sum of NZ$53 million. As of 29 June 2021, NZ$23 million of the judgment sum remained outstanding. The owners corporation then sought to recover the outstanding damages from the insurers by commencing representative proceedings in Australia[85] under Australian legislation that enabled them to make a claim directly against BMX NZ's insurance policy.[86]

In the Australian proceeding, *Koper v. Zurich* involved a representative proceeding commenced in the state of New South Wales against the insurers of BMZ NZ, Zurich[87] and Aspen[88] (collectively the defendants/insurers, as applies). The plaintiff sought leave to file a summons against the defendants in the Supreme Court of New South Wales pursuant to state-based legislation that enables third party recovery directly against insurers, by allowing a claimant to access insurance policies when the insured defendant is unable to meet its liability.[89] The proceedings that followed are procedurally complex and involve issues of Australian constitutional construction that are not germane to the New Zealand context.[90] What is relevant to the New Zealand context is the criterion that needed to be satisfied to enliven jurisdiction of the Australian court. The primary judge found (upheld on appeal) that the proceeding brought in New Zealand must be capable of being brought in Australia.[91] Relevantly, this turned on whether BMX NZ could have been served with an originating process in New Zealand that was issued by the Supreme Court of New

South Wales and whether such service would have been effective by operation of Sections 9 and 10 of the TTPA, to bring the defendant before the Australian court. Ultimately, the procedural power of service determined the substantive power to commence proceedings. The court found that the TTPA would have authorised service of an originating process on the defendant in New Zealand and accordingly the surrogate Australian proceeding against the insurers was granted leave to proceed.[92]

The Australian proceeding was brought for strategic reasons, to obviate the insolvency regime under the New Zealand Companies Act 1993 to enable class members to enjoy a right of priority over other unsecured creditors should the funds be paid to the liquidator of BMX. The effect of the Australian proceeding on the New Zealand insolvency proceeding would be that '[a]ll proceeds of a judgment in the [Australian Proceedings] will flow directly to the Plaintiff and will not form part of BMX's assets, thus not interfering with BMX's liquidation in New Zealand.'[93]

The underlying facts meant that the only viable pathway for recovery by class members was to issue proceedings from Australia. The New Zealand Supreme Court had previously found that if Koper and the class members sought to vindicate their claims in New Zealand they would be barred and have no effective avenue of redress:

> The Supreme Court of New Zealand has held that the Plaintiff cannot bring a claim based on the LRA because Zurich is not resident in New Zealand. In taking the view that the situs of the debt (and also an exclusive jurisdiction clause) is a matter of significance, the Supreme Court of New Zealand has taken a position contrary to that adopted in Chubb. If this Court were to refuse leave on discretionary grounds, then the Plaintiff would have no redress from legislation enacted in both New Zealand and New South Wales designed to ensure that the insurer meets claims of persons who have suffered loss and damage caused by an insured who holds insurance to cover the insured for that type of claim because, on the authority of Ludgater, the occurrence of the tort and the bringing of proceedings against the insured in New Zealand is insufficient and on the basis of Chubb as applied to the Claims Act, the exclusive jurisdiction clause and residency of one of the insurers (i.e. Aspen) is insufficient. That would be a most jarring result in my opinion.[94]

The presence of a litigation funder was material to the New Zealand proceeding and why it was separately constituted in a foreign jurisdiction. The insolvency regime under the Companies Act 1993 (NZ) would have prohibited any monies recovered through the litigation against the insurers from passing to the class members because of restrictions that exist under the relevant legislation.[95] The NSW Supreme Court relied on expert evidence from New Zealand King's Counsel[96] to explain the operative provisions of the Companies Act 1993, with the conclusion that if any funds were recovered and passed through the liquidator the plaintiff and the class would not be entitled to any preference claim. Relevantly, the legislation requires that, where a creditor protects, preserves the value of or recovers assets of the company for the benefit of the company's creditors by the payment of money or the giving of an indemnity, they may obtain a preferential entitlement to monies recovered in the liquidation. However, under the New Zealand legislation, this provision only applies where:

1. the creditor has 'paid money or given an indemnity'.[97] A contribution of some other kind will not suffice;
2.

the creditor shows that the payment or indemnity was for the benefit of the general body of creditors, rather than with a view to seeking to securing the net recovery for the sole benefit of the creditor or an entity related to it.; and

3. the creditor must protect, preserve or recover 'assets of the company', which does not include assets subject to a charge.

The NSW Supreme Court accepted expert evidence on the New Zealand law that concluded that the presence of the funder would likely vitiate any preference claim, as it engaged the above restrictions, namely:[98]

1. the plaintiff has a litigation funder, therefore the plaintiff (and the other group members) are not providing any payment of money or indemnity towards the litigation; and
2. the purpose of the Australian proceeding was to obtain recovery of the insured liability for the sole benefit of the plaintiff (and the other group members).

The *Koper v. Zurich* proceeding is another example of the reach of the TTPA and the changing contours of trans-Tasman litigation. The strategic nature of the litigation is perhaps an interesting indicator of the way that, in the correct circumstances, each jurisdiction may be utilised as a 'forum of last resort' to litigate claims that otherwise may have been extinguished by the domestic law.

iii New Zealand litigation landscape

The TTPA decisions handed down in 2023 represent an interesting development in the New Zealand litigation landscape. The *A2 NZ* decision represents a common-sense approach to case management of concurrent proceedings, which is aimed at reducing duplication of costs and judicial resources and avoiding conflicting judgments. Practically, it provides a welcome bulwark for dual-listed entities (or entities with trans-Tasman operations) against the risk of having to meet litigation on either side of the Tasman Sea. It will be interesting to observe whether the TTPA is used as a strategic tool to frustrate litigation by defendants due to an advantage (perceived or real) that may arise in the other jurisdiction, and relatedly whether New Zealand courts are competent to apply Australian law, a finding that may be inferred but was ultimately left open by the decision in A2 NZ.

Legal and regulatory framework

New Zealand does not have a statutory or regulatory regime specifically governing litigation funding. Accordingly, the conduct of funders in litigation is dealt with under the general law and through the torts of maintenance and champerty. The court regulates the conduct of litigation funders via its powers to:

1. stay proceedings;[99]
2. strike out proceedings;[100]
3. order security for costs;[101] and

4. make non-party cost orders.[102]

New Zealand does not have a statutory or regulatory regime specifically governing litigation funding. Accordingly, the conduct of funders in litigation is dealt with under the general law and through the torts of maintenance and champerty. The court regulates the conduct of litigation funders via its powers to:

1. stay proceedings;[99]
2. strike out proceedings;[100]
3. order security for costs;[101] and
4. make non-party cost orders.[102]

i The applicability of statutory schemes to funding agreements

The extent to which litigation funding services are captured by existing statutory schemes is currently still a matter of debate and uncertainty. Broadly, litigation funding services may be captured by general consumer protection legislation,[103] credit and financial services legislation[104] and financial services provider legislation.[105] However, in respect of each of these general legislative schemes there has been no determinative court ruling to confirm their application to services provided by third party funders.

The contractual terms of a funding agreement are arguably subject to the Fair Trading Act 1986 prohibitions against misleading or deceptive conduct,[106] making unsubstantiated claims,[107] false or misleading representations,[108] unfair contract terms[109] and engaging in unfair practices.[110] This is because the services provided by a funder are likely to be captured by the expansive definition of services under Section 2 of the Fair Trading Act 1986. However, the application of the other legislative schemes depends, at minimum, on a construction of threshold definitions under the respective legislation that have not yet been judicially determined.[111] Arguably, litigation funding services do not easily or appropriately comport with the definitions of financial products,[112] credit contracts,[113] consumer credit contracts[114] or consumer services[115] that would invoke the jurisdiction of the other legislative schemes. The result is a degree of uncertainty as to the precise regulatory requirements applying to litigation funders in New Zealand. Illustrative of the uncertainty of interpretation that currently prevails, only two of the five domestic funders operating in New Zealand have registered as a financial service provider under the Finance Service Providers (Registration and Dispute Resolution) Act 2008.[116]

ii Maintenance, champerty and abuse of process

In contrast to other common law jurisdictions, the archaic tortious protections of maintenance and champerty persist in New Zealand. Despite their persistence, there are no reported examples of these torts being invoked to regulate funder control of litigation.-[117] As a consequence, the torts have largely fallen into disuse,[118] and there has been no reported New Zealand case in which a claim in tort has succeeded.[119] Consequently, there has been a mounting reform debate on the continued relevance of these ancient torts in modern litigation.[120] The most recent voice advocating for reform is the NZLC. In May

2022, NZLC R147 recommended the abolition of tortious maintenance and champerty,[121] bringing New Zealand in line with other common law jurisdictions such as Canada and Australia.

In practice, the mechanism courts have favoured to police litigation funding has been to stay proceedings as an abuse of process.[122] The power to find a proceeding an abuse is derived from the court's inherent jurisdiction[123] and the rules of court,[124] and is governed by the test set down by the Supreme Court of New Zealand in *Waterhouse v. Contractors Bonding Ltd (Waterhouse)*.[125]

Although there have been recent examples where the court has exercised the power to stay a proceeding,[126] such orders have been granted sparingly. Taken together, the authorities indicate judicial acceptance of the legitimate role of litigation funding to facilitate access to justice, indemnify plaintiffs and provide commercial certainty for defendants.[127]

The general disposition of the court to litigation funding has been an incremental and cautious acceptance of the role played by funders in modern litigation. New Zealand courts have adopted a broadly non-interventionist approach to regulate funding that seeks to balance the rights of private parties to contract[128] with the court's supervisory role, particularly in representative proceedings.[129] The courts have shown a willingness to scrutinise client–funder relationships and intervene to protect plaintiffs, or class members as the case may be, when they consider it necessary.[130]

The relationship between litigant and litigation funder is principally a creature of contract supplemented by any existing protections at law or equity or in statue. The touchstone of regulation is the funding agreement. The orthodox position of the court in relation to funding agreements was expressed by the Supreme Court in *Waterhouse*[131] and reaffirmed by the Supreme Court in *PricewaterhouseCoopers v. Walker* at [55]:

> In Waterhouse, this Court determined that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, at least in cases not involving representative actions.[132] Nor was it the Court's role to assess the fairness of a funding arrangement as between the funder and the claimant party.[133] However, a court may exercise jurisdiction to stay for abuse of process.[134]

A principle question for courts has been the degree to which a funder may exercise control over the litigation. Courts have recognised there is a legitimate locus of control that may be exercised by a litigation funder consistent with its reasonable entitlement to protect its investment.[135] The outer boundaries of this control are somewhat uncertain. The Supreme Court has tentatively suggested this boundary in the following terms, 'to be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed to by the litigation funder.'[136]

Notably, the emergence of representative proceedings has altered the relative passivity of the court in regulating and exercising its oversight functions in respect of third party funding arrangements. Class actions represent a unique nexus between the public interest, access to justice and the fair resolution of mass claims, which has attracted increased scrutiny by courts and legislators. In particular, the availability of opt-out class actions following the decision in Southern Response v. Ross[137] has highlighted the importance of the court exercising its oversight role in circumstances where persons may unknowingly be members of a class.[138] The 2021 High Court decision in *Southern Response v. Ross* confirms that

courts will now take a more active role in class proceedings in respect of approving proposed settlements and granting leave for discontinuance[139] or communications with class members.[140]

iii Reviews into the regulation of litigation funding

In May 2022, the NZLC published its much-anticipated report into class actions and litigation funding.[141] NZLC R147 was the culmination of an extensive discussion and consultation process over the past two-and-a-half years, with the NZLC engaging widely with stakeholders from government, the legal profession, the litigation funders, business, academics and community organisations.[142] The NZLC's report makes 121 recommendations for comprehensive and integrated reform of class actions and litigation funding in New Zealand, including a statutory class actions regime.

In November 2022, the former Hipkins Labour government provided its formal response to the NZLC 147 Report, accepting in principle the 121 recommendations and confirming that it intends to begin policy work to advance the recommendations in 2023. The former government's response notes that some aspects of the NZLC recommendations require further consideration before implementation. Specifically, the following issues were raised for further analysis:

1. the policy implications of introducing a public fund for public interest litigation;
2. the scope of oversight for litigation funders and whether oversight should be restricted only to class actions; and
3. the impact on court resources posed by class actions and court oversight of litigation funding agreements.

In August 2023, the former Labour government announced, as part of an election promise, that if re-elected it would implement a statutory class actions regime reflecting recommendations from the NZLC R147. At the time of writing, substantive steps to implement the recommendations of the NZLC have not been taken.

Structuring the agreement

Any funded litigation conducted in New Zealand requires consensus being reached between the claimant, its lawyers and the litigation funder as to how the proceeding will be conducted and how the risks of the litigation will be shared.

Any funded litigation conducted in New Zealand requires consensus being reached between the claimant, its lawyers and the litigation funder as to how the proceeding will be conducted and how the risks of the litigation will be shared.

i Form of the typical litigation funding arrangement

Arrangements for funded litigation are commonly comprised of two separate client agreements. The first is the retainer, or terms of engagement, between the client and their lawyers. This agreement sets out the scope of the legal work and the terms under

which such work is to be performed. The retainer will typically set out the lawyer's basis for charging legal fees and disbursements as well as a raft of other standard terms and conditions of engagement, required by the Rules of Conduct and Client Care for Lawyers. The litigation funder is not generally party to this client retainer agreement. Commonly, the funder and lawyers have no direct contractual relationship at all, although clients often authorise their lawyers to report directly to the funder. Clients can often also agree with the funder as to what constitutes approved 'standard lawyer terms' as between the client and their lawyer. The funded client usually also authorises and directs the lawyer to receive any resolution sum on the client's behalf and to apply it in accordance with an agreed priority, as set out in the funding agreement.

The client typically enters a separate agreement with a litigation funder. This litigation funding agreement details the terms on which the litigation funding will be provided to the client. Generally, the lawyers are not a party to the funding agreement, although the agreement may provide for certain irrevocable directions to be given by the client to their lawyers for the purposes of keeping the litigation funder informed of progress and consulted on any significant decisions to be made throughout the litigation.

The funding agreement generally provides for the funder to advance some or all of the funded client's legal costs and disbursements of conducting the litigation as they are incurred, generally on a non-recourse basis.[143] The arrangements typically also require an indemnity from the funder in favour of the funded client, in respect of adverse costs, should the litigation be unsuccessful.[144] Where an adverse costs indemnity is provided litigation funders generally also agree to provide security for costs should the court make any order for security.[145]

In return, the funded client agrees the funder may receive a portion of any resolution sum recovered from the litigation. Resolution sums are usually achieved via settlement or from the proceeds of any favourable judgment or court order. The funder's remuneration is commonly calculated as a percentage of the sum recovered, although it can be calculated in other ways. Commissions based on percentages are dependent on the nature of the risks undertaken, the time involved and the type and amount of funding required. In larger projects or class action litigation, the funder may also assist with pre-claim administration, book building, project management and general administration, and may charge a separate fee for such services in the event of success. Funding agreements can allocate certain project management responsibilities and day-to-day administrative control over the litigation to the funder, allowing the funder the right to provide recommendations and administrative support to the lawyers, subject to the client's overriding instructions.

ii Judicial intervention

On various occasions the Supreme Court has been asked to consider the role it should play in respect of litigation funding agreements. As previously mentioned, the court has consistently rejected the notion that it should act in the role as regulator of litigation funding agreements,[146] expressly noting that this is more appropriately a matter for legislation or regulation if considered desirable. The NZLC has accepted this invitation, recommending a raft of legislative and regulatory changes in this area.[147]

Likewise, the court plays no role in assessing the fairness of any bargain between a funder and a plaintiff,[148] although the court can be called on to determine whether

arrangements made with litigation funders amount to an abuse of process.[149] Consistent with common law developments in other jurisdictions, the concept of what constitutes an abuse of process in the context of a litigation funding agreement has been restricted. In *Waterhouse*, the Supreme Court found that a stay on abuse of process grounds should only be made 'on traditional grounds or where the funding arrangement effectively constitutes' an impermissible assignment of a cause of action.[150] In assessing whether there has been an assignment, the court will have regard to the funding arrangements as a whole, including the level of legal control able to be exercised by the funder, the profit share and the role of the lawyers acting.

Relatedly, in *Fostif*, the New South Wales Court of Appeal recognised that a high level of control by the funder is expected and permissible but cautioned that it would be contrary to public policy for the lawyers to fully abdicate to the funder the obligation to act for the representative party.[151] This acceptance of a level of control being an inevitable part of the funder merely protecting its investment has also been embraced in New Zealand.[152] Therefore, while it is permissible for a funder to maintain day-to-day control of a claim, the legal representatives are expected to consult with the client on key issues. Hence, funding agreements often expressly preserve the client's right to override the funder's instructions and commonly include dispute resolution mechanisms.

Disclosure

The Supreme Court has made its position clear on the issue of disclosure and approval of third party litigation funding agreements, at least in the context of non-representative proceedings. The leading case in this area is again *Waterhouse*,[153] where the Court said it was not its role 'to act as general regulators of litigation funding arrangements'. The Court stressed it is not its role to give prior approval to funding arrangements.[154] However, the Court left open the scope of its supervisory role for litigation funding arrangements in connection with representative proceedings.[155]

More recently, in the course of dealing with a representative proceeding on other procedural issues, the Supreme Court in *Southern Response Earthquake Services Ltd v. Ross* considered what had been said in *Waterhouse* about the role of the court in reviewing litigation funding agreements. The Supreme Court concluded (contrary to submissions of the Law Society) that it would be premature to say that there is any expectation that a funding agreement should routinely be provided to the court as part of an application under HCR 4.24(b).[156]

So, although there is no requirement for disclosure of the funding agreement as a whole, *Waterhouse* remains authority for the proposition that the parties to the litigation are entitled to know the identity of the real parties to the litigation, and on this basis the funded parties must still disclose the fact that there is litigation funding involved, the identity of the litigation funder and whether that litigation funder is subject to the jurisdiction of the New Zealand courts.[157]

Other particulars of the funding arrangement, such as the financial means of the funder and the basis on which the funding can be withdrawn, are generally not required to be disclosed. These issues can be addressed more directly with an application for security for costs if appropriate. Even in the context of an abuse of process application, where the funding agreement is to be disclosed to the parties, the courts have still been careful to

permit the funded party to maintain confidentiality over terms that might provide a tactical advantage to their opponent should they be divulged.[158]

Costs

New Zealand is an adverse costs jurisdiction where the power to award costs is at the discretion of the court.[159] Practically, the courts administer a scale costs regime that is instructive, but not determinative, of the manner in which costs are calculated and recovered.[160] An increase or uplift on scale costs is available at the discretion of the court, following a multifactorial assessment of the complexity, significance and reasonableness of the costs claimed.[161]

New Zealand is an adverse costs jurisdiction where the power to award costs is at the discretion of the court.[159] Practically, the courts administer a scale costs regime that is instructive, but not determinative, of the manner in which costs are calculated and recovered.[160] An increase or uplift on scale costs is available at the discretion of the court, following a multifactorial assessment of the complexity, significance and reasonableness of the costs claimed.[161]

i Security for costs

Security for costs may be ordered on the application of a defendant where the plaintiff is either resident or incorporated outside of the jurisdiction, or there is reason to believe that a plaintiff will be unable to pay a defendant's costs if unsuccessful.[162] The order is discretionary, and the presence of a litigation funder may be a relevant factor to security being ordered.[163] Practically, security for costs is commonplace in representative proceedings where a litigation funder is involved. The NZLC has recommended a statutory presumption in favour of security where the proceeding is supported by litigation funding, to be provided in a form that is enforceable in New Zealand.[164] Beyond ordering security, the courts have been reticent to adopt a general regulatory mandate of litigation funding in respect of capital adequacy or requiring proof of a funder's capacity to satisfy an adverse costs award.[165]

The forms of security that the court is willing to accept are not closed, and ultimately will be at the satisfaction of the court.[166] In practice, the court has accepted the following forms of security, depending on the circumstances of each case:

1. cash paid into court or held on trust;[167]
2. a bank bond or guarantee;[168] and
3. a guarantee from the litigation funder.[169]

New Zealand courts have typically rejected after-the-event (ATE) insurance as an adequate form of security arising from concerns regarding enforceability against underwriters.[170] The court in *Houghton v. Saunders* did, however, highlight the narrow circumstances in which a deed of indemnity from an insurer may be permissible: where the underwriters' obligations were enforceable in New Zealand and the underwriters were reputable and solvent.[171]

ii Funder's liability for costs

A funder's liability for costs arises in two contexts; under contract and at general law. At general law, the power to make a non-party cost order against a funder already exists as part of the court's general costs discretion and is recognised at common law.[172] Despite the acceptance of non-party cost orders, a funder's liability for costs is the subject of an active reform debate in the class actions context. The NZLC has recommended a discrete statutory power to 'make orders directly against the litigation funder for the provision of security for costs and payment of adverse costs'[173] in class actions. Practically, the issue for the NZLC is enforceability, where the assets of the funder may be outside the jurisdiction, or the terms of the funding agreement may not be governed by the laws of New Zealand. The NZLC has recommended a suite of intersecting recommendations that would substantially amend the costs regime currently applicable to class proceedings, namely that (in addition to the aforementioned non-party orders):

1. the terms of funding agreements are only enforceable if approved by the court;[174]
2. a rebuttable presumption that security for costs, in all funded class proceedings, will be provided in a form that is enforceable in New Zealand;[175] and
3. the governing law under funding agreements of class proceedings should be the law of New Zealand.[176]

iii Costs and class actions

Class actions have introduced some novel issues into the costs landscape, such as common fund orders and common costs in concurrent proceedings.

Common fund doctrine

The common fund doctrine is in a nascent stage of development in New Zealand. The first application for a common fund order (CFO) was made in the *Ross v. Southern Response* class litigation.[177] Ultimately, the proceedings resolved in December 2021 without the Court being required to determine the application for a CFO. However, the series of decisions from the High Court, Court of Appeal and Supreme Court in this litigation describe the general contours of an emerging acceptance of the common fund doctrine.-[178]

The second CFO application was made in the *Simons v. ANZ Bank NZ* class action. The decision in *Simons v. ANZ Bank NZ Ltd* [179] (handed down on 27 July 2022) draws heavily upon the *Ross v. Southern Response* litigation, ultimately finding that the High Court has power to make a CFO in a representative proceeding, although the Court ultimately declined to make the CFO at an early stage in the proceeding.[180] Accordingly, the power exists but it has yet to be exercised in an appropriate case and at an appropriate stage.

The Supreme Court in *Southern Response v. Ross*[181] recognised that the court has power to approve settlements as a condition of leave being granted under HCR 4.24 to bring a representative proceeding on an opt out basis,[182]and that this power derives from the

court 'exercising an adjudicative power in their protective or supervisory jurisdiction'.[183] It is not clear whether such settlement approval power extends to making a CFO or the setting of funding commission rates in the absence of a statutory foundation for this power. However, such an interpretation may be available based on the Court's finding that '. . . in deciding whether to approve a settlement, courts can consider the extent to which the settlement prejudices individual class members'.[184]

The common fund doctrine arises in this context as a mechanism to ensure that individual class members are not prejudiced *inter se*. As the Supreme Court expressed, 'common fund orders are one of the techniques used to try and respond to what is referred to as the problem of "free riders"; that is, those who take the benefit of the claim without shouldering any of the burden'.[185] The advent of opt-out or open class representative proceedings in New Zealand as a result of the decision in *Southern Response v. Ross*[186] produces the potential for 'free-riding' by open class members that have not entered a funding agreement; thereby, they are not contractually bound to contribute to the legal or litigation funding costs of the proceeding, but are able to share in the resolution of the proceeding.

In the same litigation in *Ross v. Southern Response*, the Court of Appeal expressed support, albeit obliquely, that the Court had sufficient power to make such an order without determining the question.[187]

The Court of Appeals' line of reasoning ultimately informed Venning J's acceptance that the court has power to make a CFO in *Simons v. ANZ Bank NZ Ltd*.[188] Importantly, the decision provides interpretive clarity on the source of power to make such an order. The decision eschews an interpretation that the power arises under HCR 4.24,[189] preferring the inherent jurisdiction of the court, supplemented by the expansive plenary powers conferred by HCR 1.6[190] to fashion bespoke orders, where there is no existing procedure 'in the manner that the court thinks is best calculated to promote the objective of these rules'.[191] Per Venning J at [166]:

> Further, at some stage in every representative proceedings, it will be necessary for the Court to address the issue of how any fund recovered in the class action is to be distributed. That will inevitably require the Court to consider the position of, and appropriate return to, the litigation funder. As the Supreme Court noted in Southern Response Earthquake Services Ltd v. Ross it is common for this Court to make orders approving settlements and distribution proposals. The Court has an adjudicative power in its protective or supervisory jurisdiction, and there is a need for the Court to exercise that jurisdiction in that context.

As a consequence of *Simons v. ANZ Bank NZ Ltd*, New Zealand courts have the power to make CFOs, and that power may be exercised at the appropriate time, likely at settlement or judgment. In the absence of a statutory power, the jurisprudence in this area continues to accommodate and manage the innovations introduced by litigation funding. Set against this backdrop is the legislative reform debate. The NZLC has recommended a series of reforms that, if adopted, would codify the power of the court to apportion legal costs and funding commissions.

It is important to understand the distinction between a CFO and a cost sharing order as proposed by the NZLC. There is a profusion of definitions for a CFO at common law, depending upon the precise content of the order and the stage of the proceeding when an

order is sought. The order has been referred to as a commencement CFO,[192] settlement CFO,[193] judgment CFO,[194] an expense sharing order[195] and an equitable remuneration order.[196] In examining the definitional diversity that now exists, it is easy to become distracted by what has been referred to as the 'triviality of labels'.[197] In this context, a CFO is a term of convenience used to describe a broad specie of orders whose function is to apportion litigation funding costs of a proceeding.

The court has also considered the funding equalisation order (FEO) as an alternate cost-spreading mechanism. In *Simons v. ANZ Bank NZ Ltd*,[198] the Court succinctly summarised how an FEO operates:

> CFOs can be contrasted with funding equalisation orders (FEOs). FEOs deduct an amount from the settlement or award paid to non-funded members that is equivalent to the amount they would have had to pay to the funder, had they entered the funding agreement. The amount deducted is then pooled and distributed pro rata amongst all class members, but not the funder. FEOs achieve equity amongst class members, but do not augment the sums paid to the funder.

The decision in *Simons v. ANZ Bank NZ Ltd* did not specifically deal with the availability of FEOs as a matter of law. However, it can be inferred that an FEO is available on the same basis as a CFO where the court 'thinks it is best calculated to promote the objective of the HCR'.[199] There is typically a misplaced assumption that an FEO will reliably be superior to a CFO, on the basis that under an FEO the funder does not receive more than the total commission it would have received from the funded class members.[200] That assumption is misplaced particularly when accepted reflexively and without regard to the circumstances of each case.

Australian jurisprudence is instructive on this point: 'a funding equalisation order is not always the appropriate counterfactual or comparator' to a CFO.[201] The range of factors that weigh against an FEO in certain circumstances were summarised by the court in *Simons v. ANZ Bank NZ Ltd*, referring to the plaintiff's submissions:[202]

> In Mr Salmon's submission FEOs are inferior to CFOs. FEOs do not incentivise funders to invest in opt out proceedings, because they do not allow funders to collect a commission on unfunded class members' recoveries or provide certainty as to potential returns at the beginning of the proceedings. Under FEOs the Court has less flexibility to amend the funding commission rates (FCRs). CFOs are simpler and easier to understand. The other advantage of a CFO is that it obviates the need for book building and ensures that class members are able to make better informed choices as to whether to opt out.

As can be seen, the common fund doctrine is in its nascency in New Zealand but is evolving in parallel with the courts' recognition of the role played by litigation funders, the emergence of opt-out class actions and a burgeoning litigation funding market.

iv Common costs

The series of class actions against James Hardie in New Zealand have raised novel but consequential issues regarding costs incurred in concurrent or parallel class actions, alleging materially similar claims. In one of these cases a dispute arose as to whether the court should recognise and apportion costs incurred across separate, but materially

similar, class proceedings that have been incurred for the common benefit of all claims; for example, where common experts give evidence on the same subject matter or parties seek to rely upon evidence filed in related or parallel proceedings in respect of common issues.

The issue arose in *Cridge v. James Hardie* in the context of three proceedings filed against a common defendant, James Hardie, for materially similar claims.[203] The plaintiffs in the *Cridge* proceeding were the first to proceed to trial, ultimately failing in their claims at first instance and incurring significant adverse costs. The second proceeding[204] settled and the third proceeding[205] has also settled in 2023.

At first instance the court in *Cridge v. James Hardie*[206] held that common costs were incurred across all three proceedings but declined to apportion those costs, despite conceding that 'there is, however, undoubtedly within the James Hardie evidence material that would fall within the concept of a common cost, being output that will be usable in whole or in part, directly or as relevant material, in the defence of all three claims'.[207]

The common costs decision is subject to an application for leave to appeal, as at the time of writing. The consequences of this decision on concurrent class actions are manifold and potentially profound, with, inter alia, the following issues arising:

1. the ruling disadvantages claims filed first-in-time by forcing those claimants to bear all the costs risks for common work and incentivises multiplicity of proceedings, to minimise the potential adverse costs risks burden on subsequent claims. Crucially, this finding does not appear to sit conformably with the object of the HCR 'to secure the just, speedy, and inexpensive determination of any proceedings.'[208]
2. the decision does not resolve the potential risk of double recovery by a successful defendant where there is multiplicity of similar claims against them that are not heard together; and
3. the role of case management by the court where proceedings alleging similar claims against the defendant or defendants are run concurrently (or sequentially) and the appropriate role for consolidation orders.

The *James Hardie* series of class actions also raise the question of whether a bespoke class actions costs regime is necessary in New Zealand arising from the unique attributes of these types of claims, such as the cost multipliers, vulnerability of plaintiffs to adverse cost events and the general costs quantum involved. Alternatively, judicial guidelines or practice notes specific to class actions, akin to the approach taken in the Australian Federal Court, may assist the court in undertaking the complex task of cost assessment in these types of proceedings. Notably, the NZLC's view is that a bespoke class action costs regime is not necessary at this time.

Outlook and conclusions

Recent years have seen incremental developments in support of a developing third party litigation funding market. These developments have aided in maturing the jurisprudence on the use of third party litigation funding in New Zealand. Class actions have been the touchstone of many of these recent developments. The acceptance of the common fund

doctrine in the *Simons v. ANZ Bank NZ* class action, coupled with the comprehensive class action and litigation funding reform agenda advanced by the NZLC, are important milestones in the evolving architecture of New Zealand's litigation funding landscape. In particular, NZLC R147 is an ambitious blueprint that, if adopted, would provide procedural clarity to help foster competition and potentially reduce avoidable costs on procedural skirmishing over some aspects of currently untested processes and procedures. However, depending on the final form of the proposed new litigation funding court approval requirements, these may prove to be significant disincentives for litigation funders and claimants. If the hurdles are set too high they may simply discourage investment in the jurisdiction, and have other, unintended consequences, by making the commencement of claims more cumbersome, expensive and uncertain for claimants and their funders as well as defendants.

New Zealand is well positioned to advance legal claims that are at the vanguard of current litigation, such as in the areas of privacy and climate change litigation. The judicial approach to litigation funding and class actions has continued to demonstrate a willingness by the court to exercise its powers flexibly and creatively to fashion a bespoke, if ad hoc, response to the novel issues these cases bring in the absence of a statutory regime. Class actions have been the principal driver of this debate and the judicial response. The acceptance of CFOs, concurrent proceedings and litigation under the TTPA by the courts are recent examples. The court has maintained a generally non-interventionist approach to third party funding arrangements. The arrival of more funding competition in the market and the maturing discourse have created favourable conditions for statutory change but will require legislative determination in the new parliament.

Looking ahead, the immediate challenge appears to be striking the right balance between achieving appropriate levels of consumer protection while minimising regulatory compliance costs and encouraging competition from litigation funding providers. Although no silver bullet, implementing a comprehensive regime for the conduct of class actions along with a statutory framework for third party litigation funding arrangements will potentially represent a significant step towards facilitating better access to justice to more people across New Zealand.

As was stated by the Supreme Court in *Southern Response v. Ross*,[209] the objectives of representative actions are threefold: improving access to justice, facilitating the efficient use of judicial resources and strengthening incentives for compliance with the law. Providing clarity in relation to the permitted uses of third party litigation funding and laying down the rules for the conduct of representative proceedings will see all three of these objectives advanced and should result in tangible benefits to New Zealanders seeking to utilise the judicial system in the years ahead.

