Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

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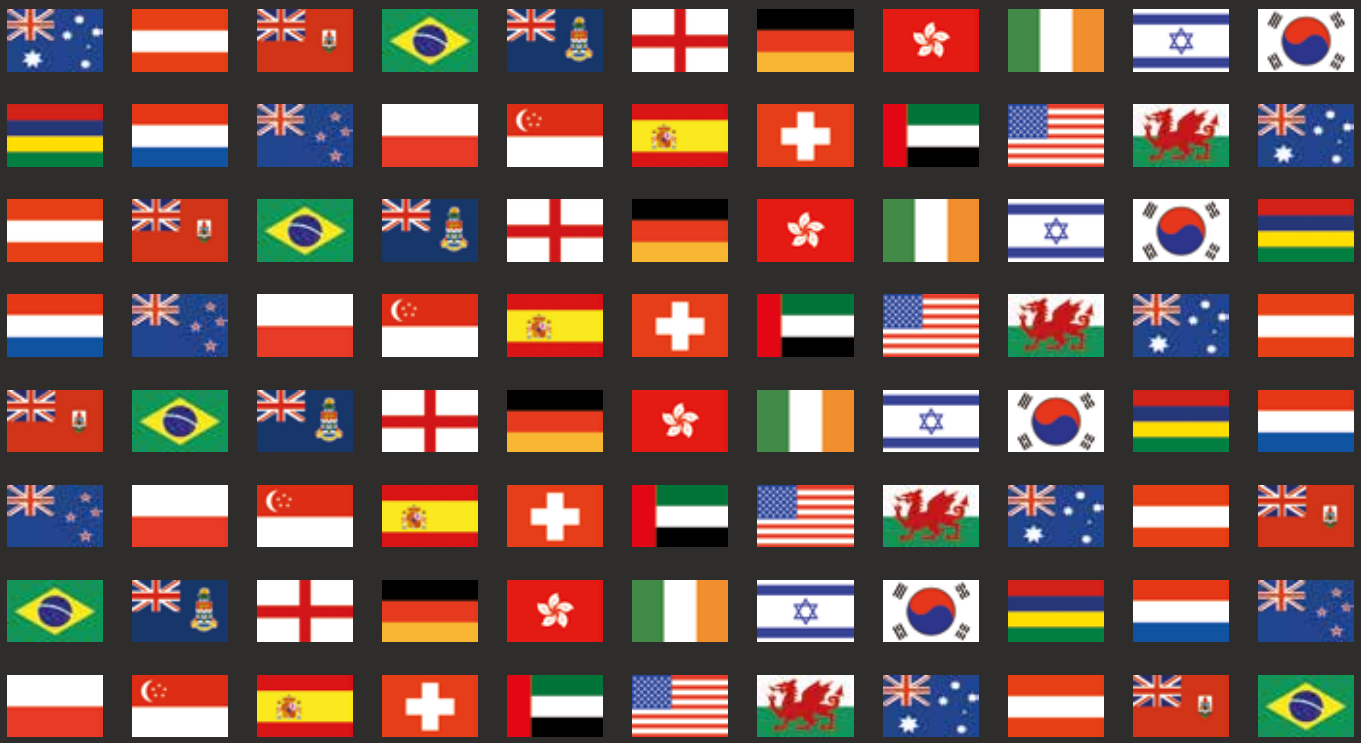

