

Litigation Funding

Contributing editors

Steven Friel and Jonathan Barnes



2017

**GETTING THE
DEAL THROUGH** 

GETTING THE
DEAL THROUGH 

Litigation Funding 2017

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Published by
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First published 2016
First edition
ISSN 2399-665X

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Litigation Funding 2017

First edition

Getting the Deal Through is delighted to publish the first edition of *Litigation Funding*, which is available in print, as an e-Book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
November 2016

Introduction

Steven Friel and Jonathan Barnes

Woodsford Litigation Funding

This publication is both timely and unique.

In many of the world's leading centres for dispute resolution, litigation funding is no longer a novelty. There are well-developed markets for litigation funding in London, New York and Sydney, and the judiciary and policymakers in those jurisdictions are largely supportive. Litigation funding is now a multibillion-dollar global enterprise. It is, therefore, perhaps surprising that this is the first global survey of the law and practice of third-party litigation funding with jurisdiction-by-jurisdiction contributions from leading practitioners around the world.

Litigation funding 'is the life-blood of the justice system ... it helps maintain our society as an inclusive one', so said the president of the UK Supreme Court, Lord Neuberger, in a 2013 speech. He was referring to the fact that litigation funding assists access to justice, allowing claimants with meritorious claims to litigate, notwithstanding that they lack the financial resources or the risk appetite to proceed without support.

Having a basis in the *David v Goliath* situations, where impecunious claimants gain access to justice, litigation funding is now also used by well-resourced claimants who wish to hedge their litigation risk. In this context, it is often referred to as litigation finance. A July 2015 article in the *New Yorker* magazine noted that 'hundreds of companies, increasingly from the Fortune 500, have used litigation finance, convinced that it was in their interest, according to people in the field.'

Of course, the best litigation funders provide more than simply financial assistance. We also provide professional expertise. In April 2016, the international law firm Freshfields Bruckhaus Deringer noted that third-party litigation funding 'is here to stay, and not just for small or cash-strapped claimants ... [T]he involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments.'

The ever-increasing prevalence of litigation funding around the world has led to some jurisdictions having to play catch-up. Law reform proposals in Hong Kong and Singapore, for example, seem to acknowledge that a failure to embrace litigation funding could lead to those jurisdictions slipping down the rankings of favoured centres for international dispute resolution. And a number of judicial and arbitral institutions around the world, for example, the International Bar Association and the International Court of Arbitration, are reviewing how their rules and guidelines should best be framed to accommodate litigation funding.

While it is impossible to summarise in this brief introduction all of the valuable work product that comes in the following chapters, there are, in our view, four important themes that we can draw from them.

First, there is clearly a need for litigation funding, in particular, because most jurisdictions report a rise in legal costs. We note also that

most jurisdictions report a drop in state support, often known as legal aid, for civil and commercial litigation.

Second, with a small number of exceptions, litigation funding is permitted, and indeed encouraged, around the world. While most common law jurisdictions have historically prohibited litigation funding, based on the ancient doctrines of maintenance and champerty, those prohibitions have largely been swept aside. The traditional centre for the common law, the courts of England and Wales, now positively embrace litigation funding as a tool of access to justice, as do their colleagues in the United States, Australia and New Zealand. While, for the time being at least, the courts of Ireland continue to apply the ancient doctrines of maintenance and champerty to prohibit litigation funding, and while those concepts still apply to some extent in Singaporean and Hong Kong domestic litigation, it is felt by many that any remaining prohibitions will eventually be overturned by legislation or by appellate court decisions. Most civil law jurisdictions, including Germany and Brazil, have never been burdened by public policy prohibitions, and litigation funding remains largely a matter governed by the private law of contracts.

Third, for a multibillion-dollar industry, there are remarkably few reported problems or disputes between litigation funders and the litigants they fund. This speaks well of both the litigation funders and the lawyers who advise litigants in relation to funding arrangements. Those who call for further regulation of the litigation funding industry might do well to recall the maxim 'if it ain't broke, don't fix it'.

Fourth, litigation funding appears to have overtaken 'after-the-event' (ATE) insurance in popularity among international litigants. The litigation funding industry appears to be more responsive to litigation needs than the insurance industry.

And finally, the huge growth of litigation funding over the last 10 years is likely to be the tip of the iceberg. There are 16 jurisdictions represented in this first edition. We confidently predict that this number will double within the next few years.

We are delighted to be involved in this publication, and we are grateful to all of the authors for their hard work. There will no doubt be many further editions in the coming years, and we look forward to having a continued involvement in providing accurate and helpful information to lawyers and litigants around the world.

Australia

Gordon Grieve, Greg Whyte and Simon Morris

Piper Alderman

1 Is third-party litigation funding permitted?

Third-party litigation funding is permitted in Australia, however, not without complexity.

Maintenance and champerty are obsolete as crimes at common law (*Clyne v NSW Bar Association* (1960) 104 CLR 186, 203) and maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. In Queensland, Western Australia, Tasmania and the Northern Territory, the torts of maintenance and champerty have not been abolished. Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it were found to be inconsistent with common law public policy considerations.

The High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (*Fostif*) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers' duties to the court and clients (conflicts, etc).

Importantly, *Fostif* did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished.

The recent decision of *Bolitho v Banksia Securities Limited* (No. 4) [2014] VSC 582, is illustrative of the circumstances where courts, post *Fostif*, are prepared to intervene. In *Bolitho*, Ferguson JA found that lawyers connected with the litigation funder should be prevented from acting for the representative plaintiff in a class action in circumstances where the litigation funder was majority owned by entities controlled by the solicitor and the barrister acting in the matter. The Court ruled, in its inherent jurisdiction, that the lawyers should be restrained from acting. While the Court did not find that the solicitor and barrister had breached any common law, statutory or professional conduct obligation, the restraint was necessary to ensure the public perception of the due administration of justice and to protect the integrity of the judicial process.

See also the recent discussion on abuse of process and the tort of maintenance in Queensland in *Taylor & Anor v Hobson & Ors* [2016] QSC 226. In this case the plaintiffs sued the defendants for damages, claiming the defendants had made a number of misleading representations in relation to the purchase of a business. The first and second defendants were the vendors and the third and fourth defendants were the vendors' solicitors. The third and fourth defendants settled with the plaintiffs through their insurer, Lexon. The deed of settlements entered into between the plaintiffs, the third and fourth defendants, and Lexon provided for a payment of

a sum of money and for Lexon to appoint its solicitors to undertake further carriage of the proceedings for the plaintiffs against the first and second defendants. These circumstances meant that Lexon assumed an interest in the litigation and in effect became a funder.

The first and second defendants applied to stay the proceedings or to have the solicitors restrained from representing the plaintiffs on the grounds of an abuse of process. Boddice J noted that Lexon's funding of the proceeding was not enough to warrant a stay of the proceedings, citing the increased recognition of litigation funding as improving access to justice. However, the possibility for the insurer to control the proceedings against the first and second defendants, even if it were exercised reasonably, gave rise to a real possibility that Lexon would impermissibly intermeddle in the conduct of the proceedings to protect its own interest. His Honour concluded that the intermeddling arose in circumstances where the interests of the plaintiffs and of Lexon did not coincide in all material respects. Boddice J ultimately stayed the proceedings for abuse of process.

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

There is no legislation or regulation in Australia that limits the fees funders can charge.

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

Theoretically, Australian courts could set aside a litigation funding agreement where the funder's interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person's inability to judge for himself or herself by reason of weakness, necessity or ignorance.

Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. The High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 restated the principles relating to unconscionable conduct. A court may set aside a bargain as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of the special disadvantage. In those circumstances, the innocent party may be relieved of the consequences of the unconscionable conduct. In *Kakavas v Crown Melbourne Limited* [2013] HCA 25, a gambling addict sought to avoid losses with a casino, arguing that the casino had taken unconscionable advantage of his vulnerability. The Court in rejecting his claim ruled that inequality of bargaining power was relevant, but not essential to establish unconscionability and that a party must rely upon standards of personal conduct known as 'the conscience of equity'. The High Court drew a clear distinction between the equitable principles of unconscionable conduct and undue influence.

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

3 Are there any specific legislative or regulatory provisions

applicable to third-party litigation funding?

Third-party litigation funders in Australia have no mandatory licensing or prudential supervision.

In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) and Ors* [2012] HCA 45 (*Chameleon Mining*), the High Court was asked to determine whether a litigation funder, International Litigation Partners (ILP), was required to obtain an Australian Financial Services License (AFSL) on the basis that litigation funding was a financial product. The Court held that the litigation funding arrangement was a credit facility but as the Corporations Act 2001 (Cth) excludes credit facilities from the definition of financial products ILP was not required to hold an AFSL. The requirement to hold an AFSL would have resulted in litigation funders being regulated by the Australian Securities and Investments Commission (ASIC) as providers of financial services. AFSL holders are required to satisfy fitness and propriety requirements and, depending on the particular financial product engaged in, capital adequacy standards. AFSL holders have specific obligations subject to ASIC oversight relating to conduct and disclosure, the manner in which the financial services are provided, the training, competence, knowledge and skills of persons providing the services, ongoing compliance of the adequacy of your financial, technological and human resources, and systems designed to ensure compliance with the financial services laws such as management of conflicts of interest and risk management.

After the *Chameleon* decision the federal government clarified the regulatory position by exempting litigation funding from all forms of regulation that apply to providers of financial services and credit facilities. However, the federal government did impose regulations that required that litigation funders must have adequate processes to manage conflicts of interest. Criminal sanctions apply for non-compliance with the conflict requirements. The conflict requirements are policed by ASIC.

The purpose of the conflict of interest regulations is to ensure that conflicts – ordinarily where the interests of funders, lawyers and litigants of the funded litigation diverge – are managed by the litigation funder. ASIC's Regulatory Guide sets out ways in which funders can meet their conflict of interest management obligations under the regulations, but otherwise do not prescribe the required mechanism for compliance with the regulations. For example, there is a requirement that litigation funders maintain a conflict of interest policy, however, regulations do not prescribe the content of the policy or the processes that a litigation funder must have in place to respond to a conflict of interest.

In its Access to Justice Report released in 2014, the Productivity Commission, the Australian government's principal review and advisory body on microeconomic policy and regulation, recommended reforms to promote access to justice and remedy a system that it says is 'too slow, too expensive and too adversarial'.

The Report recommended the removal of prohibitions on lawyers and law firms charging contingency fees and the implementation of a licensing regime to regulate third-party litigation funders.

The Commission made a number of recommendations, including implementing a mandatory licensing regime for third-party funders to require that all funders be licensed as financial service providers under the Corporations Act, that funders hold adequate capital to meet financial obligations to consumers and other parties (including costs liabilities), and comprehensive disclosure obligations.

The federal government has not acted on the recommendations of the Productivity Commission.

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

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in funded proceedings.

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

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

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

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

See question 3 with respect to the ASIC regulation of the conflicts' rules. Outside of ASIC regulations of the conflicts rule, there is no formal regulatory framework applying to litigation funders.

There are some specific examples where the terms of litigation funding agreements are supervised by the courts.

In an insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder. Under the Corporations Act, a liquidator is required to seek the court's approval, where the terms of a contract that he or she enters into involve performance that exceeds three months. This means that in almost all cases where a liquidator enters into a litigation funding agreement, court approval is required.

When reviewing a litigation funding agreement for approval, the courts take account of a range of factors, including:

- the liquidator's prospects of success in the litigation;
- the interests of creditors other than the proposed defendants;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action;
- the extent to which the liquidator has canvassed other funding options;
- the level of the funder's premium;
- the liquidator's consultations with creditors; and
- the risks involved in the claim, including the amount of costs likely to be incurred in the proposed litigation and the extent to which the funder is to contribute to those costs, to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs.

The decisions involving approval of funding agreements demonstrate that the courts do not simply rubber stamp whatever is put forward by a liquidator, and that the approval of the court is not intended to be an endorsement of the proposed funding agreement or the proposed claim, but merely a permission for the liquidator to exercise his or her own commercial judgement in the matter.

The case management of class actions commenced in the Federal Court involving litigation funding require at or prior to the initial case management conference that each party disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information that might reasonably be expected to confer a tactical advantage on the other party.

All settlements reached in class action proceedings must be court approved. Where a settlement involves a funder's interest being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness.

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

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist on the identity of the lawyers retained. Commonly, the funder will, pursuant to the funding arrangement, appoint the lawyers to provide the legal work, and the retainer agreement between the lawyers and the funded client will be pursuant to terms required by the funder.

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

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

Commonly, save in respect of settlement (see discussion below), in circumstances where a conflict arises between the lawyer's duty to his or her client and the funder, the lawyer is required to prefer the interests of and to take instructions from his or her client.

In a settlement context, in recognition of the funder's interest in the resolution of litigation, where there is a difference of opinion between the funded client and the funder in respect of settlement terms, the standard

practice in the Australian experience is that the difference of opinion is referred to the most senior lawyer acting in the matter. In the class action context, any settlement reached on behalf of the representative client will be subject to court approval.

There are no decisions of Australian courts interfering with this practice. It is submitted that this level of control over the litigation process is consistent with the principles in *Fostif* and are not contrary to public policy.

8 Do funders have veto rights in respect of settlements?

See above.

9 In what circumstances may a funder terminate funding?

Commonly litigation funding agreements entered into in Australia allow a funder to terminate the funding relationship at its discretion without cause and on the giving of notice.

Usually the termination of a funding agreement will relate to the commercial viability of the claim and be about the legal merits or quantum. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement.

Contract law principles that apply to the termination of contracts generally will apply.

10 In what other ways may funders take an active role in the litigation process?

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

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

'No-win-no-fee' conditional costs agreements are permitted in Australia.

There are prohibitions on legal service providers obtaining an interest in any financial profit derived from a settlement or judgment beyond those that are properly agreed as professional service fees. While the regulations differ from state to state, lawyers are prohibited from entering contingent fee agreements, but are permitted in a conditional fee agreement to charge an 'uplift' of up to 25 per cent if successful in the proceedings on standard hourly rates.

The Productivity Commission's Access to Justice Report recommended lifting the ban on contingency fee arrangements on the basis that they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was conditioned in that it was subject to the maintenance of the prohibition on contingency fee arrangements for criminal and family law matters, comprehensive disclosure obligations (as to the percentage of damages to be recovered by law firms and responsibility for liability for disbursements and adverse costs orders) and capping the percentage limit on a sliding scale (to prevent law firms gouging, or earning windfalls on high-value claims).

As a safeguard against contingency fees leading to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers' ethical and professional obligations.

The Commission noted the inconsistent treatment of lawyers entering into contingent arrangements, given the regulation of the legal profession, and the acceptance of third-party litigation funding, which is largely unregulated.

12 What other funding options are available to litigants?

After-the-event insurance (ATE), while having long been available in the UK market is relatively new in Australia. It can be purchased after a dispute has arisen or a proceeding is contemplated and covers adverse cost orders.

13 How long does a commercial claim usually take to reach a decision at first instance?

While there is no fixed timetable that can be applied uniformly to all commercial proceedings, the case management principles of the states, territories and Federal Court (which in most instances are uniform) provide guidelines which the courts are obliged to follow in managing cases.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates set as soon as possible. Unless there is good reason, the timetable must be adhered to. A key objective is to identify the issues in dispute really early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. Monitoring of the caseload must provide timely and comprehensive information to judges and court officers involved in management. Communication and consultation within the court and with others involved in the litigation process is an ongoing process.

The Productivity Commission's report into Government Services 2016 set out the clearance rates for Australian courts. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that courts are, on average, clearing around 90 per cent of all civil matters listed in a given calendar year. This statistic discloses only that courts are close to disposing of as many proceedings as are commenced in any given calendar year, however, complex commercial matters are unlikely to be resolved within one year of commencement. That said, case flow management is an important component of the administration of justice in Australian courts.

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

Nationally, in 2014–2015, 1,920 notices of appeal were lodged in state intermediate appellate courts, and 910 cases were filed in the Federal Court. Despite variance in completion rates, and accepting that the caseload of the appellate courts was referable to proceedings on appeal that had been on the Court lists outside 2014–2015, 1,920 appeals were determined by the intermediate state courts in 2014–2015. The Full Federal Court (Productivity Commission Report on Government Services 2016 (Table 7.21)) determined 770 appeals. While there is no average number disclosing a median number of appeals determined in any given year, the clearance rate is 94.65 per cent. Accordingly, it is appropriate to conclude that most appeals are determined within 12 months of the filing of a notice of appeal.

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

There is no objective data measuring the proportion of judgments requiring contentious enforcement processes.

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

Perceived procedural hurdles in the process of enforcing rights against insurers were cleared away by the High Court in *CGU Insurance Limited v Blakeley & Ors* [2016] HCA 2. The High Court held unanimously that a person who commences proceedings against an insolvent company or a bankrupt individual can join that defendant's insurer to the proceedings and seek a declaration that the insurer is liable to indemnify the defendant.

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

Yes, class actions are permitted in Australia and are becoming increasingly common.

In the 12 months prior to June 2015, there were 33 new class actions filed in the Federal Court and Supreme Courts in Victoria and New South

Wales. This was almost double the number of class actions filed in the previous year. Out of the 33 class actions referred to above, 13 had third-party litigation funding in their early stages.

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

Yes, the courts have powers to order that an unsuccessful party pay the costs of the successful party, although the recovery rate varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party's reasonable legal costs.

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

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

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

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

In *Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors* [2016] VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director and company secretary of Global and shareholder. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant's actual costs. Arguments that making a costs order against the company director was 'piercing the corporate veil' were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was not a miscarriage of justice and the appeal was dismissed.

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

Non-party costs orders are rarely made in a litigation funding context because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant's costs.

19 **May the courts order a claimant or a third party to provide security for costs?**

The court has the power to order a plaintiff to give security for the defendant's cost of defending the plaintiff's claim. The court can order a stay of proceedings until security is given and if there is non-compliance, the court may dismiss the claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court. Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against them in the disposal of the proceedings.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs.

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

The relatively recent availability of ATE insurance in the Australian market may explain the difficulty the Victorian Supreme Court recently

had in recognising an ATE insurance policy backed by a Deed of Indemnity as constituting adequate security. On appeal, the Victorian Supreme Court approved security for costs being provided by way of deed of indemnity from an ATE insurer (see: *DIF III Global Co-Investment Fund LP (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v BBLP LLC (formerly Babcock & Brown LP)* [2016] VSC 401).

The amount of security is calculated by reference to the anticipated costs of defending the action. This will be a matter for evidence. In complex claims, it is usual that security orders will be staged by reference to identified phases in the litigation.

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

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744).

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

ATE insurance is permitted. ATE insurance is a relatively new product in Australia but has a growing appreciation and application.

22 **Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?**

Generally, no; however, for class actions commenced in the Federal Court, claimants are required to disclose the litigation funding agreement. The commercial terms may be redacted.

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

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

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidential nature of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute.

Each of these privileges was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, the claimant sought production of certain documents created in connection with investigations carried out by law firm Maurice Blackburn in anticipation of the commencement of representative proceedings. Maurice Blackburn claimed client legal privilege over the majority of the documents sought by IOOF Ltd. The court accepted, for the most part, the client legal privilege claims made by Maurice Blackburn. However, the court stopped short of accepting in their entirety similar claims from the litigation funder, Harbour Litigation Funding Ltd, who separately claimed privilege over certain documents relating to communications with Maurice Blackburn.

Despite the fact that there was no 'traditional client/lawyer relationship' between Harbour and Maurice Blackburn, the court accepted that Harbour sought legal advice from Maurice Blackburn (despite not formally retaining them) and could claim privilege over that advice. Where documents that could be subject to a claim for litigation privilege by Maurice Blackburn's client had been confidentially shared with Harbour, the court accepted that this may not amount to a waiver.

Harbour was, however, required to produce certain communications with Maurice Blackburn that related to proposed funding agreements for the class action as these were found to be 'commercial negotiations between ... two arm's length parties' and not for the dominant purpose of legal advice. This finding is noteworthy because it distinguished previous authority that had held that litigation privilege could apply to a funding agreement and related documents on the basis that, in this case, there was

no evidence that any client had sought to claim privilege over the documents in question and Harbour could not claim litigation privilege in its own right (as it was not a potential party to the class action).

In *QPSX Limited v Ericsson Australia Ltd* (No. 5) [2007] FCA 244, the court considered whether the applicant was permitted to disclose copies of discovered documents provided by Ericsson to IMF, the applicant's litigation funder. The court dismissed the application and held that a general licence to disclose documents to IMF on the broad basis that it has a legitimate interest in the proceedings was not a sufficient basis for such disclosure.

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

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

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

The *Chameleon* decision, which is significant for clarifying that a litigation funder did not require an AFSL, arose in a context where the funded litigant purported to terminate the funding agreement by withdrawing the funder's authority to instruct the engaged lawyers on the basis that the funder did not hold an AFSL. The court held that the funder was not required to hold an AFSL and the funded party could not avoid the financial contractual consequences of terminating the funding agreement.

Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159 considered whether a litigation funder was obligated to satisfy a staged security for costs order made prior to termination. The

court dismissed the claim and determined that LCM was not obliged to satisfy the remaining stages of the order.

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

No.



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1 Is third-party litigation funding permitted?

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

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

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

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

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

There are no specific provisions in Austrian legislation.

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

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

Lawyers' professional conduct in Austria is provided by the RAO. In light of the RAO, the lawyer's independence in acting on behalf of the litigant is crucial, and this also applies in cases involving a third-party funder. However, by a clear separation of the roles between the lawyer and the funder, a lawyer who advises his or her clients in relation to a funder has no conflict of interest in principle.

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

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

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

Independence in acting on behalf of the litigant described above (see question 4) is an important principle of the lawyer's professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that if the litigant intends to replace its lawyer, funding will only be further granted if the new lawyer will be accepted by the funder.

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

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

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

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

8 Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is, in general, permissible under the ABGB and does neither interfere with the independence of the litigant's lawyer involved, nor with any other provision of Austrian law. Moreover, it is quite usual that litigants and funders agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right, and his or her right to oblige the claimant to accept a particular settlement.

9 In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories: on the one hand, there are events that are deemed to have a major effect on the risk of the proceedings and often include:

- a court or authority decisions that result in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in the case law which is decisive for the current litigation process;
- a loss of evidence or evidence which is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

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

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

10 In what other ways may funders take an active role in the

Update and trends

Having only been introduced in the early years of the twenty-first century, third-party litigation funding is a relatively new concept in Austria and there are only a few players so far. Given the steady increase of its popularity in other jurisdictions in recent years, and in light of the rather high costs for litigation and arbitration in Austria, it is likely that third-party litigation funding will be of increased relevance in the coming years.

Litigation process?

In light of the independence of the claimant's lawyer from the third-party litigation funder, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible. The lawyer would violate the professional conduct as provided by the ROA if his or her actions were based on a funder's rather than on his or her client's instructions.

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

In consequence, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder.

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

The lawyer's professional conduct prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice, is he or she allowed to agree on a premium in the event of a successful outcome, in addition to the basic fee.

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

12 What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent and limits of coverage depend upon the specific policy, as this kind of insurance usually only cover the costs of certain types of claims. Furthermore, the insurance policy usually has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event (ATE) litigation insurance is not common in Austria (see question 21).

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

13 How long does a commercial claim usually take to reach a decision at first instance?

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

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

There is a considerable difference in the respective practice of the various states of Austria. As a general rule, approximately half of the judgments

are appealed before the second instance of the respective state. On average, the second instance takes between 12 and 18 months. Only a small proportion of these judgments are appealed before the Austrian Supreme Court. An average appeal takes approximately one year.

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

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

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

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

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

Apart from the joinder of parties, known also in other jurisdictions, Austrian law does not provide for a specific collective redress. However, a class action mechanism has nevertheless been part of Austria's civil procedural law practice for over 10 years. This particular instrument, often referred to as 'class action Austrian-style' is based on the combination of several elements of Austria's Code of Civil Procedure (ZPO). In principle, not only the original owner of a claim can assert it against the debtor, but also a third party to which the claim has been assigned. Furthermore, if a plaintiff asserts several claims against the same defendant, he or she can bundle all claims to a single litigation. Finally, if the assignee and class action claimant happens to be a specific association (eg, a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court regardless of their individual claim size.

The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in a 2013 decision (*OGH*, 6 Ob 224/12b).

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

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

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

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

The ZPO does not provide for a basis for the court to order a third-party funder to pay adverse costs and to hold him or her liable for such costs. In the litigation funding concept developed and observed in Austria, the funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect.

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

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

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow

for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts grant in their judgments the prevailing respondent recourse on the claimant to recover such costs. According to the provisions of the Austrian Enforcement Regulation (EO) that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

19 May the courts order a claimant or a third party to provide security for costs?

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

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

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

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

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

In most of the cases funded so far by third-party funders in Austria, the funder's engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focussing on the claimant's status (see question 19) and did not take the existence of the third-party funder into account.

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

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

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

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

The ZPO does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that it is supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

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

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

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant is privileged and does not have to be disclosed either to the other party or the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege.

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

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

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

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

No.



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1 Is third-party litigation funding permitted?

Third-party funding describes many conducts on the part of the funder and the fundee. Not only hedge funds, but also financial institutions and the lawyers themselves may, under specific circumstances, act as funders of the clients they represent. In either form, third-party funding is not a regulated activity in Brazil per se. Therefore, third-party litigation and arbitration are neither formally prohibited nor legally permitted in Brazil.

