

Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

WOODSFORD
LITIGATION FUNDING



2019

GETTING THE
DEAL THROUGH

WOODSFORD

LITIGATION FUNDING

Your expert international partner for the funding of litigation and arbitration

Woodsford Litigation Funding is one of the world's leading providers of finance to law firms and their clients. Founded in 2010 with offices in London, Philadelphia and Singapore we deliver litigation and arbitration financing solutions for law firms, businesses and individuals around the world.

London: Contact **Steven Savage** at ssavage@woodsfordlf.com or +44(0) 20 7985 8410
Philadelphia: Contact **Josh Meltzer** at jmeltzer@woodsfordlf.com or +1 610-283-2644
Singapore: Contact **Charlie Morris** at cmorris@woodsfordlf.com or +65-6253-2527
Brisbane: Contact **Clare Owen** at cowen@woodsfordlf.com or +61 (0) 435 862 873
Tel-Aviv: Contact **Yoav Navon** at ynavon@woodsfordlf.com or +972-523-670-715

GETTING THE
DEAL THROUGH 

Litigation Funding 2019

Contributing editors

Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

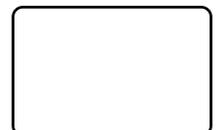
Law
Business
Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2016
Third edition
ISBN 978-1-78915-041-4

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2018. Be advised that this is a developing area.

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



CONTENTS

Introduction	5	Korea	49
Steven Friel and Jonathan Barnes Woodsford Litigation Funding		Beomsu Kim, John M Kim and Byungsup Shin KL Partners	
International arbitration	6	Mauritius	52
Zachary D Krug, Charlie Morris and Helena Eatock Woodsford Litigation Funding		Rishi Pursem and Bilshan Nursimulu Benoit Chambers	
Australia	9	Netherlands	55
Gordon Grieve, Greg Whyte, Simon Morris and Susanna Khouri Piper Alderman		Maarten Drop, Jeroen Stal and Niek Peters Cleber	
Austria	15	New Zealand	58
Marcel Wegmueller Nivalion AG		Adina Thorn and Rohan Havelock Adina Thorn Lawyers	
Bermuda	18	Poland	64
Lilla Zuill Zuill & Co		Tomasz Waszewski Kocur and Partners	
Brazil	21	Singapore	68
Luiz Olavo Baptista and Adriane Nakagawa Baptista Atelier Jurídico		Alastair Henderson, Daniel Waldek and Emmanuel Chua Herbert Smith Freehills LLP	
Cayman Islands	24	Spain	72
Guy Manning and Kirsten Houghton Campbells		Armando Betancor, César Cervera, Francisco Cabrera, Eduardo Frutos and Carolina Bayo Rockmond Litigation Funding Advisors	
England & Wales	29	Switzerland	76
Steven Friel, Jonathan Barnes and Lara Hofer Woodsford Litigation Funding		Marcel Wegmueller Nivalion AG	
Germany	35	United Arab Emirates	80
Arndt Eversberg Roland ProzessFinanz AG		James Foster, Courtney Rothery and Jennifer Al-Salim Gowling WLG	
Hong Kong	39	United States - New York	85
Dominic Geiser, Simon Chapman, Briana Young and Priya Aswani Herbert Smith Freehills		David G Liston, Alex G Patchen and Tara J Plochocki Lewis Baach Kaufmann Middlemiss pllc	
Ireland	43	United States - other key jurisdictions	90
Sharon Daly and Aoife McCluskey Matheson		Zachary D Krug, Robin M Davis and Alex Lempiner Woodsford Litigation Funding	
Israel	46		
Yoav Navon, Steven Friel and Simon Walsh Woodsford Litigation Funding			

Preface

Litigation Funding 2019

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

Israel

Yoav Navon, Steven Friel and Simon Walsh Woodsford Litigation Funding

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

Third-party funding of litigation and arbitration is permitted in Israel and has received positive judicial endorsement. In *Benny Bachar Zoabi Construction company v Bank Hapoalim*, LF 29526-10-16 (Nazareth District) (published in Nevo, 26 October 2017), the vice president of Nazareth district court, Judge Attif Ailablouni, while holding that a litigation funding agreement was valid, also encouraged the use of such funding agreements in liquidation cases:

