Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

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GETTING THE DEAL THROUGH

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Turkey

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

Third-party litigation funding is currently neither prohibited nor regulated under Turkish law. In fact, this lack of regulation is a natural result of rare recourse to funding arrangements in court litigation by Turkish parties that are not sufficiently familiar with the institution. In parallel, Turkish courts have not yet had occasion to express their position on the nature, validity and enforceability of third-party litigation funding agreements. However, where there is no restriction, the freedom of contract principle applies under Turkish law. Accordingly, parties and third-party funders, can, in principle, enter into, and structure as they wish, funding agreements provided that they comply with public policy and mandatory provisions of Turkish law.

The situation is more promising in the field of arbitration, especially in international commercial arbitration and investment arbitration. The number of Turkish parties that had recourse or at least sought to obtain funds from third parties has seen a significant increase in recent years in parallel with the increasing number of high-value disputes. Thus, third-party funding serves as a tool ensuring access to justice and equality of arms for parties that are deprived of sufficient financial resources to afford arbitration costs. This need for funding has also triggered specialisation of lawyers in the field. Considering these developments in arbitration, it would be fair to say that a funding culture is beginning to be established in Turkey and this may positively affect any future regulation as to litigation funding.

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

As there is no regulation or jurisprudence regarding third-party litigation funding, the fees and interests that can be charged by funders are not subject to any specific limitation. Accordingly, in principle, litigation funders can freely assess the matter in dispute, merits of the claims, chance of success and enforceability and then determine the amount of the fees and interest rate.

However, it is worth noting that when determining the fees and interest that a funder may request, mandatory provisions and public policy, which are applicable to all commercial transactions, should be taken into consideration. In particular, in commercial transactions, one should bear in mind that the freedom to determine the interest rate is always limited with the good faith principle set forth under article 2 of the Turkish Civil Code, the situation of economic distress of the merchant and the possibility of reduction of penal clause.

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

Turkish law does not provide any specific regulations regarding third-party funding (see question 1).

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

The Turkish Attorneyship Law and Rules of Conduct issued by the Union of Turkish Bar Associations set forth professional and ethical rules that apply to all lawyers registered in Turkey. However, these do not contain any specific rules regarding third-party funding.

On the other hand, it is worth noting that referrals made by lawyers to funders and also referrals by third-party funders to lawyers in return for a fee or role in the claim, which would be against article 48 of the Attorneyship Law that prohibits client referrals in return for fees, would trigger a criminal prosecution that may result in imprisonment of between six months and one year.

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

There are no public bodies supervising third-party financing activities.

In principle, financing and insurance transactions that have similarities to third-party funding are supervised, respectively, by the Banking Regulation and Supervision Agency and Insurance Auditing Board and those fields are regulated by detailed rules set forth in different laws and regulations. However, as litigation funders cannot be qualified as banks or insurers, they do not fall under the scope of supervision exercised by those authorities.

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

In practice, owing to the unfamiliarity of Turkish parties with third-party litigation funding, generally, lawyers inform their clients of the existence of such possibility. An initial assessment of the merits of the case, which is essential in attracting the interest of funders, is prepared by the lawyers. Hence, the usual starting point of funding procedures is lawyers' own initiative. Therefore, upon approval of the client, the lawyer would make contact with potential funders already in his or her network. Accordingly, the choosing party is the lawyer rather than the funder. If a funder does not want to work with a specific counsel and it does not have confidence in the abilities of the lawyer, it can simply refuse to provide funds rather than offering another counsel.

On the other hand, it is rare but possible that the client first has recourse to the funder. In this case, the funder may, of course, recommend lawyers that it has worked with and has confidence in. However, it would be appropriate to avoid giving consistent referrals considering the prohibition of referrals made by third parties in return for a fee or role in the claim under the Attorneyship Law (see question 4).

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

Civil hearings are open to the public unless otherwise decided by the court owing to requirements of public morality or security. Accordingly, there is no restriction impeding funders to attend the hearings. However, as to the question of the possibility of an active participation in the hearings or court-directed settlement proceedings, funders are not allowed to intervene in such a way, owing to a lack of legal interest. With regard to private settlement negotiations, the level of the funder's involvement will depend on the arrangements made between the funder and the funded party.

