

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.

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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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Contents

Introduction	3	Italy	53
Steven Friel and Jonathan Barnes Woodsford Litigation Funding		Davide De Vido FiDeAL	
Third-party funding in international arbitration	4	Korea	56
Zachary D Krug, Charlie Morris and Helena Eatock Woodsford Litigation Funding		Beomsu Kim, John M Kim and Byungsup Shin KL Partners	
Australia	7	Mauritius	60
Simon Morris, Martin del Gallego, Gordon Grieve and Greg Whyte Piper Alderman		Rishi Pursem and Taroon Ramtale Benoit Chambers	
Austria	16	New Zealand	64
Marcel Wegmueller and Jonathan Barnett Nivalion AG		Adina Thorn and Rohan Havelock Adina Thorn Lawyers	
Bermuda	20	Poland	71
Lilla Zuill Zuill & Co		Tomasz Waszewski Kocur and Partners	
Brazil	23	Spain	76
Luiz Olavo Baptista and Adriane Nakagawa Baptista Atelier Jurídico		Armando Betancor, César Cervera, Carolina Bayo, Francisco Cabrera and Eduardo Frutos Rockmond Litigation Funding Advisors	
England & Wales	27	Switzerland	80
Steven Friel, Jonathan Barnes and Alex Hickson Woodsford Litigation Funding		Marcel Wegmueller and Isabelle Berger-Steiner Nivalion AG	
Germany	34	United Arab Emirates	85
Arndt Eversberg Roland ProzessFinanz AG		James Foster, Courtney Rothery and Jennifer Al-Salim Gowling WLG	
Hong Kong	38	United States – New York	91
Dominic Geiser, Simon Chapman, Briana Young and Priya Aswani Herbert Smith Freehills		David G Liston, Alex G Patchen and Rebecca Rothkopf Liston Abramson LLP	
India	43	United States – other key jurisdictions	98
Vaibhav Gaggar and Sumedha Dang Gaggar and Partners		Zachary D Krug, Robin M Davis and Alex Lempiner Woodsford Litigation Funding	
Israel	49		
Yoav Navon and Steven Friel Woodsford Litigation Funding			

Spain

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REGULATION

Overview

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

Spanish law neither expressly permits nor prohibits third-party litigation funding. The figures of champerty and maintenance are foreign to Spain. Many legal authorities have studied how litigation funding can fit into Spanish law, and have observed that article 1255 of the Spanish Civil Code states that contracting parties can establish the pacts, clauses and conditions that they deem convenient, as long as they do not violate the law, morality or the public order. Thus, one can infer that as long as third-party funding agreements do not violate the law, morality or the public order of Spain, such agreements are lawful. In addition, the buying and selling of claims is permitted in the Spanish Civil Code, and article 1535 allows the withdrawal from a litigious credit and understands that it exists once the suit has been answered, and not before.

Third-party funding agreements have not been very common in the past, but this trend is slowly changing. Also, international arbitrations with a Spanish element or in which Spain is a party are also the object of third-party funding. The past years have seen an increase in Spain as a party in international arbitration proceedings, especially under the Energy Charter Treaty.

The attitude of Spanish courts has been to allow third-party funding agreements. For example, on 4 November 2014 Commercial Court No. 3 of Madrid approved the liquidation plan of Petersen Energía Inversora, SAU and Petersen Energía, SAU, two Spanish companies under insolvency proceedings. The plan included that both companies would enter litigation funding agreements to begin proceedings against the Republic of Argentina. Furthermore, Amanda Cohen Benchetrit, specialist judge on commercial law and adviser to the Directorate General of International Legal Cooperation of the Ministry of Justice of Spain, points out in her article, *Legal situation in Spain and the EU: possibilities for future regulation*, which was published on the website of the Spanish National Bar Association, that she believed that an explicit regulation of third-party funding was not necessary. However, she stated it might be necessary to regulate other more contentious issues such as disclosure of third-party funding agreements and their terms, and conflict of interest.

Restrictions on funding fees

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

No. Spanish law does not contemplate limits on the fees and interest funders can charge. However, if one were to consider third-party funding as a type of loan, Spain does indeed have provisions protecting borrowers from usury that would have to be considered. However, the consideration of third-party funding as a loan is a subject of debate and

does not hold water in the view of a sector of Spanish legal doctrine, according to Cohen Benchetrit.

