

Litigation Funding 2020

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Litigation Funding 2020

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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.

Lexology 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.lexology.com/gtdt.

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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Italy

Davide De Vido

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REGULATION

Overview

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

In Italy, litigation funding contracts are permitted, as an instance of application of the principle of freedom of contract as set forth in article 1322, paragraph 2 of the Civil Code, in which it is stated that:

[Parties] may . . . conclude contracts that do not belong to the categories that have a particular discipline, provided they are aimed at achieving interests worthy of protection according to the legal system.

This economic-juridical operation is largely unknown at present and is not practised at all.

Restrictions on funding fees

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

Since litigation funding contracts are an expression of the freedom of contract of parties, determination of the funding fees is a matter for free bargaining. No limits are set.

Generally speaking, the sum that is due to the funder is determined as a percentage of the sum actually made over to the funded party. However, the sum may be arrived at in other manners (eg, as a multiple of sums invested, as a fixed fee, etc).

Specific rules for litigation funding

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

No. In Italy, there are no applicable legislative or regulatory provisions.

Legal advice

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

There are no professional or ethical rules that would prevent lawyers from informing their clients about the possibility of litigation funding. However, given the principles of freedom, autonomy and independence of lawyers during their activities, it is advisable – or it is indeed even mandatory – that lawyers and funders have no interests in common.

Regulators

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

No. At present, there is no supervisory body.

FUNDERS' RIGHTS

Choice of counsel

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

Parties requesting funding are to select their own legal counsel. This decision is an expression of the fiduciary relationship existing between professionals and clients.

In any case, the litigation funding contract may include acceptance or approval clauses, or indications regarding the 'competence' of the counsel selected by the requesting party, which clauses or indications – as conditions – may determine the granting or denial of funding.

Participation in proceedings

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

The funder may attend open court hearings, and attend informal hearings provided the adverse party approves. In neither case can the funder actively participate in proceedings.

Veto of settlements

- 8 | Do funders have veto rights in respect of settlements?

Generally speaking, litigation funding contracts include the provision that acceptance or rejection of an agreement in respect of settlement requires the funder's consent, as the consequences for the beneficiary foresee and provide for in the event of a decision that clashes with the funder's, this provision also applying in the event of the party's own rejection of an agreement that, instead, the funder considers appropriate.

Termination of funding

- 9 | In what circumstances may a funder terminate funding?

There are no specific rules governing litigation funding and there are no standard instances of contract termination. Such rules may therefore be agreed upon by the parties when freely bargaining.

In general, the causes of early discontinuance of funding may be of two types.

- On the one hand, events may significantly affect litigation risk, such as:
- the emergence of previously unavailable information;
 - a case law (or even legislative) change, which decisively affects the outcome;

- loss of conclusive evidence, or acquisition of conclusive evidence, working against a satisfactory outcome of litigation; and
- changed economic conditions of the parties to litigation or their being subject to insolvency procedures.

On the other hand, the funded party may fail to perform in accordance with the contractual terms and conditions.

In the latter case, the said party may be obliged to repay to the funder the expenses and costs sustained.

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 funder can take no active role in the litigation process, which is the prerogative of the party's lawyer, who must act freely, autonomously and independently.

However, this prohibition does not prevent the funder from, generally speaking, and if specifically authorised by the party, acting as an advisor to the said party, in order to further a satisfactory outcome of litigation, or from 'supplementing' the role of the lawyer retained.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Agreements termed champerty agreements are forbidden according to the Italian legal system.

Lawyers cannot stipulate agreements according to which the fees are wholly or in part a portion of the asset that is the object of their services, or about which litigation is to be conducted.

Other funding options

- 12 | What other funding options are available to litigants?

The Italian legal system foresees alternative forms of litigation funding, such as:

- Defence funded by the state. This institute applies only to the less well off (persons with earnings that are below a legally fixed threshold value). In any case, such funding by the state cannot cover sums that the party thus assisted may be ordered to make over to a victorious counterparty.
- Services provided by trade unions to their members concerning litigation regarding labour issues, and services provided by benevolent institutions to pensioners who intend to take legal action in respect of pension issues.
- Legal expenses insurance. The extent and limits of insurance cover are contractually stipulated. Such cover is normally only provided for certain types of litigation.
- Funding of natural persons or corporations by accredited intermediaries.

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?

The time frame for first-instance decisions is 981 days.

The average duration of proceedings – calculated with respect to the entire civil chamber of the courts (contentious and friendly), considering cases both of a longer duration (eg, commercial cases) and of a shorter duration (eg, summary judgments, non-contentious business) – has been calculated as 360 days.

Time frame for appeals

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

No official statistics are available regarding the percentage of appeals. It is known that approximately two-thirds of first-instance judgments are upheld.

Enforcement

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

No official statistics are available in this regard.

COLLECTIVE ACTIONS

Funding of collective actions

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

Yes. Class action for the purposes of ascertainment of liabilities and award of damages and restitution became a part of the Italian legal system following the passing of Law 224/2007 (Finance Act 2008).

Individual consumers, committees and consumers' associations may sue in this manner.

Thanks to legislative decree 198/2009, collective litigation for the furtherance of efficiency of the operations of administrative bodies and of public service franchisees also became a part of the Italian legal system.

The rules governing class action are currently being examined with a view to modification.

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?

In Italy, the principle of the position of a loser in a lawsuit has been enshrined in article 91 of the Code of Civil Procedure, which establishes that, by means of the judgment that closes the case, the judge shall order the loser to make over the costs sustained by the counterparty, the sum including the defence counsel's fees.

Currently awaiting application and dissemination as a practice, it has been hypothesised (albeit most tentatively) that the costs of funding should be awarded alongside the costs that the judge orders are to be made over by the loser.

Liability for costs

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

No. Since the judicial measures have effect only upon the parties to the case, liability of the funder for costs sustained by the counterparty is not foreseen.

This aspect, however, is one that lies at the heart of litigation funding agreements, according to which funders may assume wholly or in part the risks of loss of the case, including a possible order that the loser is to make over costs to the counterparty.

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?)

Although abstractly feasible, such an order is issued only in some cases. It is unlikely that a judge shall order a party to provide security in respect of payment of costs.

The legal system considers this option as a matter of law for tax litigation in cases in which the loser is ordered to make over sums to the taxpayer.

The amount of the security is fixed by a prudent estimate of the court.

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

No. In fact, litigation funding comes out of a confidential agreement between the parties.

Insurance

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

Insurance contracts mean the insurer undertakes to indemnify the insured party should an event come about that was seen as a risk at the time of stipulation of the contract. Therefore, ATE is not permitted because ATE is without the prerequisites legally set forth by the Italian legal system.

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?

No, this is not the case. The funding arrangement is based on a confidential agreement between the parties.

Privileged communications

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

Yes, both at the pre-contractual and contractual stages. The relationship between the funded party and the funder is strictly confidential. Furthermore, communications between parties and lawyers are subject to the provision of professional privilege.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No. Up to the present, no disputes between litigants and their funders have been noted.



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Other issues

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

Not at present. Litigation funding shall certainly become a much more widespread practice in the near future.

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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