Notwithstanding this, if one were to imagine any type of control or rule to be applicable – even indirectly – to third-party funding, a valuable source would be the Statute of the Brazilian Bar Association (EOAB), which rules on the conditions and boundaries of the lawyers with regard to their clients, the Brazilian Code of Civil Procedure (BCCP) and the Brazilian Arbitration Act (BAA).

As explained below, the lack of actual public records on third-party funding makes the task of outlining the rules and problems concerning this practice in Brazil nearly impossible. This is why the answers in this chapter are straightforward and the authors choose not to speculate on abstract or moot cases, with a few exceptions. The spectrum of existing rules that could indirectly come into play offers an infinite array of possibilities.

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

There are no specific statutory limitations for the success owed to the funder or the fees. As previously stated, by and large, this relationship is not subject to any regulation.

However, should a limit apply, the chances are that the court or arbitral tribunal would at least consider the limit of 30 per cent, given a relevant precedent of the Superior Court of Justice REsp No. 1155200 of March 2011. In the above-mentioned case, an ad exitum collection of 50 per cent of the amount in dispute was deemed excessive by the court on the grounds that this rate is not a reasonable proportion between the quota litis agreement and the amount in dispute. Further to that, the court ruled that the lawyer took advantage of the party's despair in solving the conflict and thus such percentage was unacceptable. This case could serve as a good starting point but, given that this issue has not been raised yet, such understanding is still subject to much debate and interpretation.

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

At the time of writing, there were no specific legislative or regulatory provisions applicable to third-party litigation or arbitration funding.

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

The sole example of a rule pertaining to the relationship between the lawyers advising clients and third-party funding is a recommendation issued by the Brazilian-Canadian Chamber of Commerce (CAM-CCBC Administrative Resolution No. 18; available at www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016) that, among other provisions, describes the funding as the situation 'when a natural or legal person who is not party to the arbitration proceedings provides full or partial resources to one party so as to enable or assist the payment of the arbitration costs, receiving in return a portion or percentage of any profits earned from the award or from the agreement' (Section 1 of the Resolution) and establishes a set of commitments by each party involved in arbitration

funding. To avoid conflict of interests, CAM-CCBC recommends full disclosure (ie, full qualification) of the funder in the 'earliest opportunity' possible (section 4 of the Resolution).

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

No public entities in Brazil have laid down any principles or established any oversight mechanisms to control the funding in Brazil as yet. To our knowledge, neither governmental nor judicial bodies have shown any interest in this.

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

Not applicable.

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

Funders' attendance at or participation in arbitration proceedings depends mainly on the parties' consent. In court cases, as long as the cases are not held in camera by the judge, hearings are open to the public as per section 155 of the BCCP.

8 Do funders have veto rights in respect of settlements?

Not applicable.

9 In what circumstances may a funder terminate funding?

Not applicable.

10 In what other ways may funders take an active role in the litigation process?

This depends on the interpretation given to 'active role'. If by active role one means intervening directly in the course of a litigation or arbitration and hence acting as a lawyer (ie, filing submissions and requests to the tribunal on behalf of the lawyers and the party), then according to section 3 of the EOAB, the funder is not permitted to take an active role in the litigation process.

Section 3 of the EOAB proscribes the participation of non-lawyers or lawyers not enrolled as such in the Brazilian Bar Association in any procedure or activity that requires the participation of a lawyer in Brazil (ie, presenting a case before a judicial court). In arbitration, the standard is less strict, as BAA, section 20, paragraph 3 allows parties to resort to forms of representation other than attorneys.

In that sense, it seems that, by the letter of the law, having a third-party funder taking an active role in the arbitral procedure would not necessarily constitute a breach of the BBA or the EOAB, provided that the party acknowledges and accepts it. However, it is too soon to assume that parties, judicial courts and arbitration institutions would easily accept such level of participation without resistance. This view has not yet been tested in a concrete case.

No cases involving this specific issue have been brought to judicial courts.

To verify whether this issue has been discussed in the context of arbitration, we asked some of the most prominent arbitration institutions,

namely the Arbitration Chambers of the CCBC, the CIESP-FIESP, AMCHAM, BM&FBovespa, CBMA and Fundação Getúlio Vargas about their experiences of cases involving third-party funding, and discovered that as at the time of writing, none of the arbitration institutions consulted had ever dealt with such cases. As a result, one cannot yet ascertain for sure the acceptable standard of participation of a funder in an arbitration.

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

Since the Superior Court of Justice case *REsp No. 805919* of October 2015, contingency or conditional fee agreements have become more accepted in lawsuits dealing with civil law matters. When analysing the above-mentioned case, the reporting Justice stated that it is valid and admissible for an attorney to receive only success fees, to be borne by the losing party. As a result of that recent interpretation, it is permitted for lawyers to be paid on a fixed percentage of the final amount collected by their clients. Nonetheless, this decision has not been confirmed in other Supreme Court cases.

Before that, there were only examples of conditional or contingent fees in labour compensation cases (First Regional Labour Court – TRT1. Appeal No. 0000277-62.2013.5.01.0016).

12 What other funding options are available to litigants?

Aside from contingency or conditional fee arrangements and third-party funding, there are no other funding options available. One might think that assignment of claims is relevant here, however, this does not encompass the idea of third-party funding – rather, the actual transfer of monies and rights in connection with a claim to a third party.

13 How long does a commercial claim usually take to reach a decision at first instance?

This varies considerably from province to province and depends on other factors, such as the complexity of the case, the number of process incidents and events. Every year, the National Council of Justice publishes a report with statistics on national administration of justice in Brazil. The latest indicated that on average, the durations range from three years and four months to seven years and 10 months.

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

Again, there are many factors influencing this rate. In Rio, for instance, according to the Office of the General Directorate for Support of Jurisdictional Organs, nearly 60 per cent of cases are appealed. The duration of an appeal may vary from a couple of years to decades, depending on the tribunal in question.

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

Not applicable.

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

Group actions are permitted in Brazil in a few areas. There are no cases whatsoever involving third-party funding.

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

Yes, according to section 82, 2º of the BCCP, which entitles judges to order the unsuccessful party to pay the costs that were borne by the successful party.

Aside from that, it is mandatory for the claimant to be responsible for the costs arising from the proceedings whenever possible, except in cases where the state is the counterparty. Therefore, if the claimant handles its case successfully and is proven right, the respondent will have to reimburse the claimant for the initial costs, in addition to any other costs incurred throughout the proceedings.

Yet, as explained by Professor Teresa Arruda Alvim (ARRUDA ALVIM, Teresa. *Primeiros Comentários ao novo Código de Processo Civil: artigo por artigo* – Edição 2016. São Paulo: Editora Revista dos Tribunais,

Update and trends

The regulatory movement towards third-party funding has already started with the arbitration institutions. It is only a matter of time before Brazilian legislators start to scrutinise and establish restrictions and other control mechanisms for this practice.

2016, pages 72–73) the attorney's fees will not be encompassed therein. Therefore, the judge can rule the payment of adverse costs (ie, all the judicial costs, expert fees, registration taxes and even monetary penalties fixed throughout proceedings).

The same applies to arbitration. However, CAM-CCBC Administrative Resolution No. 18 section 2 envisioned other examples given by Professor Arruda Alvim and included attorneys' and arbitrators' fees. This means that in respect of arbitration, the costs covered in an award on adverse costs would be even higher.

Furthermore, there are innumerable examples of the application of adverse costs by Brazilian tribunals. The Superior Court of Justice, for example, when analysing the case *EDF Internacional S/A v Endesa Latinoamérica S/A and YPF S/A* (Supreme Court of Justice, SEC 5.782-EX) ordered the unsuccessful party to pay all the costs of the procedure. Another example is the case *Mercovia S/A v Comissão Mista Argentino-Brasileira (COMAB)* (Supreme Court of Justice, SEC 10.432), where, once again, the Supreme Court ordered the unsuccessful party (COMAB) to pay all procedural costs.

In light of the foregoing, the possibility of ordering the unsuccessful party to pay the costs of the successful party is widely recognised.

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

Not applicable.

19 May the courts order a claimant or a third party to provide security for costs?

According to section 83 of the BCCP, the courts have the power to order a party to provide security for costs only if the said party is not domiciled in Brazil. The aim of the legislator was to provide for monies securing the payment of costs and legal fees in case of inexistence of assets in the Brazilian territory. There is no fixed rule for the calculation of security for costs and they can be deposited in an account of public financial institutions (ie, Banco do Brasil) or – upon justified request – in an escrow account in a private financial institution.

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

Not applicable.

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

There is no specific statutory prohibition, however, ATE insurance is not commonly used in Brazil. Usually parties bear the costs of the adverse party themselves if they lose the case.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Not applicable.

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

Parties are not required by law to treat the arbitration as confidential, and in most cases they include an explicit confidentiality provision, either in the original arbitration clause or in the terms of reference. On top of that, many Brazilian arbitration institutions (CAM-CCBC (section 14); CMA FIESP-CIESP (section 10.6); CAMARB (section 12.1); CAM – BM&FBOVESPA (section 9); AMCHAM (sections 18.1 and 18.2); FGV (sections 61 and 62); and CBMA (section 11.2 and 17.1)) have among their rules express

provisions to maintain the proceedings, the documents therein presented and the award under the veil of confidentiality. Therefore, even in proceedings that are not confidential per se, the arbitration rules of the institution imply such characteristic.

Yet, aside from section 7, II of the EOAB expressly recognising that communications between the parties and their attorneys are privileged, as for now there are no guidelines regarding the communications between parties and funders, neither on arbitration nor on court proceedings. Nevertheless, considering the standard approach of deeming most aspects related to arbitration confidential, it would be possible to consider the communications between litigants and funders would most likely be treated as protected by confidentiality, but are not privileged in the meaning provided for in the EOAB.

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

There have been no reported disputes between litigants and their funders as yet.

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

The fact the arbitration chambers have not yet reported cases in connection with the presence and participation of a funder does not mean third-party funding is not already a reality in Brazil. Most information collected on the practice comes from informal, therefore not publishable, sources. Adding to that, the lack of shared knowledge regarding the legal arrangements, agreements and disputes – possibly because those are subject to arbitration – makes it difficult to provide an overview of third-party funding in Brazil.



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Cayman Islands

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1 Is third-party litigation funding permitted?

We should first define what we mean by third-party litigation funding. There are three principal forms of agreement for funding litigation: (i) agreements by which a third party advances money to fund the litigation in exchange for a share of any sums awarded (which we will refer to as 'third-party litigation funding'); (ii) contingency fee agreements by which a law firm agrees to conduct a cause of action on terms whereby its remuneration is limited to a share of any proceeds of the claim ('contingency fee agreements'); and (iii) conditional fee agreements by which a law firm agrees to conduct a cause of action on terms whereby its hourly rates are reduced if the claim fails and uplifted if it succeeds ('conditional fee agreements').

We address third-party litigation funding in response to questions 1 to 10. Contingency and conditional fee agreements are addressed separately in question 11.

Third-party litigation funding agreements are not currently permitted in the Cayman Islands, except when the plaintiff (or counter-claimant) is a company in official liquidation. This is because, outside the context of an official liquidation, they are void for illegality on the grounds of maintenance and champerty. Maintenance is the giving of assistance or encouragement to a litigant by someone without an interest in the proceedings or any legally recognised motive. Champerty is a form of maintenance by which assistance is provided in consideration for a share of the proceeds. Champerty and maintenance (which is also a tort) remain offences under the common law of the Cayman Islands, although there have been no prosecutions in the jurisdiction for either offence. This contrasts with the position in England, where both offences were abolished by statute in 1967. See generally in this regard *Quayum v Hexagon Trust Company (Cayman Islands) Limited* [2002 CILR 161].

Third-party litigation funding is, however, common, and has been judicially endorsed on many occasions, in the context of litigation brought by Cayman Islands companies in official liquidation. This is because liquidators have a statutory power to sell the 'fruits of an action' to a third-party funder, and the court has recognised that the exercise of this power constitutes a 'special statutory exemption' conferring immunity on what would otherwise be a prima facie champertous agreement. The same principles should apply to an action brought in Cayman by a foreign company in liquidation where the foreign liquidator or trustee has sold the fruits of the action pursuant to a similar statutory power of sale, although we are not aware of any case in which this issue has been considered by the Cayman court.

The exercise of a liquidator's power to sell the fruits of an action is subject to the approval of the court and to various restrictions.

In particular, it is only possible for a liquidator to enter into a third-party litigation funding agreement in respect of claims that vest in, and are brought in the name of, the company. He or she cannot do so in respect of statutory claims that vest in him as liquidator (such as preference claims), because those claims do not form part of the company's property and any assignment of the liquidator's fiduciary power in that regard would be contrary to Cayman Islands public policy.

Further, the Cayman court will not permit a liquidator to enter into a third-party litigation funding agreement that provides the third party with the right to control or interfere with the litigation. Any such agreement would fall outside the scope of the 'special statutory exemption' and would therefore be void for illegality on the grounds of maintenance

and champerty. However, an outright sale of a cause of action by an official liquidator, by way of legal assignment, where the price is expressed to be a percentage of the proceeds of the action, is a valid exercise of the liquidator's statutory power of sale, provided that it is sanctioned by the court. See, generally, in this regard *In the Matter of ICP Strategic Credit Income Fund Limited* [2014 (1) CILR 314].

There have historically been relatively few arbitrations in the Cayman Islands, although the Arbitration Law has recently been re-enacted to encompass the UNCITRAL Model Rules with a view to encouraging it. Accordingly, the question whether the common law principles of maintenance and champerty apply to arbitration proceedings has not been considered by the Cayman court. It is likely, however, that the Cayman court would follow the decision of Sir Richard Scott VC in *Bevan Ashford v. Geoff Yeandle* [1999] 2 Ch 239, in which it was held that the doctrines of maintenance and champerty did apply to arbitration proceedings. In that case, it was held that a conditional fee agreement in relation to arbitration proceedings which would otherwise have been unenforceable would not be declared invalid since the public policy objections to maintenance and champerty had been removed in that jurisdiction. However, in the Cayman Islands, the public policy objection has not yet been overruled by relevant legislation, so it is likely that third-party litigation funding in relation to an arbitration (unless used by a liquidator with court sanction) would be unenforceable. Given the current infrequency of arbitrations in Cayman, we have confined our answers to the following questions to litigation proceedings.

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

There is currently no statutory limit on such fees or interest, nor is there any firm judicial guidance in this regard.

However, as noted above, a liquidator requires the court's sanction to sell the proceeds of a claim pursuant to a third-party litigation funding agreement (see question 1). To obtain that sanction he or she will need to satisfy the court that (among other things) he or she has taken reasonable care to obtain the best price available for the claim in the circumstances (see, for example, *In the Matter of Trident Microsystems (Far East) Limited* [2012 (1) CILR 424]). The court will ordinarily expect the liquidator to have sought funding proposals from the stakeholders in the liquidation, and potentially also from third-party funders, and in so doing to have satisfied himself or herself that the proposed funding terms are the best available in the circumstances. To the extent that there are competing funding proposals, this will necessarily operate to limit the amount of fees and interest which are charged. But even if the proposed funding agreement represents the best or only terms that were offered or that the liquidator was able to negotiate, the approval of the agreement remains a matter for the court's discretion based on the facts and circumstances of the case, and the court may direct the liquidator to explore alternative funding options if it regards the proposed fees or interest as excessive.

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

Not currently, but a draft bill has been circulated in respect of a law to regulate the private funding of litigation (the draft Bill). If a law was enacted in the form of the draft Bill, it would (among other things) repeal any offences under the common law of maintenance and champerty,

and impose (as yet unspecified) limits on the amount payable to a third-party funder.

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

Not currently. The draft Bill proposes that no cause of action may be wholly or partially assigned by the client to the attorney who is acting for him.

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

At present, consideration of third-party funding lies in the hands of the judges, both as a result of the *Quayum* line of cases and, in insolvency proceedings, as a result of section 110(2)(a) of the Companies Law (2016 Revision), which requires official liquidators of a company to obtain the court's approval of any such arrangement undertaken on behalf of the estate.

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

It is very unlikely that the court would sanction a liquidator to enter into a third-party funding agreement on terms that permitted the funder to select counsel. In *ICP Strategic*, it was held that a liquidator must not fetter his or her fiduciary power to control the litigation, and that the court should scrutinise a third-party funding agreement carefully 'to ensure that it does not directly confer upon the funder any right to interfere in the conduct of the litigation or indirectly put the funder in a position in which it will be able, as a practical matter, to exert undue influence or control over the litigation'.

The draft Bill is silent on this matter, but it is possible that, should it come into force, regulations made under it might deal with the issue.

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

Funders would be entitled to attend any hearing in open court. They would usually be permitted to attend hearings in chambers with the consent of the liquidator and the judge, unless, perhaps, the other side objected. A funder would not have standing to appear by counsel at any hearing, save in the context of a costs order being sought against a funder as a non-party (see question 18).

A funder would not be permitted to have any control over a settlement (see question 6), but there is no reason in principle why it could not attend a settlement meeting with the consent of the liquidator and (if necessary) the other parties at the meeting.

8 Do funders have veto rights in respect of settlements?

No; see questions 6 and 7.

9 In what circumstances may a funder terminate funding?

The funder's rights of termination will be a matter of contract to be addressed in the funding agreement. Typically a liquidator would seek to ensure that in the event of termination the funder was committed to provide sufficient funding to meet the company's costs of bringing an end to the proceedings and the amount of any adverse costs orders.

10 In what other ways may funders take an active role in the litigation process?

As outlined above, the role of the funder in the litigation process is currently very circumscribed. This may change if the draft Bill is enacted and regulations brought into force under the proposed new law provide differently.

On a practical level, funding agreements often contain extensive information rights for funders, sometimes including the right to see the liquidator's legal advice on prospective or actual litigation by asserting a common interest privilege. The basis for asserting that type of privilege under Cayman Islands law is, however, narrower than in some other jurisdictions (for example, the United States), and depending on the nature of the information sought to be protected, common interest privilege might not be upheld if challenged on a discovery application brought by an opposing party. This is particularly important to bear in mind in the period leading up to the entry into the funding agreement and, in order to be secure, the third-party funder ought to make its

own assessment of the merits of the case, since it is arguable that, until an agreement is reached, the parties are subject to a legal 'conflict of interest', in which case privilege in the liquidator's legal advice may be lost inadvertently.

Where the company in liquidation has multiple claims against one or more defendants, a funding agreement might also give the funder the choice whether to fund a particular piece of litigation, provided that it does not give the funder any rights of control once the litigation has been commenced.

Further, many of the funding agreements sanctioned by the Court are entered into with creditors of the insolvent company, who agree to fund third-party litigation in order to recover assets of the company for distribution to themselves and the other creditors, as well as making a profit (or reducing their losses) through the funding terms. Such funders may have some degree of influence (but not control) over the liquidator and the proceedings in their capacity as creditors (rather than as funders), through the processes of the liquidation committee, creditors' meetings, and their right to make or appear at the hearing of sanction applications with regard to the exercise or proposed exercise of the liquidator's powers (eg, as to the settlement of the litigation).

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

Contingency fee agreements are currently contrary to Cayman Islands public policy and are therefore void and unenforceable. Litigation lawyers in Cayman are therefore not permitted to enter into them. The Grand Court will, however, authorise Cayman Islands liquidators to enter into contingency fee agreements with foreign lawyers, provided that (among other things) contingency fee agreements are enforceable in the foreign jurisdiction where the proceedings are to be brought. See *ICP Strategic Credit*.

Conditional fee agreements have been held by the Grand Court to be permissible, subject to approval by the court in each case, although they remain relatively rare in practice and the Court of Appeal has cast at least some doubt on whether they would be held to be enforceable as between the attorney and the client. In *Quayum*, the Chief Justice applied the following principles when considering whether to approve a conditional fee agreement:

- (a) *All such proposed arrangements must first receive the sanction of the court to be considered in the context of all the circumstances of the client and of the case.*
- (b) *The court is best placed to consider the reliability and reputation of the attorney, and will do so.*
- (c) *In the present matter and in others, as a matter of discretion, where there is to be an enhanced fee a requirement for submission to taxation on the solicitor and own client basis will be imposed and, if appropriate, a cap may be placed upon the quantum of fees recoverable.*
- (d) *In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. That is, the fee will be limited to what is reasonable in the circumstances. In this way the potential risk of unfairness to such an opponent can be avoided.*
- (e) *In appropriate cases, depending, among other things, upon the potential value and size of the litigation, the circumstances of the client and the proposed terms of the conditional fee agreement, the client should be encouraged to take independent legal advice about it. The court may so require before granting its approval.*
- (f) *The agreement must be in writing and there must be a mechanism by which the client can discharge the attorney.*
- (g) *The overriding objective is that the conditional fee arrangement must, from beginning to end, be governed in principle and in practice by what is fair and reasonable. To this end,*

notwithstanding the prior approval of the court, the court must always be able to oversee its execution, by reference, in particular, to the manner of the conduct of the proceedings by the attorney.

In *DD Growth Premium 2x Fund* [2013] (2) CILR 361, the Chief Justice considered the level of remuneration proposed in a conditional fee agreement, drawing heavily on the guidelines used in England and Wales, in particular, the 'ready reckoner' contained in *Cook on Costs* (2012), which compares the chance of winning against a likely reasonable success fee. Additionally, the law firm in that case had agreed to a sliding scale of uplift to be applied, depending on the amount of damages subsequently awarded. The formula adopted also factored in an interest rate (on the basis that no interim payments of fees would be made).

In *Attorney General of the Cayman Islands v Barrett* [2012] 1 CILR 127, the Court of Appeal held that, under the rules of taxation of costs that currently apply in the Cayman Islands, any conditional uplift fee that might be payable by a successful party to his or her attorney would not in any event be recoverable by the successful party from the losing party. The Court of Appeal left open the question of whether the right to any such fee would be enforceable by the attorney against his or her own client, as it did not arise on the facts of the case, thereby casting some doubt on whether *Quayum* and *DD Growth* were correctly decided.

If a law in the form of the draft Bill is enacted, then contingency and conditional fee agreements will be authorised by the statute, save in respect of criminal, quasi-criminal and family proceedings. Court approval of the agreements will not be required, provided that statutory limits on the fees based on a percentage of recoveries or uplifted hourly rates are not exceeded. An agreement containing fees in excess of the statutory limits will require the approval of the court.

12 What other funding options are available to litigants?

Bank lending is possible, although not common. Cayman Islands banks are generally risk averse, and would not be likely to advance significant funding for litigation costs unless heavily secured. 'Private' lending is also possible, but in certain circumstances a private source of funds may be regarded as an intermeddler, and can find himself the subject of a third-party costs order (in the event that the borrower loses the case), or having to provide a bond or payment into court on behalf of the litigant. It is possible, although not common, to obtain after-the-event insurance, but the costs of this would be unlikely to be recovered from the losing opponent.

13 How long does a commercial claim usually take to reach a decision at first instance?

No official statistics are available. Matters that are contested through to a trial may take on average 18 months to two years, depending on the complexity of the issues and the intensity of interlocutory proceedings.

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

No official statistics are available. The Cayman Islands Court of Appeal sits three or four times a year for two to three weeks each time. An appeal proceeding at usual pace will probably be dealt with within six to nine months. In cases of urgency, a procedure exists to convene a special sitting of the Court of Appeal outside its normal timetable, on payment of a fee.

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

No official statistics are available. Domestic judgments are relatively easy to enforce, particularly if there are assets within the jurisdiction that are available for execution. A wide variety of options exists, including charging orders for sale of real estate and other assets. If the judgment debtor is foreign, and has no assets in the Cayman Islands, it is possible to 'export' a Cayman Islands judgment for enforcement, provided that the jurisdiction in which the debtor has assets will recognise the judgment.

Most contentious enforcement proceedings concern attempts to enforce foreign judgments against assets situated in the Cayman Islands. Currently, this requires action by writ based on the foreign judgment debt, in which summary judgment would be sought, followed by

execution of the Cayman Islands judgment against the assets. Proposals for legislative changes to simplify this process are under consideration. It is possible in some circumstances to freeze the assets pending judgment, in cases where there is a risk of dissipation.

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

The closest thing that the Cayman Islands currently has to a 'class' or 'group' action is a 'representative' action under Order 15, rule 12 of the Grand Court Rules. This is possible where numerous persons have the same interest in the proceedings. Such proceedings can be commenced in the name of a representative, but all those whom he or she represents are parties to the action. Such proceedings can be funded by a pooling arrangement between the participants. Subject to the approval of the Court they could also be brought pursuant to a conditional fee agreement, but for the reasons explained above they could not currently be funded pursuant to a third-party funding agreement.

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

The general rule in the Cayman Islands is that costs follow the event; ie, the loser pays. It is unusual for any other order to be made, unless there has been some kind of misfeasance or negligence on the part of the winner that justifies a departure from the normal rule, or there has been a without-prejudice save as to costs offer and the 'winner' has been awarded less than the offer.

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

Under certain circumstances, yes. The Grand Court has express jurisdiction under section 24(3) of the Judicature Law to order costs against non-parties. The principles on which it will do so were considered by the Court of Appeal in *Kenney v ACE* [2015] 1 CILR 367. In that case, a creditor under a foreign judgment sued a Cayman Islands company to enforce the debt. The judgment creditor was subject to the appointment of a receiver by the Liberian courts. The Grand Court ordered the judgment creditor to provide security for costs on the basis that it was merely a nominal plaintiff for an undisclosed principal (AJA). The plaintiff company failed to provide security for costs and its action was struck out, an order for costs being made in favour of the defendant. The Grand Court ordered the plaintiff to disclose the identity of those parties funding the litigation, including Mr Kenney, an attorney in practice in the BVI, who acted for AJA. In evidence, it was determined that Mr Kenney and his clients, including AJA and a special purpose vehicle called CCI, controlled the receiver's actions, placed limits on his ability to act, and required him to account to CCI for his decisions and expenditures. Mr Kenney ensured that the receiver was no more than a straw man, executing the plans of Mr Kenney and his clients. Mr Kenney's strategy also attempted to ensure that the actual litigant in the Grand Court, the receiver, would be judgment-proof and unable to pay costs. Mr Kenney funded the litigation, and had set in place a structure that would enable him to benefit from any recoveries. It appeared from the evidence that was placed before the court on the question of leave to serve the summons on the third parties outside the jurisdiction, that the agreement that Mr Kenney had entered into was a kind of contingency fee agreement (although it is important to bear in mind that he was not licensed to act as an attorney in the Cayman Islands and could not, therefore, have conducted litigation here himself).