Finally, there is a fund that is willing to examine potential claims with professional eyes, and where the prospects of the claim look good, will be willing to fund the costs of the claim, while taking the risk that if the claim is rejected, there will not be indemnity on the funding costs, and if it succeeds, the fund will be indemnified and will receive additional returns. There is no doubt that we should bless the establishment of the fund and even say that it is a shame that it did not arise before. The idea underlying the establishment of the fund would enable the right of choice of the insolvency firm, if it so wishes, to use funding to file a claim and prevent a situation in which justified claims are waived only because of a shortage of funds. It is also necessary to encourage officeholders to apply for the services of the fund where it appears that there is a justified claim that has no sources of funding.

The use of third-party litigation funding in Israel has only recently taken off, but has grown quickly and significantly over the past three years to become an accepted part of the litigation landscape. While most of the positive judgments regarding litigation funding in Israel have related to liquidation cases, the courts have also endorsed funding in general litigation.

The courts have not provided comprehensive rulings on the Israeli court's approval regarding all of the issues relevant to litigation funding. However, the courts have, through positive endorsement of funding, certainly established a favourable environment for litigation funding.

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

There are no specific statutory limitations on the fees or the interest a funder can charge, but according to the professional regulations governing lawyers in Israel, Bar Association Law, 5721-1961, the courts have the right to alter and reduce a lawyer's contingency fee arrangements if they are held to be excessive. Also, in liquidation cases, a liquidator requires the court's approval to enter into a funding agreement and the court may review the terms of that funding agreement to determine whether entry into a funding arrangement is in the best option available to the company in liquidation.

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

Presently there are none.

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

In Israel, a lawyer's conduct is governed by the lawyer's Bar Association Rules (Professional Ethics), 5746-1986 and Bar Association Law, 5721-1961. There are no specific professional or ethical rules applicable to a

lawyer's advice in respect of third-party litigation funding, but general professional or ethical rules do apply:

- lawyers are obliged to act in the best interest of their clients;
- all information a lawyer obtains in relation to a case is confidential;
- lawyers are prevented from sharing their fee income with a third party (unless the third party is a lawyer); and
- lawyers are prohibited from soliciting work from their clients (either directly or through a third party).

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

At present, no public bodies have a specific interest in or oversight over third-party litigation funding, apart from in a liquidation context, in which a liquidator is required to seek the court's approval when entering into a funding agreement with a third-party funder.

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

There is no specific prohibition on a third-party funder insisting on a choice of counsel, and the courts have not yet considered the issue.

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

Court hearings are generally public (unless the court holds differently) and funders can attend without having to obtain permission. The court will usually set out the names of those in attendance at the hearing in the protocol (that is the transcript of the proceedings). In arbitrations or settlement proceedings, the parties usually have the right to decide who will attend on their behalf.

8 Do funders have veto rights in respect of settlements?

A funder's rights to approve or reject a proposed settlement will depend upon the terms of the funding agreement. There are no specific restrictions on these rights under Israeli law.

9 In what circumstances may a funder terminate funding?

The funder's right of termination will be a matter of contract to be addressed in the funding agreement. There are no specific restrictions on this under Israeli law.

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

The level of involvement the funder takes in the litigation process will be determined by the terms of the funding agreement. There are no specific restrictions on this under Israeli law.

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

According to the Bar Association Law, 5721-1961 and the Bar Association Rules (Professional Ethics), 5746-1986, lawyers may enter into conditional or contingency fee arrangements, except in criminal cases. However, lawyers are not permitted to make payments for clients' expenses (such as court fees or expert costs) on their clients' behalf or to provide their clients with guarantees.

12 What other funding options are available to litigants?

In several types of class action, where the case is of public and social importance, the Ministry of Justice or the Israeli Securities Authority may support the claimant with funding from dedicated funds. Also, litigants may ask for an exemption from the payment of court fees when they are unable to meet those costs, or where the claim relates to bodily injury matters. Various insurances may also contain legal expenses coverage.

