

Litigation Funding 2020

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Litigation Funding 2020

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.

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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REGULATION

Overview

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

There is currently no law or regulation that expressly prohibits or specifically regulates third-party funding.

Korean courts have not expressly shown their attitude in regard to this issue and have not endorsed such funding.

According to article 6 of the Trust Act, third-party funding must be arranged or structured in such a manner that does not constitute an entrustment of a lawsuit.

In addition, under article 34(1) of the Attorney-at-Law Act, non-attorneys are prohibited from introducing, referring or enticing a party to a case to a specific attorney in exchange for money or other benefits, and under article 34(5) of the Attorney-at-Law Act, no fees and other profits earned through services that may only be provided by attorneys-at-law shall be shared with any person who is not an attorney-at-law.

At this point, without further legislative changes, we expect Korean courts to take a conservative approach in regard to third-party funding.

While introductions and related discussions have been actively made, it appears that third-party litigation funding is not commonly used to date.

Restrictions on funding fees

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

No. There is no specific limitation on the fees and interest a third-party funder may charge. However, a funding arrangement will still be subject to the Interest Limitation Act. Under the Interest Limitation Act, the amount of money that the funder receives from the successful party other than the principal amount will be counted as 'interest'. Pursuant to the Act, statutory interest as of now is capped at 24 per cent per annum, and any amount exceeding such rate is null and void. In this regard, any amount of money that a creditor receives in connection with a loan, including a deposit, rebate, fees, deduction or advance interest is deemed as interest for the purpose of applying the statutory interest rate ceiling.

Specific rules for litigation funding

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

No. However, depending on how the third-party funding is arranged or structured, it may be limited based on the restrictions set forth under the Trust Act or the Attorney-at-Law Act (see question 1).

Legal advice

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

Under the Attorney's Code of Ethics, attorneys are prevented from 'stirring up litigation', either by directly encouraging potential clients or by indirectly permitting a third party to do so. In consideration of such rule, lawyers will need to take a careful stance on introducing or advising clients in relation to third-party litigation funding.

Regulators

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

Not at the present time. However, if third-party funding becomes more common or prevalent in Korea, it is likely that the Ministry of Justice and the Korean Bar Association will actively oversee third-party funding activities.

FUNDERS' RIGHTS

Choice of counsel

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

No definite answer can be found. However, in view of the current stance of the Attorney-at-Law Act, third-party funders will be restricted in insisting on their choice of counsel. See question 1.

Participation in proceedings

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

In principle, all civil case hearings are open to the public, unless the court determines that a public hearing is detrimental to national security or public policy.

In terms of being able to participate in hearings or court-administered settlement proceedings, generally, a third-party funder would not be permitted to participate because of a lack of adequate legal interest as required by law.

In the case of arbitration, third-party funders may be able to participate with mutual consent of the parties and permissions from tribunals.

Veto of settlements

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

While it may vary depending on terms and conditions of relevant funding contracts, we do not expect that the funders should have veto rights.

Termination of funding

9 | In what circumstances may a funder terminate funding?

The right to terminate funding would be governed by the relevant provisions of the funding contract.

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?

In principle, assuming that the funding arrangement is in compliance with relevant law, the funder's role should be limited to funding the cost of the litigation or arbitration. For the same reasons, funders are not expected or required to take any active role in the litigation process.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Conditional or contingency fee arrangements are permitted for civil cases in Korea. However, if a dispute arises in connection with the fee arrangement, the court may reduce the amount of the agreed contingency fee if the courts find that the amount is unreasonably excessive and violates equity and the principle of good faith.

In regard to criminal cases, the Supreme Court of Korea recently held that contingency fee arrangements are not permissible.

Other funding options

12 | What other funding options are available to litigants?

For litigants with limited resources to pay for the costs of a lawsuit, the court may grant litigation aid, either ex officio or upon request of the litigant.

No similar funding options are available for arbitration.

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?

A commercial claim in a civil lawsuit will typically take between eight and 12 months at the first instance, from the filing of a complaint to judgment.

In case of arbitration, although it may vary depending on the nature of the case and the administering institution, it generally takes approximately 12 to 16 months for an arbitration award to be rendered.

Time frame for appeals

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

Overall, less than 10 per cent of first-instance judgments are appealed. However, in cases heard before three-judge panels (ie, cases with claim amounts over 200 million Korean won), the appeal rate is over 40 per cent.

Appeals usually take six months to one year, but an appeal may take longer depending on the nature and complexity of the case.

There is no appeal process for arbitration in Korea.

Enforcement

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

Although no official data is available, contentious enforcement proceedings are quite common in civil cases.