Endnotes

1 Jason Geisker is a principal and Simon Gibbs is an associate at Maurice Blackburn Lawyers, the legal advisers to Claims Funding Australia Pty Ltd. ^ Back to section

2 *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC). ^ Back to section

3 *Sievewright v. Ward & Others* [1935] NZLR 43, 48, Ostler J; see also Law Commission Preliminary Paper 43: *Subsidising Litigation* NZLC PP43, page 3. ^ Back to section

4 IBISWorld, Legal Services in New Zealand (July 2021), page 9; Omni Bridgeway Annual Report 2021, page 10. ^ Back to section

5 Omni Bridgeway Annual Report 2021, page 10. ^ Back to section

6 See New Zealand Law Commission (NZLC) IP45,*Class Actions and Litigation Funding* (December 2020) (NZLC IP45) at [14.24], which identifies 40 cases in New Zealand in which the plaintiff received litigation funding. ^ Back to section

7 IBISWorld, Legal Services in New Zealand (July 2021), page 9. ^ Back to section

8 Unless recorded in a judgment or disclosed as part of a class action. Prior to the decision in*Waterhouse v. Contractors Bonding* [2013] NZSC 139, [2014] 1 NZLR 91, there was no common law obligation on a funded party to disclose the fact that it was receiving litigation funding. ^ Back to section

9 Funder of the*Strathboss Kiwifruit Ltd v. Attorney General (kiwifruit)* class action, one (of two) separate *CBL Corporation Ltd* class actions. ^ Back to section

10 Other domestic-based funders include Claims Resolution Services, Joint Action Funding Ltd, LPF Group Ltd, Risk Worldwide/My Insurance Claim and Tempest Litigation Funders. ^ Back to section

11 Claims Funding Australia Pty Ltd is a wholly owned subsidiary of Maurice Blackburn Lawyers, (Australia's largest and most successful plaintiff class action law firm) and has funded the*Ross v. Southern Response Earthquake Services* class action, and *Cridge v. Studcorp & James Hardie* class actions. ^ Back to section

12 Formerly known as IMF Bentham, it was the funder of one (of two) separate*CBL Corporation Ltd* class actions. ^ Back to section

13 Funder of the*Cooper v. ANZ Bank New Zealand Ltd* class action. ^ Back to section

14 Funder of the*Shadowclad* class action, *White v. James Hardie* class action, *Feltex* class action, *Intueri* class action. ^ Back to section

15 Claims Funding Australia has no published minimum claim size. ^ Back to section

16 See NZLC IP45, at [10.39]. ^ Back to section

17 NZLC IP45, page 13. ^ Back to section

18 ibid. ^ Back to section

19 NZLC IP45, at [14.38]. ^ Back to section

20 NZLC IP45, at [14.32]. ^ Back to section

21 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91. ^ Back to section

22 *Sage Securities Ltd v. Rood HC Wellington* CIV-2009-485-1150, 11 November 2009. ^ Back to section

23 *Patel v. Patel* [2014] NZHC 2410. ^ Back to section

24 *Williams v. Auckland Council* [2015] NZCA 479, (2015) 7 NZ ConvC 96-013. ^ Back to section

25 NZLC R147, Class Actions and Litigation Funding (May 2022) (NZLC R147), at 368. ^ Back to section

26 NZLC R147, page 368. ^ Back to section

27 ibid., page 364. ^ Back to section

28 'There are significant barriers to accessing civil justice in Aotearoa New Zealand, including the costs associated with litigation. Class actions and litigation funding are not a silver bullet for those issues, but we think they can both make important contributions.' Prime Minister Chris Hipkins, 15 September 2023, https://www.nzherald.co.nz/nz/politics/election-2023-labour-wants-to-enable-class-action-law-suits-review-district-court-jury-trials/PFJS2AGSE5BCTEHKWEQ2JN5EQQ/. ^ Back to section

29 Trans-Tasman Proceedings Act 2010, s.3(1)(a). ^ Back to section

30 Trans-Tasman Proceedings Act 2010, s. 3(1); for an Australian perspective see also Attorney-General's Department, Australian Government https://www.ag.gov.au/international-relations/private-international-law/trans-tasman-proceedings-regime. ^ Back to section

31 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013). ^ Back to section

32 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22. ^ Back to section

33 *Zurich Insurance plc v. Koper* [2022] NSWCA 128 (Bell CJ, Ward P and Beech-Jones JA). ^ Back to section

34 *Kevin James Whyte and Ors v. The a2 Milk Company Limited* CIV-2022-404-000762. ^ Back to section

35 *Kevin James Whyte and Ors v. The a2 Milk Company Limited* [2023] NZHC 22 at [68]. ^ Back to section

36 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* S ECI 2021 03645: The proceeding is a consolidated proceeding. Prior to consolidation, the two lead plaintiffs were each the lead plaintiff of a separate proceeding, being S ECI 2021 03645 (*the Thomas Proceeding*), and S ECI 2021 04403 (the Xiao Proceeding). The proceedings were consolidated on 15 June 2022. ^ Back to section

37 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [127] to [128]. ^ Back to section

38 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [39]–[47]. ^ Back to section

39 Trans-Tasman Proceedings Act 2010, s.24(1). ^ Back to section

40 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [119]. Concurrent proceedings are a factor to be considered under s.24(2)(f) of the TTPA. ^ Back to section

41 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [101]–[102] and see full analysis of the criteria under s.24(2)(f) from [70]-[102] and [119]. ^ Back to section

42 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [70]–[102] and [119]. ^ Back to section

43 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [77]. ^ Back to section

44 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [80], referring to the NZLC R147 at 5.3. ^ Back to section

45 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [78]. ^ Back to section

46 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [78]: (a) the same plaintiff classes, same or similar subject matter, commenced in the same jurisdiction; (b) different plaintiff classes, same or similar subject matter, commenced in the same jurisdiction; and (c) different plaintiff classes, same or similar subject matter, commenced in different jurisdictions. ^ Back to section

47 See *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [78]–[100]. ^ Back to section

48 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [79]. ^ Back to section

49 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [84]. ^ Back to section

50 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [116]. ^ Back to section

51 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [118]. ^ Back to section

52 id. ^ Back to section

53 Different plaintiff classes, same or similar subject matter, commenced in different jurisdictions. ^ Back to section

54 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [101]. ^ Back to section

55 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725. ^ Back to section

56 Trans-Tasman Proceedings Act 2010, s.3(1)(a). ^ Back to section

57 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [70]–[76]. ^ Back to section

58 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [39]. ^ Back to section

59 *Whyte v. The a2 Milk Company Limited* [2023] NZHC 22 at [46]. ^ Back to section

60 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725. ^ Back to section

61 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [19]–[32]. ^ Back to section

62 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [33]–[84]. ^ Back to section

63 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [85]–[165]. ^ Back to section

64 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [35]. ^ Back to section

65 Fair Trading Act 1986 and the Financial Markets Conduct Act 2013. ^ Back to section

66 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [44]. ^ Back to section

67 id. ^ Back to section

68 See full analysis*Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587 at [44]–[83]. ^ Back to section

69 In relation to claims made under the Financial Markets Conduct Act 2013, see [55]–[74]. ^ Back to section

70 Ms Jennifer Cooper KC on the Fair Trading Act 1986 (NZ) claims. ^ Back to section

71 See*Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [43]–[59]. The court appointed contradictor did not oppose the expert's conclusions (in fact, the contradictor changed his opinion in reliance on the expert's opinion) and the Court did not depart from the expert's opinion with was also in accordance with the general principle explained in *Neilson v. Overseas Projects Corporation of Victoria Ltd* 391 [185] (*Kirby J*); and *James Hardie & Co Pty Ltd v. Hall* (1998) 43 NSWLR 554 (James Hardie), 573. ^ Back to section

72 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [79], referring to Randerson J in the New Zealand case *Rimini Ltd v. Manning Management & Marketing Ltd* [2003] 3 NZLR 22 as extracted in the expert report of Ms Cooper KC at [4.6]–[4.7]. ^ Back to section

73 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [79]–[83]. ^ Back to section

74 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [120]–[165]. ^ Back to section

75 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [121]. ^ Back to section

76 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [149]. ^ Back to section

77 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [149] referring to *Pfeiffer*, 539–40 [83]–[84], quoted in *Amaca*, 650–1 [90]. ^ Back to section

78 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [119]. ^ Back to section

79 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [157]. ^ Back to section

80 *Jake Thomas and Yue Xiao v. The a2 Milk Company Limited* [2022] VSC 725 at [36]. ^ Back to section

81 *Dariusz Koper v. Zurich Insurance PLC* 2021/91398; *Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587; *Zurich Insurance PLC v. Koper* [2022] NSWCA 128; and *Zurich Insurance Company Ltd v. Koper* [2023] HCA 25. ^ Back to section

82 *Body Corporate 346799 v. KNZ International Co Ltd* [2017] NZHC 511. ^ Back to section

83 See headnote to*Zurich Insurance plc v. Koper* [2022] NSWCA 128 (Bell CJ, Ward P and Beech-Jones JA). ^ Back to section

84 *Body Corporate 346799 v. KNZ International Co Ltd* [2017] NZHC 511. ^ Back to section

85 *Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587 (per Rein J). ^ Back to section

86 Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW). ^ Back to section

87 Zurich Insurance PLC, domiciled in Switzerland. ^ Back to section

88 Insurance UK Ltd, domiciled in the United Kingdom. ^ Back to section

89 Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW). See ss.4 and 5 for the relevant leave provisions the subject of the proceedings. ^ Back to section

90 In sum, the plaintiff and class members were successful in the Supreme Court of NSW and the NSW Court of Appeal, both finding that they could bring claims against the insurers in Australia. The insurers appealed to the High Court of Australia in*Zurich Insurance Company Ltd v. Koper* [2023] HCA 25. The appeal was dismissed and the decision of the Court of Appeal (*Zurich Insurance plc v. Koper* [2022] NSWCA 128) and Supreme Court (*Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587) at first instance were upheld. ^ Back to section

91 *Zurich Insurance plc v. Koper* [2022] NSWCA 128 at [13]-[14]. ^ Back to section

92 ibid. ^ Back to section

93 *Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587 at [135(c)]. ^ Back to section

94 *Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587 at [142(3)]. ^ Back to section

95 Schedule 7, (1)(e) Companies Act 1993 ^ Back to section

96 David Chisholm KC and Jennifer Sarah Cooper KC. ^ Back to section

97 Schedule 7 (1)(e)(i). ^ Back to section

98 *Dariusz Koper v. Zurich Insurance PLC* [2021] NSWSC 1587 at [135]–[137] and [142]. ^ Back to section

99 High Court Rules 2016, r 15.1(3);*Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30] and [32]; and *Cain v. Mettrick* [2020] NZHC 2125. ^ Back to section

100 High Court Rules 2016, r 15.1(1). ^ Back to section

101 High Court Rules 2016, r 5.45. See also*Houghton v. Saunders* [2013] NZHC 1824 and *White v. James Hardie New Zealand* [2019] NZHC 188. ^ Back to section

102 High Court Rules 2016, r 14.1. *Waterhouse v. Contractors Bonding* [2014] 1 NZLR 91 at [52]-[53]. Also consider, the decision in *Prattley Enterprises* (2017) 23 PRNZ 484 recognised that a defendant may reserve its position to seek leave for any order to be made in the name of the funder, in the event an amount ordered is not paid. See also NZLC IP45 [15.50]-[15.56] and *Falloon (as executors of the Estate of the Late Bligh) v. The Earthquake Commission* [2020] NZHC 874 for an example of where a non-party costs order was made against a funder. See also NZLC IP45 at [19.19]. ^ Back to section

103 Fair Trading Act 1986; and Consumer Guarantees Act 1993. ^ Back to section

104 Credit Contracts and Consumer Finance Act 2003; and Finance Markets Conduct Act 2013. ^ Back to section

105 Finance Service Providers (Registration and Dispute Resolution) Act 2008. ^ Back to section

106 Fair Trading Act 1986, ss.9–10. ^ Back to section

107 Fair Trading Act 1986, s12D. ^ Back to section

108 Fair Trading Act 1986, s13. ^ Back to section

109 Fair Trading Act 1986, s26A. ^ Back to section

110 Fair Trading Act 1986, ss.17–26 (as the case may be). ^ Back to section

111 For a helpful discussion of these threshold definitions see NZLC IP45 at [15.57]–[15.62]. ^ Back to section

112 Finance Markets Conduct Act 2013, s.7. ^ Back to section

113 Credit Contracts and Consumer Finance Act 2003, s.7, to be read together with the definition of credit at s.6. ^ Back to section

114 Credit Contracts and Consumer Finance Act 2003, s.11. ^ Back to section

115 Consumer Guarantees Act 1993. The term 'consumer services' is used here as a term of convenience to describe the atomised definition that appears under the legislation by construing the separate terms 'consumer' and 'services' under s.2 of the Consumer Guarantees Act 1993. ^ Back to section

116 See NZLC IP45 at [15.62]. ^ Back to section

117 NZLC IP45 at [15.6]. ^ Back to section

118 See in particular *Auckland City Council as Assignee of Body Corporate 16113 v. Auckland City Council* [2008] 1 NZLR 838 (HC) at [45]–[46]. ^ Back to section

119 Law Commission Preliminary Paper 43: Subsidising Litigation, NZLC PP43, page 6. ^ Back to section

120 See for example, S Todd et al., *The Law of Torts in New Zealand* (2nd edn, 1997) (Brooker's Limited, Wellington) 1004. ^ Back to section

121 NZLC R147, Recommendation 107. ^ Back to section

122 See Elias CJ in *PricewaterhouseCoopers v. Walker* [2017] 1 NZLR 735 at [118]-[119] for an articulation of the persistence of maintenance and champerty and the how the stay for abuse of process has emerged in that setting. ^ Back to section

123 *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91 at [30]. ^ Back to section

124 High Court Rules 2016, r 15.1(3). ^ Back to section

125 *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91 at [31]-[32], referring approvingly to the Australian High Court decision in *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd* [2009] HCA 43, [2009] 239 CLR 75 at [27] per French CJ, Gummow, Hayne and Crennan JJ, citing IH Jacob 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems 23 at 43. The circumstances that may give rise to a stay for abuse, as set down in *Waterhouse*, were subsequently summarised by the Supreme Court in *PricewaterhouseCoopers v. Walker* [2017] 1 NZLR 735 at [56]. ^ Back to section

126 *Cain v. Mettrick* [2020] NZHC 2125. ^ Back to section

127 *Houghton v. Saunders* (2008) 19 PRNZ 173 (HC) at [177]. For example, to satisfy security for costs or costs awards in the event a defendant succeeds in defending a claim. Balanced against this view are the concerns expressed by the Supreme Court in *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91 at [41] and *PricewaterhouseCoopers v. Walker* [2017] NZLR 735 at [114]–[122] (per Elias CJ in dissent). ^ Back to section

128 See *Waterhouse v. Contractors Bonding* [2014] 1 NZLR 91 at [28]. Nor was it the courts' role to assess the fairness of any bargain between a funder and a plaintiff: see [48] and [76(f)]. ^ Back to section

129 See for example, *Paine v. Carter Holt Harvey Limited* [2019] NZHC 1614; *Southern Response Earthquake Services Ltd v. Southern Response Unresolved Claims Group* [2017] NZCA 489 at [79]-[80]; *Southern Response Earthquake Services Limited v. Brendan Miles Ross and Coleen Anne Ross* [2020] NZSC 126 at [81] and [86]: 'While the Court in *Waterhouse* said it was not the courts' role "to act as general regulators of litigation funding arrangements", the Court left open the scope of the courts' supervisory role for litigation funding arrangements in relation to representative proceedings. That said, we consider it would be premature to say there is an expectation that any litigation funding agreement should routinely be provided to the court as part of an application under r 4.24(b), as the Law Society submits.' ^ Back to section

130 *Southern Response Earthquake Services Ltd v. Ross* [2020] NZSC 126 at [81]. ^ Back to section

131 *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91. ^ Back to section

132 *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91 at [27]–[29]. ^ Back to section

133 *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91 at [48]. ^ Back to section

134 *Waterhouse v. Contractors Bonding Ltd* [2014] 1 NZLR 91 at [57]. ^ Back to section

135 *Waterhouse v. Contractors Bonding* [2014] 1 NZLR 91 at [45]–[46]. ^ Back to section

136 *PricewaterhouseCoopers v. Walker* [2017] NZLR 735 at [122] per Elias J (in dissent). ^ Back to section

137 *Southern Response Earthquake Services Ltd v. Ross* [2020] NZSC 126. ^ Back to section

138 *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2452 at [17]–[43]. ^ Back to section

139 *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 3497. ^ Back to section

140 *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2452; *Ross v. Southern Response Earthquake Services Ltd (No. 2)* [2021] NZHC 2453; and *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2451. ^ Back to section

141 R147 Ko ng Hunga Take Whaip nga me ng P tea Tautiringa/Class Actions and Litigation Funding. ^ Back to section

142 Terms of Reference (18 November 2019); NZLC IP45 (4 December 2020); and Supplementary Issues Paper (30 September 2021) - IP48 Class Actions and Litigation Funding: Supplementary Issues Paper (NZLC IP48). ^ Back to section

143 NZLC IP45, at [14.37]. ^ Back to section

144 Although it is not mandatory to provide such contractual indemnities as a part of a third party funding arrangement: see *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89 at [52]. ^ Back to section

145 Again, this is not a requirement, and applications for security for costs provide a practical solution to any concerns a defendant might have in this sense: ibid. at [53]. ^ Back to section

146 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89 at [28]. ^ Back to section

147 As mentioned at Section III.iii of this chapter. ^ Back to section

148 ibid. at [48] and [76(f)], although these comments were limited to non-representative proceedings. ^ Back to section

149 See *Southern Response Earthquake Services Ltd v. Ross* 2020 [NZSC] 126 at [85]. ^ Back to section

150 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [76(e)]. See also at [56]–[57] and [61]. ^ Back to section

151 *Fostif v. Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203; [2005] NSWCA 83 at [94]–[116]. ^ Back to section

152 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [46]. ^ Back to section

153 [2013] NZSC 89, [2014] 1 NZLR 91. ^ Back to section

154 ibid. at [28]. ^ Back to section

155 ibid. at [28], [28], n 29 and [76(f)], n 92. ^ Back to section

156 *Southern Response Earthquake Services Ltd v. Ross* 2020 [NZSC] 126 at [86]; Note the Court in *Waterhouse* said litigation funding agreements should be disclosed 'where an application is made to which the terms of the agreement could be relevant': at [73] See also [75] and [76(c)]–[76(d)]. ^ Back to section

157 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67]–[69]. ^ Back to section

158 ibid. at [71]. ^ Back to section

159 High Court Rules 2016, rr. 14.1, 14.6 and 14.7. ^ Back to section

160 High Court Rules 2016, Schedule 2 and Schedule 3. ^ Back to section

161 High Court Rules 2016, r. 14.6(3)(a); see *Kidd v. Van Heeren* [2015] NZHC 3191 at [4], [6], [14]-[15] and [18]. ^ Back to section

162 High Court Rules 2016, r.5.45; see also *Saunders v. Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [35]–[36] where the Court relied on its inherent jurisdiction as the basis for making an order for security against a plaintiff in a representative proceeding that was supported by a litigation funder. ^ Back to section

163 *Waterhouse v. Contractors Bonding* [2014] 1 NZLR 91 at [29]; *Walker v. Forbes* [2017] NZHC 1212 at [71]. ^ Back to section

164 NZLC R147, Recommendation 109. ^ Back to section

165 *Waterhouse v. Contractors Bonding* [2014] 1 NZLR 91 at [70]. ^ Back to section

166 High Court Rules 2016, r.5.45(3)(a)(ii). ^ Back to section

167 *Houghton v. Saunders* [2014] NZHC 21 at [4]–[8]. Security was deposited in the trust account of the plaintiff's solicitors. ^ Back to section

168 *Strathboss Kiwifruit Ltd v.* Attorney-General [2015] NZHC 1596. ^ Back to section

169 *Houghton v. Saunders* [2019] NZHC 2007 at [47]–[51]. ^ Back to section

170 *Houghton v. Saunders* [2013] NZHC 1824 and *White v. James Hardie New Zealand* [2019] NZHC 188. ^ Back to section

171 *Houghton v. Saunders* [2019] NZHC 2007 at [51]. ^ Back to section

172 High Court Rules, rr. 14.1; *Waterhouse v. Contractors Bonding* [2014] 1 NZLR 91 at [52]-[53]. See also NZLC IP45 [15.50]-[15.56] referring to *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd (No. 2)* [2004] UKPC 39, [2005] 1 NZLR 145; *Mana Property Trustee Ltd v. James Developments Ltd (No. 2)* [2010] NZSC 124, [2011] 2 NZLR 25 at [11] and *Falloon (as executors of the Estate of the Late Bligh) v. The Earthquake Commission* [2020] NZHC 874. ^ Back to section

173 NZLC R147 Recommendation 109(c). ^ Back to section

174 NZLC R147 at Recommendation 112. ^ Back to section

175 NZLC R147 at Recommendation 109(b). ^ Back to section

176 NZLC R147 at [17.80]. ^ Back to section

177 See *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2454 at [23]–[29] for a precis of the procedural background of the Ross class action and the scope of the order sought. ^ Back to section

178 In the context of a related novel application for a set aside order that was denied, the High Court in *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2454 at [63]-[64] made a favourable observation that the court had the power to make a CFO, a set aside order or a similar cost sharing order without determining the question. ^ Back to section

179 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836. ^ Back to section

180 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836 at [165]–[168]. ^ Back to section

181 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126. ^ Back to section

182 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126, [82]–[83]. ^ Back to section

183 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126, [81]. ^ Back to section

184 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126, [82]. ^ Back to section

185 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126, [60]. ^ Back to section

186 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126. ^ Back to section

187 *Ross v. Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [110] and see also [105]–[106]. ^ Back to section

188 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836 at [164]–[168]. ^ Back to section

189 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836 at [160]. ^ Back to section

190 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836 at [165]–[168]. ^ Back to section

191 High Court Rules 2016, r 1.6(2). ^ Back to section

192 *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2454 at [26]; *Davaria Pty Ltd v.* 7-Eleven*Stores Pty Ltd* (2020) 384 ALR 650, [21]. ^ Back to section

193 *Davaria Pty Ltd v.* 7-Eleven*Stores Pty Ltd* (2020) 384 ALR 650, [22]-[25] (referred to with approval in *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836) Asirifi-Otcherev*. Swann Insurance (Aust) Pty Ltd and Anor (No. 3)* [2020] FCA 1885 (referred to with approval in *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2454). ^ Back to section

194 *Davaria Pty Ltd v.* 7-Eleven*Stores Pty Ltd* (2020) 384 ALR 650, [28]–[30]. ^ Back to section

195 *Lenthall v. Westpac Banking Corporation (No. 2)* [2020] FCA 423, at [3]; *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v. Murray Goulburn* Co-Operative*Co Ltd (No. 4)* [2020] FCA 1053 at [110]; and *Uren v. RMBL Investments Ltd* (No. 2) [2020] FCA 647, [48] (referred to with approval in *Ross v. Southern Response Earthquake Services Ltd* [2021] NZHC 2454). ^ Back to section

196 *Evans v. Davantage Group Pty Ltd* (No. 3) [2021] FCA 70, [49]. ^ Back to section

197 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836 at [144]. ^ Back to section

198 id. ^ Back to section

199 High Court Rules 2016, r 1.6(2). ^ Back to section

200 *Liverpool City Council v.* McGraw-Hill*Financial* [2018] FCA 1289, [59] (per Lee J). ^ Back to section

201 *Uren v. RMBL Investments Ltd (No. 2)* [2020] FCA 647, [65]. ^ Back to section

202 *Simons v. ANZ Bank NZ Ltd* [2022] NZHC 1836 at [145]. ^ Back to section

203 *Cridge & Anor v. Studorp Limited* (CIV-2015-485-594); and *Fowler & Anor v. James Hardie New Zealand* (CIV 2015-485-773). ^ Back to section

204 *White v. James Hardie* CIV-2015-404-2981 (*White* proceeding). ^ Back to section

205 *Metlifecare Retirement Villages Limited v. James Hardie* CIV-2015-404-3080 (the *Waitakere* proceeding). ^ Back to section

206 *Cridge v. James Hardie* [2022] NZHC 2024. ^ Back to section

207 *Cridge v. James Hardie* [2022] NZHC 2024 at [16]. ^ Back to section

208 High Court Rules, r. 1.2. ^ Back to section

209 *Southern Response Earthquake Services Limited v. Brendan and Colleen Ross* [2020] NZSC 126, at [36][40]. ^ Back to section

Jason Geisker jgeisker@mauriceblackburn.com.au
Simon Gibbs sgibbs@mauriceblackburn.com.au

Maurice Blackburn

Read more from this firm on Lexology

Poland

Zbigniew Kruczkowski and **Paula Czyz**

Linklaters LLP

Summary

INTRODUCTION

YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

The market for third party litigation funding (understood as the financing of litigation, or arbitration, in exchange for a contingency fee) does not seem particularly well developed in Poland. Even though there are no public records or statistics available showing either the scale of the litigation funding market or its results, in the past few years, litigation financing has gained wider media attention.

There are a few companies (originating mostly from common law countries) addressing their litigation financing services to legal and natural persons, including law firms, in Poland. Typically, it is not the sole activity of a company; rather, litigation financing is part of a company's broader offer. Companies whose offer focuses on litigation finance are a novelty on the Polish market, although this business model is becoming increasingly widespread. One such company is a US-based private equity fund, Delta Capital Partners Management LLC, which provides financial resources to companies and legal professionals in various forms, including non-repayable funds in return for a part of compensation awarded by the court, the purchase of already accepted or awarded but not yet enforced claims, and the financing or purchase of portfolios of litigation and arbitration claims, as well as granting loans and credit as an alternative to those customarily provided by banks. Litigation financing has also gained traction in Europe. For example, Nivalion AG was founded in 2016 and has its offices in Switzerland, Germany and Austria. LitFin (a Prague-based litigation finance provider) operates in the CEE region, including Poland. Another novelty has been the creation of a litigation financing fund by some of the law firms (both national and international) operating on the Polish market, together with a global participant on the litigation financing market. Finally, there has been a significant growth of litigation finance offerings aimed at consumers (mainly in cases against banks) and other financial institutions.

As a consequence of the limited coverage of litigation financing in the public domain, not many examples of the practice have been widely reported, although randomly surfacing records go back as far as 1995. As recently as 2020, given the public interest at stake, Prairie Mining Ltd garnered a lot of media attention when it secured US$18 million to pursue, in the course of international investment arbitration, a damages claim against the Republic of Poland for the alleged breach of its obligations under the Australia–Poland Bilateral Investment Treaty and the Energy Charter Treaty.[2] Another instance of litigation funding revealed in the past few years is the litigation finance contract concluded between a Poland-based company, namely *Magna* Polonia SA, and Regera Sarl seated in Luxembourg. The total cost of financial support that will be reimbursed by the Luxembourgian entity in the proceeding brought against Emitel SA due to the alleged breach of the confidentiality obligation should not exceed €1.5 million.

In view of the scarcity of available information, it is difficult to assess the strength of this market segment or assess its development, although it is worth mentioning that some new entities have entered the market over the past years. The interest in third party litigation funding has likely increased following the market instability caused by the coronavirus pandemic. The growth of the interest in litigation funding is also expected in connection to the war in Ukraine and seeking enforcement of Ukrainian awards in Poland. Moreover, legal professionals in cooperation with litigation financing companies have recently stepped up their activities, seeking to broaden the scope of their target audience by organising

seminars and conferences and this is expected to raise awareness among both the public and companies active in the litigation management sphere. Other areas where interest in litigation funding is expected to grow include renewable energy resources,[-3] disputes concerning financing agreements, construction disputes, disputes related to public procurement and breaches of competition law.[4]

Notwithstanding the above, it is fair to say that litigation funding has yet to flourish in Poland, and it is still given little media coverage, marketing or separate identification in official statistics. There are several reasons for this. In simple terms, the economic reasons for the existence and development of the industry are the high value and complexity of claims, which require extensive funding. Most frequently, these claims are associated with healthy, strong legal entities with large operations that can produce such funding without a struggle, whereas for individuals, state legal aid seems to be the remedy for limited funding resources. It is also worth mentioning that there are pro rata limits on the entry fee in relation to the value of the claims. The cap on the entry fee in common (state) courts has doubled following the latest amendment to the Code of Civil Procedure[5] and currently amounts to 200,000 zlotys.

The element of third party litigation funding is more common on the insurance market. However, in 2022, of a total of 71,183,069 policies, legal expenses insurance policies numbered only 1,273,436.[6] More importantly, only 3,249 claims were settled between January and December 2022 (the number of claims settled seems to be falling, reaching 5,961 at the end of 2020 and 4,091 at the end of 2021).[7] The data suggests a low level of legal awareness in Polish society or a lack of interesting insurance products, which leaves a broad field for development in this branch of insurance.

The most popular and the fastest growing 'branch' of the third party litigation funding industry seems to be claims purchasing. This kind of investment takes different forms on the Polish market, ranging from securitisation funds, through debt recovery entities, to claims purchasing replacing class actions. Currently, claims alienation seems to be of utmost importance for business entities facing a growing number of overdue receivables. According to a survey of the Association of Financial Companies in Poland,[8] in the third quarter of 2019, Polish businesses dealt with 22.2 per cent of overdue receivables on average,[9] whereas 12.4 per cent of companies dealt with at least 50 per cent of overdue receivables in their portfolio. The most recent data shows that the percentage of overdue receivables dealt with by companies has decreased lately, reversing the upward trend observed in previous years. However, despite some improvement in receivables recovery, the numbers still remain relatively high and we believe will remain at these levels. The above conditions make Polish companies more and more likely to use the services of professional debt recovery entities of any kind.

As regards prospects for potential growth, there are different solutions for different market segments. The segment involving claims purchases, insurance and (considering its specifics) class action funding is developing and seems fairly mature. The segment that is lagging behind is claims financing, which is less popular and difficult to identify. When discussing the potential of the latter, we feel its use largely depends on a properly identified target. In general, it should not target corporates. However, small and medium-sized business entities may find the industry's offer attractive, since they are often intimidated by the prospect of complex, challenging disputes with high-value claims and strong counterparties. They also tend to back off when faced with disputes with foreign entities

in another jurisdiction. In addition, the above-mentioned latest amendment to the Code of Civil Procedure and other acts of law may create new opportunities for claims financing entities, since the new legislation has increased the maximum entry fee from 100,000 zlotys to 200,000 zlotys. Moreover, due to the ever-increasing number of cases, the duration of proceedings before Polish courts has increased significantly in recent years, thus fuelling interest in arbitration, which is generally more costly than court proceedings.

The attitude to carrying out disputes in Poland seems to be another inducement for the development of the market; court disputes and litigation in particular are frequent, and, with the growth of the economy, higher-value claims are more and more common. In 2021, 9,095,998 cases were brought before Polish civil courts and 1,492,182 were brought before Polish commercial courts.[10] The Ministry of Justice does not publish current data, but we assess that – relying upon media coverage and our own experience – these numbers still remain high.

Year in review

The year 2023 did not bring any significant development in third party litigation funding, although the market of litigation funding seems to be growing. In terms of legislation and established practices, there have been no changes that could drive the development of this sector. However, there does seem to be a year-on-year increase in awareness of the possibility of obtaining litigation funding. In December 2021, the Court of Arbitration at the Polish Chamber of Commerce, which is the largest Polish arbitration institution, held a debate regarding third party founding and its place in arbitration. In February 2022, the same institution announced that it was preparing recommendations for parties to require them to disclose the use of third party financing.[11] An example of the market response to the growing need for information on litigation and arbitration funding would be the fact that, in October 2023, the Court of Arbitration at the Polish Chamber of Commerce in Warsaw prepared another event in the series on 'Dispute financing as a type of investment project'.[12] This apparently indicates that third party funding, albeit still slowly, is making its way into Polish arbitration practice as well.

More recently, a Polish law firm launched a financing programme for consumer litigation against banks that some years ago had granted them loans in Swiss francs. As hundreds of thousands Polish borrowers have taken out loans in Swiss francs, the significant rise in the exchange rate of Swiss francs over the years has resulted in a wave of proceedings in which consumers seek to challenge the validity of their loan agreements. If successful, such funding programmes might thus help to popularise third party litigation funding among consumers.

The growing interest in third party litigation funding among practitioners and legal writers is also reflected in noted efforts to investigate the contractual framework of litigation finding in Poland.[13]

Legal and regulatory framework

Neither Polish statutory law nor the rules of two leading Polish arbitration courts (the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Court of Arbitration at the Confederation of Lewiatan) provide specific rules on third party litigation funding. Since

the phenomenon of third party litigation funding, in terms of its core feature (i.e., claims financing), is not yet popular in Poland as a commercial activity, there are also no court precedents regarding the field. The industry thus operates under the general framework of freedom of economic activity, currently regulated (in addition to by Poland's Constitution) by the Act of 6 March 2018 – the Entrepreneurs Act. Agreements for claims financing are subject to the rules and principles of Polish private law (i.e., the Act of 23 April 1964 (the Civil Code)), which offers far-reaching flexibility for parties. In principle, no licences are required (see, however, the comments on securitisation funds below). According to the Civil Code's regulations on contractual obligations, any agreement of this kind should therefore be considered on the basis of the general rule of freedom of contract, which means that its content or purpose shall not prejudice the nature of the relation, a statute or the 'principles of community coexistence'. The aforementioned rule means that every litigation funding contract should be analysed within the scope of, at least, its possible non-compliance with the rules of community coexistence. In this context, for example, grossly excessive remuneration may constitute an infringement of these rules.

Apart from the minor limitations of a general nature mentioned above, there are certain restrictions on the conduct of litigation funding activities by Bar-admitted lawyers (i.e., legal counsellors and attorneys-at-law). It is worth mentioning though, the attention-to-detail issue of those drafting the most recent edition of the Code of the Bar Ethics; however, ultimately this was not reflected in the most recent version of the Rules.[14] These restrictions affect the opportunities available to Polish law firms in relation to offering services of this kind.

First, it is forbidden for professional lawyers to agree on remuneration consisting solely of a contingency fee. At least part of the lawyer's remuneration should be fixed; however, it is not defined or specified how big the fixed part should be. As litigation funding is frequently based entirely on a success fee, this rule hinders litigation funding being provided by law firms. It should, however, be emphasised that, in general terms, the concept of a success fee is widely applied by Polish lawyers and is now becoming more common following clients' growing demands.

Second, it is questionable whether litigation financing (or financial intermediation) is permissible in light of the codes of conduct of professional lawyers. According to the rules applicable to professional lawyers, it is forbidden to carry on any activity that can potentially give rise to doubts as to the impartiality of the lawyer. Financial services and financial intermediation, as well as intermediation in commercial transactions, are examples of activities that are considered likely to influence the impartiality of a lawyer; therefore, it is questionable whether professional lawyers are allowed to engage in cases of litigation funding. Furthermore, this may also raise doubts because a professional lawyer's core duty is to act in the best interests of the client, which may prove controversial if funding is the key driver for a client's involvement in a dispute. Therefore, it seems that any such funding involving law firms acting on the Polish market would in fact have to be provided by a third party or a law firm that does not provide legal services on the Polish market.

In contrast to third party litigation funding, strictly speaking, claims purchasing is widely used and based on statutory regulations of a supplementary character. A claim purchase agreement itself may be concluded by anyone and no specific licence or permission is required to purchase a claim. More complex rules apply to securitisation funds, which are funds that issue investment certificates for the purpose of raising funds to acquire

receivables. The fund is obliged to apply for a permit from the Polish Financial Supervisory Commission. The operation of the fund is also subject to supervision by the Financial Supervisory Commission and the National Bank of Poland, the President of the Personal Data Protection Office, the Inspector General of Financial Information or the Office for Competition and Consumer Protection.

Apart from the above, specific rules on insurance contracts are also worth mentioning.

Polish regulation of legal expenses insurance policies is consistent with Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance, also known as Solvency II. The act implementing the Solvency II Directive provides general rules on legal expenses insurance, such as the obligation of an insurance company to bear the costs of court proceedings and services directly related to the pursuit of the claim before a court or by extrajudicial settlements, or the right of a policy holder to freely choose a lawyer. Limitations on insurance contracts derive from the Civil Code. Although the market offers a wide range of legal expenses insurance, in Poland, contrary to many other jurisdictions, only before-the-event insurance is available. It is highly questionable whether after-the-event (ATE) insurance is permitted by Polish law since, according to the Civil Code, an insurance agreement concluded after the event being subject to the agreement occurred shall be ineffective. Therefore, concluding an ATE insurance agreement would involve a high risk of nullity of the contract.

In conclusion, taking into account the still relatively low level of market interest in third party litigation funding, and the marginal number of cases of such funding, it is quite unlikely that this market will be regulated in the near future and, from the legal and regulatory framework perspective, the foregoing should be considered an inducement to potential investors.

Structuring the agreement

Since cases of third party funding agreements (as regards claims funding only) are rarely accessible in the public domain on the Polish market, it is difficult to outline the typical structure and provisions of such agreements. Nevertheless, there are certain guidelines on critical stipulations.

First and most importantly, the parties generally indicate that the funding is to be reimbursed, and to what extent, only if the case is won. This may be a fairly straightforward agreement, or fairly sophisticated, for instance, by making it conditional on whether the case is won in full or in part. Accordingly, specific rules on the distribution of the award should be provided for. The parties can specify whether the funder gets a percentage of the award, costs incurred increased by a percentage of the award or a multiple of costs incurred. It seems indispensable to provide for the rules of settlement if the costs incurred exceed the award.

Since court proceedings, especially in complex cases involving significant capital, can take many years (sometimes more than 10), the parties should set out the maximum level of funding provided throughout the litigation. The parties to a contract should also bear in mind that Polish civil procedure consists of two instances and extraordinary review procedures. During the main proceedings some additional, interlocutory proceedings may also arise, along with proceedings resulting from the counterclaim of the other party to

a process. All the aforementioned proceedings can considerably extend the duration of the main court proceedings and increase the costs incurred by the funder, and therefore decrease the profitability of the funding; thus, these should be settled in the contract. The remuneration may also be structured as a lump sum without making the fee contingent upon the percentage of the value of the claim.