2019

GETTING THE DEAL THROUGH

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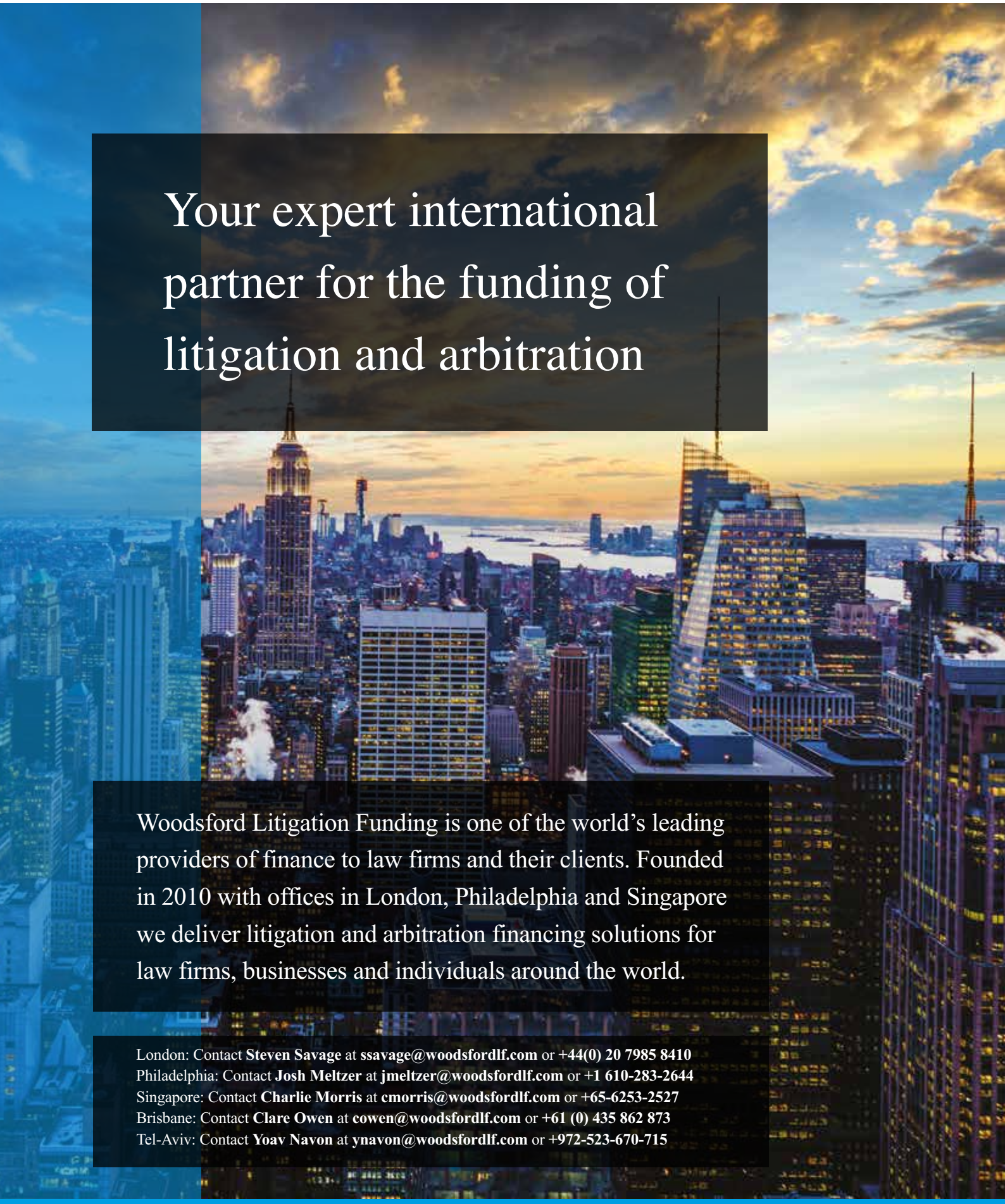

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GETTING THE DEAL THROUGH

Litigation Funding 2019

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Third edition

Getting the Deal Through is delighted to publish the third 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. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. 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 continued assistance with this volume.

GETTING THE DEAL THROUGH

London
November 2018

England & Wales

Steven Friel, Jonathan Barnes and Simon Walsh
Woodsford Litigation Funding

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

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. '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 UK government by a company of Spanish fishermen who claimed that the United Kingdom had breached EU law by requiring ships to have a majority of British owners if they were to be registered in the United Kingdom. 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 (see 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 (AA 1996).

In the 2017 case of *Walter Hugh Merricks v MasterCard & Others* [2017] CAT 16, while the Competition Appeal Tribunal rejected class certification (see question 16), the Tribunal stated that it would have approved the litigation funding arrangements in that case. In keeping with the dominant trend of judicial comment on both sides of the Atlantic, Mr Justice Roth and his colleagues on the bench spoke in positive terms about litigation funding, noting 'a range of extrajudicial material which recognised the importance of third-party funding in enabling access to justice'. They said that it should not be difficult for a tribunal to work out what a reasonable litigation funding return should be, not least because there is 'now a developing market in litigation funding'.

In March 2018, Lord Justice Jackson, while reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime in England and Wales, noted that his proposals to 'promote [third-party funding] and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs.'

Third-party funding is now a well-established and commonly used part of the English litigation landscape, which is judicially recognised as controlling costs and promoting access to justice. The third-party funding industry, which is arguably centred in London, has grown significantly in terms of the number of market participants, the capital available to them, the types of disputes that are funded and the size of investments made.

