

Litigation Funding 2020

Contributing editors
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding



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Contributing editors**Steven Friel and Jonathan Barnes****Woodsford Litigation Funding**

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Italy and the United States of America.

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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.

Lexology 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.



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Israel

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REGULATION

Overview

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 vs 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.

Today, third-party funding for litigation in Israel is an accepted part of the litigation landscape and has been judicially endorsed by the Israeli courts in recent years. Although the courts have not provided comprehensive rulings on the Israeli courts' approval regarding all of the issues relevant to litigation funding, the courts have, through positive endorsement of funding, established a favourable environment for litigation funding in Israel.

The use of third-party litigation funding in Israel has only recently taken off, but has grown quickly and significantly over the past four years. 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.

Restrictions on funding fees

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 it is the best option available to the company in liquidation.

Specific rules for litigation funding

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

Presently there are none.

Legal advice

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).

Regulators

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.

FUNDERS' RIGHTS

Choice of counsel

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.

Participation in proceedings

- 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.

Veto of settlements

- 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.

Termination of funding

- 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.

Other permitted activities

- 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.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

- 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.

Other funding options

- 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.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

According to the 2018 Israeli Judiciary Report, an average civil procedure in the district court will take 17.2 months (including compromises and withdrawals).

Time frame for appeals

- 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 2018 Israeli Judiciary Report, 814 civil appeals were filed to the Supreme Court of Israel in 2018, 28 less than 2017. Also, according to the report, an average civil appeal in the Supreme Court took 16.6 months (including compromises and withdrawals).

Enforcement

- 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.

COLLECTIVE ACTIONS

Funding of collective actions

- 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 that 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 have also been a number 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.

COSTS AND INSURANCE

Award of costs

- 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.

Liability for costs

- 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.

Security for costs

- 19 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

The Civil Procedure Regulations, 5744-1984 and the Companies Law 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 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 a 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 2.0-2.5 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.

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Insurance

- 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.

DISCLOSURE AND PRIVILEGE

Disclosure of funding

- 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, as mentioned at question 4, 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.

Privileged communications

- 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. As mentioned above, in the few decisions that have dealt with the communications between litigants and funders, 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 use that information during the trial.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There are no such disputes reported as at the time of writing.

Other issues

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 new shekel; 1 per cent of the sum above that), where half of the fee should be paid when the claim is filed, and the second half when the trial begins. Also, as mentioned above, lawyers in Israel are not allowed to pay the litigant's costs, such as court fees, expert's fees, security etc. 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 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.

UPDATE AND TRENDS

Current developments

26 | Are there any other current developments or emerging trends that should be noted?

No updates at this time.

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