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

According to the 2017 Israeli Judiciary report, an average civil procedure in the district court will take just over 16 months (including compromises and withdrawals).

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, according to the 2017 Israeli Judiciary report, 842 civil appeals were filed in 2017, 115 less than 2016. Also, according to the report, an average civil appeal in the Supreme Court took just under 17 months (including compromises and withdrawals).

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

There are no statistics available measuring the proportion of judgments which require contentious enforcement proceedings. The enforcement process is regulated by the Execution Law, enacted in 1967. A judgment rendered by an Israeli court is, in general, enforceable if it is final and binding and if the court or the Chief Enforcement Officer has not suspended its enforcement. In general, the enforcement of an enforceable judgment or arbitral award in Israel is not yet seen as particularly burdensome. The methods of enforcement available to the judgment creditor include:

- seizing a judgment debtor's assets;
- third-party debt order;
- insolvency proceedings;
- appointment of a receiver;
- attachment of earnings; and
- preventing the debtor from leaving the country.

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

Class actions are permitted in Israel. The Israeli Class Action Law came into force in 2006, and formally regulates the proceedings applying to class actions in Israel. Since the advent of the Law, class actions have become a favoured path of pursuing litigation. The majority of class actions filed in Israel are consumer claims against corporate entities, and there are also a lot of securities and antitrust claims. As mentioned, the Ministry of Justice or the Israeli Securities Authority may fund the claim when it is of public and social importance. There is no prohibition on funding a class action.

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

The court will usually order the unsuccessful party to pay some of the costs of the successful party. The amount will usually be significantly lower than the costs that are incurred by the successful party. To date, the courts have not been asked to rule on whether an unsuccessful party should pay the litigation funding costs of the successful party. Given the relatively low amounts that are often granted to a successful party in respect of its legal costs, it is unlikely, at least in the near future, that the courts would order an unsuccessful party to meet such a cost.

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

No. According to the Civil Procedure Regulations, 5744-1984, only the party to the litigation can be liable for adverse costs.

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

The Civil Procedure Regulations, 5744-1984 and the Companies Law No. 5759-1999 allow the court to order a claimant to deposit security to meet the defendant's costs. When the claimant party is a limited company, the normal position is that the claimant is required to deposit security with the court (clause 353a of the Companies Law No. 5759-1999) (when the company is established outside of Israel the chance of security being granted is even higher). If the claimant is a natural person, the normal position is that he or she will not be ordered to deposit security. The main reason for this difference is that courts want to prevent claimants from hiding behind the legal personality of a company in order to avoid paying the expenses incurred by the defendants. The court might depart from the default position, if the financial strength of the company is insufficient or the claimant's claim is particularly strong.

Although the court is not able to order a third-party funder to provide security for costs, there have been cases in which a funder has voluntarily provided security on behalf of the claimant to allow the claim to continue. The calculation of security varies from case to case, but could be up to 2 to 2.5 per cent of the claim value. The most common means in which security is provided is a payment of cash into court, but in some circumstances a bank guarantee will be permitted.

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, itself, a ground upon which the court may make an order for security for costs. 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 may influence the court's order regarding security.

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 statutory prohibition on the use of ATE insurance, however, ATE insurance is not commonly used in Israel. Defendant's costs are sometimes paid by insurances, such as professional negligence or directors' duties cases.

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. To date, the courts have not ordered the disclosure of funding agreements when requested to do so, because the funding arrangements were found not to be relevant to the determination of the dispute (a primary requirement for obtaining a disclosure order). However, if the court finds the agreement relevant to the dispute, it can compel disclosure of a funding agreement. Further, in liquidation cases, the liquidator will have to obtain the court's approval to engage in a funding agreement, and as part of this procedure the liquidator is likely to be ordered to disclose the agreement to the court and possibly to the creditors and shareholders (see question 2).