Enforcement of judgments is relatively easy: once a final and conclusive judgment is obtained, the successful party can enforce it against the assets of the unsuccessful party by initiating proceedings for execution. In addition, the court may declare a judgment to be provisionally enforceable before a final and conclusive judgment will be rendered.

Korean courts allow enforcement of foreign court judgments on the principle of reciprocity basis. Also, the courts are receptive to the recognition and enforcement of foreign arbitral awards, in particular, where the award is from a jurisdiction that is a signatory to the New York Convention.

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions are not permitted, except in limited cases based on the type of claim. These are claims for certain types of securities-related damages under the Securities Related Class Action Act; and class action suits against an enterprise that has committed an act causing potential or actual harm to the consumers' right to life, body or property, and to seek injunctive relief under the Consumer Basic Law. However, the Korean government recently announced that it would fully allow class actions regardless of the type of claim in order to efficiently seek a relief for collective losses and introduce necessary measures including new legislations and amendment to existing laws.

In addition, if the rights or liabilities forming the object of a lawsuit are common to many persons or are generated by the same factual or legal causes, such persons may join in the lawsuit as co-litigants under the Civil Procedure Act of Korea. However, only those participating in the lawsuit would be subject to the outcome of the case.

There is no specific law or regulation that regulates third-party funding for class actions or group actions, and thus, such arrangements will be subject to the same general restrictions under Korean law.

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 courts in principle order the unsuccessful party to pay the costs of the successful party in litigation. However, in calculation of the litigation costs, the courts will follow the calculation methods and the limits set in Supreme Court Regulation, resulting in recuperation of only a portion of attorneys' fees in addition to the stamp duties, etc. In line with this, without any further change of relevant law and regulation, the courts are unlikely to order the unsuccessful party to pay the litigation funding costs of the successful party.

Liability for costs

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

Adverse costs are likely to be ordered against the unsuccessful party to the litigation (or arbitration) rather than the third-party funder.

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?)

Generally, no. However, if the claimant has no domicile or place of business in Korea, or it is clear that there is no basis for the claim based on the submissions, the courts will order security for costs upon a request by the respondent pursuant to article 117 of the Civil Procedure Act of Korea.

Whether there is a need for security is not determined based on whether the claim is funded or not.

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

While there is no precedent or case that has been reported, we do not believe this would influence the court's decisions.

Insurance

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

Insurance for attorney's fees and insurance for non-payment of a judgment debt by the defendant is not legally prohibited under Korean law. However, any insurance contract that insures an event that has already occurred and is already recognised by the contracting parties and the insured party is null and void pursuant to article 644 of the Korean Commercial Code. The Supreme Court of Korea has ruled that an insurance event must be uncertain at the time of entering into the insurance contract and that any insurance contract in violation of article 644 of the Korean Commercial Code shall be null and void.

Insurance for attorneys' fees are offered by some insurers, but, in general, insurance related to litigation and legal disputes are not common in Korea.

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?

Currently, no particular legislations exist yet requiring a litigant to disclose a litigation funding agreement.

Privileged communications

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

Korea does not recognise attorney-client privilege as commonly understood and practised in common law jurisdictions. Rather, Korean laws (ie, the Civil Procedure Act and the Attorney-at-Law Act) only impose obligations on attorneys to not disclose information obtained in the course of performing his or her duties as an attorney and that is secret

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or confidential (ie, non-public information), unless otherwise exempted. This includes the work-product of the attorney prepared for his or her client.

DISPUTES AND OTHER ISSUES**Disputes with funders**

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

In a Supreme Court case (Supreme Court Judgment 2013Da28728 dated 24 July 2014) involving a dispute between litigants and their funder, the funder (the management company of an apartment complex) entered into a funding agreement with the litigants (the representative body of apartment residents) by agreeing to pay litigation costs on behalf of the litigants in return for the prospective rights of repair works, authorisation to select contractors and guarantee to renew management contracts for the apartment complex in case of a successful outcome in the litigation. After the litigation was settled, a subsequent dispute arose between the litigants and the funder. The court held that the funder's role of financing the litigation costs, de facto retaining lawyers and managing claims constituted 'representation' under article 109(1) of the Attorney-at-law Act, and therefore, the funding agreement was declared null and void.

In the above case, the Supreme Court of Korea interpreted 'representation' in article 109(1) of the Attorney-at-law Act very broadly, which may reflect a conservative approach of the Korean judiciary towards third-party funding in Korea.

Other issues

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

No, not at this point in time. However, this issue should be revisited when legislation and regulations regarding litigation funding are introduced.

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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