The Grand Court, and the Court of Appeal, gave leave to serve a costs summons on Mr Kenney and CCI in their home jurisdictions. This order was upheld on appeal. In so doing, the Court of Appeal cited the principles set out in the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 with approval and summarised that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his or her own financial benefit, he or she should be liable for the costs if his or her claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting in the interests of the company (and more especially its shareholders and creditors) rather than in his or her own interests. It is noteworthy that this principle does not depend on any analysis of maintenance and champerty; simply

Update and trends

We anticipate that third-party litigation funding will continue to be a growth area in the context of liquidations, and that if the draft bill is enacted it will lead to the development of third-party litigation funding in other contexts, to the use of contingency fee agreements, and to an increase in the use of conditional fee agreements.

the degree of control and benefit that the third-party funder exercises and obtains.

If a third-party funding agreement is appropriately drawn, approved by the court and complied with, there should not, in most circumstances, be grounds for the imposition of a non-party costs order, although it remains the case that orders for security for costs might be made.

19 May the courts order a claimant or a third party to provide security for costs?

The Grand Court has a wide discretion to order security for costs against a claimant provided by Order 23 of the Grand Court Rules and also (against a company) under section 74 of the Companies Law (2016 Revision). There are four grounds provided in the Rules, namely that the plaintiff (i) is ordinarily resident outside the jurisdiction; (ii) is a nominal plaintiff suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the costs of the defendant if so ordered; (iii) has not endorsed his or her address on the writ or his or her address is incorrect; or (iv) has changed his or her address so to avoid the consequences of the litigation. Under the Companies Law, security for costs may be ordered if the judge is satisfied that there is reason to believe that if the defendant is successful in his or her defence the assets of the plaintiff company will be insufficient to pay his or her costs.

In considering the plaintiff's ability to pay the costs, the court will take into account all the sources of funding available to the plaintiff (including third-party funding), not merely his or her own resources. The application is made by summons supported by an estimate of the costs to be incurred, and the court will, if satisfied, make an order in such sum as it thinks fit, bearing in mind that in some cases, a really significant order for security might stifle an otherwise arguable claim. It has been held that if the sole reason for ordering security is that the claimant is resident abroad, the amount of the security will be limited to the difference, if any, between the costs of enforcing a costs award in Cayman, and the (additional) costs of enforcing it abroad.

The proceedings are usually stayed until the security is provided. The most common means by which security is provided is a payment of cash into court, but in some circumstances a letter of credit or bank guarantee will be permitted. Unless the parties agree otherwise, the court will generally require any letter of credit or bank guarantee to be provided by a Cayman Islands bank.

There is no express power to order security to be provided by a third party (whether a funder or not), but, as mentioned above, the existence of third-party sources of finance to the claimant is a relevant factor that will be taken into account for the purpose of the decision.

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

On an application for security based upon the fact that the plaintiff is a nominal plaintiff, suing for the benefit of a third party, the existence of third-party funding is directly relevant, although in most cases, a claim brought with the benefit of third-party funding will not be a claim brought by a nominal plaintiff (cf. *Kenney*). In other cases, the statutory tests require consideration of the plaintiff's means, and the court will look to all of the resources of the plaintiff, including third-party funding, to make its decision. The Grand Court will apply the well-known principles in *Keary Developments v Tarmac Construction* [1995] 3 All ER 534. In that case, the court was required to consider a submission that a claim would be stifled if an order for security for costs was made because the plaintiff company was not substantial, although it was argued that it had a good claim. The Court of Appeal held that the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise

the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be uniquely within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation.

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

After-the-event-insurance is permitted, but is not common, probably because of the limited size of the market. Defence costs are sometime paid by insurers (in third-party liability cases, such as those in professional negligence or directors' duties cases). We have not had any experience of insurance for attorneys' fees other than that paid for defence costs, nor for non-payment of judgment debts. We do not think these would be objectionable in principle.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Liquidators must disclose litigation funding agreements to the court, within the liquidation proceedings, for the purpose of obtaining the court's sanction to enter into the agreement. A copy of the funding agreement, or an affidavit summarising its terms, will be placed on the court's liquidation file in connection with the application. That file is not open to inspection by the public, but it can be inspected by (among others) the creditors, shareholders, former management and former professional service providers to the company. Documents on the liquidation file can therefore become public through disclosure by one of those parties. If the court can be persuaded that the agreement or applicable affidavit is confidential and that its publication would harm the creditors' economic interests, it is possible to obtain a sealing order, within the liquidation proceedings, preventing the agreement or affidavit from being inspected on the liquidation file.

Prior to the decision in *Barrett* referred to above (see question 11), applications to sanction conditional fee agreements in ordinary civil cases were often made ex parte, and the first the defendant knew of the agreement was when a costs order was made against it. Bearing in mind that the success fee is not recoverable from the paying party, this practice is likely to cease. The question whether disclosure of the funding agreement is compellable has not been tested but, in circumstances where the issue of funding is relevant (for example, to the status of the plaintiff, or to an application for security for costs), it may well be within the discretion of the court to compel production, even if subject to safeguards as to future use of the documents, or to draw adverse inferences where the plaintiff refuses to disclose any such agreements. Bearing in mind that the court has the power to compel disclosure of the existence of third-party funders (see *Kenney*), it is a short step to compelling disclosure of the nature and terms of the funding agreement (and it is it is apparent from the report of the judgment in *Kenney* that details of at least the nature of the funding agreement were before the court).

The draft bill does not consider these issues but regulations may be made to regulate them.

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

There is no special category of privilege for such communications with funders. However, in the same way that an insurance policy is generally regarded as sui generis, we suggest that litigation funding agreements would be regarded as distinct from the facts giving rise to a cause of action, and therefore, discovery would not always be appropriate (see question 22). Clearly, if communications fit into other recognised categories of privilege (such as litigation privilege or legal advice privilege) then that privilege may be claimed, although it is unlikely that direct communications between litigants and their funders would fall within those categories. Common interest privilege, as understood in the Cayman Islands, is a fairly narrow concept, in particular a sub-set of legal professional privilege. Accordingly, the mere fact of communication between funder, litigant and the litigant's attorney does not give rise to privilege, if the substance of the communication would not, in itself, in the hands of the original donee of the information, have attracted legal professional privilege.

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

No, not yet, although there is an as yet unreported decision of the Court of Appeal in *Deutsche Bank AG London & ors v Krys (as Official Liquidator of the SPhinX Group)*, 2 February 2016, relating to a dispute between Cayman Islands liquidators and lawyers they had retained on a contingency fee basis to pursue claims in courts in the United States. The facts of the case were, however, highly specific; the *ratio* of the case concerns a point of arbitration law not specifically related to the funding arrangements.

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

We believe that the principal issues are addressed in our answers above.

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1 Is third-party litigation funding permitted?

The issue of third-party funding (TPF) is not regulated under Danish law, neither in the Danish Administration of Justice Act nor in the Danish Arbitration Act.

The Danish Arbitration Institute also has no rules on TPF, and TPF is not regulated in the procedural rules of the Danish Arbitration Association, which are inspired by the IBA Rules of the Taking of Evidence. There is no Danish case law on TPF.

The conclusion then is that there are no rules prohibiting or restricting the use of TPF in Denmark.

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

Since there are no statutory provisions, the subject is not regulated by law and no limits on fees and interest apply. Stipulating fees and interest is left to the funding agreement between the parties.

The Danish Agreement Act provides the parties in commercial dealings with a rather broad contractual autonomy.

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

The issue of TPF is not regulated under Danish law.

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

Pursuant to section 126, subsection 1 of the Danish Administration of Justice Act, a lawyer must act in a way that is consistent with legal ethics. These legal ethics are described in the Danish Basic Rules of Lawyer's Professional Code of Conduct and should be interpreted through these rules and through decisions made by the Danish Bar and Law Society. Sanctions are left to an independent body and the decisions of this body are subject to the review of the Danish courts.

It is a cornerstone of professional ethics in Denmark, as in many other jurisdictions, that a lawyer should safeguard the client's interests only.

However, since founders are generally aware that the lawyer representing the founded party acts in the interest of this party only, this is normally not an issue, but lawyers must, of course, be aware of this potential conflict at all times during the proceedings.

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

There are no public bodies who take a particular interest in TPF.

The activities of the funder might be regulated in respect of investments made in the activities of the funder, but that does distinguish itself from the regulations applicable to equity funds investing in shares, etc.

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

This issue will have to be regulated in the funding agreement and could, of course, have an impact on the conflict of interest issue mentioned under question 4.

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

This deals with two different questions, which will thus be answered separately.

The general rule under Danish law is that all court meetings are public, pursuant to clause 28 of the Danish Administration of Justice Act. The Danish Arbitration Act does not state any provisions on the matter, and the principle of party autonomy will enable the parties to determine who will have access to the hearings and how. In court litigation, such an access to the hearing will be possible.

There are no rules prohibiting a funder from participating in settlement discussions. If mediation is agreed as a settlement procedure, there could be provisions in the mediation agreement that could regulate this issue.

8 Do funders have veto rights in respect of settlements?

This issue depends on the provisions in the funding agreement.

9 In what circumstances may a funder terminate funding?

This issue is another issue not regulated by law, so that will also depend on the provisions of the funding agreement.

10 In what other ways may funders take an active role in the litigation process?

There are no provisions that allow the founder to intervene in a litigation process, so this would also be up to the provisions in the funding agreement.

However, there is a form of intervention in the Danish Administration of Justice Act that allows a third party to intervene in support of one of the original parties. The non-party intervention can, with the court's acceptance, be allowed to present evidence and make statements during the proceedings.

It would, in reality, be considered unlikely that a funder would use this formal right of intervention.

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

A conditional fee agreement is allowed in Denmark.

In contrast to some other jurisdictions, such as the United States, the Ethical Code of the Danish Bar Association forbids a lawyer from entering into fee agreements in which the lawyer's fee is fixed as a percentage of the outcome of the case (ie, *pactum de quota litis*) because of the fear of the lawyer losing his or her independence with regard to the case.

12 What other funding options are available to litigants?

Legislators wish to give people of limited means the same access to the courts as people of more favourable means. Any person, regardless of nationality or place of residence, can be granted legal aid for court proceedings in Denmark pursuant to clause 323 of the Danish Administration of Justice Act, if certain financial criteria are met.

It is also possible to take out insurance to cover attorney fees in both private and commercial matters.

The insurance will normally cover a percentage of the legal costs and a cap applies on the overall costs.

If a lawyer accepts a case where the client is covered by insurance, the lawyer will, under the Ethical Code of the Danish Bar Association, be obligated to charge only the amount that the insurance company accepts, and he or she is restricted from invoicing the client any difference between the amount paid by the insurer and whatever higher fee he or she would normally charge.

13 How long does a commercial claim usually take to reach a decision at first instance?

The average time for a commercial claim to reach a decision is 10.4 months, and 71.1 per cent of all commercial cases have a decision within a year from the time that the claim was filed.

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

In 2015, the Danish local courts received 11,462 cases in civil matters. Unfortunately, it is not possible to classify the exact areas of these lawsuits. However, in this period of time, 1,728 civil cases were appealed to the High Courts. Of the cases finished by the high courts in 2015, the court proceedings had stretched over 14.5 months from the High Court receiving the case, conducting the proceedings and rendering a decision.

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

There are no available statistics on this. Domestic enforcement proceedings are fairly easy and will normally not take more than a couple of months.

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

Denmark has a legal framework for group actions. In Denmark, the group actions are based on the principle of an opt-in option, rather than an opt-out position, which is used in other jurisdictions such as the United States.

Pursuant to clause 254 of the Danish Administration of Justice Act, similar claims from several persons can be brought before the court as one claim. However, certain criteria must be fulfilled pursuant to clause 254 of the Danish Administration of Justice Act:

- the claims are similar;
- there is Danish jurisdiction for all the claims;
- the court in which the case is tried has jurisdiction for at least one of the claims;
- the court is competent with respect to at least one of the claims;
- group action is considered to be the best way to deal with the claim;
- the group members can be identified and informed in a reasonable manner; and
- a group representative can be appointed.

It should be noted that the court's ruling in a group action case will be final for all members to the case and the group representative can be ordered to provide security for the cost potential laid on the group.

There are no rules prohibiting funders from funding group actions.

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

As in most other jurisdictions, the losing party is ordered to pay the costs to the winning party, unless the parties have agreed otherwise (cf. clause 213, subsection 1 of the Danish Administration of Justice Act).

Costs are awarded not based on the actual costs paid, but according to a fee scale made public by the courts.

The costs awarded according to this fee scale are generally lower than the actual amount spent on external counsel.

In regard to arbitration, it is also the main rule that costs follow the event. In arbitration, the tribunal would normally award party costs based on the payments actually made to external counsel.

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

There is no case law and no legal basis for a funder to be liable for adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

Security for costs is often seen in group action cases where the group can be ordered to provide security for the costs (see question 16). This is commonly seen if the party is not likely to have the means to cover the costs should the court's ruling not be in its favour.

A claimant residing outside of the EU can be ordered to provide security for costs before a case can be filed before the Danish courts on the defendant's initiative. However, it is the court that decides the size of the security required and it can also decide that the claimant should be exempt from providing security under special circumstances (cf. clause 321, subsection 1 of the Danish Administration of Justice Act).

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

Because of the lack of regulation on this matter, there are no provisions or case law regarding this.

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

Generally, it is not possible to get ATE insurance in Denmark. No Danish insurance company offers such insurance. It is not prohibited to take out such insurance, but it is not likely that any company would be willing to sign such an agreement.

Regarding other types of insurance for legal fees, see question 12.

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-
- 22 **Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?**

Because of the lack of regulation on this matter, and in the absence of case law, there is no legal basis for a disclosure obligation.

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

Lawyers and their clients are covered by privilege. The privilege is not lost because an external funder is involved in the communications or is granted access to the files.

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

There are no public records on this matter and no Danish case law.

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

Denmark is among the countries in the world with the highest trust in the legal system and the courts. It should also be mentioned that the legal system of Denmark is a hybrid between a common law and a civil law approach and that the conduct of court proceedings is closer to a common law approach than a civil law approach.

England & Wales

Steven Friel, Jonathan Barnes and Lara Bird
Woodsford Litigation Funding

1 Is third-party litigation funding permitted?

Yes, third-party litigation funding is permitted, and endorsed by the judiciary and policymakers as a tool of access to justice. While English law continues to discourage funders from ‘controlling’ the litigation that they fund, the courts have a generally positive attitude to third-party funding.

The historic, and long-abandoned, prohibition of third-party litigation funding was rooted in the ancient concepts of maintenance and champerty. Maintenance is third-party support of another’s litigation. Champerty is a form of maintenance in which the third party supports the litigation in return for a share of the proceeds.

At the start of the twentieth century, maintenance and champerty were both crimes and torts. Following the Second World War, the law on funding of civil litigation changed dramatically. The introduction of legal aid in 1950 created a state-funded exception to the historic prohibition on litigation funding. Further exceptions came with the growth of insurance and trade union-funded litigation. The Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty. While those principles continue to exist in the public policy relating to litigation funding, their scope has been much reduced, and they apply nowadays only to discourage funders from exerting undue control over the litigation that they fund. So-called ‘no win, no fee’ arrangements between litigants and lawyers (in effect, another form of litigation funding) were introduced in the early 1990s and substantially liberalised in 2000.

R (Factortame Ltd) v Secretary of State for Transport was a case taken against the United Kingdom government by a company of Spanish fishermen who claimed that the United Kingdom had breached European Union law by requiring ships to have a majority of British owners if they were to be registered in the UK. The case produced a number of significant judgments on British constitutional law. In 2002, the Court of Appeal in *Factortame* (No. 8) [2002] EWCA Civ 932 explained that only those funding arrangements that tended to ‘undermine the ends of justice’ should fall foul of the prohibition on maintenance and champerty. In other words, reasonable litigation funding arrangements entered into with professional and reputable third-party funders who respect the integrity of the judicial process are perfectly lawful.

In its 2005 decision in the case of *Arkin v Borchard Lines*, the Court of Appeal was again sympathetic to the position of professional litigation funders as tools for access to justice. The *Arkin* case is referred to in more detail in question 18.

In a landmark ruling in 2016 (*Essar Oilfields Services Limited v Norscott Rig Management* [2016] EWHC 2361 (Comm)), the English Commercial Court upheld the decision of an arbitrator (former Court of Appeal judge, Sir Philip Otton) to allow a successful claimant to recover its third-party litigation funding costs from the losing defendant as ‘other costs’ under section 59(1)(c) of the Arbitration Act 1996.

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

Litigation funding is now a well-established part of the English litigation landscape. There are a large number of professional litigation funders in London, and the market is competitive. From a commercial perspective, therefore, there is a lot of downward pressure on funders’ success fees. A litigant with a good case should readily be able to find litigation funding on attractive commercial terms.

In addition to the competitive limit on a funders’ success fee, the principles of maintenance and champerty arguably apply so as to render unenforceable litigation funding arrangements where, even if the litigant’s case is wholly successful, the funder’s return is significantly greater than the litigant’s return.

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

The voluntary Code of Conduct for Litigation Funders was launched by the Civil Justice Council, a government agency that is part of the Ministry of Justice of England & Wales, on 23 November 2011. This Code sets out the standards of practice and behaviour required of members of the Association of Litigation Funders (ALF). Membership of the ALF is voluntary, however, most of the more long-standing, professional third-party funders in the London market have joined. The Code includes provisions ensuring the capital adequacy of funders, the limited circumstances in which funders may be permitted to withdraw from a case, and the roles of funders, litigants and their lawyers.

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

The Solicitors Regulation Authority (SRA) Handbook is made up of two parts: the SRA Principles, which are mandatory principles and underpin all areas of legal practice, and the SRA Code of Conduct 2011. This Code sets out an outcomes-focused regulatory system for solicitors and establishes mandatory outcomes that must be achieved in appropriate circumstances in order to comply with the SRA Principles. The Code contains a number of provisions relevant to solicitors advising on funding. These include, chapter 1 on client care, chapter 3 on conflicts of interest, chapter 6 on your client and introductions to third parties, chapter 9 on fee sharing and referrals and chapter 11 on relations with third parties.

It is accepted that solicitors have an obligation to advise litigants on all reasonable funding options, including insurance and third-party funding. A failure to do so could result in sanction by the SRA, and potentially also liability for professional negligence. At least one major English law firm has announced that they are actively looking to represent clients with professional negligence cases against their former lawyers who had failed to discuss litigation funding options with them in advance of prior litigation.

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

The ALF, founded in November 2011, is an independent body charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of dispute resolution funding in England and Wales. The ALF actively engages with government, legislators, regulators and other policymakers to shape the regulatory environment for dispute resolution funding, including litigation and arbitration.

The ALF has been charged with administering self-regulation of the voluntary Code of Conduct for Litigation Funders that are a members of the ALF and it also maintains the complaint procedure to govern complaints made against members by funded litigants.

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

And, of course, litigation funding necessarily exists in the context of litigation or arbitration proceedings, in which the relevant court or tribunal will have oversight.

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

In deciding whether or not to fund a case, third-party funders will take into account the expertise of the litigant's choice of counsel. If a funder does not think that the litigant's legal team is suitable, the funder can choose not to fund. Alternatively, it is open to the claimant to change legal team in order to persuade a funder to invest.

Once invested in a case, a third-party funder must not exercise undue control over the litigation, including making demands as to choice of counsel. To do so would risk offending the remaining vestiges of the principles of maintenance and champerty. This point is reflected in clause 9.3 of the voluntary Code of Conduct for Litigation Funders, which provides that members of the ALF must not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

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

Yes, subject to objections from the judge, tribunal or mediator with authority over the relevant proceedings, it is perfectly lawful for funders to attend, and there are often good reasons why they should do so. Just as it has long been accepted that insurers and reinsurers with a financial interest in proceedings should be welcome to attend mediations and other settlement discussions, it is becoming more and more common for third-party funders to also attend.

8 Do funders have veto rights in respect of settlements?

The voluntary Code of Conduct for Litigation Funders states that the litigation funding agreement shall note whether (and if so how) the third-party funder may provide input into the litigant's decision in relation to settlements. It is standard for English litigation funding agreements to provide that third-party funders will be kept abreast of settlement discussions and offers, and some agreements will also provide that settlement offers within a given range will be considered reasonable and should be accepted.

9 In what circumstances may a funder terminate funding?

For members of the ALF investing in English litigation, the only permissible circumstances for terminating funding are set out at clause 11.2 of the voluntary Code of Conduct for Litigation Funders. First, where a third-party litigation funder reasonably ceases to be satisfied on the merits of the dispute. Second, where the funder reasonably believes that the dispute is no longer commercially viable. For example, where costs have escalated significantly, or the likely recovery has reduced significantly, from what was anticipated at the outset. Third, where the funder reasonably holds the view that there has been a material breach of the litigation funding agreement by the funded litigant.

Clause 12 of the Code provides that, in the absence of the circumstances described in clause 11.2, the litigation funding agreement shall make clear that there is no discretionary right for a funder to terminate the agreement.

In circumstances where the Code does not apply, for example, because the funder is not a member of the ALF, the principles of maintenance and champerty arguably apply to prohibit the funder from using the threat of terminating funding as a means of exercising undue control over the litigation.

10 In what other ways may funders take an active role in the litigation process?

In a February 2016 publication, 'International Arbitration: 10 trends in 2016', the arbitration team at international law firm Freshfields Bruckhaus Deringer LLP stated that third-party litigation funding 'is here to stay, and not just for small or cash-strapped claimants ... [T]he involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments.'

This comment reflects the maturity of the litigation funding market in London. While the early discussions about litigation funding, informed by the historic principles of maintenance and champerty, tended to focus on how to limit the funder's involvement in the litigation process, it has come to be recognised that, in addition to financial assistance, funders can also bring a lot of professional expertise to the proceedings. It remains the position in English litigation that funders should not 'control' the proceedings, but it is nonetheless acceptable that they provide input.

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

Yes. Conditional fee agreements (CFAs) have been permitted since the 1990s. In a CFA, some or all of the lawyer's fees are conditional on success. In the event of a success, the solicitor is entitled to payment of the conditional fees, plus a further uplift. The maximum uplift is 100 per cent of base rates. The Law Society publishes a model CFA and related guidance.

Damages based agreements (DBAs) were introduced in England as part of the Jackson Reforms in 2012. DBAs are similar to the American concept of contingency fee agreements. In a DBA, if the case is successful, the lawyer's fee is calculated as a percentage (capped at 50 per cent in commercial cases) of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer. DBAs were envisaged by Lord Justice Jackson in his report *Review of Civil Litigation Costs* (December 2009) as an important litigation funding option. They have, however, been used relatively infrequently. The lack of popularity relates in part to the slow speed at which lawyers adopt new business models, and in part because of uncertainty as to how the rules governing DBAs apply in practice.

12 What other funding options are available to litigants?

The availability of legal aid has been significantly restricted in recent years. However, it is still available for some types of litigation, including judicial review.

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

And various insurance policies, for example, home or car insurance policies, may contain legal expenses coverage.

13 How long does a commercial claim usually take to reach a decision at first instance?

Civil justice statistics for the third quarter of 2014, the most recent period available, stated there was an average of 56 weeks between a fast or multi-track claim (ie, higher value claims) being issued and the claim going to trial.

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

There are no accurate, up-to-date statistics on the proportion of first-instance judgments that are appealed.

The length of time from the date an appellant's notice is issued in the Court of Appeal to the date the appeal is likely to be heard varies from two months in urgent matters to around 18 months in very complex, non-urgent matters. The majority of appeals are resolved within nine months.

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

There are no statistics on the proportion of High Court judgments or arbitration awards that require contentious enforcement proceedings.

It is relatively easy to enforce judgments or awards against defendants within the jurisdiction of England and Wales. Civil Procedure Rule 70 contains general rules about enforcement of judgments and orders. The methods of enforcement available to a judgment creditor include:

- seizing a judgment debtor's assets;
- third-party debt orders;
- charging orders;
- attachment of earnings;
- insolvency proceedings;
- appointment of a receiver;
- writs of sequestration; and
- orders of committal.

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

Yes and yes. In English litigation, there are a number of ways in which multiparty claims can be pursued. The following procedures are covered by Part 19 of the Civil Procedure Rules:

- Multiple joint claimants can proceed using a single claim form where their claims can be 'conveniently disposed of in the same proceedings'.
- Multiple claims can be managed under a group litigation order (GLO) where the claims have 'common or related issues of fact or law'.
- Representative actions are permitted where one or more claimants can represent other claimants with the same interest, for example, beneficiaries of a trust.

There is no direct equivalent in English law to the US shareholder class action, but the Companies Act 2006 introduced changes to directors' duties and the derivative claims that may be brought against them.