Second, the contract should stipulate the rules on exchanging information between the parties to a contract as well as the rules on disclosing information to third parties. The arrangements of the parties should cover the admissibility of disclosure of funding by any of the parties, specifying the information that shall remain confidential. Furthermore, the parties should be aware that the funder may come to possess information classified as a company secret and thus it is highly recommended to provide for rules of confidentiality.

Third, it is recommended that the funder protect against any fraudulent misrepresentation or non-disclosure of any information or document important from the point of view of a risk assessment or a profit–loss analysis. In cases of such misrepresentation or non-disclosure, the funder should be allowed to withdraw from the contract and claim damages or contractual penalties, or both.

Finally, the parties should consider other minor issues such as who chooses the lawyer or whether (and, if so, under what conditions) the claimant is allowed to settle the dispute. In general, defining the scope of the funder's interference in the proceedings needs to be determined, otherwise it opens the way to a potential dispute between the party and the funder over the trial's handling and pursuing liability in the case of an unfavourable verdict.

In the case of claims purchasing, the agreement concluded by the parties usually constitutes a purchase agreement and an assignment. Hence, it should include elements typical for a purchase agreement, such as price and the timing of the passing of the claim, as well as related profits and burdens to the buyer, and provisions on the assignment.

In structuring the provisions on the assignment, the parties (particularly the purchaser) should focus on the responsibility of the seller for his or her entitlement to the claim and the possible insolvency of the debtor. Even though the responsibility of the seller for the entitlement to the claim is based on statutory provisions, it is in the purchaser's best interests to verify whether the disposability of the claim was limited by the parties; hence, an agreement concluded contrary to a provision limiting disposability shall be ineffective. Contrary to the seller's responsibility for his or her entitlement, the responsibility for the insolvency of the debtor does not arise from statutory provisions, and it should therefore be subject to the parties' arrangements.

In addition, in respect of claims purchases, the parties to a claim purchase agreement should be aware that according to the statutory provisions, the performance of an obligation to the former creditor shall be effective towards the acquiring party until the alienating party notifies the debtor of the assignment. Therefore, the parties should consider whether to notify the debtor of the assignment, which party is responsible for notification and how to settle any payments made by the debtor between the conclusion of the contract and the notification of the debtor (if applicable).

It is important to note that as a result of a claim purchase agreement, the seller disposes of all of his or her rights towards the claim; thus, the seller will usually not have any interest in providing for rules on the choice of lawyer or the costs of proceedings arising in

relation to the claim. Nevertheless, in every case the parties should consider concluding a non-disclosure agreement.

Disclosure

In general terms, the obligation to pay the costs of litigation (or arbitration) is imposed on the party to the process. There are, however, no regulations preventing a third party from paying the costs on behalf of the party, as long as it is clear that the court cost was paid in the case in question. It is allowed under the Civil Code to pay someone else's dues, except for those of a personal nature (which is rarely the case). There are also no regulations imposing on the party the obligation to disclose the source of financing, any agreement in this regard or, for example, a contract with a lawyer (apart from in class action claims). The party to a process is free to organise its relationship with the funder in the most convenient way. It is also important to note that even if disclosed, the third party litigation funder is not a party to a process and cannot be held liable for adverse costs.

Furthermore, Bar-admitted lawyers are not only allowed, but are also under a duty, to keep confidential all information obtained in connection with their professional activities. A confidentiality obligation applies to all the information concerning his or her client disclosed to the lawyer by the client or obtained in any other way, regardless of the source or the form of the information. Legal privilege also applies to the documents created by the lawyer and any correspondence between the lawyer and the client. Legal privilege or a confidentiality obligation have no time limits. It is even disputable whether the client can release a lawyer from the obligation of preserving secrecy. On the basis of the confidentiality obligation, the lawyer is allowed to refuse to answer any questions concerning the information covered by the obligation.

The party to the process and the third party litigation funder are, therefore, quite able to keep the financing, and any circumstances related to the financing, secret.

The situation is entirely different when the funding consists in claims purchasing. In a case of this kind, the rules on legal privilege and confidentiality remain unaltered, whereas the seller and the purchaser of the claim, as well as the claim purchase agreement itself, shall be disclosed (at least before the court). The disclosure of the legal relationship between the purchaser and the seller is necessary to prove that the transaction took place and was valid. It is important to note that hearings are public in most cases. The court can order the hearing to be held in camera upon request by a party that is a business entity if information constituting a company secret may be revealed; however, there is no actual option to limit the access of another party to such information revealed during the hearing or included in the case file. Nevertheless, company secrets shall be protected on the basis of the Act on Fair Trading providing that disclosure or making use of someone else's company secret constitutes an unfair trading practice, and as such subject to punitive measures.

Costs

The general rule of costs distribution in Polish domestic litigation is that the 'loser pays', with a very few exceptions. The losing party shall, upon the request of the winner, reimburse reasonable costs of the legal proceedings, which include court costs, the attorneys' or legal counsellors' fees and the cost of the appearance of the party before the court.

As to court costs, in disputes involving proprietary rights, the court fee ranges from 30 to 1,000 zlotys in cases where the value of the object in dispute is less than 20,000 zlotys; and 5 per cent of the value of the object in dispute (up to a maximum of 200,000 zlotys) in cases where the value of the object in dispute is greater than 20,000 zlotys. The court costs are entirely reimbursed to the winning party. However, where only a part of the claim is awarded, costs shall be reciprocally exclusive or proportionally shared. The court may also require that one of the parties reimburse all costs if the other party loses only a minor part of its claim.

The rules of reimbursement of the fee of a professional lawyer constitute a more complex issue. According to general rules, a party may request reimbursement of a lawyer's fee within the limits set out in the regulation on the fees for legal counsel's activities; for example, a limit of 10,800 zlotys for cases where the value of the object in dispute is between 200,000 zlotys and 2 million zlotys, or 25,000 zlotys where the value of the object in dispute is greater than 5 million zlotys. A party may request multiples of the fee provided for in the regulation when it is justifiable in light of the required workload of the lawyer, the value in dispute or the complexity of the case. Nevertheless, the fee reimbursed by the losing party cannot exceed six times the fee provided for in the regulation. The costs reimbursed are therefore detached from the costs actually incurred by the party, especially given the fact that the courts rarely order the losing party to pay more than the minimal fee provided for in the regulation.

When it comes to the reimbursement of the cost of a party's appearance before the court, it should be noted that, in general terms, a party represented by a professional lawyer is not obliged to be present throughout the hearings, unless the court orders the party to appear in person. Therefore, a party represented by a professional lawyer is entitled to reimbursement of the costs of personal appearance only if the appearance is requested by the court. A party not represented by a lawyer can request a reimbursement of the costs of personal appearance irrespective of a court summons, within the limits of the fee of the lawyer performing his or her professional activities in court.

Outlook and conclusions

The presence of third party litigation funding (namely the financing of a claim of a party to a court or tribunal dispute) has been growing stronger over the past few years, although data regarding this practice is difficult to access. The segment of the claims funding industry that is recognised as claims purchasing is performed under various schemes. Most frequently it involves entities dealing with difficult-to-collect or non-collectible receivables that wish to use debt recovery services or that will sell their claims to securitisation entities to recover at least part of their funds, making the claims purchasing market buoyant. Some entities would rather insure against legal expenses to mitigate any future risk of their inability to bear the costs of litigation; however, legal expenses insurance constitutes only a marginal share of the insurance market.

Part of the growing industry segment is class action claims (albeit with the state as the rather unusual 'funder').

The insignificant size of the market in third party litigation funding (in its core feature) is reflected by the lack of specific regulations in this regard. It can be expected that as soon

as this branch of business starts to grow, relevant regulations shall be introduced. For now, litigation funding is considered a commercial activity allowed under the general rules of freedom of economic activity, whereas the specific legal framework is driven by the regulations of the Civil Code. Since third party litigation funding is not a regulated activity, investors can take up and pursue this kind of economic activity without any limitations. Obviously, certain specific regulations apply to some areas of the industry related to claims purchase schemes, such as securitisation funds or insurance; third party litigation funding is not subject to any of these.

Endnotes

1 Zbigniew Kruczkowski is counsel and Paula Czyz is a senior associate at Linklaters C Wisniewski i Wspólnicy Spólka Komandytowa. ^ Back to section

2 Polish Press Agency, 'PRAIRIE MINING LTD. (5/2020) Prairie Secures A$18m Litigation Funding to Pursue Damages Claim Against the Polish Government', Report No. 5/2020, available at: http://centrumprasowe.pap.pl/cp/en/news/info/161833,5,prairie-mining-ltd-(5-2020)-prairie-secures-a$18m-litigation-funding-to-pursue-damages-claim-against. ^ Back to section

3 See the interview with Marek Jezewski, Forbes.pl, 'Zmieniaja sie sposoby finansowania sporów pomiedzy firmami', available at: https://www.forbes.pl/life/zmieniaja-sie-sposoby-finansowania-sporow-pomiedzy-firmami/5b30c65. ^ Back to section

4 S Drozd, 'Finansowanie procesów w czasach pandemii', available at: http://www.codozasady.pl/finansowanie-procesow-w-czasach-pandemii/. ^ Back to section

5 The amendment was made by the Act of 4 July 2019, amending the Code of Civil Procedure and certain other acts of law. New rules on entry fees entered into force on 21 August 2019. ^ Back to section

6 The number of legal expenses policies has been relatively stable in the past few years (1,295,158 at the end of 2020 and 1,273,436 in 2022), following the decrease by almost half from 1,906,642 at the end of 2015; Polish Financial Supervision Authority (KNF) statistics (www.knf.gov.pl/publikacje_i_opracowania). ^ Back to section

7 KNF statistics (https://www.knf.gov.pl/publikacje_i_opracowania). ^ Back to section

8 https://zpf.pl/badania-i-publikacje/raporty/raporty-cykliczne. ^ Back to section

9 The Association of Financial Companies in Poland, 'Portfolio of receivables of Polish enterprises', October 2019. ^ Back to section

10 Statistical Guidebook of Justice (https://www.isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/). ^ Back to section

11 https://kig.pl/finansowanie-sporow-przez-podmioty-zewnetrzne-czyli-third-party-funding-w-polsce/. ^ Back to section

12 https://sakig.pl/lista/finansowanie-sporow-jako-rodzaj-projektu-inwestycyjnego. ^ Back to section

13 A good example is a publication considering the legal character of an agreement financing of arbitrations by a third party published by Kaja Zaleska Korziuk (CH Beck, Warsaw, 2021). ^ Back to section

14 Code of the Bar Ethics, 1 July 2021. ^ Back to section

Linklaters

Zbigniew Kruczkowski zbigniew.kruczkowski@linklaters.com
Paula Czyz paula.czyz@linklaters.com

Linklaters LLP

Read more from this firm on Lexology

Singapore

Irene Lee Wing Yun

Deminor

Summary

INTRODUCTION

YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

Singapore has only welcomed third party funding since 2017 with the amendment of the Civil Law Act (CLA). Until then, litigation funding was considered unlawful under the general principles of maintenance and champerty. In 2017, lawmakers decided to abolish the common law torts of maintenance and champerty and approved the use of funding, but only for international arbitration and related proceedings. As a result, the first litigation funding agreement was reported in 2017, and since then there is a clear tendency in favour of third party funding.

Funding is a significant topic among legal community practitioners and has been welcomed by local players. To maintain its position as a litigation and arbitration hub in Asia, Singapore had to continue modernising the jurisdiction, and this is probably why a second amendment of the law on third party funding took place recently. In 2021, the permissible fields for funding in Singapore were expanded. Since 28 June 2021, litigation funding has indeed been allowed in domestic arbitration, court proceedings arising from or connected with domestic arbitration and proceedings commenced in front of the Singapore International Commercial Court (SICC). From now on, funding is thus possible for some court proceedings in addition to arbitration.

According to a recent well-known survey,[2] Singapore is, after London, recognised as the preferred seat for arbitration in the world, and the preferred jurisdiction in the Asia-Pacific region. Cases filed with the Singapore International Arbitration Centre (SIAC) continued to come from a strong international user base. Over the past five years, users from more than 100 jurisdictions with diverse legal systems have selected SIAC to administer their disputes.[3] To maintain this popularity, opening the door to third party funding has been a necessity.

Case law on funding is still limited, except in the insolvency sector, where funding has been recognised as being valid since 2015. In a decision of that year, the courts recognised for the first time the validity of a funding agreement concluded between a company's liquidators and three of its shareholders.[4] Acknowledging the increasing interest in third party funding in the insolvency sector, the legislature also recently modified the law by recognising the validity of the financing of insolvency proceedings. Since the entry into force on 30 July 2020 of the new Insolvency, Resolution and Dissolution Act 2018 (IRDA), a liquidator can enter into third party funding agreements (upon court approval or authorisation by the committee of inspection) in respect of claims about specific types of transactions.

These moves towards opening the Singaporean market to third party funding in the past 24 months are good indicators of a positive future for third party funding in this key Asian jurisdiction.

Year in review

The year 2023 was important with regard to formalising and advancing the framework for third party funding in Singapore. This was achieved through implementing amendments passed in prior years in relation to domestic arbitration and SICC court litigation

Conditional fee agreements (CFAs) between lawyers and their clients have been permitted in Singapore in arbitration and certain court proceedings since 4 May 2022.[5] This CFA regime is an additional step towards bringing Singapore closer to the other top global arbitration hubs and will certainly increase even more the interest shown by funders towards funding cases in Singapore. Indeed, now that lawyers can be more flexible on their fees, it will give more room and flexibility on the terms and conditions of a funding arrangement as well.

Singapore's popularity as a hub for international disputes has continued to grow in 2023. According to SIAC's announcement dated 4 April 2023, new case filings in the first quarter of 2023 were at a historical high, with 332 new cases filed, including related cases.[6] This growth can be attributed to the ongoing expansion of SIAC and the SICC, which is enhancing the country's reputation for resolving cross-border disputes, in particular as a venue for arbitration proceedings related to Southeast Asian jurisdictions. Legislative changes permitting third-party funding of disputes in Singapore have also been reshaping the dispute resolution market, further establishing the country as a hub for multinational disputes. With these changes, Singapore can expect to see growing enthusiasm from litigation funders to finance cases in the country. The updated framework will likely pique further interest from third party funders, cementing Singapore's status among the top global hubs for arbitration and dispute financing.

Legal and regulatory framework

As explained above, litigation funding was prohibited in Singapore until recently, based on the principles of maintenance and champerty.

In 2017, the CLA was amended, and the common law torts of maintenance and champerty were abolished.[7] However, as a matter of principle, litigation funding contracts continue to be contrary to public policy or are otherwise illegal (and hence unenforceable) unless they fall within permitted categories of dispute resolution proceedings.[8] Pursuant to Article 5B(2) of the CLA, 'a contract under which a qualifying Third Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty'. This, however, only applies provided the funding agreement relates to one of the prescribed dispute resolution proceedings as further defined by the CLA.

Aside from the categories prescribed by the CLA, funding is also permitted under specific circumstances in insolvency proceedings as stated in the IRDA.

As explained above, litigation funding was prohibited in Singapore until recently, based on the principles of maintenance and champerty.

In 2017, the CLA was amended, and the common law torts of maintenance and champerty were abolished.[7] However, as a matter of principle, litigation funding contracts continue to be contrary to public policy or are otherwise illegal (and hence unenforceable) unless they fall within permitted categories of dispute resolution proceedings.[8] Pursuant to Article 5B(2) of the CLA, 'a contract under which a qualifying Third Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason

that it is a contract for maintenance or champerty'. This, however, only applies provided the funding agreement relates to one of the prescribed dispute resolution proceedings as further defined by the CLA.

Aside from the categories prescribed by the CLA, funding is also permitted under specific circumstances in insolvency proceedings as stated in the IRDA.

i Litigation funding in arbitration and related proceedings

The Civil Law (Third-Party Funding) Regulations 2017 and the Civil Law (Third-Party Funding) (Amendment) Regulations 2021

The first move in favour of third party funding was made in 2017 with the introduction of the Civil Law (Third-Party Funding) Regulations 2017. Since then, third party funding agreements are valid and enforceable provided they comply with two conditions: the funding agreement must be concluded with a qualifying third-party funder; and they must relate to one of the limited prescribed dispute resolution proceedings.[9] A qualifying third party funder is a funder who carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the funder is not a party,-[10] and has a paid-up share capital of not less than S$5 million or the equivalent amount in foreign currency, or not less than S$5 million or the equivalent amount in foreign currency in managed assets.[11] The regulation further defines what are considered managed assets.-[12]

Until very recently, prescribed dispute resolution proceedings were limited to:

1. international arbitration proceedings;
2. court proceedings arising from or out of, or in any way connected with, international arbitration proceedings;
3. mediation proceedings arising out of, or in any way connected with, international arbitration proceedings;
4. applications for a stay of proceedings referred to in Section 6 of the International Arbitration Act[13] and any other application for the enforcement of an arbitration agreement; and
5. proceedings for, or in connection with, the enforcement of an award or a foreign award under the International Arbitration Act.

On 28 June 2021, the prescribed list of proceedings was broadened by the Civil Law (Third-Party Funding) (Amendment) Regulations 2021.[14] The list now also includes:

1. arbitration proceedings (thus domestic arbitrations are now included);
2. court proceedings arising from, out of, or in any way connected with, any arbitration proceedings;
3. applications for a stay of proceedings mentioned in Section 6 of the Arbitration Act or Section 6 of the International Arbitration Act, and any other application for the enforcement of an arbitration agreement;

4. proceedings for, or in connection with, the enforcement of an award under the Arbitration Act or an award or a foreign award under the International Arbitration Act;
5. defined mediation proceedings;
6. proceedings commenced in the SICC for so long as those proceedings remain in the SICC; and
7. appeal proceedings arising from any decision made in proceedings commenced in the SICC while those proceedings remained in the SICC.

In a press release of 21 June 2021, the Ministry of Law said this broadening of the scope of permissible funding could offer 'businesses an alternative avenue to fund meritorious claims and further strengthens Singapore's position as an international commercial dispute resolution hub, which will benefit the legal community here'.[15]

The initial requirements regarding the necessity of using a qualified funder have remained unchanged. Thus, it is likely that only funders evidencing enough funding capacity will meet the legal requirements to enter into a funding agreement in Singapore. While these requirements are likely to be easily met by companies whose main commercial activity is funding, they will naturally exclude any funding from a natural person or from companies pursuing a sideline business. This requirement is not surprising. Many other jurisdictions impose minimum requirements for funders to be active in their local market, evidencing a similar willingness to ensure that funders show enough capacity and professionalism before offering their services. The CLA even prescribes that, in cases where those conditions are not met, 'the rights of the Third Party Funder under or arising out of the third party funding contract affected by or connected with the disqualification or noncompliance are not enforceable by action or other legal proceedings, including arbitration proceedings'.[16]

Guidelines from the Law Society, the Singapore International Arbitration Centre, the Singapore Institute of Arbitrators and the SICC

Shortly after the first amendments to the CLA were made, several guidelines were published to guide practitioners on the use of third party funding. These are:

1. the Guidance Note 10.1.1 of the Law Society of Singapore taking effect on 25 April 2017 (the Guidance Note);[17]
2. the Guidelines of the Singapore Institute of Arbitrators (SIARB) (the SIARB Guidelines) of 18 May 2017;[18] and
3. the Practice Note of the SIAC of 31 March 2017 (the SIAC Guidelines).[19]

The Guidance Note is for the attention of lawyers and sets out 'best practices for lawyers who refer, advise or act for clients who obtain third-party funding'.[20] After an overview of the legislative framework applicable to funding, the Guidance Note discusses specific issues that may arise when a lawyer advises a client on the use of funding. It also provides guidelines on five major issues: confidentiality, the scope of funding provided, how to manage conflicts of interest, the funder's level of involvement in the proceedings and the

termination of the agreement (see the section below on the funding agreement for more details). Finally, it expressly refers to the SIARB and SIAC Guidelines, encouraging lawyers to verify that a funding agreement complies with them and to incorporate them as part of the agreement.[21]

The Guidance Note also contains a section on how lawyers should behave in their relationship with a funder, expressly prohibiting the lawyer from receiving a financial benefit from its introduction of a funder to a particular client or from having a particular financial or other interest in the funder.[22] This prohibition is in line with the general obligation of lawyers towards their clients to ensure independence and impartiality in providing legal advice.

The SIARB Guidelines are the most extensive on the subject of litigation funding. The Singapore Institute of Arbitrators has actively supported the move in favour of litigation funding and has welcomed the amendments to the CLA. The SIARB Guidelines are drafted for the attention of funders and:

> aim to promote best practices among Funders who intend to provide funding to parties in Singapore-seated international arbitrations. These guidelines set expectations of transparency and accountability between the Funder and Funded Party, as well as to encourage Funders to behave with high ethical standards towards Funded Parties so as to uphold the integrity of international arbitration practice in Singapore.[23]

As of the date of publication, the SIARB Guidelines have been supported by 13 funders listed on the SIARB's website who undertake to comply with these Guidelines in the scope of their activities in funding arbitrations in Singapore. This list includes Deminor.

As a consequence of the recent modification allowing third party funding for proceedings before the SICC, the SICC Practice Directions[24] had to be amended as well. Those Directions were first published in 2015 and contain a set of procedural guidelines regulating proceedings before the SICC that are expected to be complied with by users. The guidelines have 23 parts and are modified from time to time. Amendment No. 3 of 2021 entered into force on 28 June 2021 and inserts a definition of third party funder by referring to the definition provided by the CLA.[25] It also allows the court, when assessing costs, to take into account 'such circumstances as the Court considers relevant, including the conduct of the case and the existence, scope, extent and terms of any third-party funding contract'.[26]

Although compliance with the guidelines is strongly recommended, especially for legal practitioners, failing to do so is not sanctioned by law and would not impact the funding agreement's validity under the CLA.

Professional conduct rules

Lawyers[27] in Singapore must comply with the Legal Profession Act, and the Legal Profession (Professional Conduct) Rules 2015 (the LPR 2015).[28] Amendments to both sets of rules were made in 2017, allowing solicitors to introduce a funder to clients, and to advise on and draft third party funding contracts. However, obligations were imposed on lawyers with respect to the disclosure of the existence of a funding contract and the funder's

identity.[29] They also prohibit legal practitioners from holding any interest in a third-party funder.[30]

In addition to these rules, registered foreign lawyers involved in SICC proceedings must also comply with the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (the Representation in SICC Rules). These were amended in June 2021 along with the SICC Practice Directions and contain similar obligations to the LPR 2015 for registered foreign lawyers representing a client in an SICC proceeding.[31]

ii Litigation funding in insolvency

The Insolvency, Restructuring and Dissolution Act 2018 (IRDA) came into force on 30 July 2020 and was introduced to consolidate all the rules regulating insolvency and restructuring proceedings in Singapore.

Along with significant modifications to insolvency and restructuring proceedings, the IRDA contains references to third party funding and expressly allows judicial managers and liquidators to enter into agreements with funders for funding proceedings related to:

1. transactions at an undervalue;[32]
2. unfair preferences;[33]
3. extortionate credit transactions;[34]
4. fraudulent trading;[35]
5. wrongful trading;[36] and
6. damages against delinquent officers.[37]

Provided they have obtained the authorisation from the court or from the committee of inspection, liquidators and judicial managers may now assign the proceeds of litigation arising out of one of the above-mentioned categories in exchange for funding. However, the IRDA contains strict limits such as the fact that liquidators and judicial managers may only provide for the assignment of proceeds from actions to unwind prejudicial transactions and must avoid acts detrimental to creditors brought by judicial managers or liquidators. It does not open the scope of funding to any and every type of litigation.

Before the IRDA's entry into force, funding was already allowed in the insolvency sector by well-established case law saying that (only) liquidators can conclude funding agreements.-[38] According to the announcement made by the Senior Minister of State for Law at the time of publication of the IRDA, the latter 'is not intended to affect other funding arrangements that are allowed under common law, such as funding for causes of action that belong to the company as its property, and funding for the investigation of potential causes of action for financially distressed companies'.[39]

Structuring the agreement

The Civil Law Act does not contain any provisions on how the funding agreement should be structured. Therefore, as long as the funding arrangement meets the two conditions set out above, it will be considered valid and enforceable.

However, to assist legal practitioners in drafting funding contracts, the Guidance Note and the SIARB Guidelines have provided guidance.

The SIARB Guidelines are the only source that set out some basic principles on how the contract should be drafted and what provisions it should contain, stating that it:

1. should be in writing,
2. should specify the amount of funding to be provided to the funded party,
3. should indicate the agreed investment return to the funder;
4. should be drafted in as clear and concise a manner as possible so as to be properly understood by the funded party;
5. should specify that the funder authorises the subsequent disclosure of the funder's identity, its address and the existence of the funding to the other parties, legal practitioners and court or arbitral tribunal in the funded proceedings;
6. should adequately address all matters highlighted in Sections 3 to 8 of the SIARB Guidelines; and
7. should include a fair, transparent and independent dispute resolution mechanism for resolving any disputes that may arise between the funder and the funded party.[40]

Aside from those drafting recommendations and the major topics discussed below, parties remain reasonably free when negotiating the terms and conditions of the funding agreement, provided they comply with the general principles applicable to all commercial contracts under local law.

The Civil Law Act does not contain any provisions on how the funding agreement should be structured. Therefore, as long as the funding arrangement meets the two conditions set out above, it will be considered valid and enforceable.

However, to assist legal practitioners in drafting funding contracts, the Guidance Note and the SIARB Guidelines have provided guidance.

The SIARB Guidelines are the only source that set out some basic principles on how the contract should be drafted and what provisions it should contain, stating that it:

1. should be in writing,
2. should specify the amount of funding to be provided to the funded party,
3. should indicate the agreed investment return to the funder;
4. should be drafted in as clear and concise a manner as possible so as to be properly understood by the funded party;
5. should specify that the funder authorises the subsequent disclosure of the funder's identity, its address and the existence of the funding to the other parties, legal practitioners and court or arbitral tribunal in the funded proceedings;
6.

should adequately address all matters highlighted in Sections 3 to 8 of the SIARB Guidelines; and

7. should include a fair, transparent and independent dispute resolution mechanism for resolving any disputes that may arise between the funder and the funded party.[40]

Aside from those drafting recommendations and the major topics discussed below, parties remain reasonably free when negotiating the terms and conditions of the funding agreement, provided they comply with the general principles applicable to all commercial contracts under local law.

i Confidentiality

When performing its due diligence, the funder will have access to confidential information on the client and the litigation for which the client seeks funding.

The Guidance Note states that the client's lawyer should comply with his or her duty of confidentiality towards the client as contained in the Legal Profession (Professional Conduct) Rules 2015 (PCR 2015) when giving information to the funder. The lawyer should also advise the client to enter into a non-disclosure agreement with the funder before providing any confidential information and should make sure that this agreement (and the funding agreement) contains enough confidentiality obligations as listed in Paragraph 28 of the Guidance Note.

From the funder's perspective, based on the SIARB Guidelines,[41] a funder must observe the confidential nature of the information provided to it; and make sure not to seek disclosure of information from the client's lawyer that could result in a breach of privilege or of confidentiality by the lawyer.

ii Scope of the funding and the funder's liability for adverse cost orders[42]

The funding agreement should specify the funding amount and any explanation of how this amount could evolve. It should also specify the type of costs that the funding covers and in particular whether it covers adverse party costs, security for costs or insurance costs (for example, when the funder intends to seek after the event insurance). The Guidance Note advises the lawyer to sufficiently assist the client by ensuring that the funding agreement contains sufficient details on the scope of the funding and adverse cost orders.[43]

The funding agreement must also set a waterfall of payments in the case of recovery of any sum from the proceedings. A funder will generally require that it is paid first in the waterfall, at least in respect of the initial funding amount. The payment of its fees could be paid simultaneously with the lawyers' fees (if contingency fees are allowed), and the balance would be paid to the client.

iii Conflict of interest

While interests are often aligned between the funder and the client as they both want the litigation to result in the highest recovery possible, some conflicts may arise. For example, this could occur when the client wants to terminate the litigation early because

it intends to merge with another company and wants to clean its balance sheet of any ongoing litigation. It could also happen where the client wants an early settlement despite high chances of success. The funding agreement should contain clauses detailing how to deal with such situations, including termination clauses.[44] When drafting termination clauses, the Guidance Note advises lawyers to list the situations where the funder may terminate the agreement and the obligations that should survive the termination of the funding agreement.[45]

The Guidance Note also reminds the lawyer that in any case he or she owes professional and fiduciary duties to the client only,[46] and discourages lawyers from acting on behalf of the client and the funder in the drafting and review of the funding agreement.[47] If a dispute arises between the funder and the client, the client's lawyer should only act in the client's interest.[48]

The SIARB Guidelines contain similar provisions and encourage the funding agreement to contain a proper dispute resolution mechanism to resolve a conflict (of interests) between the funder and the client.[49] They also prevent funders from continuing to fund several parties to the same proceedings if a conflict of interest arises between them.[50]

Conflicts of interest can also arise at the level of the arbitral tribunal, for example, if an arbitrator acts as a lawyer in another dispute where a funder funds the costs of the arbitrator's client. The SIAC practice notes say that then:

> any potential candidate for appointment as an arbitrator shall disclose to the Registrar and the Disputant Parties, any circumstances that may give rise to justifiable doubts as to 2 of 2 Administered PN – 01/17 (31 March 2017) his impartiality or independence, including any relationship whether direct or indirect, with an External Funder, as soon as reasonably practicable and in any event before his appointment.[51]

Article 46 of the Guidance Note and Article 49A of the PCR 2015 contain similar obligations.

iv Funder's level of involvement in proceedings

Depending on the type of funder, it may require (if the applicable law allows) more or less involvement in the litigation decision-making process. In a classic funding agreement, the client remains the owner of the claim,[52] and should be the ultimate decision-maker. However, for particular decisions, the prior approval of the funder may be required as the funder needs to protect its investment and the estimated prospects of recovery.

The Guidance Note[53] states that the funding agreement should specify the scope of the funder's role, namely on the following topics:

1. choice of solicitor;
2. choice of arbitrator or mediator, or both;
3. strategic or tactical decisions;
4. considering advice from and providing instructions to the claimant's solicitor;
5. managing litigation expenses; and
6. providing input on decisions about whether to settle the claim and on what terms.

Disclosure

Again, the CLA is silent on whether the existence or content of a litigation funding agreement should be disclosed during proceedings.

Regarding the funding of insolvency proceedings, the IRDA does not contain a specific provision on disclosure but merely imposes an obligation on liquidators to obtain the prior approval of the court or a committee of inspection before entering a funding agreement. This obligation suggests that the liquidator or judicial manager would need to disclose at least the agreement's existence before receiving said approval, but this is not explicitly stated in the legislation.

All guidelines on third party funding in arbitration mention an obligation to disclose at least the existence of a funding agreement; the identity and address of the funder involved; and any change happening during litigation or arbitration.[54] The disclosure must be made upon the tribunal's request, but the Guidance Note provides that it should even be made on the lawyer's own initiative either at the start of the proceedings if the funding agreement is already concluded or as soon as practicable thereafter if the funding is entered into at a later stage.

No arbitration guideline contains an explicit obligation to disclose the content of the funding agreement or the parties' obligations, except on costs (see below). The SICC Practice Directions, in the chapter on the allocation of costs, suggests that the court could take into account the existence of a funding agreement, but also the scope, extent and terms of the agreement so that one could deduce that not only the existence of the funding and identity of the funder should be disclosed, but also the obligations of the parties under the agreement,[55] to allow the judge to decide on costs.

Costs

As stated above, the funding agreement should contain sufficient details on the scope of the funding and adverse party costs.

The SIAC Guidelines[56] contain important provisions on how arbitrators should consider the conclusion by a party of a funding agreement in the proceedings. While they state that the tribunal should not take the involvement of a funder alone as an indicator of a party's financial situation, this agreement could well be considered when the tribunal apportions the costs of the arbitration. They also state that the tribunal may take into account the involvement of an external funder, in ordering its award, that all or a part of the legal or other costs of a disputant party be paid by another disputant party.[57]

The SICC Practice Directions also stipulate that the court may assess the costs taking into account 'such circumstances as the Court considers relevant, including the conduct of the case and the existence, scope, extent and terms of any third-party funding contract'.[58] More importantly, the court could also order costs to be paid by a funder who is not a party to the application or proceedings.[59]

Outlook and conclusions

Companies may have a meritorious claim but lack the resources, or the willingness to allocate those resources, to litigate. By using funding, uncollected recovery potential on their balance sheets becomes an asset. The use of funding also transfers all the risks related to the litigation from the company to the funder. Litigation funding also offers opportunities for risk management.

The year 2023 continues to bear out the consequences of the covid-19 pandemic. According to SIAC's 2022 Annual Report, more than 40 per cent of the cases filed with SIAC related to contracts entered into between 2020 and 2021 during the pandemic.[60] During periods of economic difficulty, businesses across many sectors face the considerable challenge of remaining viable as downturns, recessions or other hardships significantly affect companies. Litigation funding offers especially valuable assistance for corporations lacking resources to afford legal battles and provides a way for companies to pursue recoveries through the justice system during tough stretches, potentially offsetting losses. By taking a step further in favour of funding, Singapore, as an international hub and a local market, has understood the advantages of funding for its stakeholders and has allowed them to use it more broadly. Hopefully, the next step will be to accept funding for any type of litigation and not only that before the SICC.