But leaving the consideration of third-party funding as a type of loan aside, in 2008, jurisprudence of the Supreme Court of Spain established that the prohibition of perceiving percentage-based fees only in the case of winning at trial was contrary to competition law, which strictly forbids direct or indirect price fixing. This historic ruling thus liberalised fees charged by lawyers and opened the door to third-party funders since there is nothing that prohibits a third-party from receiving a sum in exchange for sharing or assuming the cost of litigation.

Specific rules for litigation funding

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

No. In Spain there are no specific legislative or regulatory provisions applicable to third-party litigation funding. Litigation funding is very new in the Spanish legal world and it is slowly developing. Prominent and highly influential legal institutions and experts are debating whether it would be better to draft legislative provisions to regulate the issue, in accordance with continental law or, on the other hand, to let the market regulate itself, albeit with some exceptions, as we have seen in common law jurisdictions. Third-party litigation funding could be regulated in a European framework but considering the different legal systems of the EU member states, this regulation would not be an easy task.

In our opinion, excessive regulation can pervert the nature of third-party funding, which should be a tool that the market offers to claimants and defendants and that both parties, funders and clients should adapt to each specific case. That said, a minimum framework could be established with the main rules in order to establish the parameters, leaving to the parties involved the negotiation of the major content of the relationship.

Legal advice

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

Spanish lawyers are always subject to the professional and ethical rules of the Spanish National Bar Association, and must always respect the ethical principles regarding professional secrecy, conflict of interest, and independence in all of their professional undertakings. However, there is no specific set of ethical rules that applies to lawyers advising clients in relation to third-party litigation funding. Our opinion is that lawyers should exercise caution to not enter conflict of interest when, in addition to advising their clients on a case, they are going to advise them on the litigation funding agreement.

Notwithstanding, third-party funding is an extra legal tool that should be based precisely on professional and ethical rules in order to provide an honest service to the client that makes the market confident

and comfortable, and the relationship between the parties stronger. The reputation of the players in this market is one of the most important elements that the professionals of the sector should take care of. Hence, professional or ethical rules should always be borne in mind and should always guide the actions of market players.

Regulators

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

For the time being, Spanish public bodies have not expressed a particular interest in or oversight over third-party litigation funding. Pacts of this nature would always be subject to article 1255 of the Spanish Civil Code and thus have to abide by the laws, morality and public order of Spain. Precisely because champerty is unknown in Spain, third-party funding agreements in the country have greater flexibility in the definition of their terms.

Moreover, the debate is still open (see question 3) and many bodies, such as, for example, the Spanish National Bar Association, are housing conferences of sector experts, including judges, in order to sharpen their view of third-party litigation funding.

FUNDERS' RIGHTS

Choice of counsel

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

Third-party funders in Spain would be able to recommend their choice of counsel, but the final decision would always lie with the funded party to avoid any kind of conflict of interest. However, funders should have the possibility to recommend or advise the funded party on whom they believe is the best choice of counsel bearing in mind their experience in the field.

Participation in proceedings

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

In Spain, there is no rule that prohibits a funder from attending hearings and settlement proceedings. Regarding the participation of the funder in hearings and settlement proceedings, we consider that this participation should be, given the case, indirect and never a direct participation because it is the funded party who has the legitimacy before the court.

Veto of settlements

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

In Spain, funders do not have a veto right in respect of settlements. The decision on whether or not to enter into a settlement agreement always lies with the funded party. However, should a dispute arise between the funder and the funded party in respect of settlements, and given the absence of specific legislation in Spain on this topic, it would be advisable that the litigation funding contract contemplate the need to obtain a binding opinion from a third party, as contained in article 13.2 of the Code of Conduct for Litigation Funders (in its January 2018 version) of the Association of Litigation Funders of England and Wales.

Termination of funding

9 | In what circumstances may a funder terminate funding?