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

Third-party funding is now well established in England and Wales. 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 funder's success fee, the principles of maintenance and champerty arguably apply in order 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 facilitated by the Civil Justice Council, a government agency that is part of the Ministry of Justice of England and Wales (Ministry of Justice), on 23 November 2011. This Code sets out the standards of practice and behaviour required of members of the Association of Litigation Funders (ALF) funding litigation in England and Wales. ALF membership 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.

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 with delivering self-regulation of disputes whose resolution is to be achieved principally through litigation procedures in the courts of England and Wales. The ALF actively engages with government, legislators, regulators and other policymakers to shape the regulatory environment for dispute resolution funding.

The ALF has been charged with administering self-regulation of the voluntary Code of Conduct for Litigation Funders that are ALF members 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.

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

In January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that the market for third-party litigation funding continued to develop well and that he had no concerns about the activities of litigation funders. While the UK government continues to keep the industry under review, it remains of the view that the ALF voluntary Code of Conduct works well, and that there is no need for statutory regulation for third-party litigation funding.

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 its 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 the 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 increasingly common for third-party funders to also attend.

8 Do funders have veto rights in respect of settlements?

The ALF voluntary Code of Conduct for funder members 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, as follows:

- where a third-party litigation funder reasonably ceases to be satisfied on the merits of the dispute;
- where the funder reasonably believes that the dispute is no longer commercially viable (eg, where costs have escalated significantly, or the likely recovery has reduced significantly from what was anticipated at the outset); and
- 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 an ALF member, 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 what ways are funders required to take an active role?

In a February 2016 publication, '10 trends in 2016', *International Arbitration*, 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, even two years ago. 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.

In *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144 (18 November 2016), the Court of Appeal endorsed the first instance judge's determination that a responsible funder is expected to carry out a 'rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate levels' and that such steps would not be champertous. This decision makes it clear that funders should take an active role in conducting thorough due diligence prior to funding the litigant and maintain a robust process for reviewing the litigation as it proceeds. It is important to note that the Court of Appeal correctly pointed out that none of the litigation funders in this case were ALF members and the Court drew the crucial distinction between 'professional funders' and 'the funders [in this case] [who] were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case'.

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 United States' concept of contingency fee agreements. In a DBA, if the case is successful, the lawyer's fee is calculated as a percentage (capped at 50 per cent in commercial cases) of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer. DBAs 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?

The time taken for a claim in the courts of England and Wales to reach a decision at first instance will vary greatly according to the complexity of the issues in the case, the urgency of its determination and the caseload of the court in question. The Civil Justice provisional statistics for the first quarter of 2018, the most recent period available, stated there was an average of 33 weeks for a small claim to reach trial from issue and for a fast and multi-track claim (ie, higher value claims) it was almost 57 weeks.

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. However, the Civil Justice provisional statistics for the first quarter of 2018 stated that the Court of Appeal Civil Division had 914 appeals filed in 2017, down approximately 10 per cent on 2016.

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. However, the Civil Justice provisional statistics for the first quarter of 2018 recorded that there were 105,102 warrants (one of the methods of enforcing money judgments) issued in January to March 2018, an increase of 7 per cent on the same quarter in 2017. It is relatively easy to enforce judgments or awards against defendants within the jurisdiction of England and Wales. Civil Procedure Rule (CPR) 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. In English litigation, there are a number of ways in which multi-party 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 where the claims have 'common or related issues of fact or law'; and
- representative actions are permitted where one or more claimants can represent other claimants with the same interest, 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.

Changes to English competition law in 2015 gave rights to individuals (consumers and businesses) to bring private damages actions and to allow authorised class representatives to bring collective proceedings on their behalf, either on an opt-in or an opt-out basis, in the CAT. Collective proceedings may be continued only on the basis of a collective proceeding order (CPO). To date, the CAT has heard two CPO applications (*Dorothy Gibson v Pride Mobility Products Limited* and *Walter Hugh Merricks v MasterCard Incorporated & Others*). Both of those applications were rejected (with an appeal of the Mastercard decision pending at the time of writing). Two further applications for CPOs (*Road Haulage Association Limited v Man SE and Others* and *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others*) were filed in the summer of 2018.

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

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

Yes. Under CPR 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 AA 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.

In most forms of arbitration, a successful party can recover its funding costs, according to the 2016 decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited*. In light of the defendant's behaviour in the arbitration, the Commercial Court upheld the decision of an arbitrator to allow a party to recover its third-party funding costs as 'other costs' under section 59(1)(c) of AA 1996. There is no equivalent procedure for litigation, and it is therefore uncertain whether an English Court would order an unsuccessful litigant to pay the litigation funding costs of the successful party.

