Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

2019

GETTING THE DEAL THROUGH

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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

Mauritius

Rishi Pursem and Bilshan Nursimulu
Benoit Chambers

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

We consider that third-party litigation funding is permitted in Mauritius, although it is neither provided for nor prohibited by any legislation or otherwise regulated. Third-party litigation funding is not common and has not been the subject of any judicial pronouncement. Further, the common law torts of champerty and maintenance have very rarely been invoked in case law and never in the context of third-party litigation funding. It is doubtful whether the courts would find that those torts form part of Mauritius law today, but to the extent that they do, the courts are likely to be guided by the development and eventual abandonment of those concepts in England.

Although third-party litigation funding is not commonly used in Mauritius, it is increasingly being considered, especially by parties to complex arbitration matters and enforcement proceedings before the Supreme Court of Mauritius where the value of the claim involved is significant. In those cases, litigants have recourse to funders established internationally, England being the most popular market.

To date, however, there is no public information available on cases in which parties have resorted to third-party litigation funding.

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

In the absence of any legislation or regulation governing third-party litigation funding, there is no limit on the funders' fees and interest.

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

There is no legislative or regulatory provision that is applicable to third-party litigation funding. Where the litigation funding involves an assignment of a litigious right and the funder steps in the shoes of the litigant (and thus ceases to be a third party), article 1699 of the Mauritius Civil Code provides that the person against whom the litigious right has been assigned may obtain a release from the assignee by reimbursing him or her the actual price paid for the assignment, plus costs, reasonable expenses and interest calculated from the date on which the assignee paid the price for the assignment made to him or her.

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

The general rules provided in the respective Codes of Ethics for attorneys and barristers would be applicable but there is no specific rule in relation to third-party litigation funding. Unless the litigious right is assigned to the third-party funder, the lawyers' client remains the litigant and they owe their duty of care and confidentiality towards the latter and not to the third-party funder, despite any agreement that the funder will be responsible to pay their fees. Attorneys and barristers may, however, receive instructions from a third party designated and mandated by their client to represent them.

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

The Financial Services Commission regulates the provision of financial services (other than banking, which is regulated by the Bank of Mauritius) in Mauritius but the scope of the Financial Services Act does not include third-party litigation funding. Neither the Financial Services Commission nor the Attorney-General's office has so far expressed an interest in regulating the third-party litigation funding sector. However, it is expected that discussions on the regulation of third-party litigation funding will become necessary in the near future in light of the growth of the international arbitration sector in Mauritius and the government's effort over the last decade to promote the use of Mauritius as a jurisdiction of choice in the field of international arbitration by passing the International Arbitration Act (inspired from the United Nations Commission on International Trade Law (UNCITRAL) Model Law), the establishment of a permanent branch of the Permanent Court of Arbitration of The Hague in Mauritius, the hosting of the Congress of the International Council for Commercial Arbitration in 2016 and the launch of the MIAC Arbitration Centre in July 2018.

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

In the absence of any legislation or regulation governing third-party funders, the relationship between the latter and their clients is purely contractual. However, a contractual clause providing that the third-party litigation funder will choose the counsel to appear in a given case may be contrary to the litigant's constitutional right to a fair hearing, which encompasses the right to choose his own counsel. There has not yet been any judicial pronouncement on that question. In our opinion, the litigant's right to choose his or her own counsel is a fundamental right that he or she cannot contractually renounce.

In practice, the litigant generally retains the services of his lawyers before considering third-party funding and at that stage, the funder may take into account the experience and reputation of the counsel retained by the litigant in deciding whether or not to fund the case.

If there is a divergence of views between the litigant and the funder during the court or arbitral proceedings about whether there should be a change of counsel, our view is that the litigant's decision would prevail for the reasons given above.

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

Funders and other members of the public may attend hearings in open court. However, they will only be allowed to attend private hearings (for example, in arbitration matters) and settlement proceedings with the consent of all parties involved in the matter in question. Further, the extent of their participation in hearings and settlement proceedings and their ability to give instructions to lawyers on behalf of their clients, will depend on their clients' consent. In the event of a divergence of views between the funders and their clients with respect to instructions to be given to lawyers or settlement discussions, the lawyers will be bound by the instructions of their clients as opposed to that of the funders.

8 Do funders have veto rights in respect of settlements?

To the extent that funders are not themselves parties to the dispute, they do not have veto rights in respect of settlements. The funding agreement may provide that the litigant must inform and consult the funder with respect to settlement discussions and negotiations. In our view, the funding agreement may also validly provide for the funder's right to terminate the funding in the event that the litigant adopts an unreasonable attitude with respect to settlement discussions and negotiations.