In arbitration, a funder can attend the hearings if there is an agreement between the parties allowing its attendance. On the other hand, it should be noted that a high level of involvement of a third-party funder in the proceedings may cause complex and serious procedural issues resulting from:

- requests for disclosure of the terms of the funding agreement and security for costs;
- challenges based on independence and impartiality of arbitrators in relation to third-party funders;

- questions regarding the identity of the real claimant or respondent (from the perspective of the counter party and the arbitral tribunal) and the identity of real client (from the perspective of the lawyer); and
- questions regarding quality of 'investor' in investment arbitrations.

8 Do funders have veto rights in respect of settlements?

Under the freedom of contract principle, which applies under Turkish law, the funder and funded party may agree on specific conditions regarding any potential settlements. However, as a common practice, the funder's approval is sought for settlement in funding agreements. In any case, the good faith principle would prevent abuse of veto rights, if granted.

9 In what circumstances may a funder terminate funding?

Termination of funding agreements is usually regulated by specific provisions therein. Therefore, the circumstances giving the right to termination depend on the contractual arrangements between the parties. However, in case of lack of provision or clarity on this, the Turkish Code of Obligations' provisions should apply.

With regard to arbitration proceedings, funding agreement provisions regarding termination rights are of utmost importance. If the funder is entitled to terminate the funding agreement at any time, entirely at its discretion, this situation may lead the arbitral tribunal to consider third-party funding as a material and unforeseeable change of circumstances, which would constitute a ground for security for costs order.

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

Under Turkish law, funders are considered as third parties having no legal interest in the proceedings. Therefore, there is no requirement forcing funders to take an active role in the proceedings. However, within the tripartite relationship between party, funder and counsel, funders' roles may vary largely depending on the terms of the funding agreement.

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

According to article 164 of the Attorneyship Law, legal services must be rendered in return for a fee. Accordingly, the Union of Turkish Bar Associations determines and announces the minimum rates for legal services every year. If a lawyer renders his or her services free of charge, the relevant local Bar association must be notified of the situation and its reasons. Otherwise, free services or services rendered in return for a fee less than the minimum rates may trigger disciplinary prosecution by the Union of Turkish Bar Associations. As result, pure contingency fee arrangements (no win, no fee) are not permitted under Turkish law.

On the other hand, conditional fees in addition to a guaranteed base fee (no win, less fee or success fee) agreements are considered as valid to a certain extent. The parties can freely determine the calculation method of the success fee, which can correspond to a percentage of the amount recovered at the end of the proceedings, a fixed fee or a multiple of the base fee. The total of the fees shall not exceed the maximum limit determined by the Attorneyship Law, which is currently 25 per cent of the claimed amount, under any circumstances.

12 What other funding options are available to litigants?

If parties are deprived of sufficient financial resources to pay for the costs of the court proceedings, they may request legal aid, which is provided by the State Treasury. Further, as processes with similarities to third-party funding, the sale of pecuniary claims, assignment of rights and legal protection insurance are also permitted under Turkish law.

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

The length of the procedure strictly depends on a number of elements, such as the number of parties involved in the proceedings, the nature and complexity of claims, the existence of counterclaims, the number of parties and court-appointed experts and also the city where the court is located. In general, first-instance decisions are taken within one and a half to two years by commercial courts. However, in cases that require technical expertise, the issuance of expert reports takes a considerable time. In such case, the length of the proceedings may exceed two years.

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

Although there are no official statistics regarding the proportion of appealed first-instance judgments, the number of appeals and also reversal decisions are quite high in Turkey, corresponding to more than 60 per cent of the total. Owing to this high number of appeals and in order to decrease the workload of the High Court of Appeals and to accelerate the appeal procedure, a two-level appeal system was put into effect on 20 July 2016 with the commencement of operations in the regional judicial courts before which the final decisions of the first-instance courts, interim injunction decisions and decisions rendered upon objections to interim attachment orders are appealed. Only decisions with regard to claims exceeding the minimum value threshold (ie, 3,110 Turkish lira for 2017) can be appealed before the regional judicial courts (except the actions for non-pecuniary damages, which may be appealed regardless of their value, pursuant to article 341 of the Turkish Code of Civil Procedure).

As to the second level, for decisions regarding claims whose value exceeds 41,530 Turkish lira (2017 rate), parties will have the right to appeal decisions of the regional judicial courts before the High Court of Appeals.