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 anti-competitive 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 to the extent of the funding provided (commonly known as the 'Arkin cap'). In this case, the funder had spent £1.3 million on experts and supporting services,

Update and trends

Inhibitions regarding the use of litigation finance are now in the past, with 2018 seeing greater judicial acceptance and further recognition of the fact that the involvement of a third-party funder can have significant benefits in controlling legal costs. The use of litigation finance continues its year-on-year growth, buoyed by claimants and law firms seeking innovative ways to manage the costs and risks of litigation. While funding of litigation or arbitration on a case-by-case basis retains its primacy, increasing numbers of law firms are likely to use portfolio finance (where the funder's risk and reward is spread across a number of cases being pursued by the same claimant(s) or being handled by one law firm) to gain an edge in an increasingly more competitive market for legal services.

and would be ordered to contribute the same sum to opponents' costs. Further guidance on the Arkin cap was recently given by the Court of Appeal in *Excalibur Ventures LLC v Texas Keystone Inc & Ors*. In this decision, the judge upheld the Commercial Court's decision that stated the Arkin cap should be calculated not only by reference to the amount a litigation funder provided in respect of the funded litigant's costs but also the amount provided by way of security for costs. The Court found that the money the litigation funders advanced to Excalibur to enable it to provide security for costs was an investment in the claim just as much as the money provided to pay Excalibur's own costs. The Commercial Court and the Court of Appeal agreed that both are components to be included in arriving at a figure for the Arkin cap. Therefore, payment of security for costs is simply part of the costs required to be met in order to be able to pursue the action.

It is also worth noting in the *Excalibur* decision, that the Court found that litigation funders are liable to pay indemnity costs awarded against the claimant. The Court's reasoning was that a litigation funder cannot dissociate itself from the conduct of those whom the litigation funder relies to make a return on its investment. Litigation funders, absent any extenuating circumstances, 'follow the fortunes of those from whom [they] hoped to derive a small fortune' and, in this case, that meant being held jointly liable for the indemnity costs ordered against Excalibur.

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 CPR 25.13, the court may make an order for security for costs if it would be just to do so and one or more of the following conditions apply:

- the claimant is resident in a jurisdiction where it would be difficult to enforce a costs order;
- if a corporate entity, or acting on behalf of another as a nominal claimant (other than a representative claimant under Part 19 of the CPR), there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
- the claimant has withheld or changed his or her address with a view to evading the consequences of the litigation; or
- the claimant has taken steps in relation to his or her assets that would make it difficult to enforce an order for costs against him or her.

Section 38(3) of AA 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, CPR 25.13 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to above.

Security for costs by a funder

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

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, a solicitor's undertaking or, in some circumstances, an after-the-event (ATE) insurance policy. See *Premier Motorauctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2017] EWCA Civ 1872 (see question 21).

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 CPR 25.13. A defendant may seek to argue that the fact that the claimant is funded is evidence that the claimant will be unable to pay the defendant's costs if ordered to do so, which is a ground on which a court may make an order for security for costs against a claimant under CPR 25.13(c). However, while many claimants who seek third-party funding are impecunious, many others are not, and the mere fact of litigation funding would not be sufficient. Such a fact should not, in itself, influence the court's decision.

Under CPR 25.14, the court has the jurisdiction to make an order for security for costs against someone who has contributed to the claimant's costs in return for a share of any proceeds recovered in the proceedings, where the court is satisfied it is just to do so. This potential exposure of litigation funders to orders for security for costs against them does not, of course, of itself mean that an order for security for costs should be granted. In the High Court decision of *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), the Court examined factors it might consider in exercising its discretion, under CPR 25.14, as to whether or not to order security for costs against funder. These factors included:

- the motivation of the funder to be involved;
- the risk of non-payment by the funder;
- the link between the funding and the costs;
- the funder's understanding of the liability for costs; and
- other factors, including delay in bringing the application for security for costs, such as to tip the overall balance against making an order.

While, technically, CPR 25 does not apply to arbitration, an English tribunal is likely to be guided by the English court's approach referred to 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 litigation and arbitration alike.