Endnotes

1 Irene Lee Wing Yun is general counsel at Deminor. She would like to thank Alanna Lau, legal counsel at Deminor, for her assistance in writing this chapter. ^ Back to section

2 '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/. ^ Back to section

3 https://siac.org.sg/wp-content/uploads/2023/04/SIAC_AR2022_Final-For-Upload.pdf. ^ Back to section

4 SeeRe *Vanguard Energy Pte Ltd* [2015] 4 SLR 597. ^ Back to section

5 The Legal Profession (Amendment) Act 2022. ^ Back to section

6 https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-SIAC-Annual-Report-2022-1.pdf. ^ Back to section

7 Section 5A of the Civil Law Act. ^ Back to section

8 Section 5B of the Civil Law Act. ^ Back to section

9 Sections 4 and 5 of the Civil Law (Third-Party Funding) Regulations 2017. ^ Back to section

10 Section 4(1)(a) of the Civil Law (Third-Party Funding) Regulations 2017. ^ Back to section

11 Section 4(1)(b) of the Civil Law (Third-Party Funding) Regulations 2017. ^ Back to section

12 Section 4(2) of the Civil Law (Third-Party Funding) Regulations 2017 says that managed assets, in relation to a third-party funder, means all of the following: (1) moneys and assets contracted to, drawn down by or under the discretionary authority granted by investors to the third party funder and in respect of which it is carrying out fund management; (2) moneys and assets contracted to the third party funder and under the non-discretionary authority granted by investors to the third party funder, and in respect of which the third party funder is carrying out fund management; and (3) moneys and assets contracted to the third party funder , but which have been subcontracted to another party and for which the other party is carrying out fund management, whether under a discretionary authority granted by investors or otherwise. ^ Back to section

13 Cap. 143A. ^ Back to section

14 Civil Law (Third-Party Funding) (Amendment) Regulations 2021, Section 3. ^ Back to section

15 Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore, press release of 24 June 2021, https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore. ^ Back to section

16 Section 5B(4) of the CLA. ^ Back to section

17 www.mlaw.gov.sg/files/Council_GN_Third_Party_Funding.pdf. ^ Back to section

18 https://www.siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf. ^ Back to section

19 https://siac.org.sg/wp-content/uploads/2022/08/Practice-Note-for-Administered-Cases-—-On-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf. ^ Back to section

20 Article 2 of the Guidance Note. ^ Back to section

21 Article 22 of the Guidance Note. ^ Back to section

22 Section B of the Guidance Note. ^ Back to section

23 Article 1.3 of the SIARB Guidelines. ^ Back to section

24 The Singapore International Commercial Court Practice Directions, https://www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/sicc-practice-directions119bfa97ac6341a6ae26c23bd84d9662.pdf?sfvrsn=7ff8bb53_2. ^ Back to section

25 Amendment No. 3 of 2021 of the Singapore International Commercial Court Practice Directions, https://www.judiciary.gov.sg/docs/default-source/amendments-docs/2021/sicc_amendment_no-_3_of_2021.pdf?sfvrsn=f098370_2. ^ Back to section

26 Article 152 'General' of the SICC Practice Directions. ^ Back to section

27 This refers to local lawyers admitted to practise as an advocate and solicitor of the Supreme Court in Singapore and to foreign lawyers registered under Sections 36B, 36C or 36D, or granted approval under Section 176 of the Legal Profession Act. ^ Back to section

28 Legal Profession (Professional Conduct) Rules, https://sso.agc.gov.sg/SL/LPA1966-S706-2015. ^ Back to section

29 Article 49A of the LPR 2015. ^ Back to section

30 Article 49B of the LPR 2015. ^ Back to section

31 Articles 4A and 4B of the Representation in SICC Rules, https://sso.agc.gov.sg/SL/LPA1966-S851-2014?DocDate=20181022. ^ Back to section

32 Section 224 of the IRDA. ^ Back to section

33 Section 225 of the IRDA. ^ Back to section

34 Section 228 of the IRDA. ^ Back to section

35 Section 238 of the IRDA. ^ Back to section

36 Section 239 of the IRDA. ^ Back to section

37 Section 240 of the IRDA. ^ Back to section

38 See Re Vanguard (mentioned above), *Trikomsel* (HC/OS 989/2018), *Solvadis Commodity Chemicals Gmbh v. Affert Resources Pte Ltd* [2018] 5 SLR 1337. ^ Back to section

39 Second Reading Speech by Senior Minister of State for Law, Mr Edwin Tong, on the Insolvency, Restructuring and Dissolution Bill, point 52: https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-sms-edwin-tong-insolvency-omnibus-bill. ^ Back to section

40 Article 3 of the SIARB Guidelines. ^ Back to section

41 Article 5 of the SIARB Guidelines. ^ Back to section

42 See Article 3.2 of the SIARB Guidelines and Article 2 of the Guidance Note. ^ Back to section

43 Articles 30 and 31 of the Guidance Note. See also Article 3.2 of the SIARB Guidelines.- ^ Back to section

44 Article 7.1.1 and 7.1.2 of the SIARB Guidelines. ^ Back to section

45 Article 5 of the Guidance Note. ^ Back to section

46 Article 37 of the Guidance Note. ^ Back to section

47 Article 39 of the Guidance Note. ^ Back to section

48 Article 37(b) of the Guidance Note. ^ Back to section

49 Articles 2.1.3 and 3.1.7 of the SIARB Guidelines. This is also stated in Article 42 of the Guidance Note. ^ Back to section

50 Article 6.1.5 of the SIARB Guidelines. ^ Back to section

51 Article 4 of the SIAC Guidelines. ^ Back to section

52 In particular circumstances, a funder may decide to purchase the claim and will then become the owner of the claim. A lump sum would then generally be paid to the client upfront (possibly combined with a percentage in the proceeds). In this type of contract, the funder is not paying for the costs of the litigation but purchases the claims and becomes the owner of it. ^ Back to section

53 Article 2 of the Guidance Note. ^ Back to section

54 Article 47 of the Guidance Note, Article 8 of the SIARB Guidelines and Article 5 of the SIAC Guidelines. ^ Back to section

55 Article 152 'General' of the Practice Directions. ^ Back to section

56 Articles 9 and 11 of the SIAC Guidelines. ^ Back to section

57 Article 11 of the SIAC Guidelines. ^ Back to section

58 Article 152 'General' of the Practice Directions. ^ Back to section

59 Article 152 'General' of the Practice Directions. ^ Back to section

60 https://siac.org.sg/wp-content/uploads/2023/04/SIAC_AR2022_Final-For-Upload.pdf. ^ Back to section

d e m i n o r

LITIGATION FUNDING

Irene Lee Wing Yun irene.lee@deminor.com

Deminor

Read more from this firm on Lexology

Spain

Cristina Soler and **Carlos Llorente**
Ramco Litigation Funding

Summary

INTRODUCTION
THE YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
CONCLUSIONS AND OUTLOOK
ENDNOTES

Introduction

Although third party funding (or litigation funding) is relatively new in Spain, in recent years the Spanish market has experienced a rising demand from companies, law firms and individuals that see litigation funding as a tool to reduce costs and manage risks.

Third party funding is not expressly regulated in Spain but it is allowed under the Spanish private law principles governing commercial contracts. As a civil law jurisdiction, the concepts of champerty and maintenance are not part of Spanish legal culture; thus, there is no prohibition on litigation funding.

Since the first funders entered Spain in 2016 and 2017, the market has been growing exponentially year on year and this trend is expected to continue in the coming years. While not a mature market compared to other countries such as Australia, the US and the UK, and still far from the level of consolidation observed in those markets, Spain is establishing itself as an active market with a clear growth trend.

Third party funding has become a hot topic of debate, not only at arbitration conferences and webinars, but also evidenced via a proliferation of published articles on the subject[2] with growing interest among different stakeholders to learn more about it.

The various types of claims that have been driving the growth of the Spanish litigation funding market have been those either litigated in Spain or with key Spanish components that can accommodate different investor profiles. The areas that investors have gathered to be of particular interest are natural resources and energy, regulatory markets, banking and financial markets, renewable energy, capital projects and infrastructure, antitrust and intellectual property.

There is an interest in the legal financing of complex cross-border disputes, some of them pursued before the Spanish jurisdiction and others in arbitration. The rise of cross-border disputes submitted to arbitration in recent years has created the right atmosphere for the third party funding market to develop. Arbitration teams in the Spanish offices of top-tier law firms and boutique arbitration firms are showing increasing interest in litigation finance solutions.

Spain is one of the countries with the highest number of investment arbitrations in ICSID (mainly related to the conflict regarding renewables based on cutbacks carried out by the Spanish government from 2010 to 2013 to the incentive system set out for renewable energy companies). Moreover, according to ICSID statistics, the number of arbitrations involving Spanish referees is also very high.

On the other hand, private enforcement of competition law cases, and more particularly follow-on actions based on the transposition into Spanish law of the EU Damages Directive[3] have also been important drivers for the Spanish funding market. The new legislation has enhanced the process of claims for damages caused by restrictive practices and encouraged a large number of claims to be brought in this area.

Under the current economic conditions shaped by the covid-19 pandemic, and along with the availability of qualified and sophisticated practitioners, the following features of Spanish litigation have facilitated the growth of the Spanish litigation funding market:

1.

the reasonably short resolution period: for instance, the duration of first instance civil judicial proceedings in Spain is slightly above the average (312 days) of countries such as Germany (220 days) but with shorter duration than other countries such as France and Italy;[4]

2. the increase of the litigation rate in recent years. Spain had a litigation rate (civil jurisdiction) of 54 per cent in 2021, having increased by 17 per cent after the pandemic;[5]
3. the growing predictability of Spanish court judgements. In 2021, only 15.7 per cent of first instance judgments were appealed and 62 per cent were fully upheld on appeal;[6] and
4. in terms of litigation costs, Spain occupies seventh position after the US, Canada, the UK, Italy and Germany as having the highest litigation costs of the countries surveyed. The costs of international arbitration on the other hand, in complex cases, with high added value are as high as in other countries.

Finally, with regard to after the event (ATE) litigation insurance, at the time of writing, only foreign insurance companies have been reported as making ATE insurance available for litigation funding cases in Spain.

The year in review

As mentioned above, third party funding in Spain is an active and growing market. The Spanish market has become attractive for different litigation fund operators and is increasingly gaining confidence and understanding.

Law firms are becoming more familiar with the concept, and in-house legal teams increasingly see the value that litigation funding can bring to corporations.

Litigation funding structures have undergone an evolution. Not only have litigants been seeking to finance the costs of litigation, but there is also a growing market interest in the demand for monetisation of claims, judgments or arbitration awards. There has also been progress in other innovative forms of litigation funding such as claims portfolio funding or law firm finance. Through non-recourse facilities or other types of financing, law firms are able to expand their teams and their areas of scope, while working on cases under more creative fee structures.

The use of third party funding in international arbitration has particularly grown in recent years and it is seen as a very suitable financing tool that enables companies to file claims without paying all the costs of doing so. Certain fields such as insolvency and restructuring, or technology and IP, are also becoming market segments.

In addition, private enforcement of competition law cases, such as the *Truck* cartel damages claims, have continued to be the most active cases in the Spanish litigation scene. Moreover, the *Milk* cartel damages claims and, more recently, the *Cars* cartel damages claims, have been hot topics of the current litigation environment. Aggressive marketing campaigns led by law firms seeking to gather plaintiffs for these claims, benefiting from litigation funding solutions in most cases, have been launched on the market. In this type

of case, the Spanish litigation funding market has been coexisting and competing with middle-sized law firms that handle follow-on actions on a full contingency basis.

The absence of regulation of class actions in Spain, except in the case of consumers, is one of the issues that will have to be addressed so that the development of litigation funding in Spain does not slow down.

The issues under debate at the moment are, essentially:

1. the obligation and scope of the duty to disclose the financing contract in arbitration;
2. the model to be followed in the regulation of litigation funding (self-regulation or traditional government regulation); and
3. the European Parliament Resolution of 13 September 2022, with recommendations to the Commission on responsible private funding litigation, which includes the proposal of a directive on the regulation of litigation funding.

Legal and regulatory framework

In Spain there is no specific (*lex specialis*) legal and regulatory domestic framework applicable to third party litigation funding. In addition, there are currently no strong signals regarding prospects of an immediate domestic overturn of this situation

At the EU level, however, Spain, as an EU Member State, will have to implement its national legislation 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.[7] Article 10 of the Directive establishes certain rules on the funding of representative actions for redress measures, the purpose of which is to prevent conflicts of interest and to ensure that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interest of consumers. The new domestic legislation implementing the Directive should have been enforced in Spain by 25 June 2023, but currently there is only a draft of the proposed legislation (*Anteproyecto de Ley de acciones de representación para la protección de los intereses colectivos de los consumidores*), published by the Department of Justice on 9 January 2023,[8] which has been reviewed critically by some commentators in respect to its approach to litigation funding (i.e., Article 844.1f).[9]

When the Directive is finally incorporated into the Spanish legal system, its litigation funding provisions will have a significant impact on representative actions for the protection of the collective interests of consumers, although, obviously, only within a very limited subject-matter scope in the third party litigation funding sector. This situation might change, however, if the EU pushes forward the European Parliament Resolution of 13 September 2022 with recommendations to the Commission on responsible private funding litigation, which basically has its origins in the study conducted by the European Parliamentary Research Service (Responsible Private Funding of Litigation, March 2021).-[10] It is interesting to point out that the Annex of this Resolution contains specifically a proposal for a directive of the European Parliament and of the Council on the regulation of third party litigation funding.[11] There have been some immediate negative reactions

to the EU Resolution from relevant third party litigation funding stakeholders and we still need to see if there is a determined political will at the EU level to bring this project to completion. However, the fact that we have already reached this stage might mean that harmonised legislation of third party litigation funding in EU Member States is no longer wishful thinking.

In the meantime, in Spain, third party litigation funding, from a legal and regulatory perspective, is in the hands of its general statutory rules applicable to civil and commercial operations, which do not oppose this mechanism, as unanimously acknowledged within academia, the legal profession and the courts. In fact, some court decisions have already given credit to the validity of third party litigation funding in Spain

This is particularly clear in the decision adopted on 24 June 2020 by the Court of Appeals of Álava,[12] where the Court in an *obiter dicta* declared that, in the absence of a specific legal and regulatory framework, third party litigation funding is lawful in Spain. The Court particularly indicated that the legal basis for its position is grounded in Article 1255 of the Spanish Civil Code (CC) and Articles 239–243 of the Spanish Commercial Code (CCom). The reference to Article 1255 CC is an obvious, and expected, one, as this is the central article in Spanish private law in relation to party autonomy ('The contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to morals or to public order'). As such, if this is viewed from a contractual perspective, third party litigation funding transactions are free to be developed, unless they contravene mandatory rules or public policies in force in Spain. References to Articles 239–243 CCom, on the other hand, are more significant because these rules may point to the most proper legal nature and legal regime of standard third party litigation funding operations. These articles provide for a basic regulation of silent partnerships (*cuentas en participación*), which are qualified as those agreements where 'Business persons may participate in operations by other businesspersons, contributing to them with a part of the capital they may agree, thus becoming partners in the profits or losses according to the proportion determined' (Article 239 CCom).[13]

Interestingly, scholarly opinion in Spain shares the same, or a similar, mindset as to what seems to be the most acceptable legal characterisation of third party litigation funding mechanisms: an atypical contract featuring silent partnership characteristics.[14]

All in all, irrespective of the specific legal characterisation of third party litigation transactions that we might agree with, it is undeniable that the Spanish legal system presents no obstacle whatsoever to the development of third party litigation funding in Spain, at least with respect to civil and commercial claims. Relying on the Supreme Court (Administrative Law Chamber) decision of 22 January 2020,[15] however, some commentators have suggested that third party litigation funding in administrative law claims might not be accepted under Spanish law. Indeed, the Court found in this decision that, unlike in civil and commercial proceedings, in claims for damages against the Spanish public authorities, litigants are not allowed to sell their litigious or contentious credit right or rights to claim. Litigants would only be allowed to sell their credit rights if those credit rights have been acknowledged by a final administrative court judgment. Interestingly, this decision contains a dissenting opinion by Justice Arozamena, where he analyses the practice of third party litigation funding under its different formats and supports the possibility of selling future credit rights.

In addition to the general legal and regulatory framework mentioned above, the Spanish arbitration entourage has also produced some rules applicable to third party litigation funding in which, following relevant practices at the international arbitration level, this mechanism is addressed from different perspectives. The most important examples of this arbitral approach to third party litigation funding are:

1. the Code of Best Practices in Arbitration of the Spanish Arbitration Club (2019), Recommendation 6;[16]
2. the Arbitration Rules (2020) of the Madrid International Arbitration Centre (MIAC), Section 23;[17] and
3. the Rules of the Court of Arbitration of Madrid (2022), Section 9 bis.[18]

All of the above rules are classified as soft (or soft law) rules due to their non-statutory nature, and are only binding on the parties to a particular arbitration proceeding when the corresponding rules have been accepted by them. They all share the same goal of attaining proper disclosure of information related to the use of third party litigation funding in arbitration in order to avoid potential conflicts of interests.

Structuring the agreement

In the absence of any specific legal and regulatory framework applicable in Spain to third party litigation funding, and on the basis of the paramount role of party autonomy (Article 1255 CC), as seen above, third party litigation funding agreements are subject to no limitations as per their contents, except those provided for by mandatory statutory rules or the public policy principles available in Spain.

Some alleged structures that might be considered similar to third party litigation funding agreements would be contingency fees agreements (prohibited in the past but currently allowed after the Supreme Court (Section 3rd) decision of 4 November 2008) or the transfer of credits (including transfer of future credits: Article 1271 CC), as governed by Articles 1526–1536 CC. In truth, one of these precepts, Article 1535 CC, focuses on the transfer of litigious credits ('A credit shall be deemed litigious from the time that a reply to the claim relating thereto is filed') and establishes that 'In the event of a sale of a litigious credit, the debtor shall be entitled to extinguish it by reimbursing the assignee the price paid, any costs incurred and interest in the price from the day on which it was paid'). It is no surprise, therefore, that scholars in the majority agree that these neighbouring mechanisms differ notably from typical third party litigation funding contemporary structures.

Deals are usually structured following standard agreements inspired in the common law practice and are adapted to the Spanish general legal framework and to local market sensibilities and perceptions.

Some of the issues covered by litigation funding agreements are indicated below.

In the absence of any specific legal and regulatory framework applicable in Spain to third party litigation funding, and on the basis of the paramount role of party autonomy (Article 1255 CC), as seen above, third party litigation funding agreements are subject to no

limitations as per their contents, except those provided for by mandatory statutory rules or the public policy principles available in Spain.

Some alleged structures that might be considered similar to third party litigation funding agreements would be contingency fees agreements (prohibited in the past but currently allowed after the Supreme Court (Section 3rd) decision of 4 November 2008) or the transfer of credits (including transfer of future credits: Article 1271 CC), as governed by Articles 1526–1536 CC. In truth, one of these precepts, Article 1535 CC, focuses on the transfer of litigious credits ('A credit shall be deemed litigious from the time that a reply to the claim relating thereto is filed') and establishes that 'In the event of a sale of a litigious credit, the debtor shall be entitled to extinguish it by reimbursing the assignee the price paid, any costs incurred and interest in the price from the day on which it was paid'). It is no surprise, therefore, that scholars in the majority agree that these neighbouring mechanisms differ notably from typical third party litigation funding contemporary structures.

Deals are usually structured following standard agreements inspired in the common law practice and are adapted to the Spanish general legal framework and to local market sensibilities and perceptions.

Some of the issues covered by litigation funding agreements are indicated below.

i Financial terms

Although the publication of the EU proposal for a directive on the regulation of third party litigation funding has sparked some debate about imposing restrictions on the financial structure of third party litigation agreements, mostly on limiting the fees and interest funders can charge, currently parties to a litigation funding agreement are free to agree on any terms and conditions they might deem fit.

ii Choice of counsel

Under both Spanish law and professional deontological rules, funded parties have the absolute right to freely choose their counsel without any impositions or limitations established by the funder in the funding agreement. Delegating the choice of counsel to the funder might also be seen as contrary to accepted rules. To be realistic, though, it would not be reasonable to think that the funder should be excluded from this choice as the proper selection of expert legal counsel for the funded party is one of the key elements to be accounted for in the final decision adopted by the litigation fund in order to conclude the agreement.

iii Termination

Termination of third party litigation funding agreements is governed by the general rules applicable to contracts in Spain under civil and commercial legislation. These rules provide for the usual types of contractual termination scenarios, commonly linked to a fundamental breach of the litigation funding agreement. In addition, specific termination clauses are provided in these agreements for situations where the funder has a reason to believe that the litigation is legally or commercially non-viable (right of withdrawal). Under Spanish law, this right of withdrawal might clash with Article 1256 CC ('The validity and performance of

contracts cannot be left to the discretion of one of the parties'.) Consequently, clauses in the funding agreement in this respect must be carefully drafted in order to avoid simple discretionary withdrawals.

Disclosure

i Court proceedings

At present, in court proceedings in Spain there is no specific duty to disclose information on the existence of third party litigation funding (or the third party litigation funding agreement) to the other parties or to the court. The Spanish Civil Procedure Act (LEC) contemplates some instances in which the parties can request the opposing party to disclose specific documents (i.e., Articles 328 and 330 LEC) but those situations are basically reserved for the documents that might have an impact on the final resolution of the legal issue constituting the substance of the dispute. It does not seem that a third party litigation funding agreement could qualify as such a document, but the question is still open under Spanish law, specifically in the absence of a statutory rule or case law on the matter. This situation shall change, albeit in a very specific field (representative actions for the protection of the collective interests of consumers), when Article 10 Directive 2020/1820[19] is finally transposed into Spanish law.

There is one well-known court case where a third party litigation agreement was disclosed by the funded party to the court, but this was effected with the purpose that the funded party, which was subject to bankruptcy proceedings, could get the bankruptcy court's approval to file a damages claim against one of the claimant's competitors.[20] Significantly, scholarly opinion points out this specific situation (third party funding of a bankrupt claimant) as one of the situations that would, or should, justify disclosure.

ii Arbitration proceedings

On the other hand, in the field of arbitration, the rules of the most important Spanish arbitral institutions provide specifically for the disclosure of litigation funding agreements under different formulations, as follows.

Recommendation 6 of the Code of Best Practices in Arbitration of the Spanish Arbitration Club (2019), under the heading 'Duties in relation to funding', imposes an 'obligation of disclosure' in the following terms:

> (154) Any party that has received funds or obtained any type of third-party funding linked to the outcome of the arbitration shall inform the arbitrators and the counterparty no later than in its statement of claim, and provide the identity of the funder; (155) If the obtaining of funds or funding occurs after the filing of the statement of claim, then the party concerned shall provide the counterparty and the arbitrators with the same information within a reasonable period; (156) The arbitrators may request said party to provide any additional information that may be relevant. In complying with this obligation, the requested party may suppress the confidential details and, in particular the financial conditions of the transaction.

The drafters of the Recommendation emphasise that its purpose should be to protect the independence and impartiality of the arbitrators, but limiting the duty of disclosure, at least for the time being, to the existence and identity of the funder, notwithstanding that arbitrators may request parties to provide any additional information that may be relevant (Explanation, page 18).

Section 23 of the Arbitration Rules (2020) of the MIAC states:

> 1. If any party obtains third-party funding, it must notify it, along with the third party's identity, to the arbitral tribunal, the counterparty and the Centre as soon as the funding is provided.
> 2. Subject to any applicable rules on non-disclosure, professional secrecy or attor- ney-client privilege, the tribunal may request the party funded by a third party to disclose any information it considers appropriate about the said funding and about the funding entity.

Finally, likewise, although with a different structure, Section 9 *bis* ('Intervention of third parties and control of absence of conflict') of the Rules of the Court of Arbitration of Madrid (2022) declares:

> Once the arbitrators have been appointed, any intervention in the arbitration proceedings by a third party at the proposal of a party -whether by change of representation, financing by a third party, assignment of credit, or other forms of intervention- shall be subject to a no-conflict control by the Court. The party proposing the intervention of this third party must submit a declaration of absence of conflict , which will be sent to the arbitrators and the opposing party for their arguments. If the opposing party and the arbitrators corroborate the absence of conflict, the Court will accept the intervention. In case of disclosure or opposition by the opposing party and/or the arbitrators, the Court shall decide accordingly. Objections to the intended intervention must be substantiated. The intervention of third parties shall not be authorized in the event that is deemed to create a situation that could give rise to a conflict with the arbitrators already appointed.

Costs

i Court proceedings

The issue of costs is governed by Articles 241–246 and 394–398 LEC.

Article 241 LEC distinguishes between proceedings' expenses and costs. The expenses are all disbursements that directly or indirectly arise from the existence of the proceedings. The costs are the expenses related to the specific items mentioned in Article 241 LEC:

1. attorney and court representative fees, when their intervention is compulsory;
2. placement of advertisements or public notices that may have to be published during the course of the proceedings;
3. deposits required to lodge appeals;
4. experts' fees and any other payments that may have to be made to other persons involved in the proceedings;

5. copies, certifications, notes, affidavits and similar documents that may have to be requested in accordance with the law, except for those the court may request from public registries and records;
6. duties that may have to be paid as a result of any procedures needed to conduct the proceedings; and
7. court tax, when applicable.

Article 241 LEC makes clear that each party in the litigation shall pay for the expenses, including the costs, of the proceedings incurred at such party's request as they come about; however, the court may issue an award of costs in first instance proceedings (Article 394 LEC) and in appeal proceedings (Article 398 LEC).

Awards of costs are governed by the following rules, which vary depending on whether those costs are awarded by the court in first instance proceedings or in appeals against the first instance decision.

First instance proceedings

In first instance proceedings, an award of costs shall be imposed on the party who has had their pleas rejected in full unless the court understands that the case presents serious de facto or *de jure* doubts. To verify that the case is legally doubtful, case law in similar proceedings shall be taken into account. If the upholding or dismissal of the pleas is partial, each party shall pay its own costs and the common costs shall be shared equally, unless there are reasons to impose the costs on one of the parties on the basis of reckless litigation. Awards of costs in first instance proceedings may be appealed (Article 397 LEC).

When awarded, some costs are capped (one-third of the amount of the claim) unless the debtor has litigated recklessly (Article 394.3 LEC). Costs are assessed by the court's clerk within the limits and according to the procedure established by Articles 242–246 LEC.

Appeals

In appeals, the statutory framework on award of costs is as follows. When all the motions in the appeal are rejected, award of costs will follow the rules in Article 394 LEC (rejection in full). When the motions in the appeal are totally or partially granted, there will be no award on costs imposed on any of the litigants.

ii Arbitration proceedings

The rules governing the award of costs in the area of the jurisdiction of Spanish courts are not applicable in arbitration proceedings. Article 37.6 of the Spanish Arbitration Act (60/2003 of 23 December) establishes that 'Subject to agreement by the parties, the award will include the arbitrators' decision on arbitration costs, which will include their own fees and expenses, and, as appropriate, the fees and expenses of the parties' defence or representatives, the cost of the service rendered by the institution conducting the arbitration and all other expenses incurred in the arbitral proceedings.' Arbitrators therefore have more

leeway in awarding costs, subject to the agreement of the parties, the applicable arbitration rules and the arbitrators' own criteria.

iii Other issues

Under Spanish law, either statutory or case-law, there seems to be no room for the proposition that the unsuccessful party against whom the award of costs has been issued must pay the litigation funding costs.

Also, there is a strong consensus that under Spanish law third party litigation funders cannot be held liable in relation to the successful party for the payment of costs awarded against the unsuccessful funded party (i.e., Article 242 CCom).

Third party litigation funders, however, may agree with their clients to cover the risk of adverse costs awarded against the funded party by the court.

Finally, security for costs is not available under Spanish law in court proceedings. In arbitration, an order requesting security for costs might be covered by the ample wording of Article 23 Spanish Arbitration Act ('Subject to any contrary agreement by the parties, the arbitrators may, at the request of a party, grant any interim measures deemed necessary in connection with the object of the dispute'). However, in the end it will be dependent on the parties' agreement, the applicable arbitration rules and the decision of the arbitrators.

Conclusions and outlook

Litigation funding has been increasingly used in Spain since 2016 and has experienced significant growth in recent years.

A rising demand for litigation funding solutions among law firms, companies and individuals exists, and the demand for innovative ways of litigation funding, such as portfolio claims funding and law firm funding is expected to increase further. The same rising trend is expected in complex litigation, arbitration and follow-on damages claims.

Third party funding in Spain has been offering funders and potential funded parties benefits both for the parties and for the justice system (among others, flexibility when structuring the funding agreement) and has facilitated the development of the industry in this jurisdiction.

Currently, there is no regulatory framework for litigation funding in Spain. However, there has been intense regulatory activity in the field of arbitration, particularly noteworthy of which being that of the regulation at a soft-law level that has been effected by various Spanish arbitration chambers and institutions on the duty and scope to disclose the litigation funding agreement in arbitration proceedings.

Moreover, there are two developments that have taken place at EU level that may have an impact on the Spanish litigation funding arena, and that shall be carefully considered in the near future:

1. Directive (EU) 202/1828 on consumer collective redress,[21] which should already have been transposed into Spanish law, and includes provisions on third party funding;[22] and
2.

the European Parliament Resolution of 13 September 2022,[23] which includes a proposal for a directive on the regulation of litigation funding.

Endnotes

1 Cristina Soler is CEO and co-founder and Carlos Llorente is of counsel of Ramco Litigation Funding. ^ Back to section

2 S Sainz, 'The funds become strong in Spain', Expansión, 22 January 2020. (https://www.expansion.com/juridico/actualidad-tendencias/2020/01/22/5e2747e1468aeb9c548b4595.html). ^ Back to section

3 Royal Decree Law 9/2017 of 26 May, which transposes into Spanish legal System Directive 2014/104/EU on antitrust damages actions. ^ Back to section

4 European judicial systems, CEPEJ Evaluation Report, 2020 Evaluation cycle (2018 Data (https://rm.coe.int/evaluation-report-part-1-english/16809fc058). ^ Back to section

5 La Justicia Dato a Dato. Consejo del Poder Judicial 2021. ^ Back to section

6 La Justicia Dato a Dato. Consejo del Poder Judicial 2021. ^ Back to section

7 OJEU No. L 409/1 of 4 December 2020. ^ Back to section

8 See https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/Anteproyecto%20de%20Ley%20acciones%20representativas.pdf. ^ Back to section

9 See S Canudas Perarnau and A.Segura Moreiras in https://almacendederecho.org/la-financiacion-de-los-pleitos-en-el-anteproyecto-de-ley-de-acciones-de-representacion and A Ferreres in https://almacendederecho.org/53368-2. ^ Back to section

10 See Procedure 2020/2130 (INL). ^ Back to section

11 https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html. ^ Back to section

12 IdCendoj: 01059370012020200103. ^ Back to section

13 See M Oliver Cojo, 'Third-Party Litigation Funding: Current State of Affairs and Prospects for its Further Del¡velopment in Spain', 2014-*European Review of Private International Law*, Vol. 22, Issue 3, 349 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2521347). ^ Back to section

14 See D Agulló, 'The litigation funding agreements (third-party funding) in Spain', Revista de Derecho Civil, Vol. IX, No. 1 (January–March 2022) pp. 183–231 (https://nreg.es/ojs/index.php/RDC/article/view/711/567. Also, GM Solas, Third Party Funding, Cambridge University Press 2019, pp. 113–114. ^ Back to section

15 Judgment No. 53/2020 (IdCendoj: 28079130082020100001). ^ Back to section

16 https://www.clubarbitraje.com/wp-content/uploads/2019/01/Code-of-Best-Practices-in-Arbitration-of-the-Spanish-Arbitration-Club.pdf. ^ Back to section

17 https://madridarb.com/wp-content/uploads/2020/09/Arbitration-rules-EN.pdf. ^ Back to section

18 https://www.arbitramadrid.com/wp-content/uploads/2022/02/2022-Reglamento-ENG-2022-220202.pdf. ^ Back to section

19 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 (OJEU No. L 409/1, of 4 December 2020). ^ Back to section

20 L Agustina, La Vanguardia, 12 November 2018, 'UNIPOST will file a claim of 170 Mn Euros against the Spanish Post for competition abuse' (https://www.lavanguardia.com/economia/20181112/452861582245/unipost-demanda--correos-abuso-competencia.html). ^ Back to section

21 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 (OJEU No. L 409/1, of 4 December 2020). ^ Back to section

22 Currently there is only a draft law on representative actions for the protection of the collective interests of consumers (*Anteproyecto de Ley de acciones de representación para la protección de los intereses colectivos de los consumidores*) published by the Department of Justice on 9 January 2023. ^ Back to section

23 European Parliament Resolution of 13 September 2022 including a Proposal for a Directive of the European Parliament and of the Council on the regulation of third party-litigation funding (https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html). ^ Back to section

Cristina Soler cristina.soler@ramcolf.com
Carlos Llorente carlos.llorente@ramcolf.com

Ramco Litigation Funding

Read more from this firm on Lexology

Switzerland

Urs Hoffmann-Nowotny and **Louis Burrus**

Schellenberg Wittmer

Summary

INTRODUCTION

THE YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

Third party litigation funding is still a relatively new phenomenon in Switzerland. Triggered by the commercial success of FORIS AG in Germany in the late 1990s, the first reports about litigation funding emerged in Swiss legal writing around the turn of the century.[2] FORIS AG entered the Swiss market in 2000. At the time, the legality of litigation funding under Swiss law was still uncertain. In the wake of the leading case of the Swiss Federal Court, the country's highest court, which answered the question in the affirmative in 2004,-[3] Allianz ProzessFinanz GmbH (Allianz), a subsidiary of the German Allianz Insurance Group, also entered the Swiss market.[4] In 2008, Allianz even opened a representative office in Zurich. However, in 2011, Allianz stopped writing new funding business worldwide (including in Switzerland).

Thereafter, only two funders were known to be actively operating out of Switzerland: Profina Prozessfinanzierung GmbH in Zug, which was founded in 2006,[5] and JuraPlus AG in Zurich, which was founded in 2008.[6] In 2017, a new participant, Nivalion AG in Zug, which was founded in late 2016, entered the market.[7] Furthermore, in 2019, a new participant called Swiss Legal Finance SA opened an office in Geneva.[8] In 2021, blockchain-focused Liti Capital SA was founded in Geneva.[9] Among larger international participants, Omni Bridgeway has for many years been the only one with a presence in Switzerland, through an office in Geneva.[10] However, in 2021, Burford Capital established a branch office in Zug to further pursue business opportunities in the DACH region (Germany, Austria and Switzerland).[11] Several other non-Swiss (in particular German, English and French) funders are also said to be taking on Swiss cases. Furthermore, Swiss asset managers have recently shown increased interest in litigation funding. Furthermore, legal startup LegalPass established an alternative litigation funding model in the form of the first crowdfunded 'collective' lawsuit in 2023.[12]

Most Swiss-based participants seem to focus primarily on state court litigation, notably civil liability cases as well as intellectual property and inheritance disputes. Other fields of law with funded cases are general contract and corporate law (including liability of directors and officers).[13] Furthermore, there is anecdotal evidence for third party funding in arbitration, in criminal proceedings with seized assets and in claims dormant in foreign bankruptcies,[14] until recently mostly by non-Swiss funders.

The Swiss market is still relatively small. Swiss funders ordinarily require a minimum amount in dispute, ranging from 250,000 Swiss francs to €7 million.[15] Representatives of funders have stated that there are no more than around 50 funded cases in Switzerland per year. According to indications from representatives, Swiss funders receive around 50 to 100 enquiries per year each, which result in the conclusion of between five and 15 agreements per funder.[16] In addition, there are no Swiss industry associations.[17]

The year in review

The past few years have seen some movement in the Swiss market for litigation funding, with Nivalion AG, Swiss Legal Finance SA and, just recently, Liti Capital SA entering as new participants. Foreign participants, in particular the ones based in Germany, the United Kingdom or France, and even global players have also shown an increased interest in

the Swiss market. Furthermore, as mentioned above, in 2023, legal startup LegalPass established an alternative litigation funding model in the form of the first crowdfunded 'collective' lawsuit in Switzerland.[18]

There has also been a slight increase in reported court cases relating to issues of litigation funding.[19] It will be interesting to see whether this trend continues. Furthermore, scholarly writers have recently pointed to the fact that Swiss lawyers have a duty to advise their clients regarding the availability of third party funding and to represent them when entering into a funding agreement.[20] All of these factors indicate an increased awareness of third party litigation funding and the opportunities arising from it.

Legal and regulatory framework

The legality of litigation funding is no longer an issue in Switzerland since the Swiss Federal Court rendered the above-mentioned decision of 10 December 2004.[21] In this case, the Court had to review the constitutionality of a provision of the 2003 Zurich Cantonal Act on the Legal Profession (Zurich Lawyers Act)[22] that made it illegal to fund a lawsuit on a commercial basis and against a participation in the success of the suit. The Court found that the provision violated freedom of commerce as guaranteed in the Swiss Federal Constitution.[23] The Court therefore quashed the critical provision of the Zurich Lawyers Act.