Appeal procedures usually take a few years following the final judgment of the first-instance court. However, as there is no specific time limit for appeal procedures, the length may vary depending on the workload of the regional judicial courts and the High Court of Appeals.

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

Although the final domestic courts' decisions are binding, their enforcement may become problematic owing to insolvency or unwillingness of the respondent to comply with the decision. In that case, the claimant can enforce a domestic court judgment through an application made to the competent execution office. The respondent must comply with, or object to, the enforcement order within seven days of the date of notification. Upon expiry of the seven days without any objection from the respondent, the claimant can apply for attachment over the respondent's assets. In case of any objection, such disputes relating to execution proceedings are settled before execution courts, which are subject to the procedural rules provided in the Execution and Bankruptcy Law.

Regarding enforcement of foreign judgments, an enforcement decision rendered by the competent Turkish court of first instance is required. Anyone having a legal interest in enforcement may make an application to the court with a petition accompanied by the original and approved foreign judgment or its certified copy with an approved translation; and a duly approved statement or instrument proving that judgment is final, with its approved translation. The procedure is controversial.

Under article 54 of the Code on International Private and Procedural Law, the court grants an enforcement decision provided that the following applies:

- there is a legal or de facto reciprocity between the two countries;
- the judgment does not relate to a subject that is within the exclusive jurisdiction of Turkish courts, or it must not have been made by a non-competent court, provided that the non-competence had been contested by the respondent;
- the judgment is not manifestly contrary to Turkish public order; and
- the principles of due process, including proper notice, have not been violated.

With regard to enforcement of foreign arbitral awards, as Turkey is a party to the New York Convention, the procedure is relatively simple and short. However, there are still some concerns regarding the broad application of public policy by the first instance courts and the High Court of Appeals.

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

In principle, class actions or group actions as recognised in common law systems are not available under Turkish law. However, under article 113 of the new Code of Civil Procedure, which entered into force on 1 October 2011, a type of group action called 'collective action' is introduced. On the basis of this article, legal associations, corporations and other legal entities may, within the framework of their statute and on their behalf, file a collective action in order to determine the rights of those concerned, to remedy a breach of law or to prevent violation of future rights of those concerned, with the purpose of protecting their members' benefits. However, unlike typical class actions, these collective actions may not be for the purposes of obtaining compensation for monetary damages.

As there is no restriction regarding third-party funding under Turkish law, collective actions may also be funded by third parties.

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

Under Turkish law, the costs follow the event or loser pays principle applies with regard to allocation of litigation costs. Accordingly, the losing party may be ordered in the final decision of the court to recover costs of the successful party. If the court renders a decision of 'partial acceptance' or 'partial dismissal', the court costs are to be shared between both parties based on the proportions to be determined by the court. These costs and cost allocation orders are made in the final decision of the court.

As to the recoverability of costs, all cost items that may be recovered by the counterparty are listed numerus clausus in article 323 of the Turkish Code of Civil Procedure. Accordingly, the recoverable costs consist essentially of the court fees and expenses, court-appointed expert fees and expenses, and the attorney fees calculated according to the minimum attorney fee tariff issued by the Union of Turkish Bar Associations (see question 11), regardless of the actual amounts agreed and paid by and between the party and its lawyer, and other costs made during the proceedings. However, third-party funding costs are not listed in the article. Although one may argue that funding costs can be considered as other costs made during proceedings, this would not be an appropriate interpretation taking into consideration legislators' intention to minimise party costs. Therefore, litigation funding costs of the successful party are not recoverable from the losing party. However, this interpretation has yet to be tested by Turkish courts.

In principle, part of the attorney fees exceeding the amounts determined in accordance with the above-mentioned tariff that the successful party had to bear cannot be laid on the losing party. However, as a derogation to this principle, article 329 of the Turkish Code of Civil Procedure stipulates that a respondent of bad faith or a party that has initiated a lawsuit although it has no right to do so may be ordered to wholly or partially pay the professional fees agreed between the counterparty and its lawyer in addition to the trial costs. In such case, through a broad interpretation of the provision, there would be a possibility for the claimant to claim recovery of funding costs, or at least a part of attorneys' fees related to funding arrangements, within the scope of attorney fees. In any case, if requested fees are excessive, the amount will be determined by the court.