Recent changes to English competition law give rights to individuals (consumers and businesses) to bring private damages actions and to allow authorised class representatives to bring collective actions on their behalf in the Competition Appeal Tribunal (CAT).

All of the above types of group action may be funded by a third-party litigation funder.

In July 2016, it was announced that a £14 billion damages claim had been filed against MasterCard at the CAT, following the European Commission's finding in 2014 that MasterCard infringed EU law by imposing charges (known as 'interchange' fees) on businesses that accept MasterCard debit and credit cards. It is reportedly the first opt-out claim to be filed under the Consumer Rights Act 2015 on behalf of all UK consumers, and is backed by litigation funding.

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

Yes. Under Civil Procedure Rule 44.2, the court has discretion as to whether costs are payable by one party to another, the amount and when they are to be paid. However, if the court decides to make an order in relation to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to some exceptions. There are a number of circumstances the court will have regard to, including the conduct of the parties.

In relation to domestic English arbitrations, the tribunal is under no duty to make an award as to costs, subject to any agreement between the parties. However, in practice, it is generally accepted that the tribunal should, unless the parties agree otherwise. If a cost award is made, unless otherwise agreed by the parties, section 61(2) of the Arbitration Act 1996 provides that the tribunal shall award costs on the general principle that costs should follow the event, subject to circumstances where this is not appropriate. That is, the unsuccessful party pays the costs of the successful party as well as its own.

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

In English litigation, yes, but not in arbitration.

In the case of *Arkin v Borchard Lines*, the claimant had owned a shipping line that he said had been forced out of business by anticompetitive and unlawful behaviour. Third-party funding was obtained, with the funder to receive 25 per cent of the recoveries up to £5 million and 23 per cent thereafter. The claimant lost. The claimant was impecunious and not in a position to pay the defendants' costs. The role of the third-party funder, in particular the funder's liability to pay the defendants' costs, came to be considered by the Court of Appeal. It is an established principle of English law that costs follow the event. It was held 'unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action'. However, the Court of Appeal was concerned that there would be a denial of access to justice if this principle were taken too far. If a professional funder who had undertaken to fund a discrete part of litigation were potentially liable for all the costs of all the opponents, then no professional funder would be likely to undertake the risk. The Court of Appeal's solution was that a professional funder who finances part of a litigant's costs of litigation should be potentially liable for the costs of the opposing party

Update and trends

The number of products offered by litigation funders has increased significantly in recent years. In addition to 'classic' litigation funding (ie, funding litigation or arbitration on a case-by-case basis, where the funder's return is contingent on success), litigation funders now offer a number of financial products for claimants and their lawyers, including portfolio funding (where the funder's risk and reward is spread across a number of cases being pursued by a claimant or being handled by a law firm).

to the extent of the funding provided. In the *Arkin* case, the funder had spent £1.3 million on experts and supporting services, and would be ordered to contribute the same sum to opponents' costs.

Arbitration is a consensual process, founded in the contractual arbitration agreement between the parties in dispute. An arbitral tribunal has jurisdiction to make orders only in respect of the parties to the arbitration agreement. This is unlikely to include a third-party funder.

19 May the courts order a claimant or a third party to provide security for costs?

Security for costs by a claimant

An English court may order a claimant to provide security for costs. Pursuant to Civil Procedure Rule 25.13, the court may make an order for security for costs if it would be just to do so and one or more of the following conditions apply: the claimant is resident in a jurisdiction where it would be difficult to enforce a costs order; if a corporate entity, or acting on behalf of another, the claimant is impecunious; the claimant has withheld or changed his address with a view to evading the consequences of the litigation; or the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

Section 38(3) of the Arbitration Act 1996, and the rules of most arbitration institutions based in common law jurisdictions, including England, expressly provide that arbitrators may order security for costs. While, technically, Civil Procedure Rule 25.13 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to in the paragraph above.

Security for costs by a funder

Civil Procedure Rule 25.14(2)(b) allows an English court to make an order for security for costs to be given by any party who 'has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings'. This definition is likely to cover many litigation funding arrangements.

Given the contractual basis of arbitration, an arbitral tribunal may order a party to pay security for costs only if that party enters into the arbitration agreement pursuant to which the arbitration proceeds. A third-party litigation funder is unlikely to do so.

Method and amounts

In court proceedings, security for costs usually takes the form of a payment into court or the provision by the claimant of a bond. Other alternatives available in litigation, and also in arbitration, include payment into an escrow account, bank guarantees, parent company guarantees, payment into court or a solicitor's undertaking. See *Premier Motor Auctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2016] EWHC 2610 (Ch) (24 October 2016), described in question 21 below.

The amount awarded will usually be calculated by reference to the amount of costs the defendant would likely be awarded in the event that the claimant's case is unsuccessful. In arbitration, security may also be ordered in respect of arbitrators' fees.

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

The fact that a claim is funded is not, in itself, a ground on which a court may make an order for security for costs against a claimant under Civil Procedure Rule 25.13. A defendant may seek to argue that the fact that the claimant is funded is evidence that the claimant will be unable to pay the defendant's costs if ordered to do so, which is a ground on

which a court may make an order for security for costs against a claimant under Civil Procedure Rule 25.13(c). However, while many claimants who seek third-party funding are impecunious, many others are not, and the mere fact of litigation funding would not be sufficient. Such a fact should not, in itself, influence the court's decision.

While, technically, Civil Procedure Rule 25 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to in the paragraph above.

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

Yes, ATE is both permitted and commonly used. There is a well-established and competitive market for ATE in respect of both litigation and arbitration.

As London is arguably the centre of the global insurance market, it is perhaps unsurprising that there are many other insurance products related to litigation and arbitration, including insurance for lawyers acting on contingency fee agreements, which covers the lawyers' fees in the event that the claim is lost, and judgment default insurance, which covers the risk that the defendant does not comply with a judgment against it.

As a general rule, London insurers will consider insuring any high-value risk relating to litigation or arbitration. There are specialist brokers who can liaise between litigants and insurers.

In *Premier Motor Auctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2016] EWHC 2610 (Ch) (24 October 2016), Mr Justice Snowden declined to order security for costs where the claimant has the benefit of an ATE policy provided by an insurer with a good track record of paying claims. It was held that the defendants in this action failed to satisfy the court that there is reason to believe that the claimants would be unable to pay the defendants' costs if ordered to do so. The jurisdictional threshold under CPR 25.13 had not been crossed because it was not established that the relevant insurer would not pay under the policy if called upon.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no general requirement for a litigant to disclose a litigation funding agreement to any opposing party or to the court.

A litigant may, of course, voluntarily choose to do so. The fact that a professional third-party funder has agreed to back a litigation or arbitration may send a strong signal to the defendant both that the litigant has financial backing to bring the case through to trial, and that an objective third-party believes the claim to be strong.

Civil Procedure Rule 25.14(2)(b) is referred to in question 19 above. In *Wall v The Royal Bank of Scotland PLC* [2016] EWHC 2460 (Comm), the claimant was ordered to reveal the identity of third-party funders in order that the defendant could consider an application for security for costs against them.

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

This question has not been tested in the English courts, and there is, therefore, some uncertainty. The dominant view of practitioners appears to be that the litigant's privilege is protected in communications with a third-party funder by the common interest doctrine. A third-party funder may also be appointed as the litigant's agent for the limited purpose of reviewing and funding the case, which may add an additional layer of protection for the litigant's privilege.

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

There have been remarkably few publicly reported disputes between litigants and their funders. *Therium (UK) Holdings Limited v Brooke and others* [2016] EWHC 2421 is a rare example of such a dispute. In that case, a litigant was sentenced to prison for contempt of court after failing to obey court orders that arose from his alleged failure to pay his litigation funder a success fee following the settlement of his litigation.

The Association of Litigation Funders has a procedure for complaints against its members. This procedure has never been used.

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

Litigants and their instructed lawyers would be well advised to do business only with professional, regulated and properly capitalised funders; for example, funders that are members of the ALF. These members have committed to comply with the ALF's voluntary Code of Conduct. This Code sets out clear and important rules governing the relationship between a funder and its client, and provides significant benefits to both parties, including clarity on issues such as case control, settlement and withdrawal.

WOODSFORD

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1 Is third-party litigation funding permitted?

Third-party funding was launched in Germany in 1999. As is customary with new ideas, there were a few who took a critical standpoint, but the vast majority of the legal community welcomed the idea. Litigation funding closed the gap between credit facilities provided by banks, which are typically not granted without securities being provided by the claimant, and the prohibition of lawyers providing legal services whose remuneration is based solely on a successful outcome of the case (*pactum de quota litis*). Commercial litigation funders do not – and are not allowed to – provide legal services. Therefore, statutory limitations on providing funding in return for a share of the proceeds do not apply in their case. Since 2010, conditional fee agreements may be concluded, pursuant to section 4a of the German Law on the Remuneration of Attorneys (RVG), but only in limited cases.

Third-party funding has, in fact, never been legally challenged; today, it is widely known and accepted. A small number of court decisions have also confirmed its legal structure as a partnership organised under the laws of the German Civil Code between claimant and funder.

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

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

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

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

Because third-party funders are neither qualified as banks nor as insurers, neither legislative nor regulatory provisions apply.

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

The Federal Regulations for Practising Lawyers (BRAO) stipulate professional and ethical rules and regulations for lawyers. No specific rules regarding third-party funding exist, however. In accordance with various regulations and confirmed by innumerable court decisions, lawyers are under obligation to advise their clients comprehensively and impartially. There have been no court decisions so far obligating lawyers to advise a client specifically about litigation funding and its options.

However, various contributions to the legal field champion such a duty of enabling the clients to choose whether they would like to take on the cost risk themselves or whether they would like to pass it on to a litigation funder. As lawyers are already obligated to inform their

clients about the possibility of obtaining litigation protection insurance, they are well advised to also cover litigation funding when informing their clients.

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

Financial institutions such as banks and insurance providers are regulated and supervised by the Federal Financial Supervisory Authority (BaFin), located in Bonn. Commercial litigation funders are qualified neither as banks nor as insurance providers. They are thus not under the oversight of any public authority.

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

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

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

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

This is handled differently depending on the funder. Some like to be involved to a higher degree and some prefer to remain in the background. However, what all funders share is the general conception of themselves as being more than just a cash provider and the preference for taking on an advisory role during the funding process.

8 Do funders have veto rights in respect of settlements?

All litigation funding contracts provide for this key issue. As a matter of principle, a settlement always requires the approval of both the claimant and the funder. If one party would like to settle and the other does not, the party willing to settle has a contractual right to terminate the funding contract. This has a twofold effect. First, the terminating party has the right to receive the share agreed for the case of a settlement being reached; second, the party unwilling to settle at the terms offered proceeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

In practical terms, funders and clients are almost always able to come to a mutual understanding on whether a given settlement offer is to be accepted or denied. Seeing as they best function as a team (together with the lawyer), this is, of course, the wisest course of action. Should one party decide to leave the team, this weakens the remaining players, if not worse, and thus increases the risk for the party proceeding with the case (eg, the funder). As a matter of fact, claimants availing themselves of litigation funding will rarely be in a position to pay out a funder while the case has not yet been brought to a successful close.

Update and trends

Funders have been getting more and more involved in follow-on civil proceedings for damages in antitrust cases and in consumer class actions. The former is a result of the management level becoming more acutely aware of such claims at the same time as pressure is mounting to pursue such claims in accordance with newly imposed compliance obligations. The latter is attributable, on the one hand, to the increased desire on the part of policy makers and the European Commission for such claims to be brought, and on the other, to the internet as a facilitating factor, with its various platforms and virtual networks making the effective and broad collection of participants possible.

9 In what circumstances may a funder terminate funding?

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

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

10 In what other ways may funders take an active role in the litigation process?

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

As class actions are gaining in relevance for the business, litigation funders are book-building more and more cases. This means that the funder is active very early in the process and this in turn leads to the funder being heavily involved in the later proceeding as well, which then also includes choosing lawyers and experts.

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

Since July 2010, German lawyers have been allowed to work on a partly success-based fee. The development came about because the government needed to limit expenses for legal aid, while at the same time improving access to justice. Section 4a of the RVG is not very precise, and the new regulation still lacks precedents setting a legal frame. As a matter of principle, it is understood that a lawyer may work for a success-based fee only if the client were deterred from proceeding on his or her own on account of his or her economic situation. The lawyer has to review whether or not this is true for his or her client. The scope of this due diligence has not yet been clearly defined and helpful court decisions are still lacking. One could argue that the lawyer must expend a reasonable amount of time and effort for the purposes of assessing his or her client's financial situation. In contrast to the rule in the United States, the lawyer is not allowed to fund court costs, corresponding costs or disbursements. He or she cannot agree on a success fee that provides for a percentage share in the proceeds, as funders do. Only a few lawyers – who are mostly from big international firms – use this opportunity, which is still quite new. Limited as they are to their fees,

they are not direct competitors for litigation funders. On the contrary, funders make use of this circumstance to diversify the risk by agreeing on a fee that is (at least partially) contingent on a successful outcome.

12 What other funding options are available to litigants?

If a creditor does not qualify for legal aid in accordance with section 114 of the German Code of Civil Procedure (ZPO), which applies only to a very limited range of people, and if the claim cannot be sold, which is common for disputed claims, litigation funding is the only remaining possibility to enforce a claim. Some funders offer what is called 'monetisation' or 'monetisation' and buy the claim for a portion of its value. This sounds like a good idea, but in practice it does not usually work. Either the creditor's price expectation is too high or the funder's offer is too low; in any case, agreeing on a sale of the claim and the further enforcement, including the involvement of the seller, may turn out to be rather cumbersome, if at all possible.

13 How long does a commercial claim usually take to reach a decision at first instance?

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

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

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

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

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

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

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

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

In accordance with section 91 of the ZPO, the unsuccessful party always pays the costs of the proceedings. These include court costs, expert costs (if ordered by the court), and the adverse costs in accordance with the German tariff system, but no costs beyond these. If the defendant, for example, incurred costs in excess of those stipulated by the German tariff system, or if the defendant provided a private expert

opinion, those costs are generally not refundable. In case of a partial loss or win, costs are apportioned in the corresponding ratio. Because of the tariff system, court costs and those of lawyers can easily be calculated in advance; well-functioning calculators are available free of charge on the internet (eg, www.der-prozesskostenrechner.de).

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

No. Third-party funding is neither frivolous (the funder always supports a financially weaker party against a stronger party. Its service allows access to justice and creates a desired 'balance of power' before the courts), nor is the contractual relationship between funder and claimant a contract with a third-party beneficiary.

19 May the courts order a claimant or a third party to provide security for costs?

Court orders for the provision of security for costs are very rare. In practice they are only possible for claimants from outside the EU. Even an insolvency administrator, who often has no funds at his or her disposal to cover adverse costs in case of a lost trial, cannot be prevented from suing somebody. As funders are not a party to a trial, they cannot be ordered to deposit securities for the claimant. In addition, no obligations exist to disclose the (commercial) funding of a claim. In the rare case that security for costs is ordered, those costs are calculated and limited to the applicable tariff system for the defendant's and the court's costs.

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

See above.

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

Almost 42 per cent of German consumers and 20-25 per cent of companies have taken out litigation protection insurance, which covers all standard costs of a trial. ATE insurance is unknown. In practice, there is no necessity for it because of the easily calculated costs of lawyers and courts pursuant to the tariff system (which is, in comparison to the UK, inexpensive).

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

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

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

The client-lawyer privilege common in Anglo-American contexts does not exist in German civil law. A German lawyer is, of course, obliged to keep all client information strictly confidential (as stipulated by section 43a (2) of the BRAO) and client documents in his or her possession cannot be seized by the authorities. But it is important to understand that there is also no obligation to disclose information in a trial. A party may keep unfavourable information and documents to itself and cannot be forced to disclose those to the other party or to the court. This principle is only deviated from under very limited exemptions (eg, a document that by its nature is only in the party's possession not bearing the onus of proof and that is relevant for a decision). In addition, a party in civil proceedings (in contrast with criminal proceedings) has no right to lie (see section 138 of the ZPO). A lie at court is punishable under criminal law (as stipulated by section 263 of the German Criminal Code). Because a disclosure obligation similar to that in the Anglo-American legal system does not exist practically in Germany, the provision for privilege can be dispensed with as well.

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

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

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

The German market of commercial litigation funding is neatly arranged. In fact, only three funders control over 90 per cent of the market. These are ROLAND ProzessFinanz AG in Cologne, FORIS AG in Bonn and LEGIAL AG in Munich. There are no funders from outside of Germany currently playing a role on the German market. The minimum amount in dispute being funded is €100,000, and the standard share of the proceeds amounts to 30 per cent for any sum up to €500,000 and 20 per cent of any amount exceeding €500,000.



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1 Is third-party litigation funding permitted?

Third-party funding is not generally permitted for litigation in the Hong Kong courts. Such funding is considered to infringe the doctrines of champerty and maintenance, which prohibit any party without a legitimate interest in the action from assisting or encouraging a party to that action in return for a share in the proceeds if the claim succeeds. Champerty and maintenance are both torts under Hong Kong law. They are also indictable offences at common law, punishable under section 101I Criminal Procedure Ordinance by imprisonment and a fine.

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

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

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

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

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

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

It is unclear whether champerty and maintenance apply to arbitration proceedings in Hong Kong. In *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179, the Hong Kong Court of First Instance held that champerty and maintenance do not apply to arbitration proceedings, but are confined to the public justice system (ie, court litigation).

However, a later decision of the Hong Kong Court of Final Appeal created confusion about the applicability of champerty and maintenance to arbitral proceedings. In *Unruh v Seeberger*, the Court of Final Appeal held that it had no objection to third-party funding of a claim that was arbitrated outside Hong Kong, in a jurisdiction (Netherlands) that had no legal principle equivalent to champerty and maintenance. However, the court left open whether champerty and maintenance applied to arbitrations in Hong Kong, because the question did not arise in that case. The judge indicated that it was for the Hong Kong legislature to clarify the position, should it so wish. The court in *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16 made a similar statement. Consequently,

opinions differ as to whether champerty and maintenance apply to arbitration proceedings in Hong Kong, and whether third-party funding of such claims is permitted.

As at September 2016, there has been no legislative clarification. However, it is expected that the law will be amended in the near future expressly to permit third-party funding of arbitrations and arbitration-related court proceedings in Hong Kong (see question 3).

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

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

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

As at September 2016, there are no legislative or regulatory provisions specifically applicable to third-party litigation funders. Law firms are prevented from funding cases by the Legal Practitioners' Ordinance and by professional conduct rules (see question 11).

However, a sub-committee of the Hong Kong Law Reform Commission (LRC Sub-Committee) recently conducted a public consultation on third-party funding of arbitration in Hong Kong. Following the consultation, the LRC Sub-Committee recommended that the Arbitration Ordinance be amended to permit third-party funding for arbitrations taking place in Hong Kong. It also recommended that 'clear ethical and financial standards' for third-party funders providing funding to parties to arbitrations taking place in Hong Kong be developed.

Following the consultation, in June 2016, Hong Kong Secretary for Justice Rimsky Yuen announced a plan to introduce legislation to permit third-party funding of arbitrations, and arbitration-related court proceedings, in Hong Kong. It is expected that draft amendments to Hong Kong's Arbitration Ordinance will be tabled before Hong Kong's Legislative Council in late 2016.

The Hong Kong Law Society has also established a working group to consider third-party funding in Hong Kong litigation.

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

Professional conduct rules prevent Hong Kong lawyers and registered foreign lawyers from entering into conditional or contingency fee arrangements to act in contentious business. This prevents lawyers themselves, or their firms, from funding clients' claims in litigation or arbitration through such fee arrangements (see question 11). However, we are not aware of any rules that prevent lawyers from advising their clients on using third-party litigation, selecting funders or working with the funders during the proceedings.

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

As at September 2016, no regulator or other public body is officially charged with overseeing litigation funders per se in Hong Kong. To the extent that funders raise capital in Hong Kong, those activities could be regulated by the Securities and Futures Commission (SFC), if the sources of funds amount to a 'collective investment scheme' under the Securities and Futures Ordinance. If the funds provided by a funder are

considered a loan, the funder might be considered a 'money lender' under the Money Lenders' Ordinance and require a licence to conduct business with the funded party. However, most of the funding structures of which we are aware are unlikely to be considered a loan.

There is currently no other body charged with supervising the activities of third-party funders in Hong Kong. However, the LRC Sub-Committee has recommended that 'clear ethical and financial standards' be developed, and has invited submissions on whether such standards should be supervised by a statutory or governmental body, or a self-regulatory body.

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

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

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

Whether a funder is entitled to terminate funding during proceedings because it is dissatisfied with counsel will depend on the terms of the funding agreement.

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

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

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

8 Do funders have veto rights in respect of settlements?

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

9 In what circumstances may a funder terminate funding?

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

10 In what other ways may funders take an active role in the litigation process?

There is no legislative or regulatory guidance as to the degree of control that a funder can take over Hong Kong litigation or arbitration proceedings given the limited circumstances in which such funding takes place. In practice, some funders take a much more active role than others. At minimum, funders generally require regular updates from counsel on the progress of the case. They may also ask for updates on an ad hoc basis, or when there is a significant development in the case. Funders may also advise counsel and the funded party on aspects of the case. In England, it is generally accepted that funders must not control the conduct of the case; such control remains with the litigant. Funders in other jurisdictions, notably Australia, exercise a higher degree of control. For example, some funders are known to have placed a representative within the counsel team for the duration of the case. It is not yet clear what degree of control will be permitted in Hong Kong.

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

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

The restriction derives from section 64(1) Legal Practitioners Ordinance, Principle 4.17 Solicitors Guide to Professional Conduct, paragraph 124 Bar Association Code of Conduct, and the common law. These restrictions prevent law firms from acting as funders in Hong Kong.

12 What other funding options are available to litigants?

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

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

13 How long does a commercial claim usually take to reach a decision at first instance?

According to statistics released by the Judiciary of Hong Kong in February 2016 covering the period from April 2009 to March 2015, commercial claims at first instance take an average of two to two-and-a-half years from commencement to trial. Anecdotal evidence suggests that it can take anywhere from three to six months before judgment is handed down after trial.

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

It is common for decisions to be appealed from Masters to the Court of First Instance (in respect of interlocutory decisions).

However, data from the Hong Kong Judiciary Annual Report 2015 (Report) shows that a very small proportion of first instance judgments under the civil jurisdiction are appealed to the Court of Appeal, despite the fact that leave is not required (apart from certain limited circumstances) to make an appeal from the Court of First Instance to the Court of Appeal. According to the Report, only an estimated 1.4 per cent of first instance civil judgments were appealed to the Court of Appeal. The Report recorded 112 days (ie, four months) as the average waiting time for civil cases at the Court of Appeal from application to hearing date in 2015.

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

These statistics are not available. Whether or not a judgment may easily be enforced in Hong Kong depends on various factors, including the availability of assets within the jurisdiction, the accessibility of assets that may be available, the type of judgment being enforced, whether a party is seeking to enforce a domestic or a foreign judgment and, in the case of a foreign judgment, whether there is a reciprocal enforcement arrangement between that country and Hong Kong.

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

At present, there is no class action regime in Hong Kong. The only avenue that is currently available for multiparty litigation is by way of a 'representative action' brought by a party on behalf of a group of others who have the same interest in the proceedings. The 'representative action' framework, however, is inadequate for dealing with large-scale multiparty situations, and courts in Hong Kong have had to proceed on an ad hoc basis without rules designed to deal specifically with group litigation. Representative actions in Hong Kong are not common. Where they do occur, third-party funding is, in principle, permitted where one of the recognised exceptions to champerty and maintenance applies (see question 1).

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

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

The Department of Justice, in response to the report, has established a working group to consider the details of the proposed regime and make recommendations to the government. It is anticipated that the working group will conduct a consultation exercise during the course of 2016, before finalising its recommendations to the government.

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

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

Arbitral tribunals sitting in Hong Kong have broad discretion to allocate the costs of the arbitration as they see fit. Section 74(2) Arbitration Ordinance provides that the tribunal may direct in its award 'to whom and by whom and in what manner the costs [of the arbitral proceedings] are to be paid'. However, the tribunal must only allow costs that are 'reasonable in all the circumstances' (section 74(7) (a) Arbitration Ordinance). It is most usual for Hong Kong tribunals to order that costs follow the event, but there is no universal practice.

In arbitration-related court proceedings in Hong Kong, the courts have developed a practice of ordering costs on a higher basis (known as the 'indemnity' basis) against a party that fails in an arbitration-related application. This has been applied in applications to challenge arbitral agreements, set aside arbitral awards, and resist enforcement of awards (among others). On the ordinary basis, the unsuccessful party will generally pay 50–75 per cent of the other side's actual expenditure. An indemnity costs order will require the unsuccessful party to pay all of the successful party's costs, except where they are unreasonable in amount or have been unreasonably incurred (Order 62, Rule 28(4A) Rules of the High Court).

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

In Hong Kong litigation, Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B High Court Ordinance empower the courts to order any third party, including a third-party funder, to pay costs. The court's order is known as an 'adverse costs order'.

In arbitration, the funder is generally not a party to the arbitration agreement. As a result, the tribunal lacks jurisdiction over the funder and cannot order it to pay adverse costs. Instead, the tribunal may make the adverse costs order against the funded party. Whether the funder will fund (or reimburse) the funded party in respect of any adverse costs paid will depend on the terms of the funding agreement.

19 May the courts order a claimant or a third party to provide security for costs?

Order 23, Rule 1 Rules of the High Court provides that the court can order security for costs against the plaintiff only. The court has no power to order security for costs against a third-party funder. However,

the funding agreement can provide for the funder to reimburse the plaintiff for any amount paid into court in compliance with a security for costs order. This is a matter for agreement between the funder and the funded party.