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

Unlike communications between litigants and their lawyers, the communications between litigants (or their lawyers) and funders are not protected by privilege in Israel. In the very few decisions that have dealt with the communications between litigants and funders (see question 22), the courts did not order disclosure of the funding agreement (on the basis that it was not relevant to the dispute). In addition to 'litigant-client privilege', protecting communications between a lawyer and client there is also a privilege in Israel in respect of any information regarding 'preparation for trial', but once a party argues for such a privilege, that party cannot then subsequently use that information during the trial.

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

There are no 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?

Practitioners of litigation funding should be aware that while Israeli lawyers' costs are relatively low in comparison to some jurisdictions (and contingency fee arrangements are possible), there is a mandatory court fee of 2.5 per cent of the claim value (up to 25 million Israeli shekels or 1 per cent of the sum above that), where half of the fee must be paid when the claim is filed, and the second half when the trial begins. Also, lawyers in Israeli are not allowed to pay the litigant's costs, such as court fees, experts' fees and security. The litigation funding industry is in its developing stages in Israel, and considering the increasing number of cases that are funded, we might see in the near future more court decisions that will determine the rules on matters like the limits on the fees and interest a funder can charge, the legality of veto rights and the privilege in the communications between litigants and funders (including disclosure of funding agreements).

WOODSFORD

LITIGATION FUNDING

Yoav Navon
Steven Friel
Simon Walsh

ynavon@woodsfordlf.com
sfriel@woodsfordlf.com
swalsh@woodsfordlf.com

8 Bloomsbury Street
London WC1B 3SR
United Kingdom

Tel: +972 523 670 715
www.woodsfordlitigationfunding.com

Key Members of our Executive Team



Yves Bonavero:
Chairman
Ex ED&F Man



Steven Friel:
Chief Executive Officer
Ex Brown Rudnick,
DAC Beachcroft



Jonathan Barnes:
Chief Operating Officer
Ex Lewis Silkin



Mark Spiteri:
Finance and Commercial Director
Ex PWC



Charlie Morris:
Chief Investment Officer, EMEA
& APAC. Ex Enyo Law,
Addleshaw Goddard



Josh Meltzer:
Managing Director, US
Ex GE Capital



Zachary Krug:
Senior Investment Officer
Ex Quinn Emanuel



Robin M. Davis:
Senior Investment Officer
Ex Quinn Emanuel



Simon Walsh:
Senior Investment Officer
Ex Skadden



Alex Lempiner:
Executive Vice President and
General Counsel. Ex Milbank



Sarina Singh:
Director of Litigation Finance
Ex Jones Lang Lasalle



Lara Hofer:
Investment Officer
Ex Hausfeld & Co.



Helena Eatock:
Investment Associate
Ex Harcus Sinclair



Steven Savage:
Head of Marketing
Ex Burford Capital



Yoav Navon:
Consultant
Ex Ron Gazit, Rotenberg



Clare Owen:
Consultant
Ex Pinsent Masons



Jonathan Dickie:
Financial Controller
Ex KPMG

Our Investment Advisory Panel



John Potts:
Non-Executive Director;
Chairman, Investment Advisory
Panel, Ex Head of Dispute
Resolution, Clifford Chance



Judge Shira Scheindlin
Ex US Federal Judge, SDNY



John Beechey CBE
Ex President of the International
Court of Arbitration of the ICC



Fidelma Macken SC
Ex Court of Justice of the
European Union and Irish
Supreme Court



Terry O'Neil:
Ex Clifford Chance



David McLean:
Ex Latham & Watkins



Olivier Bonavero:
Ex ED&F Man

For further information, visit www.woodsfordlitigationfunding.com

London: Contact **Steven Savage** at ssavage@woodsfordlf.com or +44(0) 20 7985 8410

Philadelphia: Contact **Josh Meltzer** at jmeltzer@woodsfordlf.com or +1 610-283-2644

Singapore: Contact **Charlie Morris** at cmorris@woodsfordlf.com or +65-6224-2448

Brisbane: Contact **Clare Owen** at cowen@woodsfordlf.com or +61 (0) 435 862 873

Tel-Aviv: Contact **Yoav Navon** at ynavon@woodsfordlf.com or +972-523-670-715

[@woodsfordLF](https://twitter.com/woodsfordLF)

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com