9 In what circumstances may a funder terminate funding?

In the absence of any legislation or regulation governing third-party funding, the termination of the funding will only be subject to the provisions in the contract between the funder and their client. In determining the validity of those provisions, one would consider that they should not have the effect of depriving the litigant of their fundamental rights to a fair trial, for example, by taking control over the proceedings and imposing their decisions on the litigant with respect to the conduct of the case. However, in our opinion, the funding agreement can validly provide a termination clause that takes effect in the event that the litigant's attitude in the conduct of the proceedings is unreasonable.

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 extent to which funders may or should take an active role in the litigation or arbitration process is subject to the provisions of the funding agreement. The principles that are likely to apply to the validity of those provisions are explained above.

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

Yes. Litigation attorneys and barristers can enter into conditional or contingency fee agreements, provided that their respective contingency fees do not exceed 10 per cent of the sum of the value of the result obtained by the client, whether such a result is obtained through a judgment, arbitral award or negotiations.

12 What other funding options are available to litigants?

Legal aid is available in relation to criminal cases, family law disputes and landlord and tenant matters. Litigation funding is otherwise very rare. Although there is no legal prohibition of legal expenses insurance, it is not generally provided on the market.

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

Proceedings before the Commercial Division of the Supreme Court generally take between two and three years to complete and obtain judgment, although the estimated time frame depends largely on the volume of evidence involved, number of witnesses, the need for case management hearings and interlocutory rulings, etc. The filing of documents and written motions are effected through the court's electronic system, which avoids the expense of attorneys or barristers having to attend court for those matters. Where there is a need for case management hearings, the attorney generally makes the relevant motion on the court's electronic system and if the court accedes to the attorney's request, the court will issue a notice on the electronic system that the case will be called in court on a given date.

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

In our experience, about 50 per cent of judgments of the Commercial Division of the Supreme Court relating to complex commercial disputes are appealed. An appeal lies to the Court of Civil Appeal and generally takes about one year to be heard and thereafter six to 12 months to obtain a judgment. A further appeal may lie to the Judicial Committee of the Privy Council and the proceedings in that respect generally take 12 to 18 months.

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

In our experience, a relatively low percentage of judgments delivered by the Mauritius courts give rise to contentious enforcement proceedings in Mauritius.

With respect to foreign judgments and arbitral awards (both domestic and foreign), more than half of them are, in our experience, commonly subject to contentious proceedings. The exequatur proceedings for foreign judgments and domestic arbitral awards are governed by the provisions of the Civil Procedure Code and take place on the basis of affidavit evidence before the Judge in Chambers, which proceedings generally last about six to 12 months.

The enforcement of international arbitral awards (where the seat of arbitration is Mauritius) and foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Supreme Court (International Arbitration Claims) Rules 2013. The award creditor needs to file an application for enforcement with the office of the Chief Justice, who upon verification is satisfied that the application complies with the formal requirements in the Rules, issues a provisional order for the recognition and enforcement of the arbitral award as a judgment of the court. The award debtor may apply to set aside the provisional order within 14 days (or such other period provided in the order) of the service of the order on him or her. The award cannot be enforced until the expiry of the period given to the award debtor to apply to set aside the provisional order or such application is made, until after the determination of that application.

As regards the general methods of enforcement, where the judgment or award debtor is a company registered in Mauritius, failure to comply with the judgment would generally prompt an application to wind up the company and appoint a liquidator to realise the company's assets for distribution to creditors. That procedure before the Bankruptcy Division of the Supreme Court is based on affidavit evidence and generally takes about one year to complete.

Other means of enforcement include seizure of the judgment debtor's assets, including attachment of earnings and other receivables in the hands of third parties. Such matters are generally dealt with by the summary procedure that is available before the Judge in Chambers on the basis of affidavit evidence.

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

There is no procedure in Mauritius permitting 'class actions' or 'group actions' where a group of litigants represent members of a wider class or group who are not party to the proceedings. However, different persons may jointly enter a case based on a common cause of action. Alternatively, those parties may enter separate cases and retain their respective attorneys and counsel to appear for them; when the respective cases are in shape for hearing, the court may allow them to be consolidated and heard together. There is no legal prohibition for those cases to 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?