The Federal Court issued a very detailed opinion that provides guidance on a number of critical aspects of litigation funding. The most important points addressed are the following:

1. The Court addressed the question of whether third party litigation funding might jeopardise the independence of the lawyer acting for the funded party. Under the Swiss Federal Act on the Freedom of Lawyers (Federal Lawyers Act), lawyers in Switzerland must exercise their activity independently.[24] The Court found that the plaintiff's contractual obligations under the typical funding arrangements to promptly and fully inform the funder on all aspects of the case and not to settle the case without the funder's prior approval do not jeopardise the lawyer's independence.[25]
2. The Federal Court then considered the concern that the lawyer's duty of confidentiality[26] was at risk. In the Court's analysis, it is perfectly permissible for the client to allow his or her lawyer to disclose confidential information to the third party funder and this does not call into question the lawyer's confidentiality obligation.[27]
3. The Federal Court finally looked at the issue of conflicts of interest. Swiss lawyers have not only a contractual, but also a statutory, duty to avoid conflicts.[28] The Court found that the party's and the third party funder's interests were, as a rule, aligned, since they are both interested in obtaining the best possible result in the proceedings. However, the Court accepted that conflicts of interest might arise in certain scenarios; for example, when it comes to accepting or rejecting a settlement proposal. However, in the Court's analysis, such potential conflicts can be managed by appropriate arrangements in the funding agreement. Therefore, the mere possibility of such conflicts does not suffice to preclude third party litigation funding.[29]
4. The Federal Court also looked at the commercial realities of third party litigation funding. The Court recognised that funders will focus their acquisition efforts on

> lawyers and that the lawyers thus have a commercial interest in entertaining good relationships with professional funders, thereby being at risk of putting the funders' interests before those of the client. However, the Court found that this was not the only area of potential conflicts of interest for lawyers; it pointed as an example to the situation where the lawyer is paid by the client's professional liability insurer. The Federal Court came to the conclusion that the existence of the lawyer's legal obligation always to put the client's interests first, coupled with the threat of severe sanctions in the event of a breach, adequately addresses this concern.[30]

There are no specific statutory rules concerning third party litigation funding. Certain clauses in litigation funding agreements can be inadmissible; for example, if the funder was granted an excessive share of the proceeds of the litigation.[31] Furthermore, as discussed by the Federal Court in its leading case, the most important legal limits and prohibitions arise from lawyers' duties to exercise their activity independently, keep client-related information confidential and avoid conflicts of interest.

In this context, the Administrative Court of the canton of Aargau dealt with a case in 2008 in which the lawyer who represented the plaintiff as counsel was at the same time the president of the board of the third party funder financing the litigation. Despite this double function, the Court found that the lawyer's duty to act independently had not been breached as long as the litigation funding agreement provided for the priority of the lawyers' rules of professional conduct over the interests of the funder and did not grant the funder any right to interfere with the lawyers' handling of the litigation.[32]

By contrast, in another decision, of 22 January 2015, the Swiss Federal Court found that a lawyer had breached the duty to avoid conflicts of interest in a situation where the lawyer had represented both his client and the litigation funder when they negotiated the funding agreement. The Court found that there was a conflict between the interests of these parties with respect to the share of the proceeds of the litigation that they would receive.[33] In addition, the Court criticised the fact that the agreement provided for a share of the proceeds to be used to repay private loans that the lawyer had granted his client earlier on. As a consequence, the Court found that the lawyer had breached his professional duties.[34]

Furthermore, Swiss law narrowly restricts the options for lawyers to agree to success-related remuneration. The Federal Lawyers Act bans the possibility of agreeing on a full-success fee (i.e., arrangements under which remuneration is only owed in the event of success, or in which the sole remuneration consists in a share of the proceeds of the litigation (*pactum de quota litis*)).[35] By contrast, Swiss case law has confirmed the permissibility of a *pactum de palmario*, an arrangement pursuant to which the client pays a reduced fee and the lawyer is in turn entitled to a share of the proceeds of the litigation as an additional (contingent) fee component.[36] The courts have held that the fee component that is unrelated to the outcome of the litigation must at least cover the lawyers' costs and must allow for a reasonable profit.[37] In its most recent leading case, the Federal Court has furthermore specified that the success-related component must not exceed the amount of the unconditional fee component. Furthermore, the agreement of a *pactum de palmario* is only permissible at the outset of the mandate or after the dispute has ended, but not in between.[38] Litigation funding arrangements that circumvent the general ban on success fees are also prohibited. This can be the case if counsel in the litigation is at the same time

a shareholder of the funder, in which case the lawyer's duty to act independently would also be violated.[39]

Currently, there is no specific regulation and supervision of third party litigation funding in Switzerland. In particular, the Swiss Federal Court has clarified that third party litigation funding does not qualify as an insurance that would fall under the Insurance Supervision Act[40] because there is no payment of a premium in exchange for insurance against a future risk.[41] Furthermore, the core offering of litigation funders does not fall within the scope of other Swiss financial market laws.[42] The Federal Court does not seem to exclude a need for future regulation,[43] and representatives of litigation funders have considered whether regulation may actually be in the interest of providers to help and better establish the existing offer.[44] Nevertheless, there is currently no prospect of regulation (and no self-regulation either).[45]

Structuring the agreement

There is no specific model agreement in use by Swiss litigation funders and each funder uses its own template. However, most of the relevant agreements are structured very similarly.[46] Some funders provide a template for download from their website.[47]

The process of entering into a funding agreement ordinarily consists of two phases: after a preliminary assessment of the prospects of the case, the funder will require the prospective plaintiff to enter into an exclusivity arrangement for a certain period (e.g., three weeks), which may already specify the basic terms of the future funding agreement; during the exclusivity period, the funder will conduct a more thorough assessment allowing for an informed decision on whether to take on the case.[48]

Funding agreements in Switzerland are typically structured as a financing (not as a purchase) of the claim.[49] The funder enters into an obligation to pay all costs that are reasonably required to pursue the claim. This relates to court costs (including advances that are payable by the plaintiff) and the plaintiff's own attorneys' fees. Depending on its structure, the funding agreement may in part qualify as a contract for the benefit of a third party (e.g., for the benefit of the lawyers).[50] Furthermore, the potential compensation of the defendant for its legal fees if the claim is unsuccessful is also covered, which is not the case for many non-continental European funders. Depending on the nature of the case, the plaintiff may furthermore require the funding of a party-appointed expert to pursue the claim.[51]

In exchange for the financing, the funder receives a share of the proceeds of the litigation. Generally, Swiss funders can be expected to take a share in the region of 30 per cent of the net revenue.[52] The share may vary, however, depending on the absolute value recovered and the point in time at which the dispute comes to an end (i.e., the funder's share will be lower in the case of high amounts recovered and in the case of an early settlement).[53] Furthermore, it appears to be more and more frequent that the funder's share is calculated as a multiple of the amount invested by the funder and that the funder's share is capped.[54]

Under Swiss law, the question arises as to how the funder's claim can be secured. In Swiss civil procedure, a party cannot be authorised by agreement to pursue a claim on behalf of another person.[55] As a consequence, the plaintiff would no longer have standing to sue if the claim was assigned to the funder. Therefore, some agreements merely provide for a

duty to assign the agreed share to the funder upon first request.[56] However, a pledge of the claim as security for the funder's share seems to be the preferred option.[57]

The agreements usually provide for the funder's right to withdraw from the contract if events materially affect the initial assessment of the case. Such events typically include:

1. the surfacing of previously unknown, detrimental facts;
2. a change in case law that affects the case;
3. a loss of important evidence; and
4. a deterioration of the defendant's financial position.[58]

Some funders will only commit to funding the case before the courts of first instance.[59] In any event, however, the rendering of a judgment that results in a full or partial dismissal of the claim will usually also trigger a right of termination by the funder.[60] In the event of withdrawal, the funder will be required to cover all costs that have been incurred so far (including costs resulting from a termination of the proceedings). However, the plaintiff will be entitled to continue the proceedings at its own cost and risk.[61]

Similarly, funding agreements often provide for an exit mechanism if the parties (i.e., the funder and the plaintiff) fail to reach an agreement regarding a settlement offer. The party rejecting the settlement is usually entitled to continue the proceedings but will become liable to the other party for the proceeds that would have resulted from the settlement.[62]

Recent case law on disputes between funders and plaintiffs in Switzerland has dealt with the scope of a funding agreement (between two individuals);[63] with a funder's request for civil attachment of the alleged proceeds of an arbitration proceeding;[64] with a funder's request for debt collection based on a foreign arbitral award against the insolvent plaintiff;-[65] with a funder's request for inspection of the (defaulting) plaintiff's annual and audit reports;[66] and, finally, requests of both the plaintiff's attorney (on his or her own behalf) and the defeated plaintiff itself for debt collection against the funder.[67]

Disclosure

In Swiss civil procedure law, the parties can seek disclosure and the production of documents from the counterparty or third parties if the information is of relevance for the court's decision.[68] However, production requests must be precisely worded and relate to documents that are clearly specified since fishing expeditions are inadmissible.[69]

Legal documents stemming from communications between a party or third party and counsel are exempt from disclosure obligations (attorney–client privilege).[70] The scope of this exception was significantly expanded in 2013,[71] and is today predominantly deemed to apply to all types of legal documents (including notes to file, whether prepared by the lawyer or the client, legal assessments, draft contracts, etc.) and irrespective of whether they are in the possession of the lawyer, the client or even a third party.[72] As a consequence, assessments from counsel will be subject to privilege even if they are in the hands of the litigation funder.

Under Swiss civil procedure law, there is also no duty to disclose the existence of a litigation funding agreement.[73] In particular, production requests relating to the funding

of a claim are not permissible because they are irrelevant for the court's decision.[74] As a consequence, more often than not in court litigation, the existence of a funding arrangement will not be disclosed.

By contrast, in international arbitration, some authors have argued that a claimant would be under a duty to disclose the fact that it is supported by a litigation funder, in particular to allow for the evaluation of a security-for-costs request.[75] Furthermore, under the IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, any legal or physical person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of that party.[76] As a consequence, concerns regarding relationships between an arbitrator and one of the parties with respect to conflicts of interest extend to third party funders and may require the disclosure of the existence of a funding arrangement.[77]

There are indications for a trend towards the introduction of specific new rules addressing the disclosure of third party litigation funding in international arbitration. For example, Article 11(7) of the revised ICC Rules of Arbitration, which entered into force on 1 January 2021, stipulates that '[i]n order to assist prospective arbitrators and arbitrators in complying with their duties [to disclose any facts or circumstances with respect to their impartiality and independence], each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which 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'.[78]

In Switzerland, litigation funding agreements are typically subject to confidentiality obligations. A disclosure requires the consent of the other party.[79] Nevertheless, consideration is given to whether the chances of settlement would increase if the case's own financial strength (because of the funder's support) and soundness (given that it has passed the funder's assessment) is demonstrated to the opposing party early on. As a consequence, a voluntary disclosure of the existence of a funding arrangement for tactical reasons is considered.[80]

Costs

Swiss law of civil procedure generally follows the loser-pays rule, according to which the losing party has to pay the court costs and also compensate the winning party for that party's attorney's fees.[81] However, party costs are awarded on the basis of tariffs that depend on the amount in dispute.[82] In most cases, the compensations awarded cover only part of the actual costs incurred.

Upon the filing of the statement of claim, the court will usually request an advance on costs from the plaintiff to cover the prospective court costs.[83] The amount of this advance depends on the amount in dispute. Furthermore, each party must advance the costs for the taking of evidence that it has requested.[84] In addition, at the defendant's request, the plaintiff must also provide security for the party costs if, inter alia, the plaintiff is domiciled abroad and no treaty exemption applies; the plaintiff appears to be bankrupt; or there are other grounds for assuming that a claim for party costs would be at risk.[85] The question of whether the funding of a plaintiff's claim (to the extent the defendant becomes aware of this fact) may give rise to a duty to secure the defendant's party costs is hardly discussed in legal writing in Switzerland. In an unpublished decision of the Commercial Court of the

Canton of Zurich, however, the Court ordered a plaintiff who – had it not been for a litigation funding arrangement – clearly lacked sufficient funds for conducting major litigation to provide security for the defendant's party costs.[86] Furthermore, in another case before the same court, where the conditions for having to secure party costs were met on the part of the plaintiff (who was bankrupt), the question arose whether the plaintiff could avoid the duty to furnish security by reference to the fact that its funder would be liable under the funding agreement for potential party costs payable if the claim was unsuccessful.[87] The Court held that only the actual party's ability to meet its financial obligations was relevant for assessing whether party costs had to be secured under the CPC.[88] As a consequence, the Court concluded that the obligation of the funder, which only exists in relation to the plaintiff, to pay compensation for the defendant's party costs, did not release the plaintiff from its duty to furnish a security.[89]

In international arbitration, notable authors even argue that a claimant appearing to lack assets to satisfy a final cost award but pursuing the claim with the funding of a third party makes a strong prima facie case for security for costs.[90]

Therefore, just as in other jurisdictions, there is a risk in Swiss-based proceedings that a funded party bringing a claim will be ordered to pay a security for party costs if the lack of sufficient own funds is apparent or once the existence of a funding arrangement has been disclosed.

Outlook and conclusions

In light of the limited number of funded cases in Switzerland so far,[91] litigation funding is not yet an important phenomenon. However, litigation funding is here to stay and will very likely gain further in importance in the future.

The fact that the importance of third party funding in Switzerland has remained rather modest until now may in part have to do with the fact that class actions or other mechanisms of collective redress do not exist in Switzerland at present. In 2013, the government, via the Federal Council, published a report on collective redress, which suggested a number of measures to improve an efficient handling of mass claims in Swiss civil procedure.[92] In this report, the government expressed support for the further development of the Swiss market for litigation funding and described it as an important factor to improve access to justice in mass tort and consumer cases.[93] In March 2018, the Federal Council proposed a partial revision of the CPC, one of the key objectives of which was to strengthen mechanisms of collective redress. Furthermore, the preliminary draft law provided for a duty for courts to inform plaintiffs about the possibility of litigation funding.[94] However, the revision of the CPC, which was adopted by parliament on 17 March 2023 and will enter into force on 1 January 2025, will oblige only the government (and not the courts) to provide the public with information on third party litigation funding to facilitate access.[95] Beyond that, the advance on costs that the plaintiff has to pay at the initiation of the proceedings will generally be reduced to half of the expected court costs.[96] This measure will lower the cost barrier for litigation.

New mechanisms of collective redress have, by contrast, been made the subject of a separate legislative proposal, which was published by the Federal Council on 10 December 2021.[97] To strengthen collective redress in civil proceedings, the Federal Council proposes to extend both the scope of application and the available relief of the

pre-existing group action – which may be filed by associations only and which is to date limited to injunctions and declaratory relief – to include monetary claims.[98] Proceedings could also be concluded by way of a court-approved collective settlement.[99] In general, only those who actively join the action would be involved in the proceeding (opt-in).[100] As an exception to this rule, opt-out settlements would be possible in cases of dispersed damage.[101] However, it remains to be seen whether the draft bill will find a majority in parliament. On 24 June 2022, the commission in charge decided to postpone its decision to enter into the debate of the Federal Council's proposal for the time being and requested various additional clarifications. Furthermore, in July 2023, the commission decided to postpone its decision once more and requested even further evaluations, in particular with respect to measures against a potential abuse of collective actions.

Certainly, these legislative efforts to establish mechanisms of collective redress in Swiss law would, if made law in future, further favour the development of third party funding in Switzerland.

Endnotes

1 Urs Hoffmann-Nowotny and Louis Burrus are partners at Schellenberg Wittmer Ltd. ^ Back to section

2 See Schumacher, Prozessfinanzierung, Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, Thesis Zurich 2015, cited Schumacher, Prozessfinanzierung, pp. 22 et seq. with references. ^ Back to section

3 For more detail on this case, see Section III. ^ Back to section

4 Allianz was one of the complainants that obtained the Federal Court's leading case. ^ Back to section

5 See www.profina.ch, last visited on 16 September 2023. ^ Back to section

6 See www.jura-plus.ch, last visited on 16 September 2023. ^ Back to section

7 See https://nivalion.com, last visited on 16 September 2023. Nivalion focuses on large-scale cases (minimum amount in dispute exceeding €7 million) and is particularly active in arbitration. ^ Back to section

8 See https://www.swisslegalfinance.ch, last visited on 16 September 2023. ^ Back to section

9 See https://liticapital.com/, last visited on 16 September 2023. ^ Back to section

10 See https://omnibridgeway.com/contact/global-contact-details#Emea, last visited on 16 September 2023. ^ Back to section

11 See in this respect also https://www.burfordcapital.com/eu/insights-news-events/news-press-releases/burford-capital-expands-european-footprint/, last visited on 16 September 2023. ^ Back to section

12 See https://legalpass.ch/en, last visited on 16 September 2023. ^ Back to section

13 See Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaaufnahme und Ausblick, in*HAVE* 2013 235 et seqq., p. 240 et seq.; Dähler, Juristische, ökonomische und soziale Aspekte der Prozessfinanzierung, Presentation at the Europa Institut Zürich on 27 January 2012, Section 8. ^ Back to section

14 See in this respect Hunkeler/Wohl, Kommerzielle Prozessfinanzierung zu Gunsten von Insolvenzmassen?, in*BlSchK* 2015, pp. 41 et seqq.; for a discussion of bankruptcy-related aspects of third party funding, see furthermore Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, in *ZZZ* 2019 3 et seqq., pp. 5 et seq. and 14 et seqq. ^ Back to section

15 As a rule, minimum requirements are 250,000 Swiss francs (Profina), 1.5 million Swiss francs (Swiss Legal Finance) and €7 million (Nivalion), see http://www.profina.ch/eignung.html, last visited on 16 September 2023; https://www.swisslegalfinance.ch/qualifying, last visited on 16 September 2023; https://nivalion.com/en/what-we-do/direct-funding, last visited on 16 September 2023). ^ Back to section

16 See for an overview Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, in AJP 2018 458 et seqq. (cited Schumacher,*Pflicht zum Hinweis*), p. 460 et seq. Accordingly, there has been slight market growth in recent years (see, for comparison, Schumacher, *Prozessfinanzierung*, p. 8 with figures from 2014). ^ Back to section

17 However, Nivalion is a member of the International Legal Finance Association (see https://www.ilfa.com/membership-directory, last visited on 16 September 2023). ^ Back to section

18 See Section I. ^ Back to section

19 See, e.g., decision of the Commercial Court of the Canton of Zurich of 6 March 2018, HG170257-O (unpublished); decision of the Commercial Court of the Canton of Zurich of 12 February 2016, in ZR 115 (2016) No. 17; decision of the Federal Court 2C_814/2014 of 22 January 2015; decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040. ^ Back to section

20 Schumacher/Nater, Anwaltsrubrik: 'Prozessfinanzierung und anwaltliche Aufklärungspflichten', in SJZ 2016 43 et seqq. with reference to a corresponding statement of the Federal Court in its decision 2C_814/2014 of 22 January 2015, c. 4.3.1. ^ Back to section

21 The decision is reported in the Official Case Reporter: BGE 131 (2004) I 223 et seqq. It was confirmed later by the decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1 (not published in the Official Case Reporter). ^ Back to section

22 Anwaltsgesetz of 17 November 2003, LS (Systematic Collection of Zurich Cantonal Laws) 215.1. ^ Back to section

23 Article 27 of the Swiss Federal Constitution, SR (Systematic Collection of Swiss Federal Laws) 101. ^ Back to section

24 Article 8(1)(d) of the Federal Lawyers Act of 23 June 2000, SR 935.61. The statutory requirement that lawyers exercise their activity as independent professionals does not prohibit law firms from being organised as corporations, as long as the corporation is controlled by independent lawyers. It also permitted for a lawyer to exercise their activity as an employee provided they are employed by an independent lawyer or law firm. ^ Back to section

25 BGE 131 (2004) I 223 c. 4.5. ^ Back to section

26 The duty of confidentiality is based on a number of legal sources: the contract between lawyer and client, Article 13 of the Federal Lawyer's Act and the rules issued by the cantonal bar organisations. Breach of the duty constitutes a severe criminal offence, pursuant to Article 321 of the Swiss Penal Code (PC; SR 311.0); it also entails disciplinary sanctions. ^ Back to section

27 BGE 131 (2004) I 223 c. 4.5.6. ^ Back to section

28 The duty to avoid conflicts of interest is again based on a number of legal sources, in particular, Article 398(2) of the Swiss Code of Obligations (CO; SR 220), which requires lawyers to diligently and faithfully perform the business entrusted to them, as well as Article 12(c) of the Federal Lawyers Act. ^ Back to section

29 BGE 131 (2004) I 223 c. 4.6. ^ Back to section

30 BGE 131 (2004) I 223 c. 4.6.3, 4.6.4 and 4.6.6. ^ Back to section

31 Article 157 PC prohibits profiteering (i.e., exploitation of a party in need). Under Swiss civil law, a party that is affected by an agreement that takes unfair advantage can declare its rescission within one year of the contract having been entered into (Article 21 CO); see also BGE 131 (2004) I 223 c. 4.6.6. ^ Back to section

32 AGVE (Official Case Reporter of Court and Administrative Judgments of the Canton of Aargau) 2008 275 et seqq., c. II.2.3. ^ Back to section

33 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.2. ^ Back to section

34 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.3. ^ Back to section

35 Article 12(e) of the Federal Lawyer's Act; furthermore, BGE 143 (2017) III 600 c. 2.5 with further references. Note that Article 12(a) of the Federal Lawyer's Act is also of relevance with respect to success-related remuneration: according to this provision, lawyers are obliged to exercise their duties carefully and conscientiously. This general clause serves as a legal basis for the review of both success-related and unconditional fee components; see the recent decision of the Federal Court 2C_205/2019 of 26 November 2019, c. 4. ^ Back to section

36 BGE 143 (2017) III 600 c. 2.7.4 and 2.7.5; decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.1 (not published in the Official Case Reporter); furthermore, the*obiter dictum* in BGE 135 (2009) III 259 c. 2.3. Article 19 of the Rules of Professional Conduct of the Swiss Bar Association also assumes the permissibility of a *pactum de* palmario. ^ Back to section

37 BGE 143 (2017) III 600 c. 2.7.5; decision of the Lawyer's Supervisory Commission of the Canton of Zurich of 2 March 2006, in ZR (Official Case Reporter of the Canton of Zurich) 105 (2006) No. 46; see also decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.2 according to which this only leaves a relatively narrow scope for the agreement of success-related fee components. ^ Back to section

38 BGE 143 (2017) III 600 c. 2.7.5; confirmed in decision of the Federal Court 2C_205/2019 of 26 November 2019, c. 3. ^ Back to section

39 See AGVE 2008 275 et seqq. c. II.4. As early as 2004, the Swiss Federal Court had in its leading case stated that a lawyer's independence could potentially be jeopardised if counsel to a party held a stake in or acted as a board member of the litigation funder and would thus indirectly profit from the outcome of the litigation (BGE 131 [2004] II 223 c. 4.6.4; see also decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1). ^ Back to section

40 SR 961.01. ^ Back to section

41 BGE 131 (2004) I 223 c. 4.7. ^ Back to section

42 Wegmüller, op. cit., p. 238. ^ Back to section

43 See BGE 131 (2004) I 223 c. 4.6.6 ('These concerns can be addressed by existing laws or, if need be, regulations that will still be introduced.') and 4.8; furthermore, Schumacher,*Prozessfinanzierung*, pp. 20 et seqq. ^ Back to section

44 Wegmüller, op. cit., p. 245. ^ Back to section

45 See, however, Schumacher,*Pflicht zum Hinweis*, pp. 464 et seq., who raises the question of whether a duty for courts to inform plaintiffs about the possibility of litigation funding, as was proposed in a preliminary draft law for a partial revision of the Swiss Federal Code of Civil Procedure (CPC; SR 272; see also in this respect Section VII), should go hand in hand with regulation. ^ Back to section

46 Wey, Kommerzielle Prozessfinanzierung – ein Überblick über Angebot und Rechtsfragen, in Fellmann/Weber (eds.),*Haftpflichtprozess* 2008, Zurich/Basel/Geneva 2008, pp. 43 et seqq., 52. ^ Back to section

47 See template of Profina Finanzierungsvertrag, downloaded from www.profina.ch/ablauf/vertrag.html, last visited on 16 September 2023. ^ Back to section

48 Berger/Furter/Studer, Bei der Prozessfinanzierung, in ZZZ 2023 165 et seqq., p. 167 et seq.; Wey, op. cit., pp. 47 et seqq.; Schumacher,*Prozessfinanzierung*, p. 101. ^ Back to section

49 Schumacher,*Prozessfinanzierung* p. 104. ^ Back to section

50 See decision of the Superior Court of the Canton of Zurich of 17 May 2018, RT180057-O, c. 3.1. ^ Back to section

51 Wegmüller, op. cit., p. 241; Wey, op. cit., p. 52. ^ Back to section

52 Schumacher,*Prozessfinanzierung*, p. 21. See, however, also Wey, op. cit., p. 53, who reports a range of 20 to 50 per cent. ^ Back to section

53 Berger/Furter/Studer, op. cit., p. 168; Wegmüller, op. cit., pp. 241 et seq.; Schumacher,-*Prozessfinanzierung*, p. 21. ^ Back to section

54 Berger/Furter/Studer, op. cit., p. 168. ^ Back to section

55 BGE 137 (2011) III 293, c. 3.2. ^ Back to section

56 Profina Finanzierungsvertrag, § 3. ^ Back to section

57 Schumacher,*Prozessfinanzierung*, p. 223; Meier, op. cit., pp. 7 et seq. ^ Back to section

58 Wey, op. cit., p. 56. ^ Back to section

59 Profina Finanzierungsvertrag, § 1. ^ Back to section

60 Schumacher,*Prozessfinanzierung*, p. 99; Meier, op. cit., p. 9. ^ Back to section

61 Schumacher,*Prozessfinanzierung*, p. 99; Wey, op. cit., p. 56. ^ Back to section

62 Schumacher,*Prozessfinanzierung*, p. 100; see also Wey, op. cit., p. 56. ^ Back to section

63 Decision of the Federal Court 4A_556/2021 of 21 March 2022. ^ Back to section

64 Decision of the Federal Court 5A_14/2018 of 11 March 2019. ^ Back to section

65 Decision of the Federal Court 5A_910/2019 of 1 March 2021. ^ Back to section

66 Decision of the Commercial Court of the Canton of Zurich of 7 May 2021, HE210051-O. ^ Back to section

67 Decisions of the Superior Court of the Canton of Zurich of 17 May 2018, RT180057-O and of 24 May 2018, RT180059-O. ^ Back to section

68 Article 160(1)(b) CPC. The taking of evidence is generally limited to disputed facts that are legally relevant (Article 150 CPC; see also in this respect decision of the Court of Cassation of the Canton of Zurich of 23 February 1981, in ZR 80 [1981] No. 102 c. 7b). ^ Back to section

69 Schmid, in Spühler/Tenchio/Infanger (eds.),*Basler Kommentar Schweizerische Zivilprozessordnung*, 3rd ed., Basel 2017, para. 24 ad Article 160 with further references. ^ Back to section

70 Article 160(1)(b) CPC; see also Article 166(1)(b) CPC. ^ Back to section

71 Formerly, the exception was limited to genuine criminal defence counsel-related correspondence and it was argued that only documents in the hands of external lawyers would be protected. ^ Back to section

72 Schmid, in Spühler/Tenchio/Infanger (eds.),*Basler Kommentar Schweizerische Zivilprozessordnung*, 3rd ed., Basel 2017, para. 24 ad Article 160; Schmid/Baumgartner, in Oberhammer/Domej/Haas (eds.), *Kurzkommentar* ZPO, 3rd ed., Basel 2021, para. 6a ad Article 160; Hasenböhler, in Sutter-Somm/Hasenböhler/Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung*, 3rd ed., Zürich 2016, para. 18 ad Article 160. ^ Back to section

73 An exception applies where a party has previously obtained legal aid, in which case it is required to notify the court upon entering into a litigation funding agreement that it has made sufficient funds available and no longer depends on legal aid (see decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040, c. 8.3; furthermore, also of the Federal Court 2C_814/2014 of 22 January 2015 c. 5.2). ^ Back to section

74 See Section V, first paragraph. ^ Back to section

75 von Goeler, Third-Party*Funding and its Impact on International Arbitration Proceedings*, Alphen a.d.R. 2016, pp. 130 et seqq. (also with reference to further procedural issues that may require a party to disclose certain facts related to the funding) and pp. 338 et seq.; Scherer, 'Third-Party Funding in International Arbitration: Towards Mandatory Disclosure of Funding Agreements', in Cremades/Dimolitsa (eds.), Third-party*Funding in International Arbitration*, ICC Dossier, Vol. 10, Paris 2013; pp. 95 et seqq.; see also ICC Commission Report, Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin 2/2015, para. 89. ^ Back to section

76 General Standard 6(b) and 7(a) of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. ^ Back to section

77 Voser/Petti, the revised IBA Guidelines on Conflicts of Interest in International Arbitration, in ASA Bulletin 1/2015, pp. 6 et seqq., p. 19; Scherer, op. cit. p. 96 et seq.; see also Born,*International Commercial Arbitration*, 3rd ed., Alphen a.d.R. 2021, Vol. II, pp. 3100 et seq. Voluntary disclosure is also recommended as best practice in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration of April 2018, p. 188. ^ Back to section

78 See in this context also Article 13a of the VIAC Rules of Arbitration and Mediation 2021 and Article 13a of the VIAC Rules of Investment Arbitration and Mediation 2021, https://globalarbitrationreview.com/new-rules-investment-disputes-in-vienna-, last visited on16 September 2023, as well as Rules 14 and 53(4) of the ICSID Arbitration Rules, 2022 version, https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf, last visited on 16 September 2023. ^ Back to section

79 Schumacher,*Prozessfinanzierung*, p. 98. ^ Back to section

80 Berger/Furter/Studer, op. cit., pp. 168, 170; Wey, op. cit., pp. 54 et seq. ^ Back to section

81 Article 106(1) and (2) CPC. ^ Back to section

82 See Article 96 CPC. ^ Back to section

83 Article 98 CPC. According to the revision of the CPC which will enter into force on 1 January 2025, the advance on costs the plaintiff is required to pay will generally be reduced to half of the expected court costs (see also Section VII). ^ Back to section

84 Article 102 CPC. ^ Back to section

85 Article 99(1) CPC. ^ Back to section

86 Decision of the Commercial Court of the Canton of Zurich of 6 March 2018, HG170257-O (unpublished), c. 2.3.1. ^ Back to section

87 Decision of the Commercial Court of the Canton of Zurich of 12 February 2016, in ZR 115 (2016) No. 17. ^ Back to section

88 ibid., c. 3; see also the decision of the Commercial Court of the Canton of Zurich of 6 March 2018, HG170257-O (unpublished), c. 2.3.2. ^ Back to section

89 ibid., c. 4. The security can, however, be furnished in the form of a payment guarantee by a Swiss bank or insurance company (Article 100[1] CPC). ^ Back to section

90 Born, op. cit., pp. 2680 et seq.; see also ICC Commission Report, Decisions on Costs in International Arbitration, op. cit., para. 90. By contrast, Redfern/O'Leary, 'Why it is time for international arbitration to embrace security for costs', in*Arbitration International* 2016 397 et seqq., pp. 407 et seq., suggest that 'the fact of third-party funding alone is not enough to justify an order for security of costs'; for an overview of arbitral practice and the discussion among scholars in Switzerland, see Bachmann, 'The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri,' in ASA Bulletin 4/2020, pp. 842 et seqq. ^ Back to section

91 See Section I. ^ Back to section

92 Report of the Swiss Federal Council on Collective Redress in Switzerland of 3 July 2013, available online at https://www.bj.admin.ch/dam/bj/de/data/publiservice/publikationen/berichte-gutachten/gutachten/vpb-2013-7a-d.pdf.download.pdf, last visited on 16 September 2023. ^ Back to section

93 Report of the Swiss Federal Council on Collective Redress in Switzerland of 3 July 2013, p. 46. ^ Back to section

94 Explanatory Report of the Swiss Federal Council on the Revision of the CPC (Improvement of the Application of the CPC and the Enforcement of Rights) of 3 March 2018, pp. 50 et seq.; see also Schumacher,*Pflicht zum Hinweis*, pp. 458 et seqq. ^ Back to section

95 Article 400(2 bis) of the bill concerning the revision of the CPC (Improvement of the Application of the CPC and the Enforcement of Rights) of 17 March 2023 (see also the corresponding Explanatory Report at Swiss Federal Gazette 'BBl' 2020, pp. 2697 et seqq., 2776 et seq.). ^ Back to section

96 Article 98(1) and (2) of the bill concerning the revision of the CPC; see Section VI. ^ Back to section

97 See the Explanatory Report on the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements), BBl 2021, pp. 3048 et seqq. ^ Back to section

98 Articles 89 of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements). ^ Back to section

99 Articles 307b et seqq. of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements). ^ Back to section

100 Articles 307d(1) and 307f(1) of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements). ^ Back to section

101 Articles 307h(2) of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements). ^ Back to section

Schellenberg Wittmer

Urs Hoffmann-Nowotny urs.hoffmann-nowotny@swlegal.ch
Louis Burrus louis.burrus@swlegal.ch

Schellenberg Wittmer

Read more from this firm on Lexology

United Arab Emirates - DIFC

Mohamed El Hawawy and **Natalie Jensen**

Ince

Summary

INTRODUCTION

THE YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

The Dubai International Financial Centre (DIFC) is a free zone within the United Arab Emirates (UAE), which was established in 2004. The DIFC is a common law jurisdiction – an enclave within the UAE's otherwise civil law legal system – and has its own courts (the DIFC courts), where proceedings are governed by the Rules of the DIFC courts (RDC), which are closely modelled on the English Civil Procedure Rules. The DIFC also has its own civil and commercial legal framework, which is different from the onshore UAE law. As part of that framework, the DIFC has its own Arbitration Law,[2] which is based on the UNCITRAL Model Law. This used to be one of the many differences between the DIFC and onshore UAE; however, onshore UAE arbitration is now governed by Federal Law No. 6 of 2018, which is also based on the UNCITRAL Model Law. This change, in addition to the recent landmark ruling that calls upon Dubai courts to enforce judgments and orders rendered by the English courts in the UAE going forward,[3] brings the UAE into line with internationally accepted standards in terms of procedure and enforcement. It remains to be seen how the new Law will be applied in practice, but this development is likely to offer more certainty and, therefore, also likely to make UAE-seated arbitration more attractive to funds.

The UAE, and the Middle Eastern region in general, have not been a traditional market for litigation funding, and that has mostly been because funders have perceived Middle Eastern jurisdictions as not offering the level of certainty and predictability they look for in the legal process. However, the introduction of common law free zones such as the DIFC (and, more recently, Abu Dhabi Global Market), with their own courts and arbitration laws, gives rise to more attractive new markets for funders.

Since their establishment in 2011, the DIFC courts have seen their caseload increase steadily, and they are becoming the preferred dispute resolution forum in the region for both local and regional parties, as well as for parties from other international jurisdictions. According to the DIFC's annual report for 2022,[4] the total number of cases before the DIFC courts, including the Court of First Instance with its Technology and Construction Division (TCD) and Arbitration Division, and the Small Claims Tribunal (SCT) in enforcement proceedings, was 861, with an average value of 58,277,124.91 dirhams for cases before the Court of First Instance, including the TCD and Arbitration Division, and an average value of 95,628.92 dirhams for cases before the SCT. In 2022, the DIFC courts reported that, in the Court of First Instance, 121 cases were filed, with a total value of 4.4 billion dirhams – a 16 per cent year on year increase – and an average case value of 58.3 million dirhams – 25 per cent higher than in 2021. These figures reinforce and illustrate the DIFC courts' record of certainty for business through enforceable judgments. The operational capacity of the SCT was strong in 2022, with 472 claims filed, an increase of 31 per cent year-on-year. The total value of all claims and counterclaims was 43,224,274.02 dirhams, a 17 per cent increase on the 2021 figure.[5] This all points strongly towards significant potential for growth of litigation funding.