Because London is arguably the centre of the global insurance market, it is perhaps unsurprising that there are many other insurance products related to litigation 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 Motorauctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2017] EWCA Civ 1872, the Court of Appeal held that an

appropriately framed ATE insurance policy could in theory answer an application for security for costs, but only if the ATE policy provided 'sufficient protection' to the defendant for the claimant being unable to meet the defendants' costs. Whether an ATE policy would provide that protection will depend upon the terms of the particular policy. In the *Premier Motorauctions* case, the Court held that the ATE cover provided did not give sufficient protection to the defendants because the policy could be avoided by the insurer. The ability for the insurer to avoid the policy led the Court to conclude that there was reason to believe that the claimant would be unable to pay the defendants' costs and security for costs was granted. It should be noted that the court considered the ATE policy as part of its determination of whether it had jurisdiction to grant the order for security for costs (ie, whether there was reason to believe the claimants would not be able to pay the defendants' costs), and not as part of its discretion to grant or refuse an order for security once jurisdiction had been established. As to discretion, the Court noted that once it is satisfied that the claimants are insolvent, that there was jurisdiction to order security for costs, and that an order would not stifle the claim, it is normally appropriate to order security.

In a further recent ruling, the High Court held that an ATE policy could be sufficient security, when accompanied by a deed of indemnity from the ATE insurer (ie, when the deed constituted a separate promise by the insurer to pay the defendant's costs, which was not subject to the same avoidance rights as the ATE policy itself) (*Recovery Partners GB and another v Rukhadze and others* [2018] EWHC 95 (Comm)).

ATE insurance cover was also considered in *The RBS Rights Issue Litigation* in relation to an application for security for costs against a funder.

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.

CPR 25.14(2)(b) is referred to in question 19. In the High Court case of *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 for the defendant to consider an application for security for costs against the funder. The Court held it has the power to order the claimant to disclose the identity of its litigation funder and whether the litigation funder would share in the proceeds of the litigation. However, this power could not be used as a 'fishing expedition' and such a disclosure would only be granted if there is good reason to believe the claimant is in receipt of litigation funding and an application for security for costs would have reasonable prospects of success. The Court concluded the facts of *The RBS Rights Issue Litigation* case met this test and ordered the relevant disclosure.

In the case of In the *Matter of Edwardian Group Limited* [2017] EWHC 2805 (Ch), the High Court rejected an application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.

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

In an unreported judgment in *Excalibur Ventures LLC v Texas Keystone Inc & Ors*, Mr Justice Popplewell held that legal advice privilege may apply 'insofar as the disclosure of the funding arrangements would or might give the other side an indication of the advice which was being sought or the advice which was being given', but that not all documents brought into existence for the purposes of actual or contemplated litigation will be protected by litigation privilege. Popplewell J agreed with previous authorities that it is the 'use of the document or its contents in the conduct of the litigation which is what attracts the privilege'. The Judge endorsed the principle stated in *Dadourian Group International Inc & Ors v Paul Simms & Ors* [2008] EWHC 1784 (Ch) that 'Litigation privilege . . . can include a communication between a client and his lawyer or between one of them and a third party which comes into existence after litigation is commenced or contemplated for the dominant purpose of obtaining information or advice in connection with such litigation or of obtaining evidence (or information which might lead to evidence) for use in the conduct of such litigation.' In *Excalibur*, Popplewell J held that the funding arrangements were directly relevant to the claims and defences pleaded in that case and as a result, the defendants were granted copies of Excalibur's funding agreements that were found not to be privileged. The Court was content for certain terms (including the success fee, settlement and termination provision) to be redacted to avoid any tactical advantage the defendants may get from reviewing the terms.

In the *Matter of Edwardian Group Ltd* [2017] EWHC 2805 (Ch) confirmed that a litigation funding agreement will be privileged where it 'gave a clue to the advice given by the solicitor (*Lyell v Kennedy (No. 3)* (1884) 27 Ch D 1), or betray[ed] the trend of the advice which [the solicitor] is giving the client' (*Ventouris v Mountain* [1991] 1 WLR 607)'.

Subject to *Excalibur* and *Dadourian*, 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. *Harcus Sinclair v Buttonwood Legal Capital Limited and others* [2013] EWHC 1193 (Ch) is rare example. In this case, there was a dispute in relation to the termination of a litigation funding agreement. The High Court held that the funder validly terminated the agreement under a clause that allowed for termination if, in the

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funder's reasonable opinion, the claimant's prospects of success were 60 per cent or less.

Another example of such a dispute is *Therium (UK) Holdings Limited v Brooke and others* [2016] EWHC 2421. 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 ALF has a procedure for complaints against its members.

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 (eg, funders that are ALF members). These members have committed to comply with the ALF 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.

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