The courts can order adverse costs and they do so almost invariably. However, the successful party is generally entitled to nominal costs only, except in matters falling under the purview of the International Arbitration Act, which provides that the successful party should be awarded actual costs.

There is no judicial pronouncement on whether the unsuccessful party can be ordered to pay the litigation funding costs of the successful party and this is a matter that remains to be determined by the courts in the absence of any specific legislation in that respect. It is unlikely that such a pronouncement will be required in court litigation cases where nominal costs are awarded. However, the issue will be of interest and importance in relation to matters falling under the International Arbitration Act.

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

As matters stand, in the absence of specific legislation governing third-party litigation funding, there is no basis on which the Mauritius courts can hold a third-party litigation funder liable for adverse costs.

However, if the funder's client is ordered to pay adverse costs, the client may have an action against the funder for the latter to indemnify him or her and pay the adverse costs in his or her place on the basis of the provisions of the contract that is in place between the funder and the client. The funder's client will need to lodge a separate case to obtain that remedy against the funder.

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

The Mauritius courts can order a claimant to provide security for costs and does so almost invariably when the claimant is not a resident in Mauritius and does not own immovable property in the jurisdiction that is of sufficient value to secure the payment of any costs that may be awarded to the defendants.

The amount of security for costs is calculated on the basis of an estimate of the reasonable necessary expenses that the defendants may incur to resist the claim, such as fees of lawyers, registration fees for documents that may have to be produced and travelling and accommodation expenses of a witness who may have to travel to Mauritius from abroad. However, the essential policy of the courts is that the amount ordered should not be oppressive and should be fixed at a level that will not stifle the claimant in proceeding further. The amount ordered is normally deposited in court unless the claimant provides a bank guarantee in the sum awarded as security.

The third-party funder can provide security for costs in the place of the claimant. However, if the funder is not willing to do so, there is no basis on which the courts can order him or her to provide security for costs. The claimant may make a separate application to the court to order the funder to pay security for costs in its place if the provisions of the funding agreement provide so.

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

There is no judicial pronouncement on this matter. However, in our view, it is unlikely that the court's decision to order the claimant to pay security for costs will be influenced by the fact that the claim is funded by a third party, especially given that there is no basis on which the court can order the third party to provide such security.

In the event that the third party willingly provides the required security in the place of the claimant, it follows that the court will not order the claimant to provide security.

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

After-the-event insurance, legal expenses insurance and insurance for non-payment of a judgment debt are not prohibited by any legislative provision. However, they are not commonly used and they are generally not available on the local market.

In light of the recent growth and development of arbitration in relation to high-value claims and involving significant legal expenses, litigants have shown an increasing interest in ATE and legal expenses insurance that is available on the international market. There are, however, no public statistics on the use of such forms of insurance.

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

There is no legislation or ethical rule requiring a litigant to disclose a litigation funding agreement to the opposing party or to the court. Nor is there any basis under Mauritius law on which the court can order a litigant to disclose that information. Similarly, there is no requirement in Mauritius for the litigant to disclose a contingency fee agreement with his or her lawyers.

The position might be different in arbitration where the rules of the arbitral institution might provide for an obligation to disclose a litigation funding agreement or for the arbitral tribunal to compel such disclosure. For example, the rules of the MCCI Arbitration and Mediation Centre (MARC) effective from 21 May 2018 require the funded party to notify in writing all other parties, the arbitral tribunal and the MARC Secretariat of the fact that an agreement or arrangement for funding has been made and the name of the third-party funder.

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

The general principle that obtains in Mauritius is that communications between litigants or their lawyers and third parties (such as litigation funders) do not qualify for protection by litigation privilege. There has, however, not been any recent judicial pronouncement on this question. The Mauritius courts are likely to be guided by the development of the law in England and in particular, decisions that have established that certain communications with third parties may be privileged to the extent that they were exchanged for the purpose of obtaining advice in respect of litigation or evidence in relation to the dispute. The Mauritius courts are, however, not bound to follow the English decisions.

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

Our searches have revealed no reported disputes between litigants and their funders in Mauritius.

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

Given that litigation funding is not commonly provided by local players, the trend has been for litigants to increasingly consider litigation funding on the international market. In those cases, funding agreements are likely to be governed by foreign law and subject to the regulatory regime that may apply in the jurisdiction in which the funder is based or to which the agreement is subject. If the agreement is to be enforced in Mauritius, it may be subject to provisions generally applicable under Mauritius law regarding the invalidation or revision of unfair contract terms.

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