Various international funders have funded disputes in the DIFC in the past or have expressed interest in doing so in the future. In terms of physical presence, Omni Bridgeway, one of the companies offering litigation funding services, has an office in the DIFC.[6]

The year in review

Following the covid-19 pandemic, the DIFC courts have continued to function with modernity and reliability. All of the orders and judgments by the DIFC courts were issued in digital format, and over 90 per cent of hearings were held remotely. The courts' internal processes also operate entirely digitally, ensuring efficiency and accessibility for users.

The Arbitration Division (ARB), launched in February 2020, has seen continued success, despite a decrease in the number of cases, from 33 in 2021 to 21 in 2022. The ARB is similar to the TCD, which was launched in 2017 and leverages dedicated judicial and registry oversight and case management expertise. In addition, as the arbitration-related offerings are now streamlined, arbitration-related matters can be tended to faster as a fast response is essential for effectively supporting arbitration proceedings. In addition, being well connected on a national, regional and global scale, the new division will help to ensure certainty of recognition and enforcement of arbitral awards.

The DIFC courts launched a Digital Economy Division in 2021, and the Digital Economy Court Rules were launched in 2022. This provides further opportunity for litigation funding to expand its reach in innovative, potentially high-value areas such as fintech, e-commerce and intellectual property. The fast digital economy claims procedure could benefit from growth in litigation funding as, despite the procedure being generally suitable for claims of 100,000 dirhams or less, consent to hearings with higher claim values can be given by the parties, and the procedure's no-adverse-costs model could make it more attractive to litigation funders.

The TCD continues to deal with construction and engineering disputes, offering a forum similar to that of the Technology and Construction Court of England and Wales. It is staffed by specialist judges who are able to handle complex technical disputes. While 2020 saw an impressive increase of 200 per cent in the number of cases filed at the TCD, 2022 saw three cases heard, a 50 per cent decrease from 2021. It will nonetheless be interesting to see how the scope of this comparatively established court evolves with the emergence of the aforementioned Digital Economy Division, though the court's pre-eminence in complex construction disputes will likely continue.

Legal and regulatory framework

Established in 2004, the DIFC is a relatively new common law jurisdiction. As a result, it does not have the same history of changing attitudes to third party funding (TPF) and champerty as that shared by other common law jurisdictions. DIFC legislation is silent on the issue of TPF and champerty, but, having its origins in the English common law system, the DIFC jurisdiction has inherited much of the same modern approach to these issues.

The position in England is that maintenance and champerty are no longer crimes or torts under English law, but that champertous agreements, as a matter of public policy, are unenforceable. TPF agreements, if properly structured, have been held to be in the public interest and not champertous. This is relevant, because English court judgments have persuasive authority in the DIFC courts.

However, any English law precedent must be approached with caution, because the DIFC courts issued Practice Direction No. 2 of 2017 (the PD), which created new rules that are similar, but not identical, to the English law position.

In adopting the PD, the DIFC courts have opted for a light-touch approach to regulation, with the main requirement being that of disclosure of the fact of TPF and the identity of the funder. Subsection 3 of the PD makes it clear that the PD 'is without prejudice to any subsequent determination of the DIFC courts regarding LFAs [litigation funding agreements] in general or any specific LFA in particular (or any part thereof)'.[7] This means that we can expect further pronouncements by the DIFC courts regarding TPF that will continue shaping the procedural requirements for TPF in the DIFC.

In addition, in September 2019, the DIFC issued DIFC Order No. 4 of 2019 (the Order).[8] The Order addresses the conduct of practitioners in the DIFC and also contains several provisions relevant to TPF.

The Order imposes a general duty to avoid conflicts of interest and this should be considered when undertaking due diligence against the third party funder and in taking instructions from the client without significant third party intervention. The Order also obliges practitioners to refuse to take instructions that are in the interests of the third party funder without express written authority from the client, and imposes a duty to advise clients on the effect and impact of any TPF agreements on the client's potential liability to pay legal fees and expenses. Furthermore, the Order prohibits practitioners from accepting referral fees or benefits from a TPF provider, unless full disclosure is made in writing to the client.

One of the most significant developments in the UAE and DIFC arbitration landscape took place in September 2021 when the government of Dubai issued Decree No. 34 of 2021 concerning the Dubai International Arbitration Centre (the Decree), together with the Statute of Dubai International Arbitration Centre (the Statute). The aim behind the issuance of the Decree and the Statute was to streamline the arbitration services offering in Dubai. The Decree effectively abolished the Emirates Maritime Arbitration Centre and the DIFC Arbitration Institute and merged the operations of these two entities into the Dubai International Arbitration Centre (DIAC). It is now understood that DIAC will supervise any existing arbitrations before these two centres and will replace the two centres in existing arbitration agreements pursuant to which any proceedings have not yet been commenced. The Statute also provides, among other things, that in the absence of an agreement otherwise, the default seat for DIAC arbitrations will be the DIFC. The most recent DIAC Arbitration Rules, which came into effect on 21 March 2022, now contain specific TPF provisions in relation to disclosure and conflicts of interest (see Section V, Article 22 of the DIAC Arbitration Rules).

Currently, the TPF market in the DIFC is not regulated, but this may change as the DIFC has been considering expanding the powers of the DIFC courts to issue regulations regarding TPF (see Section VII).

It is worth noting that while contingency fees, or no-win-no-fee arrangements and agreements whereby a lawyer is rewarded by way of a share of the proceeds, are prohibited in onshore UAE proceedings, there has been a suggestion by the DIFC courts that reasonable and proper contingency fees would be allowed in proceedings in the DIFC courts.[9] Conditional fee arrangements are permitted subject to disclosure requirements (whereby, in the event that the client is successful, the legal representatives receive an uplift in fees, as opposed to a share in the proceeds).

Structuring the agreement

TPF in the DIFC is growing in popularity but is yet to reach the levels comparable with funding available in other common law jurisdictions. As a result, the TPF agreement structure is borrowed heavily from the structures typical in other common law jurisdictions, and parties can expect to negotiate similar provisions relating to exclusivity, withdrawal, confidentiality, pricing, settlement and liability for costs.

The Abu Dhabi Global Markets courts (the ADGM courts) issued the Litigation Funding Rules[10] in 2019 and these, together with the Civil Evidence Regulations 2015, prescribe the form of TPF agreements, among other things. The issuance of the Litigation Funding Rules by the ADGM courts came about as a response to the growing interest in TPF in the region. These Litigation Funding Rules are the first of their kind in the Middle East and Africa region, and aim to provide both parties and funders with greater certainty in relation to the enforceability of funding arrangements in proceedings for resolving disputes. The Litigation Funding Rules were issued after an extensive review of the TPF frameworks in other jurisdictions and a consultation stage was carried out to ensure that the views of all interested parties were received by the ADGM courts.

The DIFC courts have not yet had an opportunity to consider specific clauses in contractual disputes between funders and claimants. In one DIFC case,[11] the claimant's funders filed a Part 8 claim with the DIFC Court of First Instance to protect and preserve its interest in the funding agreement following a change of legal representation by the claimant without finalising the replacement payment mechanism under the funding agreement. The funders obtained an order that the defendants pay the sum adjudged by the Court as due to the claimant (in excess of US$11 million) into Court and that this sum be held by the Court until the parties reach settlement or until final award or judgment. This indicates the willingness of the DIFC courts to uphold the rights of the funders under TPF agreements, which is a positive trend in this jurisdiction.

Disclosure

The PD requires the funded party to disclose the fact of funding and the identity of the funder. The PD also sets out when and how notice must be given. For a standard claim (RDC Part 7), notice must be given in the case management information sheet, which has to be submitted before the case management conference (CMC) pursuant to RDC 26.3. Alternatively, if a party enters into a TPF agreement after the CMC, notice must be given in writing to all the other parties, as well as to the DIFC Courts' Registry, within seven days of entering into the agreement. In all other claims, written notice must be served to all other parties to the dispute as well as the DIFC Courts' Registry, where proceedings have yet to be commenced, as soon as practicable after commencement, including within the claim form or the particulars of claim and, in instances where the agreement was entered into after the proceedings were commenced, notice must be given within seven days of the date of the agreement.[12]

The PD also makes it clear that there is no notice requirement for claims made in the SCT unless those claims are transferred to or appealed to the Court of First Instance, in which case notice must be given in accordance with the procedures outlined above.

This move towards transparency has its advantages, but parties should bear in mind potential consequences that this may entail. The PD does not require disclosure of a copy or

of any part of the TPF agreement, but it is notable that the court may order such disclosure. TPF agreements often contain confidential and privileged information, so it is sensible that there is no standard requirement to disclose an agreement. It remains to be seen in which circumstances the DIFC courts would order the disclosure of an agreement or parts of it. As the DIFC is a common law jurisdiction, the DIFC courts recognise the concept of privilege, and therefore the parties can seek to protect their interests by utilising carefully drafted non-disclosure and common-interest clauses in TPF agreements.

In addition, the DIAC Arbitration Rules 2022 mentioned above contain provisions that require a party who has entered into such an arrangement to promptly disclose this to all other parties and the centre, together with details of the identity of the funder and whether or not the funder has committed to an adverse costs liability. If any TPF arrangement gives rise to a conflict of interest between the funder and any member of the tribunal, the parties are prohibited from entering into such arrangement.

Costs

The position in relation to the liability of funders for adverse costs, security for costs and recovery of costs of securing TPF in the DIFC is broadly similar to the position in the United Kingdom.

The PD clarifies that the DIFC courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems appropriate. However, the PD is silent on the amount of costs that can be so recovered. It remains to be seen whether a cap similar to the *Arkin* cap on costs recoverable from third party funders will apply.

A defendant may seek an order for security for costs against a third party funder, and the DIFC courts have jurisdiction to make this order if they are satisfied, having regard to all the circumstances of the case, that it is just to do so.

RDC Rule 25.103 clarifies that the defendant may seek an order for security for costs against someone other than the claimant, and the court can make such an order if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and one or more of the conditions in Rule 25.104 applies.[13] RDC Rule 25.104 stipulates two conditions: that the person has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against them; or 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 in the proceedings, and is a person against whom a costs order may be made.

In addition, the PD says that the court may consider the fact of disclosure of TPF when deciding on the application for security for costs, but the fact of funding shall not by itself be determinative.

The PD does not address the question of whether the costs of TPF are recoverable in DIFC court proceedings; this therefore remains an area of uncertainty.

In line with other major jurisdictions, the arbitration legislation in the DIFC does not authorise arbitrators to make costs orders against third parties as they are not parties to the arbitration agreement. The position regarding recoverability of TPF costs in DIFC-seated arbitration has not been addressed in case law yet. In England, the judgment in *Essar v.*

Norscot[14] addressed this issue, finding that the definition of 'other costs' in Section 59(1) of the English Arbitration Act 1996 includes TPF costs. *Essar* was subsequently applied in the case of *Tenke Fungurume Mining SA v. Katanga Contracting Services SAS*,[15] to award the defendant fees it had paid on its litigation funding loan. Notably, however, Section 38(5) of the DIFC Arbitration Law, which defines the scope of what constitutes arbitration costs, is not as widely drafted as Section 59(1) of the Arbitration Act 1996.

Outlook and conclusions

The DIFC courts have dedicated significant attention to developments in TPF worldwide, and to creating a regulatory environment that benefits parties' access to TPF. The DIFC courts' Order issued in September 2019 and the ADGM courts' issuance of the Litigation Funding Rules earlier in that year show a strong interest in TPF in the region.

The DIFC courts remain a benchmark internationally for modern international commercial courts. Following the launch of 'tejouri' (a globally available digital vault for secure storage of important documentation) in 2022, further technological innovations are likely to emerge as the DIFC courts seek to further enhance their technical capabilities and versatility for users.

The launch of Dubai's 'D33 Strategy', which aims to double FDI into Dubai to 650 billion dirhams in the next decade,[16] may make further legislation in this area an attractive strategy for enhancing Dubai's attractiveness for litigation funders, as well as businesses from a wide range of industries. Following the recognition of TPF in the 2022 DIAC Arbitration Rules, 2024 could therefore be an exciting year of evolution for TPF in the DIFC and other courts across the Middle East.

Endnotes

1 Mohamed El Hawawy is a joint managing partner and Natalie Jensen is a partner at Ince & Co Middle East. ^ Back to section

2 DIFC Law No. 1 of 2008, as amended. ^ Back to section

3 *Lenkor Energy Trading DMCC v. Puri* (2020) EWHC 75 (QB). ^ Back to section

4 DIFC Courts Annual Report (2022), https://www.difccourts.ae/media-centre/publications/annual-reports/annual-report-2022-english. ^ Back to section

5 https://www.difccourts.ae/media-centre/newsroom/rapid-execution-new-strategy-widens-appeal-difc-courts-jurisdiction-international-business-community. ^ Back to section

6 https://omnibridgeway.com/. ^ Back to section

7 https://www.difccourts.ae/rules-decisions/practice-directions/practice-direction-no-2-of-2017-on-third-party-funding-in-the-difc-courts. ^ Back to section

8 https://www.difccourts.ae/application/files/7315/9473/3516/DIFC_Courts_Order_No._4_of_2019_Mandatory_Code_of_Conduct_for_Legal_Practitioners_in_the_DIFC_Courts.pdf. ^ Back to section

9 *Loralia Group LLC v. Landen Saudi Company* [2018] DIFC ARB 004. ^ Back to section

10 https://www.adgm.com/documents/courts/legislation-and-procedures/legislation/rules/litigation-funding-rules-2019.pdf. ^ Back to section

11 *Vannin Capital PCC PLC v. Mr Rafed Abdel Mohsen Bader Al Khorafi and ors* 2014 DIFC CFI 036. ^ Back to section

12 https://www.difccourts.ae/rules-decisions/practice-directions/practice-direction-no-2-of-2017-on-third-party-funding-in-the-difc-courts. ^ Back to section

13 https://www.difccourts.ae/rules-decisions/rules/part-25. ^ Back to section

14 *Essar Oilfields Services Ltd v. Norscot Management Pvt Ltd* [2016] EWHC 2361 (Comm). ^ Back to section

15 *Tenke Fungurume Mining S.A. v. Katanga Contracting Services S.A.S.* [2021] EWHC 3301 (Comm). ^ Back to section

16 https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/strategies-plans-and-visions/finance-and-economy/dubai-economic-agenda-d33. ^ Back to section

Ince

Mohamed El Hawawy mohamedelhawawy@incegd.com
Natalie Jensen nataliejensen@incegd.com

Ince

Read more from this firm on Lexology

United Kingdom - England & Wales

Emily O'Neill

Deminor

Summary

INTRODUCTION

THE YEAR IN REVIEW

LEGAL AND REGULATORY FRAMEWORK

STRUCTURING THE AGREEMENT

DISCLOSURE

COSTS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

The litigation funding market in England and Wales is one of the most mature in the world. Estimates of the size of market in the UK in 2023 range from £1.5 billion to £4.5 billion. Based on our own research, we believe these amounts represent the addressable market and that the amounts effectively deployed are probably a fraction of this.[2] All reports agree that the market has grown significantly in the past year. In 2022, PWC UK predicted growth at a compound annual growth rate of 8.7 per cent over the next five years – from £2.2 billion in 2023 to £3.7 billion by 2028.[3] Sources cite a number of factors as causing that growth, including:

1. the increasing cost and complexity of litigation;
2. the increasing awareness of litigation funding among companies and individuals;
3. the increasing availability of funding from institutional investors interested in investing in alternative asset classes;
4. the need for businesses to free up working capital; and
5. the innovation in the litigation funding market introducing new funding models and structures.

Over the past five years, there has been a range of new entrants to the market, from private investors to hedge funds and family offices. However, this year, the socio-economic environment has had a significant impact on the UK economy with the effects of Brexit, the Russia–Ukraine war, the aftermath of covid and governmental policy all coalescing to create a volatile environment with high inflation and rising interest rates. Raising finance against this backdrop is more challenging than in the past few years and the increase in interest rates means that investors have opportunities to achieve target levels of return on their capital in lower risk investments. In addition, the decision in *PACCAR*[4] has had an impact on the way in which litigation funding agreements in England and Wales are structured, and as such, extrapolating market size from reports predating July 2023 may not be reflective of the market going forward.

In the past year, there has been significant movement and volatility within the litigation funding market in England and Wales.[5] There are no conclusive reports as to why this has been the case but it is likely to be a combination of the factors outlined above. As such, it is difficult to reach a data-based conclusion as to the specific level of funding activity, which remains active in the market in England and Wales today.

The year in review

The past year has been a turbulent year for the litigation finance industry in the UK. As mentioned above, the *PACCAR* decision has meant that litigation funding agreements have had to be restructured to enable the funder to receive its capital back and return without reference to the benefit obtained by the claimant. In addition, we have seen the first cases where funded parties are seeking to challenge funding agreements that were rendered unenforceable by PACCAR.[6]

The range of funding structures available has continued to rise, with an increased demand for law firm funding both for portfolios of cases as well as more generally from financiers who understand the legal industry.

The covid-19 pandemic is still having a significant impact on the UK court system, with delays making case durations longer. However, it has also been reported that the insolvency market has returned to pre-pandemic levels following the end of the UK government's measures to supress insolvencies during the pandemic.[7]

The number of group litigation cases being brought in England and Wales is continuing to increase, with a number of opt-out actions in the Competition Appeal Tribunal (CAT) having been certified in the past year as well as Civil Procedure Rules (CPR) 19.8 representative actions and group litigation orders having been commenced with funders actively working to structure PACCAR-compliant agreements.

Insurance providers are offering a wider variety of products from capital protection, work in progress protection, own costs cover to judgment preservation insurance. In addition, more insurers are entering the market. However, although the range of products available is offering more choice to litigants, the increased size of the litigation insurance market does not yet seem to have reduced premiums, which can still be relatively high.

Legal and regulatory framework

Historically, English law prohibited arrangements where litigation was funded or 'maintained' by third parties based on public policy grounds. The doctrines of champerty and maintenance date back to the Middle Ages and were designed to curb the power of English barons who were increasingly using their wealth and power to influence the legal system in their favour. They were introduced as a remedy against the assignment of weak or fraudulent claims to wealthy people on the assumption that the assignee would be more successful in prosecuting the claim and would receive a share of the damages recovered. Champerty and maintenance were seen as ways to prevent the English barons from abusing their power in this way and to ensure that everyone had access to justice, regardless of their wealth or status. Champerty and maintenance were formally codified in The Maintenance and Embracery Act 1540, which made it a criminal offence to provide financial or other assistance to someone who was involved in litigation, unless the person providing assistance had a legitimate interest in the outcome of the case. These doctrines were designed to help maintain order and stability within the English legal system.

Champerty, an aggravated form of maintenance, was defined by Lord Fletcher Moulton LJ in 1908 in *British Cash and Parcel Conveyors Ltd v. Lamson Store Service Co Ltd* [8] as 'a bargain with a stranger to a suit whereby that stranger agrees to champion or maintain the suit in return for a share of the proceeds if the suit is successful'. Maintenance involved providing financial or other assistance to someone who was involved in litigation, without having a legitimate interest in the outcome of the case and where the assistance was provided without excuse. This could include paying the litigant's living expenses or providing legal representation. Maintenance was seen as problematic because it could give the person providing assistance too much control over the litigation, and it could also lead to corruption and bribery. Champerty was where the financing party provided funding in exchange for a share of the proceeds if the lawsuit was successful. This was

considered to be improper as it foresaw a risk that it could lead to the third party taking control of the litigation. These doctrines were somewhat controversial, with some arguing that they were too restrictive and that they prevented people from bringing legitimate claims. Others argued that they were unfair because they disproportionately affected the poor and vulnerable. Despite these criticisms, the doctrines of champerty and maintenance remained in force for over 400 years.

In the 20th century, the concerns that had led to the introduction of champerty and maintenance began to diminish. Frivolous and vexatious litigation was no longer as much of a problem, and there were better safeguards in place to prevent corruption and bribery. Until the 1960s, champerty and maintenance were broadly defined and strictly enforced.

In 1960, in *Westminster Bank Ltd v. Kennedy*,[9] Lord Denning distinguished between champertous agreements and those that served a legitimate purpose, such as providing access to justice for those unable to afford legal costs. He argued that these doctrines were no longer necessary to protect the justice system, and that they were actually preventing people from accessing justice. Lord Denning distinguished between legitimate third-party funding arrangements and those that genuinely sought to exploit the legal system, and in doing so introduced a more nuanced approach.

The doctrines of champerty and maintenance were abolished in England and Wales in 1967 by the Criminal Law Act. Although Sections 13 and 14 of the Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty, Section 14(2) left intact the rule that a contract which breached the rule against maintenance and champerty would be contrary to public policy and unenforceable. Therefore, although champerty and maintenance were abolished as legal doctrines in England and Wales in 1967, Lord Fletcher Moulton's definition[10] remains relevant in assessing the enforceability of third-party funding arrangements. In making this assessment, Lord Denning emphasised the importance of assessing the specific circumstances of each case, considering factors such as the purpose of the funding, the relationship between the funder and the litigant, and the potential impact on the administration of justice.

By the 1980s, there was a shift in the focus of public policy relating to champerty and maintenance from the remedy against intermeddling in the litigation to supporting the use of funding to provide access to justice for those who could not afford to litigate. In *Trendtex Trading Corp v. Credit Suisse*, Lord Roskill observed:

> [The] courts have adopted an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case.[11]

In November 2008, Lord Justice Jackson was tasked with conducting a wide-ranging review of the litigation costs regime with the objective of making recommendations to improve efficiency and recovery of costs. Jackson LJ's report of December 2009 proposed widespread changes in commercial litigation, including the introduction of contingency fee arrangements.[12] Jackson's report concluded that third party funding was 'beneficial in that it promoted access to justice'. Jackson LJ stated that:

> There is no access to justice if parties cannot afford to bring meritorious claims or to defend unmeritorious claims. If civil justice is to be affordable, it is necessary . . . that methods of funding meritorious claims or defences be available to parties of limited means.

He set out five reasons for his conclusion:

> (i) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third-party funding promotes access to justice.
> (ii) Although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.
> (iii) The use of third-party funding (unlike the use of conditional fee agreements ('CFAs')) does not impose additional financial burdens upon opposing parties.
> (iv) Third-party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.
> (v) Third-party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases.[13]

In 2009, the litigation funding industry in England and Wales was still in its infancy. Jackson LJ considered whether third party funding should be regulated or subscribe to a voluntary code. Jackson LJ noted that the general view among respondents to the phase II consultation carried out as part of his review were that there should be some kind of regulation, but respondents disagreed as to whether a voluntary code would be sufficient or whether there should be a statutory regulation. The Law Society of England and Wales responded to the consultation and set out two key concerns:

> (i) The litigation funding agreement is likely to allow the funder to withdraw funding in circumstances which would be contrary to the client's interest or unreasonable.
> (ii) There is no guarantee against the funder becoming insolvent, with all the consequences which would flow from that.

Jackson LJ's Final Report considered a draft voluntary code that had been developed by the Third Party Litigation Funders Association in conjunction with the Civil Justice Council (CJC). He did not consider that the draft code adequately addressed the two key concerns outlined by the Law Society. The CJC then opened a consultation on its proposed Self Regulatory Code for Third Party Funding in June 2010 and a summary of responses was published in June 2011.[14] The final version of the Code of Conduct for Litigation Funders was published in November 2011.[15] It was also agreed that the Association of Litigation Funders of England and Wales (ALF) should be established as the industry self-regulatory body.

The ALF is an independent body that has been charged by the Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. The ALF Code of Conduct (the Code) sets the standard for all litigation funders operating in England and Wales. ALF membership is voluntary for litigation funders and the ALF does not have the power to sanction non-members for breaches of the Code.

Article 2 of the Code addresses the key concerns identified by Jackson LJ and the Law Society in that a funder member of the ALF must have:

> access to funds immediately within its control including within a corporate parent or subsidiary ('Funders Subsidiary'), or acts as the exclusive investment advisor to an entity or entities, which has access to funds immediately within its or their control including within a corporate parent or subsidiary ('Associated Entity'), such funds being invested pursuant to a Litigation Funding Agreement ('LFA') to enable a Litigant to meet the costs

(including pre-action) of resolving disputes by:
i. receiving a share of the proceeds if the claim is successful (as defined in the LFA); and
ii. not seeking any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

Jackson endorsed that parties could continue to be free to take out after-the-event (ATE) insurance to mitigate adverse party cost risk. However, where the ATE policy is entered into on or after 1 April 2013, the ATE insurance premium would no longer be recoverable from the other side irrespective of whether the case is won or lost.

Historically, English law prohibited arrangements where litigation was funded or 'maintained' by third parties based on public policy grounds. The doctrines of champerty and maintenance date back to the Middle Ages and were designed to curb the power of English barons who were increasingly using their wealth and power to influence the legal system in their favour. They were introduced as a remedy against the assignment of weak or fraudulent claims to wealthy people on the assumption that the assignee would be more successful in prosecuting the claim and would receive a share of the damages recovered. Champerty and maintenance were seen as ways to prevent the English barons from abusing their power in this way and to ensure that everyone had access to justice, regardless of their wealth or status. Champerty and maintenance were formally codified in The Maintenance and Embracery Act 1540, which made it a criminal offence to provide financial or other assistance to someone who was involved in litigation, unless the person providing assistance had a legitimate interest in the outcome of the case. These doctrines were designed to help maintain order and stability within the English legal system.

Champerty, an aggravated form of maintenance, was defined by Lord Fletcher Moulton LJ in 1908 in *British Cash and Parcel Conveyors Ltd v. Lamson Store Service Co Ltd* [8] as 'a bargain with a stranger to a suit whereby that stranger agrees to champion or maintain the suit in return for a share of the proceeds if the suit is successful'. Maintenance involved providing financial or other assistance to someone who was involved in litigation, without having a legitimate interest in the outcome of the case and where the assistance was provided without excuse. This could include paying the litigant's living expenses or providing legal representation. Maintenance was seen as problematic because it could give the person providing assistance too much control over the litigation, and it could also lead to corruption and bribery. Champerty was where the financing party provided funding in exchange for a share of the proceeds if the lawsuit was successful. This was considered to be improper as it foresaw a risk that it could lead to the third party taking control of the litigation. These doctrines were somewhat controversial, with some arguing that they were too restrictive and that they prevented people from bringing legitimate claims. Others argued that they were unfair because they disproportionately affected the poor and vulnerable. Despite these criticisms, the doctrines of champerty and maintenance remained in force for over 400 years.

In the 20th century, the concerns that had led to the introduction of champerty and maintenance began to diminish. Frivolous and vexatious litigation was no longer as much of a problem, and there were better safeguards in place to prevent corruption and bribery. Until the 1960s, champerty and maintenance were broadly defined and strictly enforced.

In 1960, in *Westminster Bank Ltd v. Kennedy*,[9] Lord Denning distinguished between champertous agreements and those that served a legitimate purpose, such as providing access to justice for those unable to afford legal costs. He argued that these doctrines were no longer necessary to protect the justice system, and that they were actually preventing people from accessing justice. Lord Denning distinguished between legitimate third-party funding arrangements and those that genuinely sought to exploit the legal system, and in doing so introduced a more nuanced approach.

The doctrines of champerty and maintenance were abolished in England and Wales in 1967 by the Criminal Law Act. Although Sections 13 and 14 of the Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty, Section 14(2) left intact the rule that a contract which breached the rule against maintenance and champerty would be contrary to public policy and unenforceable. Therefore, although champerty and maintenance were abolished as legal doctrines in England and Wales in 1967, Lord Fletcher Moulton's definition[10] remains relevant in assessing the enforceability of third-party funding arrangements. In making this assessment, Lord Denning emphasised the importance of assessing the specific circumstances of each case, considering factors such as the purpose of the funding, the relationship between the funder and the litigant, and the potential impact on the administration of justice.

By the 1980s, there was a shift in the focus of public policy relating to champerty and maintenance from the remedy against intermeddling in the litigation to supporting the use of funding to provide access to justice for those who could not afford to litigate. In *Trendtex Trading Corp v. Credit Suisse*, Lord Roskill observed:

> [The] courts have adopted an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case.[11]

In November 2008, Lord Justice Jackson was tasked with conducting a wide-ranging review of the litigation costs regime with the objective of making recommendations to improve efficiency and recovery of costs. Jackson LJ's report of December 2009 proposed widespread changes in commercial litigation, including the introduction of contingency fee arrangements.[12] Jackson's report concluded that third party funding was 'beneficial in that it promoted access to justice'. Jackson LJ stated that:

> There is no access to justice if parties cannot afford to bring meritorious claims or to defend unmeritorious claims. If civil justice is to be affordable, it is necessary . . . that methods of funding meritorious claims or defences be available to parties of limited means.

He set out five reasons for his conclusion:

> (i) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third-party funding promotes access to justice.
> (ii) Although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.
> (iii) The use of third-party funding (unlike the use of conditional fee agreements ('CFAs')) does not impose additional financial burdens upon opposing parties.
> (iv) Third-party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.

> (v) Third-party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases.[13]

In 2009, the litigation funding industry in England and Wales was still in its infancy. Jackson LJ considered whether third party funding should be regulated or subscribe to a voluntary code. Jackson LJ noted that the general view among respondents to the phase II consultation carried out as part of his review were that there should be some kind of regulation, but respondents disagreed as to whether a voluntary code would be sufficient or whether there should be a statutory regulation. The Law Society of England and Wales responded to the consultation and set out two key concerns:

> (i) The litigation funding agreement is likely to allow the funder to withdraw funding in circumstances which would be contrary to the client's interest or unreasonable.
> (ii) There is no guarantee against the funder becoming insolvent, with all the consequences which would flow from that.

Jackson LJ's Final Report considered a draft voluntary code that had been developed by the Third Party Litigation Funders Association in conjunction with the Civil Justice Council (CJC). He did not consider that the draft code adequately addressed the two key concerns outlined by the Law Society. The CJC then opened a consultation on its proposed Self Regulatory Code for Third Party Funding in June 2010 and a summary of responses was published in June 2011.[14] The final version of the Code of Conduct for Litigation Funders was published in November 2011.[15] It was also agreed that the Association of Litigation Funders of England and Wales (ALF) should be established as the industry self-regulatory body.

The ALF is an independent body that has been charged by the Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. The ALF Code of Conduct (the Code) sets the standard for all litigation funders operating in England and Wales. ALF membership is voluntary for litigation funders and the ALF does not have the power to sanction non-members for breaches of the Code.

Article 2 of the Code addresses the key concerns identified by Jackson LJ and the Law Society in that a funder member of the ALF must have:

> access to funds immediately within its control including within a corporate parent or subsidiary ('Funders Subsidiary'), or acts as the exclusive investment advisor to an entity or entities, which has access to funds immediately within its or their control including within a corporate parent or subsidiary ('Associated Entity'), such funds being invested pursuant to a Litigation Funding Agreement ('LFA') to enable a Litigant to meet the costs (including pre-action) of resolving disputes by:
> i. receiving a share of the proceeds if the claim is successful (as defined in the LFA); and
> ii. not seeking any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

Jackson endorsed that parties could continue to be free to take out after-the-event (ATE) insurance to mitigate adverse party cost risk. However, where the ATE policy is entered into on or after 1 April 2013, the ATE insurance premium would no longer be recoverable from the other side irrespective of whether the case is won or lost.

i The Consumer Credit Act

The Consumer Credit Act 1974 may apply to litigation funding where the finance is structured as a loan to an individual litigant. Regulated credit agreements under the Consumer Credit Act are defined as agreements under which a creditor provides a borrower with credit and the borrower agrees to repay the credit and any other charges. Repayments can be made in one or more instalments. Non-recourse litigation funding agreements, where the funder receives its capital back and return only in the event of success from the damages awarded, are unlikely to be classified as regulated credit agreements as repayment is only a contingent liability for the litigant.

ii Regulated activities

In general, litigation funding in England and Wales is not a regulated financial services activity under the Financial Services and Markets Act 2000 (FSMA). However, there are some specific activities and claim types that are regulated activities under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). If the funder is carrying out these activities, it would need to be authorised by the Financial Conduct Authority. These regulated activities include specific claims management activities as well as if the funder is acting as a fund manager where the funder is carrying on the activities by way of a business. Authorisation would be required by the Financial Conduct Authority (FCA) for each activity that the funder carries out.

A funder falls within the scope of the RAO if it is constituted under the laws of England, Wales and Scotland or has individuals who are ordinarily resident or, if a company, is constituted in Great Britain. In addition, the RAO covers the funder's activities where the funder is providing claims management services in respect of a claimant or potential claimant who is ordinarily resident or if a company is constituted in Great Britain.

The regulated activities under the RAO are:

1. Seeking out, referrals and identification of (regulated) claims or potential claims; and
2. advice, investigation or representation in relation to (regulated claim types).[16]

The regulated claim types are:

1. a personal injury claim;
2. a financial services or financial product claim;
3. a housing disrepair claim;
4. a claim for a specified benefit;
5. a criminal injury claim; or
6. an employment related claim.[17]

All other claim types do not fall within the scope of the RAO, so funders who seek out or identify out-of-scope claims will not require authorisation by the FCA. In addition, purely

providing funding in respect of regulated claim types does not require the funder to be authorised by the FCA. Only where a funder is carrying out regulated activities in respect of regulated claim types would it be required to be authorised by the FCA.

Structuring the agreement

This chapter has considered the litigation funding market in England and Wales and the variety of products that are available. A wide range of structures are available and in use for funding litigation. The type of investment structure will have an impact on the funding agreement.

Given that the doctrines of maintenance and champerty are still applied when considering the enforceability of the LFA, funding agreements must take into account the factors the court will consider in assessing whether a funding agreement is contrary to public policy, as given below.

1. Does the funder have a legitimate interest in the outcome of the litigation?
2. Is the funder exerting undue influence over the litigation?
3. Is the funding arrangement fair and reasonable to the litigant?

Until July 2023, the standard business model employed by most funders (i.e., taking the higher of a percentage of the damages or a fixed multiple of funding drawn down[18] for a single-case commercial litigation funding) has remained relatively consistent. On 26 July 2023, the Supreme Court ruled (in a majority four-to-one decision) in the *PACCAR* case that litigation funding agreements that specify the return to the funder by reference to the benefit obtained by the claimant are classified as damages-based agreements (DBAs) under Section 58AA(3) of the Courts and Legal Services Act 1990 (CLSA). DBAs must comply with the requirements of the DBA Regulations. It was common ground that the litigation funding agreements in issue were not compliant with the DBA Regulations 2013, and as such were held to be unenforceable.

The *PACCAR* decision arose in the context of an application for a collective proceedings order (CPO) in the CAT in an action against truck manufacturers to recover excess purchase costs incurred by their customers arising out of a cartel to fix the prices of trucks sold. To obtain a CPO, applicants must show that they have adequate funding arrangements in place. The defendant truck manufacturers challenged the litigation funding agreements as being unenforceable DBAs under Section 58AA(3) of the CLSA.