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

With a narrow interpretation of existing regulations, the answer would be no. Only the parties of the procedure may be ordered to pay adverse costs. As there is no regulation regarding third-party funding or jurisprudence like that of US and UK courts allowing them to issue cost orders against third-party funders having sufficient involvement and interest in the case, there is no legal ground for tribunals to order a third party to be held liable for costs. However, it would be an interesting case if a party sued the funder on the basis of the aforementioned article 329 of the Turkish Code of Civil Procedure, claiming that it solicited the claimant and acted with bad intention, which is why it would be jointly responsible for the adverse costs.

Turning to arbitration, the arbitrators' competence, which is solely based on the consent of the parties, does not extend to third parties. Therefore, in principle, arbitral tribunals do not have power to issue cost orders against third-party funders. However, depending on the particularities of each case, an extension of the arbitration agreement to third parties and assignment of rights issues, which may establish the competence of the arbitral tribunal against third parties, should be considered.

It goes without saying that the funder can undertake to pay adverse costs in the funding agreement and such undertaking will constitute a stipulation for the benefit of a third party.

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

The courts would not order the claimant to provide security for costs with its own initiative. However, the respondent can request security for litigation costs to be provided by the claimant under the following conditions set forth in article 84 of the Turkish Code of Civil Procedure:

- the claimant is a Turkish citizen who does not have his or her habitual residence in Turkey; and
- the respondent can provide evidence of the claimant's financial difficulty (such as its insolvency or existence of restructuring proceedings).

On the other hand, article 85 of the Turkish Code of Civil Procedure explicitly lists the situations where security for costs cannot be requested and the claimant's recourse to legal aid is one of those.

As an exception to the above, foreign claimants will be asked to provide security for costs and damages under article 48 of the Code on International Private and Procedural Law unless there is a contractual, de facto or legal reciprocity, which enables Turkish claimants to file lawsuits in the state of which the foreign claimant is a national, without providing security.

The amount and type of the security is under discretion of the court. If the claimant does not comply with the security for costs order, its case will be rejected on procedural grounds. However, the courts cannot order third parties to provide security for costs under any circumstances.

There are no court precedents regarding security for costs application in the case of third-party funding.

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

In light of the above (see question 19), the courts' discretion on granting of security for costs is quite limited by the explicit rules. Accordingly, with regard to the relation between third-party funding and security for costs, the appropriate question to be answered by the court is whether the existence of third-party funding can be considered as sufficient evidence to show the claimant's financial difficulty. Although there are no precedents on the issue, a general principle applicable to all cases would not be established. Particularities of the situation of each funded party and terms of funding agreements, especially those regarding termination rights of the funder and its liability to pay adverse costs, should be assessed on a case-by-case basis.

As to arbitration proceedings, the Turkish International Arbitration Law does not provide a specific provision regarding security for costs. However, its article 6 empowers arbitrators and domestic courts to grant interim measures and as an interim measure, the arbitrator may order security for costs.

The parties may agree upon the circumstances in which a tribunal may order security or they may preclude an order for security. In the absence of such an agreement, the respondent should convince the arbitral tribunal that the claimant must provide security for the cost. In such case, material and unforeseeable change of circumstances criteria are generally applied in commercial arbitrations. In this regard, as stated above, particularities of each case should be considered carefully.

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

Legal protection insurance is available under Turkish law. However, commercial disputes are not covered by this insurance under the general conditions of legal protection insurance, issued by the under secretariat of the Treasury.

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, there is no provision or jurisprudence requiring disclosure of funding agreements. Although in commercial cases the burden of collecting evidence is on the parties, the judge has an exceptional power to order submission of evidence within the scope of its duty to enlighten the case under article 31 of the Code of Civil Procedure. Accordingly, the judge may order disclosure of litigation funding if he or she considers this necessary for the sake of the proceedings. Nevertheless, the party can refuse to disclose this by alleging that it contains a trade secret.

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

Lawyers are under a strict confidentiality obligation regarding their clients as per article 36 of the Attorneyship Law. Therefore, they are prohibited from disclosing any information obtained during the performance of their duties. This can only be waived with the client's consent. However, even in the case of the existence of the client's consent, lawyers may refuse to disclose information. When it comes to the funders, however, this privilege does not exist given that they are not party to the proceedings or they are not the client.

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

No, there are no court precedents regarding disputes between litigants and their funders.

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

Considering the increasing number of cases funded by third parties, especially in the field of international arbitration, it is highly possible that legislation regulating third-party funding will be adopted.

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