Unless the parties agree otherwise, arbitral tribunals sitting in Hong Kong can order security for costs against a party to the arbitration (section 56(1)(a) Arbitration Ordinance). The tribunal has no jurisdiction to make such an order against a third-party funder. However, funding agreements will typically provide that a funder will pay any security for costs order, because if such order is not paid the claim will not proceed.

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

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

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

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

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

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

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

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

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

To maintain privilege in any communication under Hong Kong law, the communication must remain confidential. Assuming that communications between a funder and the funded party are confidential (either pursuant to a confidentiality agreement, or otherwise), they should be protected by litigation privilege. Litigation privilege protects communications between a lawyer, the lawyer's client, and any third party, where litigation is pending or in reasonable contemplation, and the communications are made for the 'sole or dominant' purpose of preparing for or dealing with the litigation. (For the purposes of this test, 'litigation' includes both litigation and arbitration proceedings.)

Common interest privilege may also apply between the funder and the funded party, since they will have a common interest in the outcome of the proceedings. For common interest privilege to apply, the purpose of the communication must be for the parties to inform each other of the facts, issues or advice received in respect of a legal issue, or to obtain or share legal advice in respect of contemplated or pending litigation.

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

We are not aware of any such disputes.

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

There are no other issues.



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Ireland

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1 Is third-party litigation funding permitted?

Third-party litigation funding is not generally permitted in Ireland. The maintenance and champerty rules exist under the Maintenance and Embracery Act (Ireland) 1634 and prohibit third-party funding by third parties who have no legitimate interest in the proceedings.

The High Court in Ireland has considered the impact of this old statute in a number of cases between 2013 and 2015 and has affirmed the rules still exist. In the context of third-party funding, an application was made in the case of *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise & Other* (2015) to assess the legality of a third-party funding agreement. The plaintiff, Persona Digital Telephony Limited, was unable to fund the proceedings. A professional third-party funder from the UK was prepared to enter into a litigation funding arrangement. The plaintiff sought a declaration from the High Court that the litigation funding arrangement did not constitute an abuse of process or contravene the rules on maintenance and champerty.

While the High Court had some sympathy for the plaintiff, it affirmed that both maintenance and champerty are part of Irish law and are torts and criminal offences. The High Court found that to permit a litigation funding arrangement by a third party with no legitimate interest in the proceedings would necessitate a change in legislation and this could not be done by the High Court. This decision was unexpected, given some obiter dicta from the High Court in a judgment approving ATE insurance that provided that the laws have to be interpreted in the context of modern social realities.

Therefore, pending appeal, the High Court ruling in *Persona Digital* outlaws third-party funding. This case has been appealed to the Supreme Court. A decision is expected in 2017.

While professional third-party funding arrangements are unlawful in this jurisdiction, the Irish courts have found that third parties who have a legitimate interest in proceedings, such as shareholders or creditors of a company involved in proceedings, can lawfully fund them, even when such funding may indirectly benefit them.

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

As set out above, third-party litigation funding is not permitted in this jurisdiction. As such, there are no limits.

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

As set out above, third-party litigation funding is not permitted in this jurisdiction by virtue of the common law rules on maintenance and champerty.

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

As professional third-party litigation funding is not permitted in this jurisdiction, this question is not applicable.

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

No. See questions 1-4.

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

Currently not applicable.

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

Currently not applicable.

8 Do funders have veto rights in respect of settlements?

Currently not applicable.

9 In what circumstances may a funder terminate funding?

Currently not applicable.

10 In what other ways may funders take an active role in the litigation process?

Currently not applicable.

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

Litigation lawyers may enter into conditional or contingency arrangements with clients, where any payment made at all by the client to the solicitor is contingent on the success of the case. However, Irish lawyers are expressly prohibited from charging fees by reference to a percentage of damages awarded.

These arrangements are referred to as 'no foal, no fee' or 'no win, no fee' arrangements and are more common in personal injuries claims involving an individual plaintiff than in commercial cases.

12 What other funding options are available to litigants?

In the *Greenclean Waste Management v Leahy* (2014) case, after-the event (ATE) insurance policies were held not to offend the rules of maintenance and champerty. Such policies can be used as security for costs, providing the terms are not conditional. No foal, no fee arrangements are permitted whereby the lawyers defer billing until the case has been won. Finally, third-party funding is permitted where the funder has a legitimate pre-existing interest in the litigation.

13 How long does a commercial claim usually take to reach a decision at first instance?

The length of time for a commercial claim to reach a decision in the High Court can vary considerably depending on the complexity and urgency of the case. However, recent data provides that the average length of High Court proceedings, from issue to disposal, is approximately two years.

In certain circumstances, a claim may be transferred to a division of the High Court known as the Commercial Court. The Commercial Court runs extremely stringent case management procedures and generally, although not always, delivers judgment promptly. According to Commercial Court statistics, 90 per cent of cases are decided within one year. There are considerable delays in the appellant courts.

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

According to recent data, approximately 2.5 per cent of High Court cases are appealed. These decisions can be appealed to the Court of Appeal or, in certain circumstances, to the Supreme Court. The average length

of such proceedings is approximately 1.5 years in the Court of Appeal and three years in the Supreme Court.

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

There is no data publicly available.

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

There is no framework in Ireland to facilitate class actions. However, the Irish Commercial Court has applied scheduling measures to ensure consistency and efficiency in its handling of multiparty/multi-claim litigation, in particular, in financial services litigation. Frequently, the parties will apply a representative action approach, whereby a small selection of cases are tried together on the basis that it is likely the others will follow the judgment.

For example, in 2008, the Commercial Court was faced with more than 50 individual shareholder claims related to the fraudulent investment operations run by Bernard Madoff, and the Commercial Court decided to take forward a small number of cases initially, as representative actions or test cases. In this instance, it was decided that two cases by shareholders and two cases by funds would be heard sequentially as a first step, and the Court stayed the other claims pending the resolution of the four test cases.

A similar approach was adopted by the Irish Commercial Court in relation to claims for the mis-selling of financial products that were initiated by over 200 claimants against ACC Bank in 2010. Five claimants' cases were heard as test cases and the remaining claimants agreed that 'the outcome of the litigation will determine the result of their claims, subject to the possibility of a separate trial on particular and unusual facts different to those in issue in these proceedings.'

Funding of the representative action by the class members does not offend the laws of maintenance and champerty, as the class has a pre-existing legitimate interest in the litigation. Professional third-party funding is prohibited.

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

Yes, the loser pays rule applies in this jurisdiction.

As such, costs 'follow the event' or, more simply, the successful party is entitled to recover its costs from the unsuccessful party. However, costs are ultimately a matter of discretion for the court and it is common now for issues-based cost awards to be made.

In addition, in *Moorview Developments Ltd v First Active Plc* (2011), a third-party funder who had a legitimate interest in the proceedings as he was a shareholder, but was not a party, was held liable for the costs of the action.

In addition, costs are usually awarded on a party-party basis rather than solicitor-client basis, which means that only the costs reasonably incurred by the successful party in prosecuting or defending the

litigation are recoverable. Typically, recoverable costs are 50-75 per cent of the total costs incurred.

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

The Irish courts have recognised a jurisdiction under the Rules of the Superior Courts to make an award of costs against a legitimate third-party litigation funder (for example, a shareholder or creditor). See below.

19 May the courts order a claimant or a third party to provide security for costs?

A defendant may make an application to court to seek security for costs from a claimant; however, it is at the court's discretion whether or not to make such an order.

It is important to note that different rules apply to foreign individuals and corporations than apply to Irish citizens and corporations. It is virtually impossible to obtain an order against an individual based in Ireland, the EU or the territory covered by the Brussels Convention. The court grants such an order only in the following circumstances:

- if the claimant is resident outside the jurisdiction and not within the EU or the European Free Trade Area (EFTA);
- if the defendant has a prima facie defence to the claim and verifies this on affidavit; or
- if there are no other circumstances that obviate the need for security for costs.

The defendant applies for security for costs by way of request to the claimant. If the claimant fails to agree to provide security within 48 hours of receiving the request, the defendant can make an application for security for costs to the court by notice of motion and grounding affidavit.

Security for costs can also be sought against an Irish corporate claimant. It is generally easier to obtain an order against a corporate claimant than an individual claimant, as a company has the benefit of limited liability. The defendant must establish a prima facie defence and demonstrate that there is reason to believe that the claimant would be unable to pay a successful defendant's costs. The onus then shifts to the claimant to establish that the order should not be granted. If an order is granted, the proceedings are stayed until the claimant provides the security. If the claimant does not provide the required security, its claim is dismissed.

Typically, security is a percentage of the predicted costs where there is evidence that the party is impecunious. In cases where the security is granted as the party resides outside of the EU or EFTA, it will be calculated on the basis of the additional cost of enforcement of a judgment.

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

See question 19.

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

ATE insurance is permitted in this jurisdiction. It is a relatively new product on the market and is not yet commonly used. However, as a result of a recent case confirming its legitimacy, it may become more popular. There are no other similar types of insurance available to claimants.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no obligation on a party to proceedings to disclose a funding agreement that is in place between itself and a legitimate third-party funder. An opposing party can make an application for disclosure of such an agreement, but this may not be granted.

In the recent High Court case *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise & Other*, the court was asked to determine whether professional funding contravened the laws of maintenance and champerty. The judge held that a funding agreement was to be disclosed to the extent that it was necessary for the court to determine the issue of whether the funding was lawful. He held that information relating to budgeting and method of payment, etc, was to be redacted, and that while it may later become relevant, such information was not relevant at the time and did not need to be disclosed. He stated that he was:

of the view that where the disclosure of the details of the funding agreement might confer an unfair and disproportionate litigation advantage, there should be careful scrutiny of the necessity for production of the document for the fair disposal of the issue.

As such, it appears that a party may be compelled by the court to disclose a funding agreement to the extent that it is necessary to determine a particular issue, but that the courts will be reluctant to do so if it would result in an unfair advantage to the party seeking disclosure.

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

Yes. To the extent that the agreement is lawful it would be a privileged communication if the dominant purpose was the preparation and defence of the litigation.

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

There have been no reported disputes between litigants and their funders in Ireland.

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

The recent High Court decision in *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise & Other*, which confirmed the prohibition on professional third-party litigation funding in Ireland because of the rules on maintenance and champerty, has been appealed to the Supreme Court. As such, it remains to be seen whether the Supreme Court will uphold these rules or overturn the High Court decision and allow for third-party funding in this jurisdiction.

Korea

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1 Is third-party litigation funding permitted?

There is currently no law or regulation that expressly prohibits or specifically regulates third-party funding.

Korean courts have not expressly shown their attitude in regard to this issue and have not endorsed such funding.

According to article 6 of the Trust Act, third-party funding must be arranged or structured in such a manner that does not constitute an entrustment of a lawsuit.

In addition, under article 34 of the Attorney-at-Law Act, non-attorneys are prohibited from introducing, referring or enticing a party to a case to a specific attorney in exchange for money or other benefits.

At this point, without further legislative changes, we expect Korean courts to take a conservative approach in regard to third-party funding.

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

No. There is no specific limitation on the fees and interest a third-party funder may charge. However, a funding arrangement will still be subject to the Interest Limitation Act. Under the Interest Limitation Act, the amount of money that the funder receives from the successful party other than the principal amount will be counted as 'interest'. Pursuant to the Act, statutory interest is capped at 25 per cent per annum, and any amount exceeding such rate is null and void. In this regard, any amount of money that a creditor receives in connection with a loan, including a deposit, rebate, fees, deduction or advance interest is deemed as interest for the purpose of applying the statutory interest rate ceiling.

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

No. However, depending on how the third-party funding is arranged or structured, it may be limited based on the restrictions set forth under the Trust Act or the Attorney-at-Law Act (see question 1).

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

Under the Attorney's Code of Ethics, attorneys are prevented from 'stirring up litigation', either by directly encouraging potential clients or by indirectly permitting a third party to do so. In consideration of such rule, lawyers will need to take a careful stance on introducing or advising clients in relation to third-party litigation funding.

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

Not at the present time. However, if third-party funding becomes more common or prevalent in Korea, it is likely that the Ministry of Justice and the Korean Bar Association will actively oversee third-party funding activities.

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

No definite answer can be found. However, in view of the current stance of the Attorney-at-Law Act, third-party funders will be restricted in insisting on their choice of counsel. See question 1.

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

In principle, all civil case hearings are open to the public, unless the court determines that a public hearing is detrimental to national security or public policy.

In terms of being able to participate in hearings or court-administered settlement proceedings, generally, a third-party funder would not be permitted to participate because of a lack of adequate legal interest as required by law.

In the case of arbitration, third-party funders may be able to participate with mutual consent of the parties.

8 Do funders have veto rights in respect of settlements?

No.

9 In what circumstances may a funder terminate funding?

The right to terminate funding would be governed by the relevant provisions of the funding contract.

10 In what other ways may funders take an active role in the litigation process?

In principle, assuming that the funding arrangement is in compliance with relevant law, the funder's role should be limited to funding the cost of the litigation or arbitration.

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

Conditional or contingency fee arrangements are permitted for civil cases in Korea. However, if a dispute arises in connection with the fee arrangement, the court may reduce the amount of the agreed contingency fee if the courts find that the amount is unreasonably excessive and violates equity and the principle of good faith.

In regard to criminal cases, the Supreme Court of Korea recently held that contingency fee arrangements are not permissible.

12 What other funding options are available to litigants?

For litigants with limited resources to pay for the costs of a lawsuit, the court may grant litigation aid, either ex officio or upon request of the litigant.

No similar funding options are available for arbitration.

13 How long does a commercial claim usually take to reach a decision at first instance?

A commercial claim in a civil lawsuit will typically take between eight and 12 months at the first instance, from the filing of a complaint to judgment.

In case of arbitration, although it may vary depending on the nature of the case and the administering institution, it generally takes approximately 12 to 14 months for an arbitration award to be rendered.

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

Overall, less than 10 per cent of first-instance judgments are appealed. However, in cases heard before three-judge panels (ie, cases with claim amounts over 200 million won), the appeal rate is over 40 per cent.

Appeals usually take six months to one year, but an appeal may take longer depending on the nature and complexity of the case.

There is no appeal process for arbitration in Korea.

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

Although no official data is available, contentious enforcement proceedings are quite common in civil cases.

Enforcement of judgments is relatively easy: once a final and conclusive judgment is obtained, the successful party can enforce it against the assets of the unsuccessful party by initiating proceedings for execution. In addition, the court may declare a judgment to be provisionally enforceable before a final and conclusive judgment will be rendered.

Korean courts are receptive to the recognition and enforcement of foreign arbitral awards, in particular, where the award is from a jurisdiction that is a signatory to the New York Convention.

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

Class actions are not permitted, except in limited cases based on the type of claim. These are claims for certain types of securities-related damages under the Securities Related Class Action Act; and class action suits against an enterprise that has committed an act causing potential or actual harm to the consumers' right to life, body or property, and to seek injunctive relief under the Consumer Basic Law.

In addition, if the rights or liabilities forming the object of a lawsuit are common to many persons or are generated by the same factual or legal causes, such persons may join in the lawsuit as co-litigants under the Civil Procedure Act of Korea. However, only those participating in the lawsuit would be subject to the outcome of the case.

There is law or regulation that regulates third-party funding for class actions or group actions, and thus, such arrangements will be subject to the same general restrictions under Korean law.

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

Yes. However, in calculation of the litigation costs, the courts will follow the calculation methods and the limits set in Supreme Court Regulation.

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

Adverse costs are likely to be ordered against the unsuccessful party to the litigation (or arbitration) rather than the third-party funder.

19 May the courts order a claimant or a third party to provide security for costs?

Generally, no. However, if the claimant has no domicile or place of business in Korea, or it is clear that there is no basis for the claim based on the submissions, the courts will order security for costs upon a request by the respondent pursuant to article 117 of the Civil Procedure Act of Korea.

Whether there is a need for security is not determined based on whether the claim is funded or not.

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

No.

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

Insurance for attorney's fees and insurance for non-payment of a judgment debt by the defendant is not legally prohibited under Korean law. However, any insurance contract that insures an event that has already occurred and is already recognised by the contracting parties and the insured party is null and void pursuant to article 644 of the Korean Commercial Code. The Supreme Court of Korea has ruled that an insurance event must be uncertain at the time of entering into the insurance contract and that any insurance contract in violation of article 644 of the Korean Commercial Code shall be null and void.

Insurance for attorneys' fees are offered by some insurers, but, in general, insurance related to litigation and legal disputes are not common in Korea.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Currently, no particular legislation exists yet requiring a litigant to disclose a litigation funding agreement.

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

Korea does not recognise attorney-client privilege as commonly understood and practised in common law jurisdictions. Rather, Korean laws (ie, the Civil Procedure Act and the Attorney-at-Law Act) only impose obligations on attorneys to not disclose information obtained in the course of performing his or her duties as an attorney and that is secret or confidential (ie, non-public information), unless otherwise exempted. This includes the work-product of the attorney prepared for his or her client.



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

In a Supreme Court case (*Supreme Court Judgment 2013Da28728* dated 24 July 2014) involving a dispute between litigants and their funder, the funder (the management company of an apartment complex) entered into a funding agreement with the litigants (the representative body of apartment residents) by agreeing to pay litigation costs on behalf of the litigants in return for the prospective rights of repair works, authorisation to select contractors and guarantee to renew management contracts for the apartment complex in case of a successful outcome in the litigation. After the litigation was settled, a subsequent dispute arose between the litigants and the funder. The court held that the funder's role of financing the litigation costs, de facto retaining lawyers and

managing claims constituted 'representation' under article 109(1) of the Attorney-at-law Act, and therefore, the funding agreement was declared null and void.

In the above case, Supreme Court of Korea interpreted 'representation' in article 109(1) of the Attorney-at-law Act very broadly, which may reflect a conservative approach of the Korean judiciary towards third-party funding in Korea.

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

No, at this point in time. However, this issue should be revisited when legislation and regulations regarding litigation funding are introduced.

Netherlands

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1 Is third-party litigation funding permitted?

Third-party litigation funding is allowed in the Netherlands. It is already common in mass claims, which are often litigated or settled through special claims vehicles. With regard to individual claims, third-party litigation funding is not very widespread, but the market seems to be emerging. This applies to both court litigation as well as arbitration.

There seems to be no particular interest from the judiciary as to whether or not litigation in the courts is funded by a third party; a possible explanation is that, as explained below, costs awarded in proceedings in state courts are fixed and bear no relationship to the real cost incurred by a litigant. At present, the legislator doesn't seem inclined to regulate third-party funding. However, as the market is emerging and third-party litigation funding will thus become more common, some form of regulation is to be expected, most likely in the domain of consumer claims.

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

There are, in principle, no limits on the fees and the interest third-party funders can charge, other than the general limits of enforceability of contracts and the powers of courts to mitigate the effect of or amend contract clauses that should qualify as wholly unreasonable. These powers are rarely exercised in practice. The ultimate test for the validity of an agreement on fees and interest is whether the agreement runs contrary to good morals or public policy, in which case it is null and void. There is no published precedent for litigation funding, but one could imagine this could apply to a usurious arrangement.

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

No.

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

There are no specific professional or ethical rules applying to lawyers advising clients in relation to third-party litigation funding but general professional and ethical rules apply. In this regard, a lawyer representing both the litigant and the funder with regard to the drafting of the funding agreement should, for example, be aware of possible conflicting interests and confidentiality obligations.

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

The Ministry of Security and Justice has demonstrated an interest in third-party litigation funding. The Ministry observed in 2013 that the market is emerging, but did not take steps to regulate it. The Ministry's main concerns seem to be the accessibility of the legal system and the protection of the litigant in relation to the funder, especially if the litigant is a consumer.

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

It is generally assumed at present that third-party funders are free to insist on their choice of counsel. Although the European Court of Justice is very reluctant to accept clauses in legal expenses insurance agreements limiting the insured's choice of counsel, we note, however, that such clauses are agreed upon before the occurrence of a specific

dispute has arisen and that third-party litigation funding will in general be agreed upon thereafter.

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

As a general rule, court hearings are open to the public. The law only provides for a limited number of exceptions, but these hardly apply to commercial disputes. Third-party litigation funders may, therefore, generally attend court hearings. Arbitration hearings are, on the contrary, held in camera and absent the permission of the parties to the arbitration the third-party funder may not attend such hearings. There is no rule that would prevent third-party funders from participating in settlement discussions.

8 Do funders have veto rights in respect of settlements?

In the funding agreement, the parties may agree that the third-party funder has a veto right. Parties may also agree that if the litigant refuses to accept a settlement that the funder considers appropriate, the litigant shall reimburse all costs of the funder, as well as the amount the funder would have received in case of a settlement. In a 2011 decision, the Amsterdam Court of Appeals (ECLI:NL:GHAMS:2011:BU8763) held that such an arrangement is not invalid per se.

9 In what circumstances may a funder terminate funding?

The circumstances in which the third-party funder may terminate funding would normally be agreed in the funding agreement. Absent any specific provision, it is not a given that the funder may terminate the funding agreement at will, in view of the potential exposure of the litigant; general principles of contract will apply, under which termination would be justified in case of a default by the litigant. A rescission with immediate effect may be called for in the event of error or deceit.

10 In what other ways may funders take an active role in the litigation process?

As the third-party funder will generally not formally be party to the proceedings, one has difficulty imagining how the funder could take a formal role in the litigation process. Behind the scenes, the third-party funder may assist the litigant and counsel. The funder may also have an informal role in the litigation process and could, for example, assist with or directly enter into settlement discussions with the opposing party.

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

The general rules of professional conduct disallow Dutch lawyers from entering into conditional or contingency fee arrangements, except in case of personal injury claims where these are currently allowed, subject to a number of conditions. Litigation lawyers may, however, always conclude fee arrangements at a reduced hourly rate, provided at least the actual costs are covered, subject to subsequent increase in the event of victory or successful settlement. In this respect, an agreement that the fee will be increased with a percentage of the amount awarded is allowed. In addition, lawyers may agree to provide their services on the basis of generally accepted and commonly used debt collection fee rates.

12 What other funding options are available to litigants?

Legal expenses insurance policies, although common in the Netherlands for consumers, are less popular with companies and generally contain a relevant number of exclusions. For mass claims, special litigation vehicles are created. These vehicles can be funded by third-party litigation funders or by a number of aggrieved parties; their 'investment' is limited to a fraction of the costs of litigation that the aggrieved party would incur when pursuing an individual claim.

13 How long does a commercial claim usually take to reach a decision at first instance?

In some 60 per cent of all commercial disputes the first instance trial is decided in less than 12 months. These cases will on average be limited to a statement of claim followed by a statement of answer and a court hearing. Approximately 85 per cent of all commercial claims will be decided at first instance within 24 months.

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

Between 10 per cent and 15 per cent of all first-instance judgments in commercial claims are appealed. Less than 50 per cent of these appeals are decided within 12 months. Approximately 80 per cent of all appeals are decided within 24 months.

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

Judgments rendered by Dutch courts will never require (contentious) enforcement proceedings. Arbitral awards rendered in the Netherlands can be enforced after an exequatur has been granted by the court. Exequatur proceedings are in principle ex parte proceedings, but the party that fears imminent enforcement may request the court to schedule a hearing before rendering an exequatur, if there are grounds for the annulment of the arbitral award. Foreign judgments and arbitral awards are often recognised and declared enforceable in the Netherlands. The Brussels I and Brussels I-bis Regulation, the Hague Convention on Choice of Court Agreements and the 1958 New York Convention are applicable in the Netherlands; the latter Convention only applies if the award was rendered in one of the 156 state parties where the Convention is currently in force.

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

Class actions and group actions are permitted. Under the Collective Settlement of Mass Claims Act (2005), the Amsterdam Court of Appeals can declare a collective settlement binding on all the aggrieved parties, whether Dutch or foreign, on an opt-out basis. The settlement agreement must be entered into by a special litigation vehicle duly representing the interests of the aggrieved parties and a party that has committed itself to compensate the aggrieved parties, such entity not necessarily being the party that caused the damage. This mechanism has often been applied with great success in international mass claims. The special litigation vehicle may be funded by third parties. Collective redress in group actions is presently not possible, but the justice ministry is working on an act enabling collective redress in group actions as well.

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

In commercial court litigation the unsuccessful party will be ordered to pay the costs of the victorious party. The costs of the prevailing party subject to reimbursement are, however, very limited; the court's cost order will cover the actual costs of service of the writ of summons and the court fees, but legal fees are only compensated on the basis of a flat rate, which in most cases does not remotely cover the actual cost incurred. Only in IP litigation or in rare cases where an abuse of law by the unsuccessful party was ascertained can the unsuccessful party be obliged to compensate the full costs of the prevailing party.

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

As long as third-party litigation funders are not a party to the litigation, they cannot be held liable for adverse costs.

Update and trends

In the course of 2017, international litigants will have the option to submit disputes to the Netherlands Commercial Court, a specialised chamber within the Amsterdam District Court and, on appeal, with the Amsterdam Court of Appeals. Proceedings before the Netherlands Commercial Court (NCC) will be heard and conducted in English and result in decisions rendered in English. A substantive link between the dispute and the Netherlands will not be required. Therefore, third-party funders may find the NCC an interesting alternative to significantly more costly litigation in, for example, London, Delaware or Singapore.