Under Section 58AA(3)(a):

> a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that–
> (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
> (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;

Section 58AA(7) states that 'claims management services' 'has the same meaning as in the Financial Services and Markets Act 2000 (see Section 419A of that Act)'. Section 419A of the FSMA states:

> 1. In this Act 'claims management services' means advice or other services in relation to the making of a claim.
> 2. In subsection (1) 'other services' includes–
> (a) financial services or assistance'

The Supreme Court held that the litigation funding agreements relied on by the claimants were DBAs and were unenforceable as not meeting the requirements of the DBA Regulations. However, even if the litigation funding agreements had been compliant DBAs, Section 47C(8) of the Competition Act 1998 provides that DBAs are unenforceable in opt-out collective proceedings before the CAT.

Given that opt-out proceedings in the CAT require litigation funding to bring the claim, the CAT has taken a practical approach to managing the impact of *PACCAR* on the cases before it. In September 2023, in*Gutmann v. Apple*,[19] the CAT was informed that Mr Gutmann had not yet finalised a new funding agreement following the *PACCAR* decision. However, on 1 November 2023, the CAT certified Mr Gutmann's claim to proceed on the condition that suitable updates to the funding agreement are put in place to provide an enforceable funding agreement.

On 21 November 2023, the CAT certified the *Neil v. Sony*[20] case to proceed, approving the funding agreement in place. The LFA provided that the funder would receive the higher of either a multiple of its costs limit or a percentage of the damages 'only to the extent enforceable and permitted by applicable law'. The CAT held that the LFA including this wording was not an unenforceable DBA. The CAT also rejected Sony's arguments that the claim amount available to the funder from which to take its return acted as a cap, and so recovery from those damages would be by reference to the financial benefit obtained by the claimant. The CAT held that the reference must be to the amount of the financial benefit obtained. It also considered that the wording in the LFA that 'any provision of this agreement which begins with the words “only to the extent enforceable and permitted by applicable law”' could be severed if required. The CAT considered that the LFA would remain valid as 'the removal of the unenforceable provision does not so change the character of the contract that it becomes “not the sort of contract that the parties entered into at all”'.[21]

The Department for Business and Trade has also addressed the *PACCAR* decision. On 31 August 2023, it issued a statement:

> The Department is aware of the Supreme Court decision in Paccar and is looking at all available options to bring clarity to all interested parties.

On 15 November 2023, the UK government proposed an amendment to Section 47C CA in the Digital Markets, Competition and Consumers Bill to delete reference to 'claims management services'. This would mean that funders would not be performing claims management services and so their LFAs would not fall within the definition of a DBA under Section 58AA(3)(a) of the CLSA. The proposed amendments will address funders in the CAT but will mean that funding agreements outside the CAT remain unenforceable where the funder's return is calculated as a percentage of the damages received by the claimant.

Disclosure

In general, there is no requirement to disclose litigation funding agreements in the Courts of England and Wales. However, there are a couple of exceptions to this general rule:

1. Where the other party makes an application for security for its costs under CPR25.14, the court will undertake an assessment of the litigant's ability to pay those costs. Where the litigant is does not appear to have the means to fund the case itself, the court may order disclosure of the funding arrangements in order to confirm that the arrangements are adequate to ensure that the litigant can pay any costs order awarded against it. The courts have the inherent power to order disclosure of the identity and address of a third party funder, and that the third party confirm whether it had contributed or agreed to contribute to the claimant's costs in return for a share of any money or property recovered. However, the court has no inherent power to order the disclosure of the agreement between the claimant and the third-party funder before a security for costs application is made.
2. Litigation funding agreements are required to be disclosed in the context of collective actions. The court or tribunal has a duty to ensure that the arrangements agreed with the class representative are reasonable and in the interests of all class members as well as ensuring that any adverse costs award can be paid by the class representative before ordering that the case can proceed.

In addition, a litigant may wish to voluntarily disclose that it is funded to demonstrate to the other party that it has a strong case and that its claim has been assessed by a third party.

Costs

Part 44 of the CPR sets out the general rules about costs. Pursuant to Section 51 of the Senior Courts Act 1981, the court has discretion to award costs to one party or another and to establish the timing of that payment and the amount of the costs to be paid. However, the general position is that the unsuccessful party will be required to pay the costs of the successful party but the court may make a different order. The fact that a party has entered into a damages-based agreement will not affect the making of any order for costs that otherwise would be made in favour of that party.[22]

Under CPR 46.2, the court also has discretion as to whether to order costs against a third party such as a funder. If the court is minded to make a third party costs order, the funder would be added to the proceedings as a party to the costs proceedings and would be given the opportunity to attend a hearing where the court would consider the matter.

Security for costs is a factor that is frequently raised by defendants in funded cases. The courts have held that ATE policies can be sufficient to evidence that the litigant can satisfy a costs order awarded against it and would not require the litigant to provide security by payment of monies into court. The court must assess whether the ATE insurance is 'sufficient protection', which requires the court to evaluate the risk of the company being unable to pay the costs notwithstanding the insurance.[23] In making that assessment, the court needs to satisfy itself that, in the ATE, there are no insurance policy terms pursuant

to which the insurers can readily but legitimately and contractually avoid liability to make payment of the defendant's costs.

> This requires the court to form a view at this stage on (1) the meaning of the policy, and (2) on how readily it may be avoided legitimately and contractually, and (3) to form a view of the likelihood of circumstances arising which will enable the policy to be readily, legitimately and contractually avoided.[24]

The court has accepted a suitable anti-avoidance endorsement alongside the ATE insurance policy as sufficient to provide security for the defendant's costs.[25]

Until recently, there had been a long-standing principle that any costs award made against a litigation funder would be limited to its contribution to the case (the 'Arkin Cap').[26] However, in *Davy v. Money*,[27] the court departed from the Arkin Cap because the court considered that the funder was implicit with the claimant in elements of the case, parts of which led to an indemnity costs order. In addition, the court considered that the funder was due to receive more than the claimant in the event of success. The court did confirm that the funder would not be liable for costs incurred prior to it entering into the funding agreement as there needed to be a causal link between the funder and the costs claimed.

Following the Jackson review, from 1 April 2013, parties are no longer able to recover costs simply because they are reasonably and necessarily incurred. Costs incurred on or after 1 April 2013 must be 'proportionate' to the matters in issue in the claim (except for cases commenced before 1 April 2013, when the proportionality test does not apply). This means that courts are required to deal with cases justly, at proportionate cost (i.e., in ways that are proportionate to the amount of money involved), considering the importance of the case, the complexity of the issues and the financial position of each party. On 1 October 2023, a new fixed costs regime was introduced in England and Wales. This is unlikely to impact funders as it applies only to claims of less than £100,000.

Outlook and conclusions

There remains strong demand for litigation funding in England and Wales. The decisions of the English courts, together with the statements made and actions that have been taken by the UK government and courts to clarify the system following PACCAR, suggest that England and Wales remains a favourable market for investment in litigation funding. This in turn will maintain the growth and development of available litigation funding products.

Endnotes

1 Emily O'Neill is a general counsel at Deminor. ^ Back to section

2 PWC, https://omnibridgeway.com/docs/default-source/insights/regulation/class-action-centre/litigation-funding---final-pwc-report---march-2020.pdf?sfvrsn=6f7cc6ec_7; Grand View Research, https://www.grandviewresearch.com/press-release/legal-services-market; Research & Markets, https://www.researchandmarkets.com/reports/5234755/global-litigation-investment-funding-market. ^ Back to section

3 Strategy&, UK Legal Services Market Report 2022, PwC UK, https://www.pwc.co.uk/industries/assets/uk-legal-services-market-report-2022.pdf. ^ Back to section

4 *R (on the application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28. ^ Back to section

5 'Losses grow at litigation funder despite higher revenue',*Law Gazette-*, https://www.lawgazette.co.uk/news/losses-grow-at-litigation-funder-despite-higher-revenue/5117949.article; 'UK Litigation Funder Augusta's Employees Bolt for Omni Bridgeway', bloomberglaw.com, https://news.bloomberglaw.com/business-and-practice/uk-litigation-funder-augustas-employees-bolt-for-omni-bridgeway; 'Listed firm sells litigation finance business to pay off debts', News, Law Gazette, https://www.lawgazette.co.uk/news/listed-firm-sells-litigation-finance-business-to-pay-off-debts/5116635.article. ^ Back to section

6 *Therium Litigation Funding A IC v. Bugsby Property LLC* [2023] EWHC 2627 (Comm). ^ Back to section

7 Manolete Partners Plc interim financial statements, 30 September 2023. ^ Back to section

8 [1908] 1 KB 1006. ^ Back to section

9 [1960] 2 All ER 466. ^ Back to section

10 *British Cash and Parcel Conveyors Ltd v. Lamson Store Service Co Ltd* [1908] 1 KB 1006. ^ Back to section

11 [1982] A.C. 679 at 702; [1981] 3 W.L.R. 766. ^ Back to section

12 Review of Civil Litigation Costs: Final Report, https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf. ^ Back to section

13 id., Chapter 11. Third Party Funding. ^ Back to section

14 Third Party Funding - Courts and Tribunals Judiciary, https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/costs-funding-and-third-party-funding/third-party-funding-2/. ^ Back to section

15 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+News+Release+-+Code+of+Conduct+for+Litigant+Funders.pdf. ^ Back to section

16 S.89G RAO. ^ Back to section

17 s.89H–89M RAO. ^ Back to section

18 Multiples can also be calculated based on a multiple of capital committed but this is less usual than using capital deployed as the base number. ^ Back to section

19 *Mr Justin Gutmann v. Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited* https://www.catribunal.org.uk/sites/cat/files/2023-11/14687722%20Mr%20Justin%20Gutmann%20v%20Apple%20Inc.%2C%20Apple%20Distribution%20International%20Limited%2C%20and%20Apple%20Retail%20UK%20Limited%20-%20Judgment%20%28CPO%20Application%29%20%201%20Nov%202023.pdf. ^ Back to section

20 *Alex Neill Class Representative Limited v. Sony Interactive Entertainment Europe Limited; Sony Interactive Entertainment Network Europe Limited; and Sony Interactive Entertainment UK Limited* https://www.catribunal.org.uk/sites/cat/files/2023-11/15277722%20Alex%20Neill%20Class%20Representative%20Limited%20v%20Sony%20Interactive%20Entertainment%20Europe%20Limited%3B%20Sony%20Interactive%20Entertainment%20Network%20Europe%20Limited%3B%20and%20Sony%20Interactive%20Entertainment%20UK%20Limited%20-%20Jud_0.pdf. ^ Back to section

21 *Tillman v. Egon Zehnder Ltd* [2019] UKSC 32. ^ Back to section

22 CPR 44.18. ^ Back to section

23 *Premier Motor Auctions Ltd (in Liquidation) v. PwC & Lloyds* [2017] EWCA Civ 1872. ^ Back to section

24 *Saxon Woods Investments Ltd Francesco Costa and others* [2023] EWHC 850 (Ch). ^ Back to section

25 *Saxon Woods Investments Ltd Francesco Costa and others* [2023] EWHC 850 (Ch). ^ Back to section

26 *Arkin Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055. ^ Back to section

27 *Davey Money & Ors* [2019] EWHC 997 (Ch). ^ Back to section

Emily O'Neill emily.oneill@deminor.com

Deminor

Read more from this firm on Lexology

USA

Lina Bensman, **Patrick C Swiber** and **Katerina Wright**
Cleary Gottlieb Steen & Hamilton LLP

Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL AND REGULATORY FRAMEWORK
STRUCTURING THE AGREEMENT
DISCLOSURE
COSTS
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

Litigation funding has come a long way in the United States since the 1990s, when the industry first began to take hold. According to self-reported data collected by litigation funding firm Westfleet Advisors, litigation funders invested US$3.2 billion in US commercial lawsuits in 2022,[2] up from US$2.8 billion in 2021.[3] The same survey reports that, in 2022, 44 US litigation funders were managing a combined US$13.5 billion in assets.[4] This growth should come as no surprise: litigation funders claim to target returns of up to 20 per cent.[5]

The litigation funding industry in the US is varied, and includes specialised litigation funding firms, hedge funds and other diversified investors that have a dedicated litigation finance arm, and ad hoc investors that make only occasional investments in litigation.[6] More than 30 litigation funders have joined the American Legal Finance Association,[7] and the International Legal Finance Association, incorporated in Washington, DC, has expanded since its initial founding in 2020 from six members to 20.[8] Publishers such as Chambers,[9] The Legal 500[10] and Leaders League[11] now prepare industry rankings identifying the most prominent litigation funders. There are no regulations that restrict the practice of litigation funding to a defined category of participants, so any entity – or any individual – may fund litigation.

Discussions of US litigation funding divide it into two principal categories: commercial funding, which typically involves corporate parties and commercial claims such as breach of contract, and consumer funding, which typically involves individual plaintiffs and claims such as personal injury or product liability.[12] Litigation funders argue that consumer funding provides access to justice for plaintiffs who may lack the resources to pursue or sustain litigation, and levels the playing field by enabling them to retain more sophisticated counsel.[13] As for commercial claims, they argue that funding is of value even to well-resourced companies because it provides immediate access to liquidity, shifts the risk of litigation away from the company and takes litigation costs off of the corporate balance sheet.[14] In the US, where companies vastly outspend other parts of the world on litigation,-[15] those costs are often significant.

Despite the large scale of modern litigation funding in the US, there remains meaningful uncertainty as to how any particular funding arrangement may be treated if subjected to court scrutiny. Different states take different approaches, and in many the law is actively evolving. Both proponents and opponents of litigation funding have further confused the landscape by being quick to announce the demise – or continuing vitality, as the case may be – of common law prohibitions that historically constrained the practice. Anyone with an interest in litigation funding, whether as a funded (or potentially funded) party or as a litigant facing a funded adversary, is well served by a full and nuanced understanding of the applicable law.

Year in review

Developments in 2023 are consistent with recent trends. A number of decisions reflect that, in certain states, champerty remains prohibited or significantly restricted. Courts in New York, North Carolina and Pennsylvania invalidated champertous assignments, citing

familiar public policy concerns about strangers to litigation stirring up strife in order to speculate on potentially profitable claims.[16]

One prominent 2023 decision concerning litigation funding issued in August from the Minnesota Supreme Court. Having earlier (and in the same case) abolished the Minnesota prohibition on champerty,[17] the Court declined to find that the litigation funding agreement at issue was subject to the state's usury laws, but remanded to the trial court on the issue of whether the funding agreement's repurchase rate (effectively, 60 per cent interest) was unconscionable on its face.[18] In addition to confirming that, even in states without a prohibition on champerty, litigation funding remains subject to various challenges and risks, the decision includes a notable concurrence in which one of the justices asks, at length and in detail, that Minnesota's legislature 'consider regulation of the litigating financing industry'.[19] While affirming that district courts 'are more than capable of scrutinizing litigation financing agreements to determine whether equity allows their enforcement',[20] the justice raised 'legitimate practical concerns about the effect of unchecked litigation financing agreements on plaintiffs and defendants alike', including that they 'may interfere with plaintiffs' ability to control litigation and settle, leading to prolonged litigation in cases that would have settled but for the financing term', and concludes that 'it would be beneficial for the Legislature to address these concerns through regulation.'[21]

Indeed, a number of state legislatures are actively considering these issues. To begin, at least three states have recently considered introducing disclosure requirements. In May 2023, Montana Governor Greg Gianforte signed into law Senate Bill 269, the Litigation Financing Transparency and Consumer Protection Act, which requires litigants to disclose litigation funding agreements.[22] One month later in Louisiana, Governor John Bel Edwards vetoed legislation that would require such disclosure.[23] Around the same time, a bill was introduced in the Nevada Senate Judiciary Committee proposing disclosure of litigation funding.[24] Additionally, proposals for more expansive regulation of the litigation funding industry have been put forward in Florida and Missouri. Specifically, in March 2023, a bill titled the 'Litigation Financing Consumer Protection Act' was introduced in the Florida state legislature, and would require litigation funders to register with the Florida Department of State, post a US$250,000 surety bond, and include certain terms (e.g., a right of recission) and disclosures (e.g., the funding amount and interest rate) in litigation funding contracts.-[25] Reflecting more expansive regulation, in July 2023, Missouri Governor Michael Parson approved new legislation which, among other changes, requires litigation funders to obtain a licence with the state and requires certain disclosures regarding material terms of the contract.[26]

Though federal regulation is limited, regulators have also been increasingly active in this area. On 3 May 2023, the US Securities and Exchange Commission (SEC) adopted rules that require certain registered investment advisers to report information about investments in litigation finance made by private funds they manage; specifically, they must report confidentially to the agency the percentage of their capital targeted for use by law firms as part of an investment strategy.[27] Separately, in 2022, the SEC issued comment letters to Burford Capital concerning how the company was determining the fair value of its legal finance assets, after which Burford consulted with its auditors and revised its approach. Applying its revised valuation approach, Burford restated its financial statements for the prior three years 'to correct a material understatement of capital provision assets and capital provision income', which the SEC ultimately reviewed with no further comments.[28]

Legal and regulatory framework

In the US, there is no federal legislation regulating litigation funding. Thus, understanding the law applicable to any particular litigation funding arrangement requires close study of applicable state legislation and common law. Nor is it always simple to determine which state's laws may apply – even when a litigation funding agreement provides that it is governed by the law of a particular state, it is possible that a court considering a challenge to that agreement may apply the law of a different state altogether, such as the state where the underlying litigation is proceeding.[29] There may even be a question as to whether state common law applies at all; in some instances, federal common law may govern.[30]

In the US, there is no federal legislation regulating litigation funding. Thus, understanding the law applicable to any particular litigation funding arrangement requires close study of applicable state legislation and common law. Nor is it always simple to determine which state's laws may apply – even when a litigation funding agreement provides that it is governed by the law of a particular state, it is possible that a court considering a challenge to that agreement may apply the law of a different state altogether, such as the state where the underlying litigation is proceeding.[29] There may even be a question as to whether state common law applies at all; in some instances, federal common law may govern.[30]

i Regulation of litigation funding by courts

Historically, litigation funding was constrained by the broad adoption of the common law prohibition against champerty, which is an agreement 'to divide litigation proceeds between the owner of [a] litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim,'[31] as well as related prohibitions on barratry ('the offense of frequently exciting and stirring up quarrels and suits between other individuals')[32] and maintenance ('an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend [the suit]').[33] These prohibitions have ancient origins – scholars date them back to medieval England, with roots in ancient Greece and Rome[34] – and were designed to prevent 'strangers profiting from the litigation of others';[35] the 'stirring up' of 'strife'[36] and of frivolous or vexatious lawsuits-[37] and 'speculati[on] in lawsuits';[38] as well as exploitation of funded parties ('financial overreaching by a party of superior bargaining position')[39] and assumption of control by a funder over the litigation or settlement of a client's claims.[40] They were also motivated by widespread distrust of litigation itself.

Over time, attitudes towards litigation softened; at the same time, increasing trust was placed in the ethical rules governing lawyers, which eased some of the concerns about the corrosive effect of the profit motive on litigation, leading to the acceptance of contingent fee arrangements. Today, the public policy concerns animating the prohibition on champerty have lost some of their urgency. Consequently, a number of states have relaxed or even abolished their prohibition on champerty. Importantly, in doing so, these states have not discarded the public policy concerns that previously supported that prohibition, and litigation funding arrangements that activate those concerns remain subject to challenge under other common law doctrines such as unconscionability.

For example, in *Saladini v. Righellis*, while the Supreme Judicial Court of Massachusetts was 'no longer . . . persuaded that the champerty doctrine is needed to protect against the evils once feared', it recognised 'other devices that more effectively accomplish these ends'.[41] The court explained that it would 'consider whether the fees charged are excessive or whether any recovery by a prevailing party is vitiated because of some impermissible overreaching by the financier'.[42] Similarly, in *Osprey, Inc. v. Cabana, L.P.*, the Supreme Court of South Carolina abolished champerty as a contractual defence, but made clear that the abolition 'does not mean that all [litigation funding agreements] are enforceable as written'.[43] The court reasoned that 'other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits', and then enumerated several factors a court could consider in determining whether to enforce, modify or set aside a litigation financing agreement, including 'whether the financier engaged in officious intermeddling'.[44] Most recently, in *Maslowski v. Prospect Funding*, the Supreme Court of Minnesota found that the champerty doctrine was 'no longer necessary', but emphasised that 'district courts may still scrutinize litigation financing to determine whether equity allows their enforcement', explaining that an agreement could be invalidated if found 'unconscionable or unenforceable for some other reason'.[45] In short, even in states where an absolute prohibition on champerty no longer exists, the practice of litigation funding remains subject to legal risk. This is vividly illustrated by the *Maslowski* proceedings, where part of the litigation funding agreement at issue was found to be unenforceable even after the decision in that same proceeding abolishing Minnesota's prohibition on champerty.[46]

Meanwhile, a number of states have maintained the prohibition on champerty.[47] Others never adopted it in the first place.[48] Still others have not examined the question in decades, making it difficult to predict what approach they will take when confronted with a challenge to a modern funding arrangement.[49] And even those states that have recently addressed these issues have generated only a small number of cases that do not address all of the complexities of modern litigation funding. Taken as a whole, therefore, the common law regulation of litigation funding across the United States is best understood to be inconsistent, evolving and uncertain.

ii Regulation of litigation funding by states

Unsurprisingly, the various states also take different approaches to legislation concerning litigation funding. Some states criminalise the practice (e.g., Illinois),[50] some merely prohibit it (e.g., Kentucky),[51] some allow it within defined boundaries (e.g., New York)[52] and some have no related legislation at all. The focus of much of the existing regulation is on consumer funding, reflecting the greater concern evoked by individual plaintiffs holding small claims; commercial funding, whose clients are generally sophisticated and well-resourced, has not provoked a similar level of legislative concern.

Some states have enacted legislation that seeks to directly address the public policy concerns underlying the prohibition on champerty. For example, Ohio requires a litigation funding agreement to state in 'at least twelve-point boldface type' that the funder 'agrees that it shall have no right to and will not make any decisions with respect to the conduct of the underlying civil action or claim or any settlement or resolution thereof and that the right to make those decisions remains solely with you and your attorney in the civil action or claim'.[53] And a number of states have enacted legislation designed to prevent litigation

funders from exploiting unsophisticated plaintiffs. For example, over the past few years, a number of states have expressly set limits on the interest rates that litigation funders may charge: in Nevada, the interest rate is limited to 40 per cent annually; in Indiana, 36 per cent; in Arkansas, 17 per cent; and in Tennessee, 10 per cent.[54] While most litigation funding agreements are confidential, there are some dramatic examples of funding agreements in which the effective interest rate charged to the client far exceeded such limits.[55] Some states have also required litigation funders to make certain minimum disclosures to their clients. For example, Ohio requires disclosure of information such as the total amount to be advanced to the consumer, and the total amount to be repaid to the funder.[56] Some states, such as Maine and Nebraska, not only require litigation funders to disclose certain information in their funding contracts, such as the total amount consumers must repay, but also require litigation funders to register with the state.[57]

Disclosure has also been a major focus of regulation of litigation funding. Because most litigation funding agreements are confidential, participants in litigation do not generally know whether or not their adversaries are funded. Some states (e.g., Wisconsin) have begun to require disclosure of litigation funding.[58] Disclosure of litigation funding is also mandated by certain courts (e.g., the Northern District of California, as to any proposed class, collective or representative action; and the District of New Jersey, for all actions)-[59] and even by certain judges, either through generally applicable rules[60] or through orders in particular cases.[61] Disclosure requirements have also been discussed at the national level, though none have yet been adopted. Specifically, in March 2021, a bill was introduced in Congress that would require plaintiffs in federal class actions and multi-district litigations to disclose any litigation funding agreements; it remains in committee.[62] In addition, multiple proposals have been made to the Advisory Committee on Civil Rules Committee to amend the Federal Rules of Civil Procedure to require disclosure of litigation funding in federal courts, including as recently as May 2023.[63]

Finally, states also indirectly regulate litigation funding through the ethical rules governing lawyers. These ethical rules require lawyers to comply with duties owed to their clients, and thus preclude lawyers from participating in litigation funding arrangements that would, for example, compromise the lawyers' independent judgment.[64] The ethical rules also constrain the economic arrangements litigations funders can enter into with lawyers and law firms. For example, Rule 5.4 of the Model Rules of Professional Conduct (and as adopted in similar form by individual states) prohibits lawyers from sharing fees with non-lawyers, and bars law firms from offering ownership to non-lawyers.[65] Notably, there has recently been interest in exploring relaxing this rule to expand ownership of law firms to non-lawyers, with supporters claiming that doing so will increase access to legal services.-[66] Some state bar associations and state governments (e.g., Florida and California) have declined to relax Rule 5.4.[67] And, where such reforms have proceeded, care has been taken to address attendant risks. For example, effective on 1 January 2021, Arizona abolished its Rule 5.4, permitting 'alternative business structures' comprised of lawyers and nonlawyers to apply for a licence to carry out business with the state.[68] At the same time, the state revised other portions of its ethics rules to require disclosure of such structures, informed consent and safeguards for client confidentiality, even for clients receiving non-legal services.[69] Likewise, in August 2020, Utah revised its Rule 5.4 to permit fee-sharing and non-lawyer ownership of law firms in a closely-monitored regulatory 'sandbox' pilot programme.[70] Like Arizona, Utah imposed additional requirements on

lawyers working with these new entities, including mandating disclosure and informed consent prior to accepting representation.[71]

In summary, the legislative approaches to litigation funding are as varied and evolving as those of state common law. And it is likely that new frontiers in regulation will continue to open up as the industry further matures and becomes increasingly visible.[72] Staying abreast of the most recent legislative developments in relevant states is important to anyone evaluating the risks and opportunities offered by a particular funding arrangement.

Structuring the agreement

Sometimes, litigation funders purchase claims outright and litigate them directly as the plaintiff.[73], [74] When considering how to structure agreements of this kind, it is, of course, important to confirm that the claims at issue are freely assignable, and to research whether any of the states whose law may apply in the event of a challenge allow an assignment of the type contemplated. For example, New York law will void as champertous assignments whose principal purpose is litigation.[75] And in some states it may make a difference if the claim was assigned before litigation commenced.[76] There is also some debate as to whether the assignment of federal claims is governed by state or federal law.[77]

More often, litigation funders invest in claims that belong to others. Such agreements can be structured in numerous ways, and flexibly adapted to the particular needs and circumstances of each litigation funding deal. Within the broad framework of 'money today, in return for money tomorrow', many variations are possible. The funder may make amounts available to cover the costs of litigation, or may pay a lump sum upfront for the same purpose, or may pay a lump sum up front without restricting its use, or offer a combination of these, or offer value in yet another way. The funder may invest in one claim, or in a portfolio of claims (diversifying its risk).[78] And the funder may contract directly with the plaintiff, or may arrange a deal with a lawyer or firm. In exchange for the funding it provides, the funder will generally gain the right to receive a share of any amounts ultimately recovered in pursuing the claim, whether through settlement or judgment. This, too, may be structured in numerous ways (and can be designed to change with the passage of time):

1. as a simple percentage of the recovery;
2. as a return of the original invested amount together with interest;
3. as a multiple of the original invested amount; or
4. according to any other principle mutually agreeable to the parties.[79]

In general, litigation funders prefer to characterise their agreements not as loans, but as non-recourse investments, meaning that they are only entitled to recover if the plaintiff succeeds on the relevant claim or claims. This is intended to avoid regulations (such as usury laws) that apply to loans.[80] Whether or not any particular litigation funding agreement will be subject to usury laws may depend on whether recovery is sufficiently certain that the funder cannot be said to be taking on any real risk.[81]

When negotiating a litigation funding agreement, there are a number of key terms that require special attention, detailed below.

Sometimes, litigation funders purchase claims outright and litigate them directly as the plaintiff.[73], [74] When considering how to structure agreements of this kind, it is, of course, important to confirm that the claims at issue are freely assignable, and to research whether any of the states whose law may apply in the event of a challenge allow an assignment of the type contemplated. For example, New York law will void as champertous assignments whose principal purpose is litigation.[75] And in some states it may make a difference if the claim was assigned before litigation commenced.[76] There is also some debate as to whether the assignment of federal claims is governed by state or federal law.[77]

More often, litigation funders invest in claims that belong to others. Such agreements can be structured in numerous ways, and flexibly adapted to the particular needs and circumstances of each litigation funding deal. Within the broad framework of 'money today, in return for money tomorrow', many variations are possible. The funder may make amounts available to cover the costs of litigation, or may pay a lump sum upfront for the same purpose, or may pay a lump sum up front without restricting its use, or offer a combination of these, or offer value in yet another way. The funder may invest in one claim, or in a portfolio of claims (diversifying its risk).[78] And the funder may contract directly with the plaintiff, or may arrange a deal with a lawyer or firm. In exchange for the funding it provides, the funder will generally gain the right to receive a share of any amounts ultimately recovered in pursuing the claim, whether through settlement or judgment. This, too, may be structured in numerous ways (and can be designed to change with the passage of time):

1. as a simple percentage of the recovery;
2. as a return of the original invested amount together with interest;
3. as a multiple of the original invested amount; or
4. according to any other principle mutually agreeable to the parties.[79]

In general, litigation funders prefer to characterise their agreements not as loans, but as non-recourse investments, meaning that they are only entitled to recover if the plaintiff succeeds on the relevant claim or claims. This is intended to avoid regulations (such as usury laws) that apply to loans.[80] Whether or not any particular litigation funding agreement will be subject to usury laws may depend on whether recovery is sufficiently certain that the funder cannot be said to be taking on any real risk.[81]

When negotiating a litigation funding agreement, there are a number of key terms that require special attention, detailed below.

i Control

In their marketing and public statements, US litigation funders go out of their way to disclaim taking any control over the litigation or settlement of the claims they invest in.[82] The reality is more complicated. In a recent headline-making dispute, a litigation funder attempted to take direct control of its client's ability to settle the claims in which the funder had invested.[83] Other litigation funding agreements that have become public contain provisions that appear to give the funder potential influence over the litigation, such as control over selection of counsel.[84] Another provision that may raise concerns about funder control is any requirement that the client actually pursue the claim (and this concern will be heightened if there is a specific requirement that the client litigate in a particular way,

for example, to maximise the financial return, and likewise if there is no limitation on the obligation such as that only 'commercially reasonable efforts' are necessary).[85] Whether and to what extent litigation funders obtain control over the claims they invest in is important to assessing the risk that the litigation funding agreement will be invalidated by a court.[86] It is also important because control has value. A plaintiff considering accepting funding would therefore be wise to consider whether to agree to give up any influence or control, and if that is on the table, to carefully evaluate and allocate the risk that such provisions (or the agreement as a whole) may be invalidated, including through mechanisms such as fallback provisions restructuring the economics in the event that the control provisions do not survive court scrutiny.[87]

ii Confidentiality

Litigation funding agreements are generally confidential.[88] This is unsurprising: the funding agreement will inherently reflect something about how the parties valued the claim, and the negotiation and performance of the agreement may involve the exchange of highly sensitive and privileged information.[89] Funders may seek a continuing right to be informed about the progress of the claim, and may specifically seek ongoing access to confidential information.[90] Moreover, if the existence of the funding agreement becomes known to litigation adversaries, they may seek additional discovery concerning the agreement, increasing the costs and risks of the litigation. For these reasons, both the client and the funder will usually be aligned in wanting to ensure that confidentiality is preserved. However, a client's interest in confidentiality may diverge from the funder's in various scenarios; for example, public companies need to be able to comply with reporting requirements. And, in the event of a dispute, the parties need to preserve their ability to seek relief without risking an accusation that they are in breach of their confidentiality obligations.

iii Termination

Funding agreements may allow both of the parties to terminate the arrangement under at least some circumstances, though parties may have common law termination rights under applicable state law in addition to any rights provided by the agreement itself. The client may be afforded a contractual termination right if the funder does not provide agreed funding, for example.[91] The agreement should provide clear guidelines for how the economics of the relationship work moving forward should the client decide to terminate (e.g., whether the funder receives a share of any later returns post-termination). The funder will likely also have a right to terminate, but clients should ensure that any such right is well-defined and tied to objective milestones in the case, to ensure that the funder does not try to exit the relationship should developments in the case make the investment seem less attractive.

iv Dispute resolution

Clients and funders may come into conflict if their interests diverge (leading one to favour settlement, and the other to favour continued litigation), which can happen when they have different views as to the strength of the claims at issue. Even when they agree on the strength of the claims, clients may have non-monetary priorities that cause their interests to diverge from the funder's interest in a monetary return. For example, they may value

an injunction over damages, or they may have business reasons for wanting to terminate – or continue – litigation against a business partner or rival. As with any agreement, it is prudent to provide for the possibility that a dispute will arise.

It appears that the majority of US litigation funding agreements provide for confidential arbitration of any disputes, which is consistent with the many reasons for parties to such agreements to value their continued confidentiality.[92] Potential funding clients may want to consider whether, depending on the nature of the dispute, they may prefer a different forum.

Disclosure

In general, US courts allow extensive pre-trial discovery.[93] Adversaries of funded parties (or even parties suspected to be funded) can simply serve discovery requests for information about the funding relationship.[94] These requests may seek a copy of the funding agreement itself, but also other related documents, including documents surrounding the formation of the funding relationship or even ongoing communications between the funder and client.

Defendants facing funded adversaries often see advantages in these sorts of requests. At a basic level, defendants want visibility into the players opposing them in the case so that they can tailor their strategy accordingly.[95] For example, funding can alter the dynamics of settlement, and it may be to a defendant's advantage to know who all of the stakeholders are when negotiating a resolution.

Thus far, US courts confronted with these sorts of discovery requests often – though not always – deny discovery of funding agreements and related documents, on the basis that they are either not relevant to the dispute or that they are otherwise protected from disclosure.

In general, US courts allow extensive pre-trial discovery.[93] Adversaries of funded parties (or even parties suspected to be funded) can simply serve discovery requests for information about the funding relationship.[94] These requests may seek a copy of the funding agreement itself, but also other related documents, including documents surrounding the formation of the funding relationship or even ongoing communications between the funder and client.

Defendants facing funded adversaries often see advantages in these sorts of requests. At a basic level, defendants want visibility into the players opposing them in the case so that they can tailor their strategy accordingly.[95] For example, funding can alter the dynamics of settlement, and it may be to a defendant's advantage to know who all of the stakeholders are when negotiating a resolution.

Thus far, US courts confronted with these sorts of discovery requests often – though not always – deny discovery of funding agreements and related documents, on the basis that they are either not relevant to the dispute or that they are otherwise protected from disclosure.

i Relevance

US courts generally limit discovery to material that is 'relevant to [a] party's claim or defence'.[96] Some courts have found documents and information pertaining to litigation funding to be irrelevant and thus not discoverable. For example, courts have rejected arguments that such discovery is relevant to the plaintiff's credibility or to show bias,[97] standing to sue[98] or to the adequacy of class counsel in a class action case.[99] The case law is not uniform, however, and other courts have ordered discovery when presented with similar relevance arguments.[100]

ii Protection from discovery

Even if relevant, some courts find that funding materials are otherwise protected from discovery. Much of the case law focuses on the work product doctrine, which states that 'a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative', unless certain exceptions apply.[101] Courts have repeatedly found that sharing materials protected as work product with a litigation funder does not destroy that protection, insulating them from discovery.[102] Here again, there are exceptions. For example, a court may find that work product protection does not apply to certain funding-related documents because they were prepared in connection with the funding relationship and not the underlying litigation.[103] Alternatively, even if it does apply, work product protection can be overcome by a showing of 'substantial need' for the materials,[104] which adversaries may invoke in an effort to discover funding materials.[105]

Some documents shared with funders may also be subject to attorney–client privilege, which applies to confidential communications between a lawyer and a client that relate to the client's request for legal advice. While providing attorney–client privileged documents to a third party like a funder typically waives the privilege, the documents may still be protected from discovery if the common interest doctrine applies. That doctrine generally allows parties with a common legal interest to share privileged materials with one another without waiver.[106] Again, there are exceptions, as some courts have expressly held that the common interest doctrine does not apply to funders, since funders and clients do not have common legal interests as opposed to common financial interests.[107]

To summarise, funding agreements and communications between funders and clients are generally not subject to discovery requests. But the decisions remain somewhat mixed, and therefore funders and clients cannot reliably predict what the result will be if an adversary seeks discovery.