It is reasonable to consider that the funder would be able to terminate a funding agreement if the terms of the funding contract were violated by the client or by the lawyer. Otherwise, an early termination without

contractual cause can inflict several damages on the client if alternative funding has not been sought in due time. The litigation funding contract should stipulate the circumstances under which a funder would be able to terminate funding. As such, it would be advisable that it contemplate the conditions set forth in article 11.2 of the Code of Conduct for Litigation Funders (in its January 2018 version) of the Association of Litigation Funders of England and Wales, under which a funder would be able to terminate funding when the funder:

- reasonably ceases to be satisfied about the merits of the dispute;
- reasonably believes that the dispute is no longer commercially viable; or
- reasonably believes that there has been a material breach of the litigation funding agreement by the funded party.

Should a dispute arise between the funder and the funded party on terminating funding, we also recommend that the litigation funding contract contemplate the need to obtain a binding opinion from a third party, as contained in article 13.2 of the Code of Conduct for Litigation Funders (in its January 2018 version) of the Association of Litigation Funders of England and Wales.

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?

Given the absence of specific legislative or regulatory provisions on third-party funding, there is ample freedom in determining the role played by the funder. This role would have to be agreed upon by the funded party and the lawyer and defined in the third-party contract subscribed by all three. The only limitation to any active role played by the funder would be the principles established in article 1255 of the Spanish Civil Code: respect of the laws of Spain, morality, and the public order.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Yes. Jurisprudence of the Spanish Supreme Court ruled that the prohibition of perceiving percentage-based fees only in the case of winning at trial was contrary to competition law. This historic ruling eliminated article 16 of the Spanish National Bar Association's Code of Conduct, which limited the fees that lawyers could charge clients. From then on, litigation lawyers are free to enter into conditional or contingency fee agreements. These kinds of fees allow the client and the funder to set up a different way of financing by decreasing the upfront legal costs that the latter may cover and thus, allowing the client to get better conditions of financing.

Other funding options

12 | What other funding options are available to litigants?

Litigants in Spain can request financing from banks or other financial entities. However, it is important that they bear in mind that these kinds of entities are not familiar with these types of operations and it could therefore be difficult to access this type of funding. Moreover, litigants can also contract different types of insurance to cover the risk of adverse costs, for example. This kind of insurance is becoming more important since it allows the funder and the funded party to control the risk if the claim is eventually lost.

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?

In Spain, commercial and civil claims usually take, on average, 382 days to reach a decision at first instance, according to the *Study on the functioning of judicial systems in the EU member states*, published by the European Commission for the Efficiency of Justice in Strasbourg on 5 April 2018 (page 203).

Time frame for appeals

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

According to the judicial statistical data provided by the General Council of the Spanish Judicial Authority in 2017, the proportion of first-instance judgments that were appealed stood at 17.8 in commercial courts (*Juzgados de lo Mercantil*), a proportion that has gone down to 11 in 2018.

With regards to the length of time that appeals usually take, according to the judicial statistical data provided by the General Council of the Spanish Judicial Authority, the average length of time of an appeal in 2018 was 7.9 months.

Finally, and according to the same data provided by the General Council of the Spanish Judicial Authority, the percentage of appeal judgments totally confirming the ruling at first instance decreased to 71.4 per cent in 2018, from 72.2 per cent in 2017.

Enforcement

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

The majority of judgments require contentious enforcement proceedings. However, this does not happen when the unsuccessful party voluntarily complies with the judgment within 20 days from the moment the judgment has become final. Notwithstanding the above, the causes to oppose contentious enforcement proceedings are very specific. The procedure itself is not very difficult.

On the other hand, we should underscore that once a judgment has been made at first-instance, it is possible to request its provisional enforcement, with the consequential benefits for the plaintiff who does not have to wait until the end of possible appeals to be satisfied in his or her claims. That said, provisional enforcement is undertaken with the necessary caution and guarantee measures in the event an appeal judgment was to revoke the first-instance ruling.

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 contemplated in Spanish law, and therefore cannot be funded by third parties. The regulation of class actions is one of the main justice system reforms that is being called for by lawyers, judges and members of academia.