19 May the courts order a claimant or a third party to provide security for costs?

A third-party funder that is not a party to the litigation or the arbitration proceedings cannot be ordered to provide security for costs. Courts may only order that security for costs be provided by foreign claimants who reside in a jurisdiction where enforcement of a Dutch judgment is not provided for under any treaty; such costs will, however, always be limited to the costs that may be imposed on the unsuccessful party as discussed in question 17. Although the Dutch arbitration act does not contain any provision with respect to security for costs in relation to arbitral proceedings, it is generally accepted that tribunals may order security for costs. However, in practice, this rarely happens. Any security that must be provided pursuant to an order from the tribunal is calculated on the basis of how the proceedings are expected to evolve. In most cases, a party ordered to provide security for costs shall abide by the order by providing a bank guarantee for the set amount.

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

The fact that the claim was funded by a third party does in itself not influence the decision by a court or a tribunal, but may in practice contribute to solving the security issue.

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

ATE insurance is not used in the Netherlands, probably because the risk of significant adverse cost decisions is virtually non-existent, since costs are fixed and liquidated, as explained in question 17.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Dutch law does not explicitly provide for the disclosure of the litigation funding agreement to the opposing party, the court or arbitral tribunals. Particularly if the litigant should also claim the funding cost, the litigant may be compelled to disclose the funding agreement. Disclosure will often follow upon the opponent's request to the court, but may also be ordered out of the court's or the tribunal's own motion.

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

Communications between litigants and funders are not protected by privilege. In the Netherlands, privilege lies with the lawyer rather than with the client; communication between a litigant and his or her lawyer is therefore protected by privilege. If the litigant's lawyer also represents the funder, communications between the lawyer and the funder may as a consequence also be privileged.

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

Very few disputes between litigants and their funders have resulted in published case law. In the above 2011 decision (see question 8) the Amsterdam Court of Appeals held that a specific funding agreement with a consumer was valid, but that the third-party funder is under a duty of care to apprise the litigant of the ins and outs of the funding agreement, in particular, the fee structure, especially if the litigant is a consumer.

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

The case law of the Amsterdam Court of Appeals makes clear that collective settlements under the Collective Settlement of Mass Claims Act barely need to have Dutch elements, which makes these an inexpensive and attractive alternative to US litigation and the Dutch decision may be automatically recognised within the EU. It will be interesting whether, based on the current legislative initiative, collective redress in class actions will also be possible in the near future.

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1 Is third-party litigation funding permitted?

Yes. Although the common law torts of maintenance (assisting a party in litigation without justification) and champerty (assisting in consideration of a share of proceeds of the litigation) have not been abolished in New Zealand, the recent attitude of the New Zealand courts to third party-funding can be described as ‘cautiously permissive’. The Supreme Court of New Zealand has said 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 outside ‘representative’ actions (see question 16). Instead, the role of the courts is to adjudicate on any applications brought before them to which the existence and terms of a litigation funding arrangement may be relevant. The Supreme Court has accepted that some measure of control by a third-party funder is ‘inevitable’ to enable a litigation funder to protect its investment (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91).

Similarly, in the context of a funded representative action, the High Court has stated that concerns as to champertous pursuit of claims have to be tempered by the reality that funded arrangements are commercial arrangements and it ‘would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune’ (*Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZH 1596 at paragraph 66).

Under the High Court Rules or its inherent powers, the High Court may intervene in both representative or non-representative funded proceedings where:

- there is a manifestation of an abuse of process on traditional grounds, such as where proceedings deceive the court, are fictitious, or a mere sham, use the process of the court in an unfair or dishonest way or for some ulterior or improper purpose or in an improper way, those that are manifestly groundless, without foundation or serve no useful purpose, and those that are vexatious or oppressive (*Pricewaterhousecoopers v Walker* [2016] NZCA 338 at paragraph 14(e)); or
- where a funding arrangement amounts to an assignment of a bare cause of action to a third-party funder in circumstances where this is not permissible (ie, the exceptions to maintenance and champerty do not apply). In assessing whether litigation funding arrangements amount to an assignment that is not permitted, the court will have regard to the level of legal (rather than de facto) control able to be exercised by the funder, the profit share of the funder, and the role of the lawyers acting (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91).

Given the private nature of arbitration, the treatment of third-party litigation funding in domestic arbitration in New Zealand is largely unknown. The relevant legislation (the Arbitration Act 1996) does not contain any provisions relating either directly or indirectly to litigation funding. Instead, an arbitrator has power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (Article 19, Schedule 1). An arbitrator may also order ‘any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently’ (Clause 3(1)(j) of Schedule 2). These broad powers would encompass the ability to

regulate funded domestic arbitrations in the respects referred to in the questions below.

In addition, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court or District Court assistance in the exercise of the powers conferred on the arbitral tribunal relating to the conduct of arbitral proceedings (Clause 3(2) of Schedule 2). This ability would allow either the arbitral tribunal of its own motion, or one of the parties with its approval, to request assistance from the High Court or District Court in the event of an issue arising in the context of a funded domestic arbitration.

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

There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court of New Zealand has said that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff, including remuneration (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91). In the context of a representative funded action, the High Court was not persuaded that the terms of the funding agreement (including an entitlement to terminate the funding agreement without cause on five days’ notice and a power to veto in relation to settlement) were inappropriate for a representative action (*Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 70).

That said, in assessing whether litigation funding arrangements amount to an assignment that is not permitted, the courts will have regard to the profit share of the funder (see above).

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

No. Only the common law is applicable. In particular, the common law torts of champerty and maintenance still exist in New Zealand.

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

No specific rules apply. The general professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 apply.

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

No public bodies have specific interest in or oversight over third-party litigation funding, apart from the courts.

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

It does not appear that this issue has come before the courts to date. It is very unlikely that third-party funders have such a legal entitlement, because choice of counsel is the exclusive right of the client (ie, the plaintiff). This right is reflected in the professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

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

There is no restriction on representatives of funders attending hearings or settlement discussions, unless excluded by order of the Court. Funders do not have a right to participate in hearings, and attempts to do so might raise concerns of abuse of process. Funders may participate in settlement proceedings, but cannot influence or make settlement decisions unless this is provided for under the funding agreement.

8 Do funders have veto rights in respect of settlements?

Only if such rights are provided for under the funding agreement. The courts take a fairly liberal approach to such veto rights. In *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraphs 70–73, the High Court was not persuaded that the existence of a power of veto in relation to settlement was inappropriate for a representative action. This was for the following reasons:

- in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- to the extent the action requires positive input from all the claimants, the funder will need to maintain their goodwill to carry on with the action; and
- where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, reputationally this will provide a fetter on the funder's ability to act unreasonably.

9 In what circumstances may a funder terminate funding?

In the first instance, this will depend on the terms of the funding agreement (which often provide for termination upon notice). If the funding agreement does not make express provision for termination, the Contractual Remedies Act 1979 will apply by default. A funder would be able to cancel (prospectively) a funding agreement in the following circumstances:

- for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;
- if a term of the funding agreement is broken by the plaintiff(s); or
- if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

In all these situations, the funder may exercise the right to cancel if, and only if:

- the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the funder; or
- the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be:
 - substantially to reduce the benefit of the contract to the funder;
 - substantially to increase the burden of the funder under the contract; or
 - in relation to the funder, to make the benefit or burden of the contract substantially different from that represented or contracted for.

10 In what other ways may funders take an active role in the litigation process?

Funders may not take any active role in the litigation process if that would amount to an abuse of process (see above).

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

Yes, but only of a certain type. 'Conditional fee agreements' (where payment depends on whether the outcome of the matter is successful) are permissible under sections 333–335 of the Lawyers and Conveyancers Act 2006 if the fee arrangement amounts to:

- the normal fee that would have been charged for the services provided; or
- the normal fee is accompanied by a premium that:
 - compensates counsel for the risk of not being paid at all;
 - compensates counsel for waiting to be paid until proceedings have been concluded; or

- is not calculated as a proportion of the amount recovered by the proceedings.

However, conditional fee agreements are prohibited for criminal proceedings, immigration proceedings and family law proceedings.

Conditional or contingency fee agreements that fall outside this statutory permission may be illegal or unenforceable, especially where the payable fee is calculated as a proportion of the amount recovered (and therefore amounts to the tort of champerty).

12 What other funding options are available to litigants?

Government-funded legal aid for litigants who cannot afford lawyers is available through the Ministry of Justice for certain civil disputes (including debt recovery, breaches of contract, defamation and bankruptcy proceedings). A litigant must apply for such aid. Whether aid is granted depends on a number of factors including: any arrears from a previous legal aid debt, the income of the litigant, the assets of the litigant and the merits of the legal case. Legal aid is considered a loan and a litigant may have to repay some or all of the legal aid, depending on how much they earn, what property they own and whether they receive any money or property as a result of the case.

13 How long does a commercial claim usually take to reach a decision at first instance?

This will depend on the nature and complexity of the claim, the number of parties, the level of court in which it is filed and the workload of that court. Given the typical quantum of funded claims, almost all of these will be filed in the civil jurisdiction of the High Court. The statistics for the last two years are as follows:

- 1 January to 31 December 2015 – the average age at disposal was 650 days; and
- 1 January to 31 December 2014 – the average age at disposal was 513 days.

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

In the civil jurisdiction of the High Court, the statistics for the last two years are as follows:

- 2015 – 2,456 cases were disposed; and
- 2014 – 2,473 cases were disposed.

New civil appeals to Court of Appeal:

- 2015 – 248, which means that 10.09 per cent were appealed; and
- 2014 – 257, which means that 10.39 per cent were appealed.

How long an appeal takes will depend on the nature and complexity of the appeal, the number of parties and the workload of the Court of Appeal. On average, an ordinary civil appeal might take at least one year to be disposed of, from the date of filing until the date of judgment.

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

There are no statistics available on this issue. Whether enforcement proceedings are required will depend on the defendant's financial position in each case.

In the High Court, following the sealing of judgment, a range of enforcement options are available against the judgment debtor and the judgment debtor's personal or real property (in Part 17 of the High Court Rules). These are as follows:

- order for examination of the debtor;
- attachment orders over salary or wages due and payable by an employer;
- charging orders over real or personal property;
- sale orders over land and chattels;
- possession orders over land and chattels;
- arrest orders;
- sequestration orders over rents and profits from real and personal property; and
- imprisonment until security deposited or bond executed.

Generally, an enforcement procedure in respect of real property (such as a sale order) is the most difficult to implement.

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

The High Court Rules allow for 'representative' actions rather than 'class actions' or 'group actions' per se. Rule 4.24 provides:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding –

(a) with the consent of the other persons who have the same interest; or

(b) as directed by the court on an application made by a party or intending party to the proceeding.

Sub-paragraph (a) allows a group of identified plaintiffs to sue together if they consent to this. The plaintiffs are then listed together in the same statement of claim.

Sub-paragraph (b) allows a group of plaintiffs who may or may not be identified to sue together, where some substantial question of law or fact is common to a number of litigants or the claims of a number of potential litigants arise out of the same transaction or series of transactions (*Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NLR 541 at [8]). In making directions, the Court may allow 'opt-in' periods, during which additional claimants can join the classes represented.

Such actions may be funded by third parties, subject to the restrictions described above.

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

Yes. All matters of costs are at the discretion of the High Court (Rule 14.1) but one of the default principles is that the party that fails with respect to a proceeding or an interlocutory application should pay (scale) costs to the party who succeeds (Rule 14.2(a)).

Generally, costs are assessed by applying the appropriate daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application (Rule 14.2(c) and (d)).

According to Rule 14.6(3), the Court may award increased costs where:

- the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under the highest scale band;
- the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by:
 - failing to comply with the rules or with a direction of the court;
 - taking or pursuing an unnecessary step or an argument that lacks merit;
 - failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument;
 - failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the rules;
 - failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
- the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
- some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

According to Rule 14.6(4), the Court may award indemnity (ie, actual) costs where:

- the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding;
- the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party;

Update and trends

The Rules Committee (a statutory body with responsibility for procedural rules in the courts) released a draft Class Actions Bill/High Court Amendment (Class Actions) Rules for consultation in 2008. This contains a new procedure to enable true 'class action' proceedings in New Zealand. Specifically, a 'class action' may be commenced if:

- seven or more persons have claims against the same proposed defendant or defendants;
- the claims are in respect of, or arise out of, the same, similar or related circumstances; and
- all the claims give rise to at least one substantial common issue of law or fact.

A final draft was sent to the Secretary for Justice in 2009. In 2012, the Commerce Committee recommended that the government give priority to the introduction of a class actions regime. However, to date, it appears that no further progress has been made.

- costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding;
- the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it;
- the party claiming costs is entitled to indemnity costs under a contract or deed; or
- some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

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

Yes. If the successful party applied for third-party costs orders against the funder, third-party funders would only be liable for a costs order where the litigation would not have been undertaken without their involvement or where they not only fund the proceedings but substantially control or benefit from them (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2004] UKPC 39, [2005] 1 NZLR 145).

The courts will not award indemnity or increased costs merely because a litigation funder with a profit motive stands behind the losing party (*Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67 at paragraph 135).

19 May the courts order a claimant or a third party to provide security for costs?

Yes. Under Rule 5.45 of the High Court Rules, on the application of a defendant, a judge may order the giving of security for costs if:

- a plaintiff is resident out of New Zealand;
- a plaintiff is a corporation incorporated outside New Zealand;
- a plaintiff is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
- there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants (*Saunders v Houghton* (No 1) [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 36).

Calculation of the sum is a matter for the Court to assess in all the circumstances. Those circumstances include the:

- amount or nature of the relief claimed;
- nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutories;
- estimated duration of trial; and
- probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual (ie, solicitor and client) costs.

Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of default scale costs.

The sum ordered must either be paid into court, or security for that sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank guarantee directly enforceable by the defendant.

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

Yes, this does have an influence, and may justify increased security for costs. In *Houghton v Saunders* [2015] NZCA 141, the Court of Appeal stated at paragraph 11:

[The fact a party is supposed by a litigation funder] may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit. Security allows the court to hold the funder more directly accountable for costs. It is consistent with the Court's jurisdiction to award costs against a non-party which is sufficiently interested in the litigation. Security is all the more appropriate where the funder can avoid liability for future costs by terminating the funding agreement by notice before the litigation concludes.

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ\$100,000 (increased from NZ\$86,000) because the overseas litigation funder retained the right to terminate its indemnity to the representative plaintiff for costs on notice and the scale costs of the proceeding were unusually high.

It was confirmed by the High Court in *Highgate on Broadway Ltd v Devine* [2013] NZHC 2288, [2013] NZAR 1017 at paragraph 22(d) that the fact the plaintiff is funded is a ground for the order of security.

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

Yes, ATE is permitted in New Zealand. In our experience, it is commonly used by funders.

Generally, the only types of parties who would use other types of insurance to cover legal (defence) fees would be company director defendants (directors and officers insurance) and professional defendants, such as lawyers, accountants, architects and engineers (professional indemnity insurance).

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

A litigant must make initial disclosure of the following matters at the time a funded proceeding is commenced to the other party or parties:

- the fact there is a litigation funder and the funder's identity;
- whether or not the funder is subject to the jurisdiction of the New Zealand courts; and

- (possibly) the terms of withdrawal of funding, if those terms in some way give legal control over the proceedings to the funder, or are relevant to application for security for costs.

The litigation funding agreement itself must be disclosed where an application is made to which the terms of the agreement could be relevant, such as applications for a stay on the basis of abuse of process, applications for third-party costs orders, and applications for security for costs (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraphs 73–74).

In relation to the latter type of application, the Supreme Court has said that it is 'strongly arguable' that the courts have power to order disclosure of at least the existence of a litigation funder and the relevant terms of the funding agreement (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 63).

Disclosure is subject to redactions relating to confidentiality, and litigation-sensitive and privileged matters.

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession of power of a party (Schedule 2 Rule 3(1)(f)). This is broad enough to encompass a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

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

Yes. The Evidence Act 2006 provides that the following communications and materials are protected by privilege of three kinds:

- Privilege for communications with legal advisers that are intended to be confidential and are made in the course of and for the purpose of the person obtaining professional legal services from the legal adviser or the legal adviser giving such services to the person (section 54).
- Privilege for a communication or information (section 56) – where a person who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of:
 - a communication between the party and any other person;
 - a communication between the party's legal adviser and any other person;
 - information compiled or prepared by the party or the party's legal adviser; or
 - information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

In all these cases, the communication or information must be made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.

- Privilege for settlement negotiations or mediation (section 57) – a person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:

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- intended to be confidential; and
- made in connection with an attempt to settle or mediate the dispute between the persons.

Further, a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute (section 57(2)).

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

There do not appear to be any such disputes reported as at the time of writing.

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

It appears that some funded litigation has occurred in the main Pacific Islands. The civil procedure rules of Fiji, the Cook Islands and Samoa all permit 'representative actions', rather than 'class actions' or 'group actions' per se.

Poland

Tomasz Waszewski

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1 Is third-party litigation funding permitted?

Third-party litigation funding is permitted in Poland on the basis of the rule of freedom of contract. Since third-party litigation funding has not yet become popular in Poland, there are no court rulings that allow us to establish the Polish courts' attitude towards third-party litigation funding.

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

Polish law does not lay down specific rules limiting the fees of third-party funders. If Polish law governs the funding agreement, funders and litigants may determine their legal relationship at their own discretion within the general limits of freedom of contract laid down by Polish law. These limits follow the nature of the contractual relationship, good customs and the provisions of law.

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

No specific legislative or regulatory provisions applicable to third-party litigation funding have been adopted in Poland.

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

No specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding. The rules of ethics applicable to qualified lawyers do not distinguish funders from other third parties. Lawyers are obliged to act in the best interest of their clients and may not be under any third-party influence, including that of funders. Lawyers may take instructions from their clients only. All information the lawyers obtain in relation to the case is confidential.

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

According to publicly available information, so far no public bodies, including the financial regulator and the Minister of Justice, have any particular interest in or oversight over third-party litigation funding.

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

The choice of attorneys belongs only to litigants. Nonetheless, it seems that it would not violate Polish law if funders and litigants agreed that the choice of a reputable attorney indicated by the funders would be a condition for funding the case.

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

Funders may attend all hearings that are open to the public. In Polish domestic litigation, the general rule is that the public may attend all hearings, unless the court orders a closed hearing. The court orders a closed hearing if hearing the case with the public in attendance would be a threat to public policy or morality, or if there is a possibility that protected confidential information or company secrets might be revealed.

According to the rules of the 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, hearings held in arbitration proceedings are closed unless the parties agree otherwise. Thus, funders may attend the hearing only upon the consent of both parties.

Funders may participate in out-of-court settlement proceedings. There are no restrictions on attending institutionalised settlement proceedings before the court, which are in general open to the public. Funders may not attend institutionalised mediation proceedings, which are confidential. The parties and their lawyers are not allowed to disclose any facts made known to them in mediation proceedings to any third parties, including funders, without the consent of both parties.

8 Do funders have veto rights in respect of settlements?

Funders do not have veto rights in respect of settlements.

9 In what circumstances may a funder terminate funding?

Polish law does not determine in which circumstances funders may terminate funding. If Polish law governs a funding agreement, the agreement should indicate the circumstances in which a funder may terminate funding.

10 In what other ways may funders take an active role in the litigation process?

Not applicable.

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

According to the rules of ethics applicable to qualified lawyers, they are not permitted to enter into conditional or contingency fee agreements if the whole fee is payable only if the case is won. However, lawyers may enter into an agreement upon which a part of fee is due regardless of the outcome of the case, while the remaining part of the fee is paid if the case is won. The rules of ethics do not give a clear-cut answer as to what the proportion between these two parts of the fee should be.

Specific provisions apply to lawyers representing clients in class action proceedings. Lawyers may be entitled to a conditional or contingency fee only; however, the fee cannot exceed 20 per cent of the award. It is disputable whether these provisions only limit conditional and contingency fees, or the sum of the conditional or contingency fee and fee due regardless of the outcome of the case.

12 What other funding options are available to litigants?

An alternative funding option available to litigants in domestic litigation is to apply to the court for legal aid by way of releasing the party from the duty to pay court costs and to appoint an attorney for the party whose fee would be paid by the state. Court costs include court fees, the costs of the opinions of court-appointed experts and witnesses' costs. Providing the litigant with legal aid does not release the litigant from all expenses. Even if a litigant was provided with legal aid, he or she may be liable for adverse costs if the opposite party wins the case.

The court will provide legal aid to a litigant who, as an individual, cannot bear court costs without affecting his or her ability to support himself or herself and his or her family. A litigant who is a legal person will be provided with legal aid if it has no sufficient funds to bear court

costs. However, experience shows that courts are reluctant to provide entrepreneurs with legal aid even if they are on the verge of insolvency.

If legal aid is granted, the State Treasury will cover court costs and attorney's fee instead of the litigant. The fees of court-appointed attorneys are regulated by law. The adverse party will be ordered to reimburse the State Treasury if it loses the case.

Litigants cannot be granted legal aid in class action proceedings. However, if consumers bring a class action, they will not incur court costs if the consumers' ombudsman agrees to join the proceedings on the side of consumers as the class representative. The body may decide to join the case at its own discretion. As the class representative, it may also be liable to pay adverse costs if the case is lost, and be ordered by the court to provide security for those costs.

Legal aid is not available to litigants in arbitration proceedings pursuant to rules of Court of Arbitration at the Polish Chamber of Commerce in Warsaw and Court of Arbitration at the Polish Confederation Lewiatan.

13 How long does a commercial claim usually take to reach a decision at first instance?

According to the information published by the Ministry of Justice, the average length of legal proceedings in commercial cases heard before district courts that ended in the first half of 2016 was 14.5 months. District courts generally adjudicate in cases exceeding 75,000 zlotys at the first instance; thus, a third-party funded case will most probably be heard by these courts. In 92.8 per cent of cases heard before district courts, it took no more than three years to reach a decision at first instance. This data does not include the duration of order for payment proceedings that usually precede the main proceedings. For payment proceedings, the court orders the defendant to pay the money sought by the claimant or to deny the claim within 14 days. The average duration for an order for payment proceedings is three months. As regards total length of time, an average commercial case takes 17.5 months to reach a decision at first instance.

The length of proceedings at first instance depends on the complexity of the case, the number of witnesses, and the number of court-appointed experts. The place where the case is heard may also have an impact on the duration of case. For example, because of the high number of cases heard by courts in Warsaw, proceedings before these courts are significantly longer. In the first part of 2016, the average duration of proceedings in commercial cases before the District Court in Warsaw was 20 months, and the average duration for an order for payment proceedings, which usually precedes the main proceedings, was 4.3 months. As regards total length of time, an average commercial case heard before this court took 24.3 months to reach a decision at first instance. (The averages presented above were calculated on the basis of data published by the District Court in Warsaw.)

Class action proceedings at first instance last longer because of the additional stages of these proceedings involving the verification of the admissibility of class action, and the summons of potential litigants to join the class action on the side of the class representative. These stages may delay the whole proceedings by two years or more.

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

Official statistics published by the Polish Ministry of Justice indicate that rulings are seldom appealed against in commercial cases in domestic litigation. In the first half of 2016, district courts made decisions in 7,596 commercial cases (excluding orders for payment) at first instance, while 2,065 appeals were filed with appellate courts against the first instance rulings of district courts. However, experience shows that in high-profile or high-value cases, a losing party very often appeals against the ruling.

The Ministry of Justice has not published statistics regarding the average duration of appellate proceedings in domestic litigation for 2016. Yet, calculations made on the basis of information published by the Appellate Court in Warsaw show that the average length of appellate proceedings before this court in commercial cases that ended in the first half of 2016 was 13.8 months.

Appellate proceedings last much longer if the court decides to take additional evidence. Moreover, in specific circumstances, the court may refer the case back for reconsideration to the court of first instance, which considerably lengthens the whole proceedings. In

regard to appellate proceedings before the Appellate Court in Warsaw, which ended in the first half of 2016, less than 8 per cent of commercial cases were referred back to district courts for reconsideration pursuant to data published by this court.

Appeals in commercial cases quite often succeeded in the first half of 2016. Appellate courts dismissed or rejected entirely 60.6 per cent of appeals in commercial cases. The remaining appeals resulted in the court of first instance's ruling being overruled, at least partially, or in the referral of the case back to the court of the first instance for reconsideration.

In specific situations, the party that loses appellate proceedings may appeal against the ruling of the appellate court to the Supreme Court. The appeal does not suspend the enforceability of the ruling unless the appellate court decides otherwise.

There is no publicly available detailed data for the duration of arbitration proceedings in Poland. According to the Polish Arbitration Survey 2016 carried out by Kocur & Partners law firm, in cooperation with Kozminski University in Warsaw and the University of Economics in Katowice, among Polish arbitration practitioners and the largest companies operating in Poland, the duration of arbitration was graded 4.21 points on average on a scale of 1 to 7 points, where 7 stood for a short duration.

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

There is no official data as to what proportion of judgments made by Polish courts in domestic litigation require enforcement proceedings. Usually, solvent debtors pay the award voluntarily to avoid paying the costs of enforcement proceedings. Still, it is not uncommon for fraudulent debtors to dispose or conceal assets. In all enforcement proceedings in 2015, bailiffs recovered 12.2 per cent of the sum of all awards to be enforced. There are no official statistics regarding the effectiveness of enforcement proceedings in commercial cases.

In respect to arbitral awards, according to the Polish Arbitration Survey 2016, only 10 per cent of respondents indicated that the arbitral award was voluntarily complied with in all cases they were involved in, while 18 per cent of respondents claimed that it happened in the majority of cases. Twenty per cent of respondents indicated that the arbitral award was voluntarily complied with in around half of the cases. Some 22 per cent of participants admitted that the losing party voluntarily complied with the award in a minority of cases, while 15 per cent indicated that it happened in none of the cases. About 12 per cent of respondents answered that it is difficult to say, and 3 per cent indicated that no award was issued in any of the cases they were involved in.