Costs

In US litigation, prevailing parties typically cannot recover attorneys' fees or costs absent a contractual agreement, statute or court rule authorising such a recovery.[108] In rare cases, however, litigation funders have been unexpectedly saddled with an award of costs. For example, in Abu-Ghazaleh*v. Chaul*, the court held that the funders were the real parties in interest in the litigation because they 'had to approve counsel', paid litigation costs, 'had veto power over whether the litigation was filed, who would file it and how it would be pursue[d]', and had 'the final say over any settlement agreements proposed to the plaintiffs'.[109] And as the parties to the case, the funders were responsible for a statutory

award of attorneys' fees.[110] In ordinary cases, however, cost-shifting is far less prevalent in the US than in other jurisdictions or in international arbitration proceedings.

Outlook and conclusions

As the litigation funding industry continues to become more established and the market for litigation funding matures, we expect to see accelerating development of a body of increasingly nuanced case law and continued interest in regulation. Meanwhile, there continue to be widely varying approaches to litigation funding across the US. Because of the lack of uniformity in the common law and applicable regulations, there is risk and opportunity in equal measure. The risks can be addressed as long as they are understood, so those interested in taking advantage of litigation funding should ensure they take a thorough approach to understanding the current state of the law applicable to their potential arrangement. And the opportunities are meaningful, including the potential to participate in shaping the law as it evolves.

Endnotes

1 Lina Bensman is a partner and Patrick C Swiber and Katerina Wright are associates of Cleary Gottlieb Steen & Hamilton LLP. ^ Back to section

2 Westfleet Advisors, The Westfleet Insider: 2022 Litigation Finance Market Report at 2–3 (2022), https://www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf. ^ Back to section

3 id., at 3. ^ Back to section

4 id. ^ Back to section

5 Katie Linsell, Litigation Finance Finds Its Feet Targeting Returns Up to 20%, Bloomberg (30 October 2020), https://www.bloomberg.com/news/articles/2020-10-30/lawsuits-attract-investors-hunting-windfalls-in-low-yield-era#xj4y7vzkg. ^ Back to section

6 GAO, Third-Party Litigation Financing: Market Characteristics, Data, and Trends at 6 (December 2022), https://www.gao.gov/assets/gao-23-105210.pdf. ^ Back to section

7 See id., at 6; American Legal Finance Association, https://www.americanlegalfin.com (last visited 19 September 2023). ^ Back to section

8 International Legal Finance Association members include, in alphabetical order, Balance Legal Capital, Burford Capital, Contingency Capital, DE Shaw & Co., Delta Capital Partners, Fortress, GLS Capital, Harbour Litigation Funding, Innsworth, Law Finance Group, Longford Capital, Nivalion, Omni Bridgeway, Parabellum Capital, Pretium, SLF (Swiss Legal Finance), Therium, TRGP Capital, Validity, and Woodsfood. ILFA, Membership Directory, https://www.ilfa.com/membership-directory (last visited 20 September 2023); see also ILFA, Commercial Legal Finance Industry Leaders Launch First-Ever Global Association (8 September 2020), https://uploads-ssl.webflow.com/5ef44d9ad0e366e4767c9f0c/5ff881f26697a22230f6717a_ILFA%20200908%20Launch%20release%202021%20edit%20.pdf (listing the six founding members). ^ Back to section

9 Chambers and Partners, Litigation Support USA – Nationwide, https://chambers.com/legal-rankings/litigation-funding-usa-nationwide-58:2816:12788:1 (last visited 19 September 2023) (listed in a ranking of the top three of four 'bands': Parabellum Capital, Burford Capital, Fortress Investment Group, LLC, Omni Bridgeway, Longford Capital Management, Validity Finance LLC, Bench Walk Advisors, GLS Capital, Statera Capital, Therium Capital Management and Lake Whillans Capital Partners LLC). ^ Back to section

10 The Legal 500, Litigation Funding – The UK and the US Rankings 2023, https://www.legal500.com/practice-areas/litigation-funding-2023 (listing US funders Burford Capital, Omni Bridgeway, Parabellum Capital, Therium, Delta Capital, Lake Whillans Capital Partners, Statera Capital, Bench Walk, Woodsford). ^ Back to section

11 Leaders League, Dispute resolution: Litigation, https://www.leadersleague.com/en/rankings/dispute-resolution-litigation-ranking-2023-litigation-funders-united-states (last visited 19 September 2023) (listing Burford Capital, Omni Bridgeway, Therium, Fortress Investment Group, Longford Capital Management, Parabellum Capital, Curiam Capital, Delta Capital Partners Management, GLS Capital, Lake Whillans, Validity Finance, Bench Walk, Statera Capital and Woodsford Litigation Funding). ^ Back to section

12 GAO, Third-Party Litigation Financing at 1. ^ Back to section

13 Jeunesse Mensier, The Role of Litigation Funding in Securing Access to Justice, Therium Capital (16 February 2023), https://www.therium.com/blog/the-role-of-litigation-funding-in-securing-access-to-justice/. ^ Back to section

14 See Giugi Carminati, Litigation Finance: A Modern Financial Tool for Corporate Counsel, American Bar Association (12 December 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-december/a-modern-financial-tool-for-corporate-counsel/; Jason Levine, A Primer on US Defense-Side Litigation Finance, Omni Bridgeway (7 July 2022), https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/07/07/a-primer-on-defense-side-litigation-finance. ^ Back to section

15 Thomson Reuters, US Companies Vastly Outspend Rest of the World on Legal Services, Acritas Study Shows (21 June 2017), https://www.thomsonreuters.com/en-us/posts/legal/acritas-legal-services-spending-study/ (noting that US companies spend 166 per cent more on legal services than their global counterparts); US Chamber Institute for Legal Reform, Litigation Cost Survey of Major Companies (10–11 May 2020), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf ('[a]s a percent of revenue, multi-national company respondents to the survey spend a disproportionate amount on litigation in the United States relative to their expenditures in foreign jurisdictions. Depending on the year, relative US costs were between four and nine times higher than non-US costs (as a percent of revenue).'). ^ Back to section

16 *Sharbat v. Iovance Biotherapeutics, Inc.*, 2023 WL 34377, at *15 (S.D.N.Y. 4 January 2023); see also *MLRN LLC v. U.S. Bank, Nat'l Ass'n*, 217 A.D.3d 576, 579 (1st Dep't 2023) (reversing lower court decision dismissing affirmative defence of champerty, where timing and circumstances of purchases and nominal purchase price were 'sufficiently suggestive of a primarily champertous purpose'); *Piedmont Roofing Servs. LLC v. Universal Prop. & Cas. Ins. Co.*, 2023 WL 366035, at *2 (W.D.N.C. 10 January 2023), report and recommendation adopted in part, rejected in part, 2023 WL 196461 (W.D.N.C. 17 January 2023); *Hudak v. Apostolate For Family Consecration, Inc.*, 2023 WL 5670713, at *9 (W.D. Pa. 26 July 2023). ^ Back to section

17 See infra nn.45-46 and accompanying text. ^ Back to section

18 Maslowski v. Prospect Funding Partners LLC, 2023 WL 5419613, at *6 (Minn. 23 August 2023). ^ Back to section

19 id., at *9 (Moore, J., concurring). ^ Back to section

20 id., at *11. ^ Back to section

21 id., at *11–12. ^ Back to section

22 The Litigation Financing Transparency And Consumer Protection Act, SB0269, https://legiscan.com/MT/text/SB269/id/2810355/Montana-2023-SB269-Enrolled.pdf. ^ Back to section

23 Emily R Siegel, Litigation Finance Disclosure Legislation Vetoed in Louisiana, Bloomberg Law (16 June 2023), https://news.bloomberglaw.com/business-and-practice/litigation-finance-disclosure-legislation-vetoed-in-louisiana. ^ Back to section

24 Lawsuit lender transparency bill stirs heated dialogue, 2News (14 March 2023), https://www.2news.com/townnews/civil_law/lawsuit-lender-transparency-bill-stirs-heated-dialogue/article_4d04c170-c2d9-11ed-af68-e345af88e877.html. ^ Back to section

25 HB 1447, Litigation Financing Consumer Protection Act, https://www.verisk.com/siteassets/gated/blog-material/fl-hb-1447.pdf; SB 1612, Litigation Financing Consumer Protection Act, https://www.verisk.com/siteassets/gated/blog-material/florida-sb-1612.pdf. ^ Back to section

26 See Missouri Division of Finance, Consumer Legal Funding, https://finance.mo.gov/consumercredit/consumer-legal-funding.php (last visited 18 September 2023); Missouri SB 103, Current Bill Summary, https://senate.mo.gov/23info/BTS_Web/Bill.aspx?SessionType=R&BillID=44662#:~:text=The%20act%20describes%20a%20%22consumer,in%20the%20consumer's%20legal%20claim (last visited 18 September 2023). ^ Back to section

27 Andrew Ramonas, SEC Tells Private Equity Firms to Report on Litigation Finance (3 May 2023), https://news.bloomberglaw.com/esg/sec-tells-private-equity-firms-to-report-on-litigation-finance. ^ Back to section

28 Form 20-F for the year ended December 31, 2022, Explanatory Note, Burford Capital https://d18rn0p25nwr6d.cloudfront.net/CIK-0001714174/ca7dfa61-ddc4-4c1d-86a8-b08a7c23275d.pdf; US SEC Closes Comment Letter Review, Burford Capital (24 August 2023), https://www.sec.gov/Archives/edgar/data/1714174/000110465923094891/tm2324769d1_ex99-1.htm. ^ Back to section

29 See, e.g.,*Incline Energy, LLC v. Stice*, 2009 WL 1975038, at *1 (W.D. Ky. 6 July 2009) (applying Kentucky law to litigation funding agreement in which Kentucky resident assigned proceeds of a Kentucky cause of action being litigated in Kentucky, despite a New York choice of law clause). ^ Back to section

30 For example, federal common law may govern a challenge to the assignment of a federal claim. See, e.g.,*Bluebird Partners, L.P. v. First Fid. Bank, N.A. New Jersey*, 85 F.3d 970, 973 (2d Cir. 1996) ('The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws.'); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 437 (3d Cir. 1993) ('[T]he validity of the assignment of a[] [federal] antitrust claim is a matter of federal common law.'). ^ Back to section

31 Champerty,*Black's Law* Dictionary. ^ Back to section

32 *Osprey, Inc. v. Cabana Ltd. P'ship*, 340 S.C. 367, 374 (S.C. 2000). ^ Back to section

33 id., at 373 (citations omitted). ^ Back to section

34 *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 372 (2d Cir. 1999). ^ Back to section

35 *Boling v. Prospect Funding Holdings, LLC*, 2017 WL 1193064, at *4 (W.D. Ky. 30 March 2017), aff'd, 771 F. App'x 562 (6th Cir. 2019). ^ Back to section

36 *Osprey*, 340 S.C. at 383. ^ Back to section

37 id., at 380; Definition and nature of champerty, 14 C.J.S. Champerty and Maintenance § 1 (2023). ^ Back to section

38 Definition and nature of champerty, 14 C.J.S. Champerty and Maintenance § 1 (2023).- ^ Back to section

39 *Saladini v. Righellis*, 426 Mass. 231, 235 (1997). ^ Back to section

40 Champerty was historically prohibited because allowing it would facilitate 'inauthentic claims'; that is, champerty permitted 'someone who had not suffered a wrong to exercise some degree of control over a claim for redress for a private wrong suffered by a stranger.' Anthony J. Sebok,*The Inauthentic Claim*, 64 Vand. L. Rev. 61, 94 (2011). ^ Back to section

41 *Saladini v. Righellis*, 426 Mass. 231, 235–37 (1997). ^ Back to section

42 id., at 236. ^ Back to section

43 *Osprey*, 340 S.C. at 374. ^ Back to section

44 id. ^ Back to section

45 *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 241 (Minn. 2020). ^ Back to section

46 See*Maslowski v. Prospect Funding Partners LLC*, 978 N.W.2d 447, 457 (Minn. Ct. App. 2022) (affirming trial court ruling that penalty clause of litigation funding agreement was unenforceable because it 'unconscionably interfered with [plaintiff's] decisions as to her legal claim, including the decision to select her own counsel'), rev'd on other grounds, 2023 WL 5419613 (Minn. 23 August 2023). ^ Back to section

47 See, e.g., *In re DesignLine Corp*., 565 B.R. 341, 346-49 (Bankr. W.D.N.C. 2017) (invaliding funding agreement as champertous under North Carolina's common law prohibition); *WFIC, LLC v. LaBarre*, 148 A.3d 812, 818 (Pa. Super. Ct. 2016) (same, under Pennsylvania's common law prohibition). ^ Back to section

48 See*Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1136 (1990) (California has 'no public policy against the funding of litigation by outsiders'); *Abbott Ford, Inc. v. Superior Ct.*, 43 Cal. 3d 858, 885 n.26 (1987) (California 'has never adopted the common law doctrines of champerty and maintenance'); California Ethics Formal Opinion No. 2020-204 (noting that 'prohibitions against champerty or its variants [. . .] should not be a barrier to a litigation funder enforcing a litigation funding contract in California'); Anglo-Dutch*Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App. 2006) (noting an absence of 'any authority that agreements that are 'champertous in nature' are automatically void or against public policy'). ^ Back to section

49 For example, before deciding*Maslowski* in 2020, the Supreme Court of Minnesota had 'most recently considered the status of champertous agreements' in 1932. *Maslowski*, 944 N.W.2d at 238. ^ Back to section

50 See 720 Ill. Comp. Stat. Ann. 5/32-12 ('Maintenance. If a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promote litigation, he or she is guilty of maintenance and upon conviction shall be fined and punished as in cases of common barratry.'). A relatively recent federal court decision, however, concluded that the 'statute should not be given a new life by judges' in the setting of an ordinary commercial litigation finance agreement, 'to which the Illinois Legislature never intended it be applied.'*Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 727 (N.D. Ill. 2014). ^ Back to section

51 See Ky. Rev. Stat. Ann. § 372.060 ('Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.'); see also*Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562 (6th Cir. 2019) (affirming a lower court decision finding that the litigation funding agreements at issue would violate this statute and Kentucky public policy). ^ Back to section

52 See N.Y. Jud. Law § 489(1) (prohibiting individuals and companies from purchasing or taking an assignment of notes, other securities, 'or other thing in action, or any claim or demand with the intent and for the purpose of bringing an action or proceeding thereon'). ^ Back to section

53 Ohio Rev. Code § 1349.55(B)(3). ^ Back to section

54 See Nev. Rev. Stat. § 604C.310 (40 per cent annually); Ind. Code § 24-12-4.5-2(a)(1)(A) (36 percent annually); Ark. Code Ann. § 4-57-109(b)(1) (17 per cent annually, per Ark. Code Ann. § 4-57-104 and Ark. Const., amend. LXXXIX, § 3); Tenn. Code Ann. § 47-16-110(a) (10 per cent annually). ^ Back to section

55 For example, the US Consumer Financial Protection Bureau initiated enforcement actions against one litigation funder accused of charging 9/11 first responders 250 per cent for funding. Jody Godoy, Litigation funder to pay $1 to settle CFPB, N.Y. lawsuit over 9/11 fund, Reuters (23 November 2022), https://www.reuters.com/legal/litigation/litigation-funder-pay-1-settle-cfpb-ny-lawsuit-over-911-fund-2022-11-23/. ^ Back to section

56 Ohio Rev. Code §. 1349.55. ^ Back to section

57 Me. Rev. Stat. tit. 9-A, §§ 12-101–12-107 (West); Neb. Rev. Stat. Ann. §§ 25-3301–25-3309 (West). ^ Back to section

58 2017 Wisconsin Act 235, § 12 (2018) ('Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.'); see also Jamie Hwang, Wisconsin law requires all litigation funding arrangements to be disclosed,*ABA Journal* (10 April 2018), https://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed; see also Andrew Strickler, Wis. Gov. Signs Legal Funder Transparency Rule, *Law360* (3 April 2018), https://www.law360.com/legalethics/articles/1029480/wis-gov-signs-legal-funder-transparency-rule. ^ Back to section

59 See Standing Order For All Judges Of The Northern District Of California, Contents Of Joint Case Management Statement (17 January 2017), https://northerndistrictpracticeprogram.org/wp-content/uploads/2018/06/Standing_Order_All_Judges_1.17.2017.pdf; United States District Court District of New Jersey Local Rules (21 June 2021), https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf. ^ Back to section

60 For example, Chief Judge Connolly of the US District Court for Delaware requires disclosure of the identity and address of the funder, whether the funder's approval is necessary for litigation or settlement decisions in the action (and if so, the terms relating to that approval), and a brief description of the funder's financial interest. US District Court for the District of Delaware, Standing Order Regarding Third-Party Litigation Funding Arrangements (18 April 2022), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf. ^ Back to section

61 See, e.g.,*In re Nat'l Prescription Opiate Litig*., 2018 WL 2127807, at *1 (N.D. Ohio 7 May 2018) (order mandating disclosure of litigation funding and requiring in-camera review of the underlying agreement). ^ Back to section

62 Litigation Funding Transparency Act of 2021, S. 840, 117th Cong. (2021). ^ Back to section

63 ILR Urges Advisory Committee to Adopt Mandatory Uniform Disclosure of TPLF (9 May 2023), https://instituteforlegalreform.com/blog/ilr-urges-advisory-committee-to-adopt-mandatory-uniform-disclosure-of-tplf/ (referencing Letter Re: Proposed Fed. R. Civ. P. 26(a)(1)(A)(v) (8 May 2023) https://instituteforlegalreform.com/wp-content/uploads/2023/05/Coalition.Comments_ThirdPartyLitigationFunding77.pdf). ^ Back to section

64 Model Rules of Pro. Conduct Rule 1.8(f) (Am. Bar Ass'n 2023) ('A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship'). ^ Back to section

65 id. at Rule 5.4. ^ Back to section

66 See, e.g., Jason Solomon, Deborah Rhode and Annie Wanless, How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice (April 2020), https://law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf. ^ Back to section

67 In November 2021, the Florida Bar's Board of Governors unanimously rejected (46-0) proposals to permit minority ownership in law firms by non-lawyers and to permit fee-sharing with non-lawyers. Mark D Killian, Board Details Its Opposition To Special Committee's Proposals, The Florida Bar (Jan. 10, 2022), https://www.floridabar.org/the-florida-bar-news/board-details-its-opposition-to-special-committees-proposals/#:~:text=Non%2Dlawyer%20Ownership%20of%20Law%20Firms&text=The%20board%20unanimously%20rejected%20the,equity%20interest%20in%20law%20firms. In March 2022, the Florida Supreme Court agreed with the state bar and let the current Rule 5.4 remain in effect, rejecting the proposals of the Special Committee to expand law firm ownership to non-lawyers. Letter from J Tomasino to J Doyle (3 March 2022). In September 2022, a California law was passed that limits the ability of the California State Bar to implement a regulatory sandbox opening the door to nonlawyer ownership of law firms. Joyce Cutler, California Restrains State Bar From Expanding Nonlawyer Practice (19 September 2022), https://news.bloomberglaw.com/business-and-practice/california-restrains-state-bar-from-expanding-nonlawyer-practice. ^ Back to section

68 See Alternative Business Structures (ABS) Questions & Answers FAQ, ('The Court unanimously adopted the elimination of Rule 5.4. What does this allow? Nonlawyers may partner with lawyers. Nonlawyers may own, have an economic interest in, manage, or make decisions in, an Alternative Business Structure that provides legal services. Lawyers will be permitted to split fees.'). ^ Back to section

69 See, e.g., Arizona Revised Rule 1.5(e), https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/ (requiring a lawyer to disclose to the client and obtained informed consent if there is fee sharing); Arizona Rule 1.7 cmt. 1, https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/ ('A lawyer must disclose potential conflicts of interest if the lawyer refers a client for nonlegal services provided in the firm by either the lawyer or nonlawyer in the firm'); Rule 1.6 cmt. 22, https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/ (requiring lawyers to 'establish reasonable safeguards within firms' to assure that all client information remains confidential, even if the only services provided to the client are nonlegal). ^ Back to section

70 Utah Courts, To Tackle the Unmet Legal Needs Crisis, Utah Supreme Court Unanimously Endorses a Pilot Program to Assess Changes to the Governance of the Practice of Law (13 August 2020), https://legacy.utcourts.gov/utc/news/2020/08/13/to-tackle-the-unmet-legal-needs-crisis-utah-supreme-court-unanimously-endorses-a-pilot-program-to-assess-changes-to-the-governance-of-the-practice-of-law/. ^ Back to section

71 See Utah Rule 5.4. Professional Independence of a Lawyer, 5.4(d), https://legacy.utcourts.gov/rules/view.php?type=ucja&rule=13-5.4 (A 'lawyer may practice law with nonlawyers, or in an organization, including a partnership, in which a financial interest is held or managerial authority is exercised by one or more persons who are nonlawyers, provided that the lawyer shall: (1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and (2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.'). ^ Back to section

72 For example, there has not yet been significant discussion in the US of whether a duty of care should be imposed on litigation funders. For a discussion concerning the potential imposition of fiduciary duty requirements on funders; see M. Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95*Minn L Rev* 1268, 1327–1329 (2010–2011) (noting that 'a fiduciary duty on the part of the funder toward the client can improve the client's position vis-à-vis the funder's shareholders where the funder has to navigate potentially competing interests'). ^ Back to section

73 Although this discussion focuses on the more common plaintiff-side agreements, we note that some litigation funders also market defence-side products. See, e.g., Jason Levine, A Primer on U.S. Defense-Side Litigation Finance,*Omni Bridgeway* (7 July 2022), https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/07/07/a-primer-on-defense-side-litigation-finance. ^ Back to section

74 The Federal Rules of Civil Procedure allow for substitution of parties, which can be used when ownership of a claim changes hands. See Fed. R. Civ. P. 25(c) ('If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.'). ^ Back to section

75 See, e.g.,*Justinian Cap. SPC v. WestLB AG*, 28 N.Y.3d 160, 167-68 (N.Y. 2016) (invalidating funding agreement where 'there was no evidence, even following completion of champerty-related discovery, that [funder's] acquisition of the notes was for any purpose other than the lawsuit it commenced almost immediately after acquiring the notes'). ^ Back to section

76 id. at 166–67. ^ Back to section

77 Compare*Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 437 (3d Cir. 1993) ('[T]he validity of the assignment of a[] [federal] antitrust claim is a matter of federal common law.'), with *Martin v. Morgan Drive Away, Inc*., 665 F.2d 598, 604–05 & n.5 (5th Cir. 1982) (applying state law to evaluate validity of assignment agreement and declining to 'create. . . a federal common law of champerty out of whole cloth'). ^ Back to section

78 GAO, Third-Party Litigation Financing at 8. A recent survey published by a litigation funding company claims that, in 2022, approximately one-third of new funding deals were single-case financing arrangements, while approximately two-thirds were portfolio arrangements. 2022*Litigation Finance Market Report* at 6, https://www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf. ^ Back to section

79 For example, a litigation funding contract from Therium Litigation Funding that was disclosed publicly as part of a separate litigation provided for Therium to receive from claim proceeds (1) reimbursement for costs it advanced; (2) a six-times return on its investment; and (3) two per cent of overall proceeds. See Litigation Funding Agreement,*Gbarabe v. Chevron Corp*., 2016 WL 4154849, ECF No. 186-4 at 73 & 75-76 (N.D. Cal. 16 September 2016) (Therium's funding agreement for plaintiffs' lawyers in class action case brought in US federal court by victims of Nigerian natural gas rig explosion) ('Therium Agreement'). ^ Back to section

80 See Am. Bar Ass'n Commission on Ethics 20/20, Informational Report to the House of Delegates at 12–13 (2012) (noting that usury is 'the taking of interest at a rate that exceeds the maximum rate provided by law for the particular category of lender involved in the transaction' and discussing its potential applicability to litigation finance transactions). ^ Back to section

81 See, e.g.,*Fast Trak Inv. Co., LLC v. Sax*, 962 F.3d 455, 462-67 (9th Cir. 2020) (whether litigation funding agreement was a loan that could violate New York usury laws in part turned on certainty of recovery from funded cases); *Ruth v. Cherokee Funding, LLC*, 820 S.E.2d 704, 709 (Ga. 2018) (litigation finance arrangement was not a 'loan' under Georgia law because 'obligation of repayment attached only upon the successful resolution' of underlying lawsuits'). ^ Back to section

82 See, e.g., Letter from International Legal Financial Association to Judicial Conference of the U.S., at 4 (3 October 2022), https://www.uscourts.gov/sites/default/files/22-cv-o_suggestion_from_international_legal_finance_association_ifla_-_rule_16c2_0.pdf (letter from litigation funding trade association asserting that '[l]itigation funders do not control litigation strategy . . . ILFA's members are passive investors.'); Parabellum Capital, What Sets Litigation Funders Apart?, https://web.parabellumcap.com/what-sets-litigation-funders-apart (last visited 20 September 2023) ('At Parabellum, we do not exercise any control over the cases in which we are invested, and we do not believe it is ever appropriate to do so.'); Burford Capital, How we work with law firms, https://www.burfordcapital.com/how-we-work/with-law-firms/ (last visited 20 September 2023) ('We act as passive investors and do not control strategy or settlement decision-making.'). ^ Back to section

83 See, e.g., Alison Frankel, Sysco sues litigation funder Burford, blasts Boies Schiller over $140 million soured deal, Reuters (9 March 2023), https://www.reuters.com/legal/legalindustry/sysco-sues-litigation-funder-burford-blasts-boies-schiller-over-140-million-2023-03-09/. Cleary Gottlieb was counsel to Sysco Corporation. ^ Back to section

84 See, e.g., Litigation Funding Agreement between Legalist Fund II, L.P., and DiaMedica Therapeutics Inc., at § 6.7 (27 December 2019), https://www.sec.gov/Archives/edgar/data/1401040/000143774920000102/ex_168050.htm ('The Plaintiff agrees and undertakes that it will not engage a new attorney or law firm by executing a retainer agreement or other contract to employ such attorney or law firm to advise and/or represent the Plaintiff in connection with the Claim(s), without giving the Funder thirty (30) days' prior notice and without giving good faith consideration to the Funder's response, if any.'). ^ Back to section

85 See, e.g., Therium Agreement § 3.1.3 ('The Lawyers shall at all times . . . prosecute the Claim diligently and use all reasonable endeavors, consistent with the professional conduct of the Claim . . . to recover the maximum possible Contingency Fee in respect of the Claim.'); Second Amended and Restated Capital Provision Agreement at § 5.3(b)(i),*Glaz LLC v. Sysco Corp*., No. 23-cv-2489, ECF No. 21-1 (S.D.N.Y. 3 May 2023) ('Burford Agreement') (client 'shall use all commercially reasonable efforts to: pursue [funded claim] . . . bring about the reasonable monetization of such Claim . . .; and collect and enforce any settlement, final judgment or award.'). ^ Back to section

86 Professor Anthony J Sebok, an ethics adviser to Burford Capital, has written that 'any funding agreement that allows a funder to take control of settlement' would be 'seen against public policy in every [US] state.' Anthony J Sebok, The Rules of Professional Responsibility and Legal Finance: A Status Update, Cardozo Law Jacob Burns Inst. For Advanced Legal Studies, Faculty Research Paper No. 671, 11 n.41 (2022). Courts examining litigation funding agreements often focus on the question of control. See, e.g., *Maslowski v. Prospect Funding Partners LLC*, 978 N.W.2d 447, 457 (Minn. Ct. App. 2022) (invalidating funding arrangement that interfered with party's 'control over her underlying lawsuit' because it '[r]estricted [her] freedom to enter into settlements'); *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 579–80 (6th Cir. 2019) (invalidating funding agreement that 'effectively [gave] [the funder] substantial control over the litigation'); *In re Nat'l Prescription Opiate Litig.*, 2018 WL 2127807, at *1 (N.D. Ohio 7 May 2018) (funding agreements that 'give to the lender any control over litigation strategy or settlement decisions' will be 'deem[ed] unenforceable'). ^ Back to section

87 Parties considering accepting funding should also seek independent counsel to advise on the funding agreement, instead of relying on counsel litigating the underlying matter. ^ Back to section

88 See, e.g., Therium Agreement §§ 13 & 14 (privilege and confidentiality provisions); Burford Agreement § 8 (provisions imposing strict confidentiality obligations). ^ Back to section

89 Before deciding whether to invest in a claim, litigation funders will generally want to perform some due diligence to ensure that they have confidence in their valuation. This may include review of confidential and even privileged information. Such due diligence can be performed under a separate non-disclosure agreement. ^ Back to section

90 As with other aspects of a litigation funding arrangement, it is possible to structure this according to the parties' preference; for example, privileged information may be carved out of any ongoing information-sharing obligation. Compare, e.g., Burford Agreement § 5.3(b)(4) (requiring client to 'keep the [funder] fully and promptly apprised of each material development in relation to [funded claims]'), with id., § 9.4 ('the [client] is not obligated to provide to the [funder] any information that is subject to attorney-client privilege'). ^ Back to section

91 See, e.g., Burford Agreement § 15. ^ Back to section

92 See, e.g., Therium Agreement § 24; Burford Agreement § 29. ^ Back to section

93 In federal courts, for example, parties may obtain discovery in various forms (e.g., documentary evidence, responses to written interrogatories, or oral or written testimony) into 'any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.' Fed. R. Civ. P. 26(b)(1). In addition, '[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.' id. ^ Back to section

94 See, e.g., Fed. R. Civ. P. 34 (permitting parties to serve requests for production of documents). ^ Back to section

95 A well-publicised case in the US underscores the importance of this point. Wrestler Hulk Hogan sued internet media company Gawker after Gawker published a sex tape, but Hogan lacked resources to aggressively litigate the case himself. Hogan was secretly backed by Silicon Valley billionaire Peter Thiel, however. See, e.g., Andrew Ross Sorkin, Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker,*NY Times* (25 May 2016), https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html. Thiel had a personal vendetta against Gawker after the site outed him as gay many years before. With Thiel's backing, Hogan was able to make different strategic decisions in the case than he would have if forced to litigate with only his own resources. See id. ^ Back to section

96 See Fed. R. Civ. P. 26(b)(1). The standard quoted above is the one that applies in federal court, though state courts apply similar standards. ^ Back to section

97 *In re Valsartan* N-Nitrosodimethylamine*(NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 615–19 (D.N.J. 2019) (rejecting relevance argument based on 'credibility and bias,' among other grounds); *Benitez v. Lopez*, 2019 WL 1578167, at *1-2 (E.D.N.Y. 14 March 2019) (rejecting relevance arguments based on plaintiff's 'motives' or 'credibility'). ^ Back to section

98 *Colibri Heart Valve LLC v. Medtronic CoreValve LLC*, 2021 WL 10425630, at *2-4 (C.D. Cal. 26 March 2021) (rejecting relevance argument based on speculation that funding arrangement may deprive plaintiff of standing to assert patent infringement). ^ Back to section

99 *Kaplan v. S.A.C. Cap. Advisors, L.P.*, 2015 WL 5730101, at *5 (S.D.N.Y. 10 September 2015) (rejecting relevance argument based on class counsel's adequacy because defendants had 'provided no nonspeculative basis for raising such concerns'). ^ Back to section

100 See *Conlon v. Rosa*, 2004 WL 1627337, at *2 (Mass. Land Ct. 2004) (noting that '[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders' and that discovery into funding materials was relevant to plaintiff's potential 'agenda' unrelated to the merits of its claim); *Gbarabe v. Chevron Corp.*, 2016 WL 4154849, at *1 (N.D. Cal. 5 August 2016) (granting discovery of funding agreement as 'relevant to determining adequacy of representation in this putative class action'). ^ Back to section

101 See Fed. R. Civ. P. 26(b)(3). ^ Back to section

102 See, e.g., *Continental Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1020–21 (D. Ariz. 2020); *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, 2018 WL 466045, at *5-6 (W.D. Pa. 18 January 2018); *Viamedia, Inc. v. Comcast Corp.*, 2017 WL 2834535, at *1-3 (N.D. Ill. 30 June 2017); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 737–39 (N.D. Ill. 2014). ^ Back to section

103 *Acceleration Bay LLC v. Activision Blizzard, Inc.*, 2018 WL 798731, at *2 (D. Del. 9 February 2018) (no work production protection because documents were 'prepared with a "primary" purpose of obtaining a loan, as opposed to aiding in possible future litigation'). ^ Back to section

104 See Fed. R. Civ. P. 26(b)(3). ^ Back to section

105 See *In re Int'l Oil Trading Co.*, LLC, 548 B.R. 825, 838–39 (Bankr. S.D. Fla. 2016) (finding 'substantial need' for discovery of funding agreement to support potential argument that bankruptcy proceeding was improper because petitioning creditor was working at litigation funder's behest). ^ Back to section

106 See, e.g., id., at 831–32 (holding that communications among attorney, client, and funder were subject to Florida's 'more expansive' common interest doctrine because the parties were part of a 'common enterprise'). ^ Back to section

107 *Cohen v. Cohen*, 2015 WL 745712, at *4 (S.D.N.Y. 30 January 2015) ('Although [plaintiff and litigation funder] 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.'); see also M Steinitz & A Field, A Model Litigation Finance Contract, 99 *Ia. L. Rev*. 711, 730–34 (2014) (discussing New York's approach to attorney-client privilege and work product issues in funding context). ^ Back to section

108 See, e.g., *Sage Sys., Inc. v.* Liss, 198 N.E.3d 768, 770 (N.Y. 2022) ('Under the American Rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorised by agreement between the parties, statute or court rule.' (quotations omitted)). ^ Back to section

109 Abu-Ghazalehv. *Chaul*, 36 So. 3d 691, 693–94 (Fla. Dist. Ct. App. 2009). In US litigation, cases generally must be 'prosecuted in the name of the real party in interest.' See Fed. R. Civ. P. 17(a)(1). This rule is based on the principle that defendants have 'a right to know, and confront, the real party in interest in the case they are defending.' M Steinitz, Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements, 53 *U.C. Davis L. Rev.* 1073, 1101 (2019). In Abu-Gazaleh, the court applied Florida's state law version of this rule, which provides that parties to litigation include 'not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of the proceedings.' 36 So. 3d at 694. ^ Back to section

110 id., at 693–94. ^ Back to section

CLEARY GOTTLIEB

Lina Bensman lbensman@cgsh.com
Patrick C Swiber pswiber@cgsh.com
Katerina Wright kawright@cgsh.com

Cleary Gottlieb Steen & Hamilton LLP

Read more from this firm on Lexology