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 general rule in the Spanish legal system is that the unsuccessful party pays the costs of the successful party. The expenses that are included in these costs are regulated by Spanish procedural law and include, for example, lawyer and court representative fees, technical reports and public fees. These expenses could generally coincide with the costs linked to the funding of a litigation. However, the amount of adverse costs is moderated by the courts, and normally do not surpass the parameters established by the Bar Associations of each Spanish province. Therefore, it is not guaranteed that the unsuccessful party will have to pay for the entirety of the costs and expenses incurred by the successful party.

Notwithstanding the above, in order for the unsuccessful party to be condemned to the payment of the costs of the successful party, the judgment has to fully esteem the presented claim. Should the judgment partially esteem the claim, each party pays for their own costs.

As we have stated above, and in view that Spanish courts use the parameters published by the provincial Bar Associations when ordering the unsuccessful party to pay adverse costs, a rule that is accompanied and reinforced by jurisprudence, it is doubtful that a court would order the unsuccessful party to pay costs that exceed that amount. Thus, it is highly unlikely that an unsuccessful party in Spain will ever have to pay the costs of litigation funding to the successful party.

Liability for costs

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

Given the current situation in Spain and the absence of specific legislation on this topic, as we have seen in the previous questions, a third-party litigation funder can be held liable for adverse costs if that was stipulated in the litigation funding contract. In principle, the funder would be responsible for paying adverse costs in the event that the funded party were unsuccessful.

Thus, in the event of losing, the funded party would have to pay the costs of the successful party. In order for the unsuccessful party to pay for the costs of the successful party, the judgment has to fully esteem the claim of the opposing party, or what is the same, fully object the opposition of the other party (see question 17). In the event that the judgment only esteems part of the claim, each party would pay for their own 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?)

Spanish legislation does not contemplate courts ordering a claimant or a third party to provide security for costs in the event of being condemned to pay costs.

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

To date, Spanish legislation does not contemplate this case in providing security for costs (since it does not contemplate, in general, the need to provide security for costs (see question 19). Thus, a court would not be influenced on its decision on security for costs if a third-party funds the claim. However, this is an issue that could change in the future under specific legal or regulatory provisions.

Insurance

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

The issue of insurance related to claims and their expenses is quite new in Spain, and remains very uncommon. An ATE insurance is permitted and courts will not oppose parties from contracting it.

Spain does have a legal defence insurance (*Seguro de Defensa Jurídica*) whereby the insurer is obliged to, within the limits established in the contract and by the law, take care of the expenses of the insured as a consequence of the latter's involvement in a judicial, arbitral or administrative procedure. The insurer is also obliged to provide the insured with judicial and extrajudicial legal aid that derives from the insurance coverage.

Despite the fact that the legal defence insurance must be the object of an independent contract, it may be included in a separate chapter within a single policy. To date, legal defence insurance is very much linked to insurance policies for cars and light motor vehicles, and is very rarely seen as a stand-alone insurance.

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?

In Spanish law, there is no obligation for the litigant to disclose a litigation funding agreement to the opposing party or to the court. As previously discussed, this is an issue that could be the object of future legal or regulatory provisions, as expressed by Cohen Benchetrit. Only the court can compel disclosure of a funding agreement. The opponent would only be able to request it, and the final decision would lie with the court.

Privileged communications

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

Yes. Communication between litigants or their lawyers and funders is protected by privilege, and can only be waived under the indication of regulatory or supervisory authorities to which either the litigants, their lawyers or funders are subject, or pursuant to any court order or order by another competent authority or tribunal.



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DISPUTES AND OTHER ISSUES

Disputes with funders

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

To date, we are unaware of any disputes that have arisen in Spain between litigants and their funders.

However, any dispute that were to arise in the future between litigants and their funders would probably reach the courts. We would therefore have to wait between five to seven years to see what the position of Spanish courts, and specifically the Supreme Court, would be on the subject.

Other issues

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

There is no specific regulation on third-party funding in Spain. Therefore, as long as financing agreements do not violate the principles contained in article 1255 of the Spanish Civil Code, that is, that they abide by the law, morality, and the public order of Spain, there should not be any problem in creating tailor-made financing contracts.

UPDATE AND TRENDS

Current developments

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

There are no trends that should be noted. The awareness of third-party funding is on the rise in Spain, benefitting access to justice, in general, and providing innovative solutions to holders of claims, awards and judgments.

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