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

Opt-in class actions are permitted in Poland in cases concerning consumers' claims, product liability claims and delicts, excluding claims for the protection of personal rights. There are no restrictions on funding class actions by a third-party funder.

Regulation on class action proceedings in Poland may be significantly amended in the near future. The Polish government presented a new bill that would allow class actions concerning unfair enrichment and disputes over agreements in B2B relations. Moreover, the Polish government has begun working on a new bill that would permit an opt-out class action.

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

In Polish domestic litigation, the rule is that the court orders the losing party to pay the reasonable costs of proceedings the winning party incurs, including court cost, the costs of appearing in person before the court and the fee of one attorney.

The reimbursement of an attorney's fee is limited and usually does not correspond to the fees actually paid to that attorney. In cases exceeding 5 million zlotys, the court will order the losing party to pay from 25,000 zlotys to 150,000 zlotys to cover the opposing attorney's fee for proceedings at the first instance. The limits to reimburse an attorney's fee for appellate proceedings and proceedings before the Supreme Court are in the range of 50 per cent to 100 per cent of fees for first instance proceedings. The courts rarely order the losing party

to pay more than the minimal rate, regardless of the fees actually paid (eg, 25,000 zlotys in cases exceeding 5 million zlotys).

If a part of a claim is awarded, the court may order the losing party to pay a proportional part of the adverse costs or decide that each party has to pay its own costs. If only a minor part of the claim is denied, the losing party has to reimburse the adverse costs in full within the afore-said limits. In certain justified circumstances, the court may order the losing party to pay only part of adverse costs or no adverse costs at all. The winning party may be ordered to pay adverse costs if the defendant accepts the claim in the first response addressed to the court and, simultaneously, did not give the claimant any reasons to file the statement of claim.

Different rules apply in arbitration. According to the rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the arbitral tribunal decides which party should cover the adverse costs taking into account the outcome of the case and other relevant circumstances. The adverse costs include arbitration and registration fees, expenses incurred in relation to the arbitration proceedings and reasonable attorneys' fees. The arbitral tribunal decides what fees are reasonable in each given case. The Court of Arbitration at the Confederation of Lewiatan has adopted similar rules.

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

A third-party litigation funder may not be held liable for adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

In domestic litigation, the court orders the claimant to provide security for costs if the claimant comes from a country outside the European Union. Moreover, the court may order the class representative in class action proceedings to provide security for costs. The court cannot order a third party, including funders, to provide such security.

Upon the defendant's motion, the court is obliged to order the claimant to provide security for costs if the claimant has its place of residence, 'usual stay' or a registered office outside the European Union. However, there are a number of cases in which a foreigner cannot be obliged to provide security. In particular, a foreigner cannot be ordered to provide security if it has assets in Poland sufficient to cover the costs of the proceedings, or the parties subject the case to the jurisdiction of Polish courts or the ruling of a Polish court in regard to costs is enforceable in the country where the claimant has its place of residence, 'usual stay' or registered office. In addition, Poland has entered into a number of treaties that release foreigners from the duty to provide security for costs (eg, with China and Russia).

The court calculates security taking into account the anticipated costs the defendant may incur in the first instance proceedings and the appellate proceedings, except for the costs of counterclaim. The costs that may be incurred in proceedings before the Supreme Court should also be included if an appeal to the Supreme Court is permitted in a given case. Since the aim of the security is to ensure the enforcement of the claimant's payment of adverse costs, the amount of security should

in general correspond to the hypothetical amount of adverse costs that the court would order the claimant to pay if it loses the case. The security should be deposited in cash or by wire transfer to the designated bank account of the Polish Ministry of Finance, unless the court decides otherwise. If the security is not paid, the statement of claim will be rejected by the court.

In class action proceedings, upon the defendant's motion, the court may order the class representative to provide security for costs. In practice, however, the courts are highly reluctant to order the class representative to provide security. According to judicial rulings, the defendant seeking security has to convince the court that there is a high probability of the claim being dismissed and that the defendant most likely will not be able to enforce the reimbursement of its costs without the security. These conditions arising out of case law are supposed to be introduced to statutory law by the new bill proposed by the Polish government. The security cannot exceed 20 per cent of the claim. The security should be provided in cash or by wire transfer within the term indicated by the court, which should be no shorter than one month.

In arbitration proceedings before the leading courts of appeal in Poland, the Polish Chamber of Commerce in Warsaw, and Court of Arbitration at the Confederation of Lewiatan, the arbitral tribunal may not order a claimant to provide security for costs.

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

Third-party litigation funding is irrelevant for the court in respect of deciding on security for costs.

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

After-the-event legal expense insurance is not used in Poland. It is disputable if Polish law even permits after-the-event insurances. There is a risk that they might be deemed as unenforceable or as an illegal wager. Before-the-event legal expenses insurances are permitted, but are not popular.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

It is not obligatory for the litigant to disclose a litigation funding agreement to the opposing party or to the court. The court cannot order the disclosure of funding.

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

The communication between litigants or their lawyers and funders is not privileged. Nonetheless, Polish law permits litigants and funders to conclude a non-disclosure agreement that would secure confidentiality between them. The breach of the confidentiality established by such an agreement may be deemed a criminal offence pursuant



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to Polish law in certain circumstances. The parties may also agree on contractual penalties in the case of a breach of confidentiality. The non-disclosure agreement does not release the parties from the duty to disclose information to authorised public bodies if the disclosure of information is mandatory under provisions of law. Moreover, information covered by a non-disclosure agreement may be used in court as evidence.

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

According to publicly available information, no disputes between litigants and their funders have been reported.

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

The practitioners of litigation funding should be aware that Poland is relatively affordable for litigants in relation to high-value claims.

In domestic litigation, the court fee to file a lawsuit is generally 5 per cent of a claim. The fee for filing a lawsuit in class action proceedings is 2 per cent of the claim. The same fees apply for filing an appeal. Each fee cannot exceed 100,000 zlotys.

In arbitration proceedings before the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, if the claim exceeds 1 million zlotys, the arbitration fee equates to 62,200 zlotys plus 0.9 per cent of surplus over 1 million zlotys. This percentage of surplus being a part of fee is reduced to 0.6 per cent in regard to a surplus over 10 million zlotys, and to 0.3 per cent in regard to a surplus over 100 million zlotys. Arbitration fees at the Court of Arbitration at the Confederation of Lewiatan are similar.

Singapore

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1 Is third-party litigation funding permitted?

As a general rule, third-party funding is currently not permitted in Singapore. It is restricted by legislation and the common law doctrines against maintenance (the improper support of litigation in which the supporter has no legitimate concern, without just cause or excuse) and champerty (when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the claim). These doctrines prohibit third-party funding across both litigation in the Singapore courts and arbitration proceedings seated in Singapore.

There are limited exceptions to this rule following the decision of the Singapore High Court in the case of *Re Vanguard Energy* [2015] SGHC 156, which found that the sale by a liquidator of a cause of action and the proceeds of such actions is permitted under the statutory insolvency regime (section 272(2)(c) of the Singapore Companies Act (Cap. 50)), and therefore fell outside the doctrine of maintenance and champerty.

More broadly, the court in that case also considered (albeit on an obiter basis) that the assignment of a bare cause of action (or the fruits of such action) might not be struck down by the courts if:

- it is incidental to a transfer of property;
- the assignee has a legitimate interest in the outcome of the litigation (the question here being whether the funder's interest in the litigation justifies his or her intervention); or
- there is no realistic possibility that the administration of justice may suffer as a result of the assignment, which will be viewed in light of prevailing public policy, with particular regard to ensuring the administration of and access to justice as well as the interests of vulnerable litigants.

While *Re Vanguard* is a first-instance decision, it still signifies a significant shift in Singapore's approach to third-party funding and a slight relaxation on what was previously considered a strict position. Having said that, we are not aware of any cases since *Re Vanguard* that have attempted to extend this principle beyond the context of insolvency.

The common law position described above is likely to change soon. Singapore has proposed legislation to significantly change the law on third-party funding – this is discussed further below.

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

As third-party funding is currently prohibited under Singapore law (barring the potential limited common law exemption mentioned above), Singapore law is silent as to any specific limits on the fees and interest funders could potentially charge. Insofar as funding is permitted, this will be a matter to be negotiated between the funder and funded parties.

Given the current limited circumstances where funding may be permitted, it is possible that a court considering general principles of justice and public policy will take into account level of fees and interest in considering whether an arrangement is 'incidental' or 'legitimate'; ie, an arrangement that is clearly heavily profit-driven may not be considered favourably.

This may ultimately be dealt with by the proposed legislative changes discussed below, as other jurisdictions have, for example, imposed specific limits along these lines to dissuade aggressive 'ambulance chasing' by funders in search of huge profits.

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

Currently there is no specific legislative or regulatory provisions applicable to third-party litigation funding.

However, it is expected that the position in Singapore as outlined above (see question 1) will change soon, at least with respect to arbitration and arbitration-related court proceedings. In June 2016, the Singapore government published the Civil Law (Amendment) Bill 2016 and Civil Law (Third-Party Funding) Regulations 2016 (the Draft Legislation). The Draft Legislation proposes to abolish the common law torts of maintenance and champerty and permit and regulate third-party funding in international arbitration and related court proceedings. If enacted as proposed, the Draft Legislation will establish a framework to allow such arrangements and implement certain safeguards such as requiring funders to have immediate access to sufficient funds in Singapore. As presently drafted, the Draft Legislation would not permit third-party funding for general litigation in the Singapore courts.

The Draft Legislation is making its way through the Singaporean legislative process. The public consultation period closed on 29 July 2016 and on 7 November 2016 the bill was sent to Parliament for its first reading. We expect the legislation to be approved quickly, potentially as early as before the end of 2016 or in the first half of 2017.

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

Given the current restrictions under Singapore law, there are no specific professional or ethical rules that apply to third-party funded litigation or arbitration. However, Singapore lawyers and foreign lawyers practising in Singapore will still be subject to the general conduct and ethics rules and standards applicable to them and will need to comply with these. For example, lawyers will need to balance the need to preserve client confidentiality and to act in the best interests of their clients when advising on a third-party funded case.

In the context of arbitration, General Standards 6(b) and 7 of the International Bar Association's (non-binding) Guidelines on Conflicts of Interest in International Arbitration now contains a requirement for the disclosure of a party's funding arrangements in certain circumstances (broadly, if there is any relationship between the funder and an arbitrator).

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

As third-party funding is currently not permitted, there are no public bodies with a particular interest or oversight of third-party litigation funding. This is likely to change if the Draft Legislation comes into force.

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

Given the current restrictions under Singapore law, there are no specific laws or rules which apply to choice of counsel in the context of third-party funding. However, funders may be able to influence the choice of counsel via their decision on whether or not to fund a particular case. For example, funders could decide not to offer funding if they are unhappy with the choice of counsel. Depending on when a funder

becomes involved, they could take an active role in the selection of counsel, or require such rights in funding agreements.

Singapore lawyers and foreign lawyers based in Singapore are subject to the requirements and duties of the Legal Profession (Professional Conduct) Rules 2015, which include general provisions on independence and integrity, confidentiality and referral payments, in the context of client introductions and work referrals by a third party (which would include a third-party funder).

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

In terms of arbitration proceedings, it is likely that funders would be able to attend hearings only if all of the parties and the tribunal agree (subject to prevailing confidentiality provisions in the underlying agreement). In terms of litigation, court hearings in Singapore are generally public and therefore there would be nothing preventing a funder from attending the proceedings if they wished to do so. If a court orders proceedings to be held in camera, it is possible that funders might not be permitted to attend hearings.

Singapore law is currently silent on the extent to which (if at all) a funder would be entitled to participate in hearings and settlement proceedings. Whether, and the extent to which, funders will be able to participate in proceedings if the Draft Legislation is passed is not known.

8 Do funders have veto rights in respect of settlements?

This is not a matter addressed in current Singapore law or in the Draft Legislation. The veto rights of funders (ie, their ability to approve or reject a proposed settlement) are primarily a matter to be dealt with in individual funding agreements between parties and their funders.

9 In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate a funding arrangement is a matter which will be negotiated between the funder and the funded party and recorded in the relevant funding agreement. These may include, for example, where the funder becomes aware of fraud or wrongdoing by the funded party.

10 In what other ways may funders take an active role in the litigation process?

See question 7. There is currently no legislative or regulatory guidance as to the role funders can take in the litigation or arbitration process in Singapore.

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

Conditional and contingency fee agreements are presently not permitted in respect of litigation in the Singapore courts or for lawyers based in Singapore participating in Singapore seated arbitrations.

12 What other funding options are available to litigants?

Litigation costs are usually funded by the litigants themselves. In certain civil matters, litigation costs can be state-funded where Singapore citizens and permanent residents are financially eligible for legal aid.

13 How long does a commercial claim usually take to reach a decision at first instance?

The length of time a claim would take to reach a decision at first instance will depend on a number of factors, including the complexity of the claim. Typically, a commercial claim might take on average one to one-and-a-half years to reach a decision at first instance in the Singaporean courts. This may be quicker in the new Singapore International Commercial Court.

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

It is difficult to provide a reliable estimate, although we understand that significantly less than half of first instance civil judgments will be appealed in the Singapore courts. On average, appeals usually take six to nine months to reach judgment.

Update and trends

The use of third-party funding in arbitration has been a hot topic worldwide. Third-party funders have long been aware of arbitration as a high-value area for growth, and have been paying close attention to developments and trends. One notable trend is Asia's shift toward the more liberal approach taken to third-party funding by western jurisdictions. As Asia's foremost arbitration destinations, there is a particular focus on Singapore and Hong Kong, both of which have published proposals for reform. While these jurisdictions are notably behind the trend in doing so, Singapore's Draft Legislation makes it clear that:

- third-party funding is increasingly utilised in major arbitration centres throughout the world;
- offering third-party funding increases a party's flexibility in relation to arbitration; and
- this flexibility is crucial to the continued promotion of Singapore as a leading venue for international arbitration

Singapore's Ministry of Law has indicated that related amendments will be made to the Legal Profession (Professional Conduct) Rules to accompany the Draft Legislation. While the details of these amendments were not included in the 2016 public consultations on the Draft Legislation, it was noted in the consultation paper that the amendments are 'expected to draw reference from best practices and international standards reflected in the revised International Bar Association Guidelines on Conflict of Interest in International Arbitration' and that they will include a duty on practitioners to disclose the existence of third-party funding arrangements and a prohibition against practitioners having interests in funders or referrals.

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

While there are no statistics available on the proportion of judgments that require contentious enforcement proceedings, experience suggests that Singapore-based judgment debtors tend to pay their judgment debts where they are able to do so. Cases where contentious enforcement proceedings are required are more commonly seen in cases involving cross-border litigants, such as judgment debtors domiciled overseas. Where contentious enforcement proceedings are required, the ease of enforcement is dependent on various matters of practicality; for example, the location and accessibility of assets to be enforced against.

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

The only form of representative group litigation in Singapore is the action governed by Order 15, rule 12 of the Rules of Court, which states that where numerous persons have the same interest in proceedings they may begin proceedings by or against any one or more of them representing the whole (or except one or more of them). Representative actions can be initiated by the parties without the approval of the court, although the court may terminate the action at its discretion.

There are no special rules relating to the payment of solicitors' fees in representative proceedings.

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

The general rule in Singapore is that costs follow the event, such that the unsuccessful party in an application or proceedings is usually ordered by the court to pay the successful party's reasonable legal costs. However, the order for costs, and the quantum of costs to be ordered, is entirely at the court's discretion in both principle and amount. There are a number of factors that the court can consider when exercising its discretion.

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

As a general rule, courts in Singapore are not precluded from awarding costs against a third party. However, such orders are exceptional, and will turn on the question of whether in all the circumstances it is 'just' to make such an order, looking in particular at (i) whether there

is a 'close connection' between the non-party and the proceedings; and (ii) whether the third party caused the costs in question to be incurred.

Singapore courts have noted that the discretion to award costs against a third party may be exercised where that party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them. However, the court will only 'lift the corporate veil' in such a manner where there is fraud or highly unconscionable conduct.

In arbitration, tribunals derive their jurisdiction from an arbitration agreement between parties, and their jurisdiction is limited to those contracting parties. Accordingly, arbitral tribunals seated in Singapore have no power over third parties and cannot order them to pay adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

Defendants in Singapore can apply for an order that claimants provide security for their costs under Order 23 of the Rules of Court provided that certain grounds are met, including, for example, that the claimant resides out of the jurisdiction, or is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so.

Section 388 of the Companies Act provides that where a claimant is a corporation, the court may order security for costs, and stay proceedings until it is paid, if there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in its defence.

In deciding whether to grant security for the defendant's costs, the court will consider factors such as whether the claimant's claim has a reasonable prospect of success, the ease of enforcing any such order (including the location of the claimant's assets, for example), and whether such an order would stifle the claimant's claim.

The court has complete discretion as to the amount of security to be given, and will fix a sum having regard to all the circumstances of a case. It is not always the practice to order security on a full indemnity basis. The court may be assisted by, for example, lawyers' estimates and skeleton bills of costs. It is for the applicant to provide materials to enable the court to come to a view on the quantum to be ordered as security. Payment is usually made into court, or, exceptionally, may be given by providing a bond.

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

The High Court of Singapore has indicated that it would not hesitate to make an order for security for costs to deter 'interested parties ... trying their luck by fielding unmeritorious or dubious claims using (an) impecunious corporation as a shield which may then leave the defendant who ultimately emerges victorious with unpaid costs' (see *Frantonios*

Marine Services Pte Ltd and anor v Kay Swee Tuan [2008] 4 SLR(R) 224). Looking forward, this decision may prompt courts in the future to consider funding arrangements when deciding on applications for security for costs.

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

After-the-event insurance has been available in Singapore since 2009, although we understand that its use is not widespread at the present time.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is currently no obligation to disclose funding agreements. However, if the Draft Legislation is passed in its current form, lawyers will be bound to disclose the existence of any funding agreement and the identity of the funder to the relevant court or tribunal as well as their counterparties in proceedings.

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

Singapore recognises the concept of legal privilege, known as legal professional privilege, which encompasses legal advice privilege and litigation privilege.

Communications between (i) a client and its lawyer; (ii) a client's lawyer and third parties acting as agents for a client; and (iii) a client and third parties, attract legal professional privilege if made for the purpose of obtaining legal advice or preparing for or conducting pending or contemplated litigation. There is also case law that suggests that communications between a third party that is not an agent of the client can attract legal professional privilege if made for the dominant purpose of obtaining legal advice for the client.

There is, therefore, some scope to argue that communications between litigants or their lawyers and funders would attract legal privilege in Singapore, although this is far from certain. The position is likely to be clarified with the Draft Legislation coming into effect.

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

There have been no public reports of such disputes.

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

There are no other issues.



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Switzerland

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1 Is third-party litigation funding permitted?

The Swiss Federal Supreme Court held in 2004 that litigation funding by third-party funders is permissible in Switzerland if the funder acts independently of the client's lawyer (decision BGE 131 I 223). The Court stated that it could even be advantageous for a claimant having its claim assessed by an independent expert who intends to cover the financial risk of the envisaged litigation process and thus complementing the claimant's lawyer's view.

In 2014, the Court expressly confirmed its earlier decision. It further concluded that in the meantime, litigation funding has become common practice in Switzerland, and it held that it is part of the lawyer's professional conduct as provided by the Federal Act on the Freedom to Practise in Switzerland (BGFA) to inform claimants about a potential litigation funding option as the circumstances require (Supreme Court decision 2C_814/2014).

Thus today, litigation funding in Switzerland is an accepted practice and has been judicially endorsed by the Federal Supreme Court twice in recent years. In light of its rather comprehensive and detailed legal analysis, the Court established in Switzerland quite a clear and favourable environment for third-party litigation funding.

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

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

The Federal Supreme Court has not explicitly stated a limit, but has indirectly approved the common practice in Switzerland with success fees ranging from 20 per cent to 40 per cent of the net revenue of the litigation process. In its legal analysis, the Court cited a source who described a success fee of 50 per cent as 'offending against good morals and thus illegal', however, without confirming or even commenting this opinion.

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

There are no specific provisions in the Federal Code of Civil Procedure (CCP) or in any other Swiss legislation. However, the Federal Supreme Court held that a range of existing general provisions in various parts of the Swiss legislation (eg, article 27 of the Civil Code, article 19 of the Code of Obligation, article 8 of the Unfair Competition Act) would be applicable should a litigation funding agreement violate certain principles of Swiss law.

With regard to regulatory provisions, the Court explicitly stated that third-party litigation funding cannot be regarded as an insurance offering as defined by the Swiss Insurance Supervision ACT (ISA). Furthermore, the core offering of a funder does not in general fall under the Swiss financial market laws (eg, Banking and Insurance Acts, Anti-Money Laundering Act and Collective Investment Scheme Act). However, depending on the funding structure funders might qualify as asset managers of collective investment schemes and must be authorised by the Swiss Financial Market Supervisory Authority (FINMA).

In light of the lawyer's professional conduct in Switzerland, which does not allow for lawyers to be paid on the basis of contingency fees only, it has to be kept in mind that any funding agreement that directly or

indirectly results in such a contingency fee model for the involved lawyer would violate the respective provisions.

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

The lawyer's professional conduct in Switzerland is provided in article 12 of the BGFA. According to the above-mentioned Federal Supreme Court decisions (see question 1), the lawyer's independence in acting on behalf of the litigant is crucial; this also applies in cases involving a third-party funder. However, the Court also stated that by a clear separation of the roles between the lawyer and the funder, a lawyer who advises his or her clients in relation to a funder has no conflict of interest in principle. In addition, the Court held that it is part of the lawyer's professional conduct to support its clients in negotiations with the funder; obviously, always advising in the interest of the client.

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

The Federal Supreme Court clarified this question with regard to the point that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA (see question 3). As the core offering of a funder generally does not fall under the Swiss financial market laws, there is no known interest of the Swiss financial regulator to oversee litigation funding reported.

In its 2013 report on collective redress, the Swiss Federal Council suggested to promote litigation funding in Switzerland in general, without pointing at a specific need for regulation or oversight.

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

Independence in acting on behalf of the litigant (see question 4) is an important principle of the lawyer's professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that if the litigant intends to replace its lawyer, funding will only be further granted if the new lawyer will be accepted by the funder.

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

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

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

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

Update and trends

Third-party litigation funding is a relatively new concept in Switzerland. Having been introduced only in 2005, there are only few domestic players so far. Given the steady increase of its popularity in other jurisdictions in recent years and in light of the rather high costs for litigation and arbitration in Switzerland, it is likely that third-party litigation funding will be of increased relevance in the coming years.

8 Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is generally permissible under the Swiss Code of Obligation and interferes with neither the independence of the litigant's lawyer involved nor with any other provision of Swiss law. Moreover, it is quite usual that litigants and funders agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right and his or her right to oblige the claimant to accept a particular settlement.

9 In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings and often include:

- a court or authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in the case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

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

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

10 In what other ways may funders take an active role in the litigation process?

As the Federal Supreme Court emphasised the independence of the claimant's lawyer from the litigation funder, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible. The lawyer would himself violate the professional conduct as provided by the BGFA if his actions were based on a funder's rather than on his client's instructions.

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

In consequence, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder.

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

The lawyer's professional conduct as provided by BGFA prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice, is he or

she allowed to agree on a premium in the event of a successful outcome in addition to the basic fee.

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

12 What other funding options are available to litigants?

Legal cost insurances are widely available in Switzerland. However, the extent and limits of coverage depend upon the specific policy as these insurances usually only cover the costs of certain types of claims. Furthermore, the insurance policy has usually to be arranged before a person or entity becomes aware of the need to litigate. After-the-event (ATE) litigation insurance is not common in Switzerland (see question 21).

A claimant may also seek legal aid if he lacks the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success. However, both conditions are rather strictly handled by Swiss courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security, an exemption from court costs or the appointment of a lawyer by the court if necessary to protect the rights of the party. In theory, legal aid is also available to companies, provided, among other things, that the object in dispute is the company's only remaining asset.

13 How long does a commercial claim usually take to reach a decision at first instance?

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

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

There are no comprehensive statistic data available regarding the proportion of appealed first-instance judgments. There is also a considerable difference in the respective practice of the various cantons of Switzerland. As a general rule, approximately one-third of judgments are appealed before second instance. On average, the second instance takes between one year and 18 months. Only a small proportion of these judgments are appealed before the Federal Supreme Court. An average appeal here usually takes less than one year.

Challenges to an arbitration award are heard exclusively by the Swiss Federal Supreme Court and are generally adjudicated within a time period of four to six months from the date of the challenge.

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

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

The enforcement of Swiss judgments is governed by the CCP and by the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA). A judgment rendered by a Swiss court is in general enforceable if it is final and binding and if the court has not suspended its enforcement or it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Switzerland is not seen as particularly burdensome, expensive or unsecure. Also, it is important to note that an enforceable Swiss judgment allows for an attachment of known assets of the debtor located in Switzerland.

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

Class actions are not part of Switzerland's civil procedural law practice. The only form of collective redress available under the CCP is the joinder of parties. Unlike class actions, the parties to the joinder may not seek damages on behalf of others who have not joined the proceedings.

The funding of such litigation processes by a third party is comparable to the funding of individual claims, and is thus permissible without any restrictions.

In its 2013 report on collective redress, the Swiss Federal Council suggested a number of measures to support the effective and efficient procedural handling of a large number of identical claims against the same respondent or respondents and to allow for a facilitated enforcement of consumer rights in particular. The authors of the report also suggested to promote litigation funding by third parties to cover the costs of the envisaged collective redress proceedings.

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

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

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

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

The CCP does not provide for a basis for the court to order a third-party funder to pay adverse costs and to hold him liable for such costs. In the litigation funding concept developed and observed in Switzerland, the funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect.

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

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

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

funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

19 May the courts order a claimant or a third party to provide security for costs?

There are two different types of security for costs that Swiss courts may order from a claimant.

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

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Switzerland, appears to be insolvent, owes costs from prior proceedings, or if for other reasons there seems to be a considerable risk that compensation will not be paid. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Switzerland has entered into a treaty that excludes respective security bonds.

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

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

In most of the cases funded so far by third-party funders in Switzerland, the funder's engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focusing on the claimant's status (see question 19) and did not take the existence of the third-party funder into account.

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

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

By contrast, legal cost insurances are commonly used in Switzerland. If they are arranged before the need to litigate arises, they provide cost coverage to the extent of the specific policy, but usually only for certain types of claims.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

The CCP does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that it is supported by



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a third-party funder. It also does not provide a basis for a Swiss court to order a litigant to do so.

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

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

While any legal advice given by a Swiss or non-Swiss lawyer to a litigant is privileged and does not have to be disclosed either to the other party or the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege.

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

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

No disputes between litigants and funders have been recorded in Switzerland so far.

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

No.

United States – New York

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1 Is third-party litigation funding permitted?

In New York, third-party litigation funding is permitted, subject to a number of caveats that will be discussed in the sections below.

Third-party litigation funding is still a relatively new concept in the US compared with, for example, the United Kingdom, but case law suggests growing acceptance by the courts in the US. This acceptance can be seen through the case law mentioned below, which has, on the whole, protected claimant-funder disclosures, held funder participation not to constitute impermissible interference between lawyer and client, and held that funder's returns do not constitute usury. When addressing the issue of third-party funding of law firms, New York Supreme Court Justice Shirley Kornreich extolled the value of 'the sound public policy of making justice accessible to all regardless of wealth' and recognised that the expense of litigation can otherwise deter litigation against 'deep pocketed wrongdoers'. See *Hamilton Capital VII LLC I v Khorrami LLP*, No. 650791/2015, 2015 WL 4920281, at *5 (NY Sup Ct 17 August 2015).

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

There are no explicit limits on the fees and interest that a funder can charge. NY Banking Law section 14-a provides that interest on a loan cannot exceed 16 per cent. The permissible interest rate can go up to 25 per cent if the loan value is from \$250,000 to \$2.5 million, without any limit for loans in excess of \$2.5 million. However, since third-party litigation funding is generally provided on a non-recourse basis, the funding is treated as a purchase or assignment of the anticipated proceeds of the lawsuit, and therefore not subject to the usury statute and the limits on interest rates. See New York City Bar Association's Committee on Professional Ethics (NYCBA) Formal Opinion 2011-2; *Lynx Strategies LLC v Ferreira* 957 NYS2d 636 (NY Sup Ct 2010) (third-party investment for share of proceeds is not usury) but see *Echeverria v Estate of Lindner*, 2005 NY Slip Op 50675(u), at 4-5 (Sup Ct Nassau County 2005) (non-recourse agreement was a 'loan', not an investment, because recovery was certain under strict liability statute and interest rate was, therefore, usurious).

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

There are no statutes or regulations in New York directly applicable to third-party litigation funding, let alone any that expressly prohibit, or that would have the effect of prohibiting, third-party litigation funding.

One question that is often asked is if champerty prohibits third-party litigation funding. Since federal law does not address champerty, state law governs. There is significant variation between the states on this issue, with each state having its own definition of conduct that is champertous (although several states no longer prohibit, or never prohibited, champerty).

New York has laws, long on the books, that prohibit champerty. New York courts interpret champerty to occur when a party purchases a note, security, or claim with 'with the intent and for the primary purpose of bringing a lawsuit'. See *Justinian Capital SPC v WestLB AG*, No. 155, 2016 WL 627007 (NY 27 October 2016). The prohibition against champerty is 'limited in scope' and has historically been 'directed toward preventing attorneys from filing suit merely as a vehicle for obtaining

costs'. See *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp*, 13 NY3d 190 (NY 2009).

No court in New York has found the traditional third-party litigation funding model, whereby the third-party litigation funder makes a non-recourse loan to the holder of a claim to cover legal fees or costs in exchange for a portion of the proceeds (whether through court action or settlement) arising from the holder's enforcement of its claim, to be champerty.

The Court of Appeals of New York has analysed the champerty statute in the context of transactions in which a party acquires a note or security and then brings a lawsuit in its own name on the basis of that note or security. These cases help illustrate why third-party litigation funding is not champerty under New York law. The difference between champertous and non-champertous conduct turns on party's intent when entering into the transaction. Compare *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp*, 13 NY3d 190 (NY 2009) (it was not champerty where the party purchased a note and brought an action as a way to enforce its rights under the note) and *Justinian Capital SPC v WestLB AG*, No. 155, 2016 WL 627007 (NY 27 October 2016) (it was champerty where the sole purpose of acquiring the note was so the plaintiff could bring the action).

In both of these cases, the transactions were structured very differently from how a traditional third-party funding agreement is structured. For example, a third-party litigation funder does not acquire the asset itself, nor does it bring a lawsuit in its own name. Instead, the party whose lawsuit is being funded is, and remains to be, the original owner of the asset that is the subject of the litigation. Furthermore, the nature of the funder's interest is to the proceeds of the litigation, not the underlying asset itself.

In the unlikely event a court was to consider third-party litigation funding to be champerty, the statute prohibiting champerty was amended in 2004 to add a safe harbour provision (NY Judiciary Law 489(2)). The safe harbour provision exempts any transaction in excess of \$500,000 from the prohibition against champerty. See *Justinian Capital SPC v WestLB AG*, No. 155, 2016 WL 627007 (NY 27 October 2016). This would serve to protect just about any litigation funding arrangement from being prohibited as champerty.

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

In New York, a lawyer's conduct is governed by the New York Rules of Professional Conduct (NYRPC). A lawyer who violates the NYRPC could be subject to disciplinary action, which could lead to his or her disbarment (rescindment of his or her right to practise law).

The NYRPC rules that a lawyer needs to consider in connection with third-party litigation funding relate to (i) the lawyer's obligation to provide candid advice about the benefits and risks of litigation funding; (ii) avoiding conflicts of interest; (iii) maintaining client control over the proceeding and (iv) the disclosure of information to the funder.

Rule 2.1 specifies that:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

This means that a lawyer may not render advice based on the best interests of anyone other than his or her client. Accordingly, if a client is seeking litigation funding, a lawyer must ‘provide candid advice regarding whether the arrangement is in the client’s best interest’, and should discuss the costs and benefits, as well as alternatives. See NYCBA Formal Opinion 2011-2.

Where the third-party litigation funder is paying the client’s legal fees, the lawyer must ensure that the payment structure does not create a conflict of interest. The lawyer can meet his or her ethical obligations by obtaining informed consent from the client and ensuring that the funder does not interfere with the lawyer’s independent judgement or the client-lawyer relationship (NYRPC 1.8(f)(2)). The rules prohibit a lawyer from representing a client if, for whatever reason, there is a risk that the lawyer’s professional judgement will be adversely affected by the existence of the funder (NYRPC 1.7(a)).

At all times, it is the client who must control the litigation. While the client may permit the funder to be involved in the strategy or other aspects of the lawsuit (subject to any risks discussed throughout this article), such involvement is only allowed with the client’s explicit and informed consent (NYCBA Formal Opinion 2011-2). Except as authorised by law, a funder’s influence must never amount to interfering with, directing or regulating the lawyer’s judgement, or compromising his or her duty to maintain client confidences (NYRPC 5.4(c)).

Thus, regardless of the funder’s financial interest, a lawyer has a duty to abide by the client’s decision regarding litigation objectives and whether to settle a matter (NYRPC 1.2).

In addition, as will be discussed in more detail in question 23, an attorney cannot disclose any information to any party, including a funder (or potential funder) without obtaining the client’s informed consent to disclose such information (NYRPC 1.6(a)(1)).

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

There are no governmental bodies that currently regulate or oversee third-party litigation funding in New York state.

Various lobbying organisations and legislative agencies in the US, and in New York, have suggested that further regulation is warranted, and have proposed that the SEC, Federal Trade Commission, or even the Consumer Financial Protection Bureau would be well-placed to oversee third-party funders and ensure that third-party funders transact in a manner that protects the attorney-client relationship and the integrity of the judicial system and comports with the public interest. However, no such regulatory oversight has been enacted federally or in New York state.

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

From a legal and ethical perspective, the client must select his or her own counsel and have control over the litigation (NYRPC 1.2). However, from a practical standpoint, the funder is deciding whether to enter into a contractual agreement with the client and if the funder does not approve of the attorneys that the client wishes to retain, the funder is fully within its rights to decline to fund the litigation.

The quality of the attorneys is a significant factor in a funder’s decision whether to fund the litigation. Thus, any client seeking litigation funding should expect that the funder will insist on counsel with experience, expertise, and a proven record of success.

Once the funding agreement is signed and the client has retained its lawyers, the client controls the engagement. If the funder becomes displeased with the client’s attorneys, the funder can speak with the client about its concerns, but the client decides whether, and with whom, to replace the attorneys. If the client does not follow the funder’s wishes, the funder’s only recourse will be governed by the terms of the funding agreement, which may allow the funder to cease funding the litigation.

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

Court hearings in New York, and in the United States as a whole, are generally open to the public and anyone, including the funder, may attend as an observer. The funder is not considered a party and therefore would not be entitled to participate in any judicial proceeding or otherwise be represented in a hearing or other court appearance.

Settlement conferences normally only include the parties to the litigation. Courts generally want to encourage settlement and, for this reason, settlement communications are treated as confidential and not discoverable in future litigation or by other parties. The funder should have no expectation of being able to participate in these discussions, though both parties could presumably consent. Further, even though the funder does not get a seat at the negotiating table as a matter of right, nothing prohibits a client from consulting with its funder about a proposed settlement or the funder from offering his thoughts to the client and counsel regarding settlement.

In arbitration, the hearing and settlement proceedings are both confidential and, absent agreement of the parties, the funder would not be entitled to attend.

8 Do funders have veto rights in respect of settlements?

There is no law in New York that directly addresses a funder’s veto rights in respect of settlement. In general, the funding agreement, including rights in respect of settlement, is defined by contract. As a matter of contract law, there is no reason why a client could not grant a funder the right to veto the client’s acceptance of a settlement agreement.

That being said, an attorney is ethically obligated to ‘abide by a client’s decision whether to settle a matter’ (NYRPC 1.2(a)). Thus, even if the funder was granted veto authority over settlement decisions, if the client wants to accept a settlement in the face of a funder’s exercise of its veto rights, the lawyer must follow the client’s instructions and accept the settlement. The New York City Bar has considered this question and noted that absent client consent, a lawyer is not permitted to allow anyone to direct or influence litigation strategy, including whether to settle (NYCBA Formal Opinion 2011-2).

9 In what circumstances may a funder terminate funding?

In general, the funding agreement, including the right to terminate, is defined by contract. If the terms of a contract call for continued funding, the funder has an obligation to continue funding, barring grounds for voiding that obligation. Such grounds may include fraudulent inducement or omission of material fact. A funder may also be excused from continued funding under the agreement if the contracting party materially breaches the agreement.

10 In what other ways may funders take an active role in the litigation process?

In addition to providing the financial resources to support litigation, funders can be a valuable resource to counsel and to the client in other ways. By serving as an adviser or sounding board, the client (and the client’s lawyers) can draw on a funder’s broad experience and financial acumen to, among other things, consider the strategy and tactics as to the litigation and assess strengths and weaknesses in the case as the litigation proceeds, and evaluate settlement proposals.

A funder can also review certain materials about the litigation and provide its thoughts to the client and the client’s lawyers. The materials that the funder can review, however, will likely be limited by a protective order in the litigation that will restrict access to the other side’s document production. The materials the funder can review may also be limited by concerns of potential waiver of attorney-client privilege or work product protection (see question 23).

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

Litigation lawyers may enter into contingency fee arrangements.

12 What other funding options are available to litigants?

Litigants have a wide range of funding options available to them. In addition to a full litigation funding agreement, where the funder covers all costs and legal fees, the litigant can enter into a partial funding agreement, where the litigant (or the litigant’s attorneys on a contingent basis) agrees to pay a percentage of the legal fees and the funder does not fund the entire litigation.

A funder may also purchase an interest in the litigant (as well as certain rights to serve on the litigant’s board) in exchange for a percentage of any recovery, which may address certain concerns about waiver of attorney-client privilege and work product.

A litigant can, of course, seek to take a recourse loan, using the proceeds of the litigation as collateral that must be repaid regardless of the results of the action.

13 How long does a commercial claim usually take to reach a decision at first instance?

In the US District Court for the Southern District of New York, a commercial claim can be expected to take over 29 months from filing to a hearing on the merits of the case. Since many cases are resolved before trial through motion practice or settlement negotiations, the median length from filing to disposition of a case is 7.9 months. These statistics are available at www.uscourts.gov/statistics-reports/case-load-statistics-data-tables and www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2016.

For complex commercial claims, the timeline in New York state court would be similar. Most of these claims will be heard before the Commercial Division of the New York Supreme Court, which is a specialised division that focusses on creating uniformity and predictability in complex commercial disputes.

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

Approximately 10 per cent of filed cases are appealed. In cases that have gone to trial, nearly 40 per cent are appealed. See Eisenberg, Theodore, 'Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes' (2004). Cornell Law Faculty Publications. Paper 359, available at <http://scholarship.law.cornell.edu/facpub/359>.

In the Court of Appeals for the Second Circuit, which encompasses New York, the median time from filing an appeal to disposition is 11.1 months.

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

In our experience, defendants generally satisfy a judgment against them without the need for enforcement, let alone contentious enforcement proceedings.

However, if a defendant is unwilling to satisfy a judgment against it, both federal and New York courts have robust and well-established mechanisms to empower the plaintiff to locate, freeze and seize the defendant's assets to satisfy the judgment.

The ease or difficulty in enforcing a judgment is influenced by a myriad of factors, including the judgment debtor's willingness and resources to resist enforcement proceedings; the size of the judgment; the location of the judgment debtor's assets; what, if any, steps the judgment debtor has taken to conceal its assets; and the extent to which the judgment creditor has mitigated against the risk of an unsatisfied judgment by careful selection of targets through pre-suit investigation and by learning as much as possible about the judgment debtor during discovery in the underlying litigation.

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

Class actions are permitted and third parties may fund them. In fact, third parties have funded many of the larger class actions. See, for example, *Kaplan v SAC Capital Advisors LP*, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (a securities class action on behalf of shareholders seeking over \$680 million arising from an insider trading scandal was funded by a third party).

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

In responding to this question, we think it best to distinguish between 'costs' (disbursements related to expenses other than legal fees) and 'fees' (legal fees). As a general rule, in US litigation, the losing party does not pay the attorneys' fees of the prevailing party except in specific types of cases, or where otherwise required by a contract between the parties. For instance, consumer protection or civil rights lawsuits allow for the collection of attorneys' fees, as do patent-related matters in exceptional cases. In addition, a court has the discretion to order the unsuccessful party (or its attorney) to pay to the prevailing party its attorneys' fees or other financial sanctions, if the unsuccessful

party engaged in frivolous conduct in connection with the litigation (22 NYCRR 130-1.1; see also Fed R Civ P 11). New York has defined conduct to be frivolous if '(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation ...; or (3) it asserts material factual statements that are false' (22 NYCRR 130-1.1(c)).

Further, 'costs' are awarded to the prevailing party in both the New York state system and the federal system. In the state system, costs are set by statute and are a small and arbitrary amount based on factors such as timing and amount of resolution, with a maximum amount of a few hundred dollars. In federal court, however, awarded costs can be significant. Chargeable costs include some court and transcript fees, witness fees and documentation costs (28 USC section 1920). Expert witness fees, which can be large out-of-pocket expenditures, depending on the nature of the litigation, are generally not chargeable beyond the small statutory daily attendance fee. However, documentation fees in some cases have been held to include e-discovery vendor fees, which can be substantial.

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

No published case applying New York law has held a third-party litigation funder liable for adverse costs (including attorneys' fees in applicable circumstances).

This does not mean that the terms of the funding agreement may not make the funder responsible for the payment of any adverse costs order. Best practices dictate that the funding agreement address if the funder is or is not responsible for the payment of any adverse costs order (including any responsibility for attorneys' fees).

19 May the courts order a claimant or a third party to provide security for costs?

Courts do not order a party to provide security except if it is seeking a preliminary injunction or temporary restraining order in advance of the adjudication of the dispute on the merits. See, for example, NY CPLR section 6312(b); Fed R Civ P 65(c). The court will set the amount of security required to 'an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained' (Fed R Civ P 65(c)).

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

No. The applicable rules provide that the security should be calibrated to the amount of the potential damages that would be incurred if a party is wrongfully enjoined, not the resources of the party seeking an injunction.

Moreover, in many cases, the court would not necessarily be aware of the existence of third-party funding.

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

After-the-event (ATE) insurance indemnifies the client for legal costs in the event the client loses its case. ATE insurance, which is purchased after the dispute has arisen, can protect against paying the other side's adverse costs and can reimburse the client for its own attorneys' fees and out-of-pocket expenses.

There is no statute in New York that prohibits ATE insurance. That being said, as in most states, insurance in New York is, generally speaking, a heavily regulated field, with licensing and other rules that may affect who can issue or purchase ATE insurance.

In our experience, ATE insurance is not commonly used in New York. But as lawyers and clients in New York become more familiar with ATE insurance, we would expect interest in this product to grow, including with clients who may have the resources to pay legal fees and costs on their own, but want to offset fees and costs if they lose the case.

We are not aware of other types of insurance, in the context of fees or expenses, commonly used by claimants in New York. But as interest in litigation funding grows, we would not be surprised if interest in ATE insurance grows with insurance alternatives entering the market.

Update and trends

Third-party funding of litigation is becoming an increasingly well-known and utilised model in civil litigation throughout New York. Both small and large companies are using third-party funding, including companies with the capital to self-fund, but that would rather offset some of the costs of the litigation to third parties.

In many quarters, litigation funding is seen as giving greater access to justice, by allowing resource-strapped litigants to pursue worthy claims against deep-pocketed defendants. Critics of litigation funding argue that it will clog the courts with meritless litigation, brought by clients who, having offloaded the financial burdens of litigation to a third party, will pursue claims that perhaps they otherwise would not or could not pursue.

As the industry grows, and as litigation funding becomes a factor in more cases, we cannot rule out continued, and perhaps growing, resistance by critics of litigation funding, but the growing trend, certainly in New York, seems to be towards acceptance of litigation funding as levelling the playing field and promoting access to justice by giving access to the courts to claimants who otherwise would not have the resources to pursue their claims.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no statutory obligation in New York to disclose the existence of a litigation funder or a litigation funding agreement to the opposing party or to the court.

However, an opposing party could compel the disclosure of a litigation funding agreement if the court determines that the agreement is relevant to the case and it is not otherwise protected from disclosure. The only New York court that has addressed the disclosure of a funding agreement ruled that the funding agreement was not relevant to the lawyer's adequacy as class counsel in a securities class action lawsuit. *Kaplan v SAC Capital Advisors LP*, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (explicitly declining to address if disclosure of the agreement would be entitled to work product protection). Determining the adequacy of class counsel is a very narrow and fact-specific analysis, so this decision's applicability to more traditional third-party litigation funding may be limited.

If a court determined that the funding agreement was relevant to the case, then a party would be required to disclose the funding agreement if it were not protected from disclosure by attorney-client privilege or work product protection (see question 23).

If deemed relevant, a client would likely be compelled to disclose at least some information about the identity of the third-party funder. See, for example, *In re Nassau County Grand Jury Subpoena Duces Tecum*, dated 24 June 2003, 4 NY 3d 665, 678-79 (NY 2003) (information regarding the payment of fees by a third party is not protected as an attorney-client privileged communication).

New York courts have not addressed if work product protection would protect against the disclosure of the funding agreement. They have, however, recognised that the terms of a joint defence agreement, which is an agreement to share information between multiple defendants to the same litigation, is considered work product. See *RFMAS Inc v So*, No. 06 Civ. 13114 VM MHD, 2008 WL 465113 (SDNY 15 February 2008).

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

In certain circumstances, the attorney-client privilege and the work product doctrine protect against the disclosure of communications and information shared between attorney, client and funder. There has been very limited analysis of these protections by New York courts as they relate to third-party litigation funding. We suspect that New York courts may find that attorney-client privilege will not protect communications with a funder from disclosure. Further, New York courts will likely find that work product protection will protect from disclosure certain communications and information provided to a funder.

Communications between an attorney and client for purposes of providing legal advice are privileged in all US jurisdictions, including New York. If attorney-client communications are disclosed to a third party, the privilege can be deemed to have been waived as to the

communications themselves and even in some cases as to the subject matter of the communications. However, if the communications are shared with a third party with whom the client has a 'common legal interest', there is no waiver of the privilege.

In the context of third-party litigation funding, whether disclosure of communications with a funder waives attorney-client privilege turns on whether a client has a common legal interest with the funder. There has only been one decision in New York addressing this question and it did not extend the common interest doctrine to litigation funders. There the court declined to protect information shared with a litigation funder. It noted that '[a]lthough the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy.' See *Cohen v Cohen*, No. 09 CIV 10230 LAP, 2015 WL 745712, at *w (SDNY 30 January 2015). In so ruling, the court found that since the litigation funder was not a party to the litigation and there was no suggestion that she had a legal claim against the defendant, there could not be a common legal interest.

The work product doctrine is separate and distinct from attorney-client privilege. The work product doctrine protects from disclosure documents prepared, and information collected, in anticipation of litigation. The work product doctrine seeks to prevent such documents and information from falling into the hands of the party's adversary. Unlike attorney-client privilege, disclosing work product to a third party does not waive work product protection where such disclosure did not substantially increase the likelihood that the work product would fall into the hands of an adversary in the litigation. See *In Re Steinhardt Partners LP*, 9 F3d 230 (2d Cir 1993).

Since New York courts have not addressed the applicability of work product protection to the disclosure of information given to a third-party litigation funder, we look to other jurisdictions for guidance. Courts in those jurisdictions have generally found such information to be protected as work product. See *Miller UK Ltd v Caterpillar Inc*, 17 F Supp 3d 711, 736 (ND Ill 2014) (the disclosure of a memorandum describing the strengths and weaknesses of a case to a funder was protected as work product). This would specifically include documents prepared with the intention of disclosing to potential investors to aid in future litigation. See *Mondis Tech Ltd v LG Elecs Inc*, No. 2:07-cv-565, 2011 WL 1714304, at *3 (ED Tex 4 May 2011) (documents prepared with the intention of disclosing to potential investors in aid of future litigation was protected). We expect, but are not certain, that New York courts will adopt the same reasoning and protect work product disclosed to third-party litigation funders.

In the end, a balance needs to be struck between obtaining sufficient information to make decisions about whether or to what extent to fund a case and the risk of waiver, which could lead to the disclosure of information that could harm the case, and the funder's investment in it, by putting at risk the attorney-client privilege.

Given the lack of definitive case law in New York on this issue, to avoid the risk of waiving attorney-client privilege, a funder should tread lightly in requesting communications between the client and attorney that would otherwise be protected as privileged communications.

On the other hand, work product protection will likely allow the client to disclose to the funder documents prepared in aid of the litigation that should be sufficient to allow a funder to make an informed funding decision and to remain apprised of key developments over the life of the case.

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

We are not aware of any reported disputes in New York between a litigant and a funder in cases where the funder has lent money to the holder of a claim to cover the legal fees and costs in exchange for a portion of the proceeds arising from the holder's enforcement of its claim.

There may be several reasons why there have been no reported disputes in New York. Most funding agreements have strict confidentiality provisions. And since most funding agreements have arbitration clauses, if there is a dispute between a litigant and a funder, that dispute would be confidentially arbitrated.

It is worth noting that there have been several reported disputes in New York (or by courts applying New York law) in the context of consumer legal funding, where a consumer legal funder provides a non-recourse advance to a plaintiff (commonly in a tort case) to cover the

plaintiff's living expenses during the pendency of the case in exchange for a portion of the proceeds from the case. See *Lynx Strategies LLC v Ferreira*, 957 NYS2d 636 (NY Sup Ct 2010) (confirming an arbitration award in favour of the funder where the plaintiff and plaintiff's law firm did not pay the funder its share of the settlement proceeds); *Obermayer Rebmann Maxwell & Hippel LLP v West*, Civ No 15-81, 2015 WL 9489791 (WD Pa 30 December 2015) (applying New York law and holding that failure to pay the funder its share of the proceeds was breach of a funding agreement); *MoneyForLawsuits V LP v Rowe*, No. 4:10-CV-11537, 2012 WL 1068171 (ED Mich 23 January 2012) (same).

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

As legal costs continue to increase, as client budgets for litigation shrink, and as lawyers and clients learn more about litigation funding, interest in litigation funding is growing in the US, and more and more funders are entering the market. In selecting funders with which to do business, clients and counsel should look for funders that have established track records of funding cases through to completion; ample resources to handle the expense of litigation; the fortitude to weather the uncertainties that are an inevitable feature of litigation; the ability to make funding decisions without inordinate delay; and the ability to offer sound advice along the way, while still respecting the autonomy of the client and the ethical duties of the lawyer to his or her client.

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